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REPORTS

OF THE

SUPREME COURT

OF

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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., K.C.M.G.

" DÉSIRÉ GIROUARD J.

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

" JOHN IDINGTON J.

" LYMAN POORE DUFF J.

" FRANCIS ALEXANDER ANGLIN J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ALLEN BRISTOL AYLESWORTH K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. JACQUES BUREAU K.C.

Errata and Corrigenda.

Page 190, line 32, for "languages" read "language."

" 242, line 5, for "133" read "113."

" 431, line 22, for "was" read "were."

" 521, line 31, for "two" read "three."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL 41 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Bow, McLachlan Co. v. *The "Camosun"* (40 Can. S.C.R. 418). Appeal to Privy Council allowed with costs, 23rd July, 1909.

Burchell v. *Gowrie* (not reported). Leave to appeal to Privy Council granted, 1st December, 1909.

Burrard Power Co. v. *The King* (43 Can. S.C.R.). A petition for leave to appeal direct from the Exchequer Court of Canada, was dismissed without costs, 9th July, 1909.(*) Subsequently an appeal to the Supreme Court of Canada was heard and on 15th February, 1910, was dismissed with costs; a cross-appeal by the Crown was not dealt with in view of the grounds on which the company's appeal was disposed of by the majority of the judges. Leave to appeal to the Privy Council was granted, 26th April, 1910.

County of Carleton v. *City of Ottawa* (41 Can. S.C.R. 552). Leave to appeal to Privy Council refused, 22nd February, 1910.

Equity Fire Insurance Co. v. *Thompson* (41 Can. S.C.R. 491). Leave to appeal to Privy Council granted, 20th July, 1909.

Grand Trunk Pacific Railway Bonds, In re (42 Can. S.C.R. 505). Leave to appeal to Privy Council granted, 18th March, 1910.

Horne v. *Gordon* (42 Can. S.C.R. 240). Leave to appeal to Privy Council granted, 1st December, 1909.

James Bay Railway Co. v. *Armstrong* (38 Can. S.C.R. 511). Appeal to Privy Council dismissed with costs, 30th July, 1909.

King, The, v. *Burrard Power Co.* The Privy Council refused to hear an application by the Attorney-General of Canada for leave to appeal direct from the Exchequer Court of Canada, made on 15th July, 1909. (See 53 Can. Gaz. 385.) *Vide supra, Burrard Power Co.* v. *The King.*(*)

Larin v. *Lapointe* (42 Can. S.C.R. 521). Leave to appeal to Privy Council granted, 16th February, 1910.

Montreal, City of, v. *Beauvais* (42 Can. S.C.R. 211). Leave to appeal to Privy Council refused with costs, 1st December, 1909.

Montreal Light, Heat and Power Co. v. *Regan* (40 Can. S.C.R. 580). Leave to appeal to Privy Council refused with costs, 20th July, 1909.

Montreal Street Railway Co. v. *City of Montreal* (41 Can. S.C.R. 427). Leave to appeal to Privy Council refused with costs, 30th July, 1909.

Ontario, Province of, v. *Dominion of Canada* (42 Can. S.C.R. 1). Leave to appeal to Privy Council granted, 20th July, 1909. (See 53 Can. Gaz. 415.)

Pilling et al. v. *Attorney-General of Canada, In re, Quebec Southern Railway.* Leave to appeal to Privy Council was granted, 26th April, 1910.

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St. John Pilot Commissioners v. *Cumberland Railway and Coal Co.* (38 Can. S.C.R. 169). Appeal to Privy Council allowed with costs, 28th October, 1909.

Sedgwick v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639). Leave to appeal to Privy Council granted, 20th July, 1909.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE TERRITORIAL COURT OF THE YUKON TERRITORY.

THE PROVINCE OF ONTARIO (RESPONDENT) .... APPELLANT:

1908 *Dec. 1-3.

AND

1909 *Feb. 12.

THE DOMINION OF CANADA (CLAIMANT) .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Indian lands—Extinguishment of Indian title—Payment by Dominion—Liability of Province—Exchequer Court Act, s. 32—Dispute between Dominion and Province.

Where a dispute between the Dominion and a Province of Canada, or between two Provinces comes before the Exchequer Court as provided by sec. 32 of R.S.C. [1906] ch. 140, it should be decided on a rule or principle of law and not merely on what the judge of the court considers fair and just between the parties.

In 1873 a treaty was entered into between the Government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By said treaty the Salteaux agreed to surrender to the government all their

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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right, title and interest in and to said lands and the government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands and pay each Indian $5 per year and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario and in 1903 the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The Province disputed liability and, by counterclaim, asked for an account of the revenues received by the Dominion while administering the lands in the Province under a provisional agreement pending the adjustment of the boundary.

Held, reversing the judgment of the Exchequer Court (10 Ex. C.R. 445) Girouard and Davies JJ. dissenting, that the Province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the Province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada(1) condemning the Province of Ontario to pay a portion of the amount claimed by the Dominion as having been expended for the benefit of the province.

In 1873 the Dominion Government made a treaty with the Salteaux tribe of Ojibeway Indians by which the latter surrendered all their rights and privileges in land covering the area from the watershed of Lake Superior to the North-West Angle of the Lake of the Woods and from the American border to the height of land from which the streams flow towards Hudson Bay, containing about 55,000 square miles. The pay-

(1) 10 Ex. C.R. 445.

ments to be made for such surrender and the obligations to be performed by the Dominion are stated in the above head-note.

At the time this treaty was made the boundary between the Provinces of Ontario and Manitoba had not been defined and the lands were administered by the Dominion and Ontario jointly pending such definition.

In 1878 the position of the boundary was referred to arbitration and finally determined in 1884, when it was found that some 30,000 square miles of the territory surrendered by said treaty was in Ontario. The Dominion eventually took proceedings in the Exchequer Court to recover from the province its proportionate share of the sums expended in carrying out the treaty.

The judgment of the Exchequer Court as published in the report(1), holds the province liable to re-pay the Dominion the amounts necessarily expended in extinguishing the Indian title to the lands in question and the question as to which of the sums claimed were so expended was reserved for further hearing. On Dec. 4th, 1907, judgment on the further hearing was given and formally entered as follows:

"Wednesday the 4th day of December, 1907.

"The further consideration of the questions involved in this action reserved by the judgment of this court of the 18th day of March, 1907, having come on for hearing at Ottawa on the 3rd and 4th days of December in the year of our Lord, 1907, before this court, in the presence of counsel for the respondent as well as the claimant, upon hearing the evidence and what was alleged by counsel aforesaid.

(1) 10 Ex. C.R. 445, at p. 478.

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"1. This court doth order and adjudge that the Dominion do recover from Ontario three hundred and five, four hundred and ninety-thirds (305-493) of all the following expenditures made by the Dominion to or on behalf of the Indians:—

"(*a*) All expenditures made by the Dominion to the Indians in payment of annuities under the treaty in the pleadings mentioned at the rate of five dollars per annum for each Indian person from the date of the treaty to the date hereof.

"(*b*) All expenditures made by the Dominion for ammunition and twine for nets for the use of the Indians as provided by the said treaty, not however exceeding in the whole one thousand five hundred dollars per annum.

"(*c*) All expenses reasonably incurred by the Dominion for provisions and presents supplied to the Indians at the treaty negotiations, but not to exceed in the whole the sum of twenty-one thousand two hundred and ninety-six dollars and ninety-six cents, claimed in Schedule "B" of the statement of claim of the Dominion herein.

"(*d*) In respect of the payments made by the Dominion for or on account of the present of twelve dollars per head stipulated by the treaty to be paid to each man, woman and child of the bands of Indians represented at the treaty and claimed under the first item of Schedule "A" in the said statement of claim, the sum of five dollars per head.

"2. This court doth further order and adjudge that the action of the Dominion with respect to all classes of claims in the schedules of the said statement of claim, other than those in respect of which the Dominion has hereinbefore been adjudged to be entitled to recover, be dismissed, without prejudice, however,

to the right of the Dominion to claim against Ontario by way of set-off to the counterclaim of Ontario the expenditures made for the surveys of reserves for farming lands and the other reserves for the Indians agreed for under the treaty, as part of the expense properly incurred by the Dominion in the administration of the disputed territory pursuant to the conventional boundary agreement between the Dominion and Ontario, of the 26th day of June, 1874.

"3. This court doth further order and adjudge that it be referred to the registrar of this court to inquire into and take an account of all sums expended by the Dominion in respect of the several classes of expenditure as to which the Dominion has hereinbefore been adjudged to be entitled to recover and report thereon to this court.

"4. This court doth further order and adjudge that it be referred to the registrar of this court to inquire into and take an account of all revenues collected by the Dominion under the said conventional boundary agreement, and also of all disbursements and expenditures duly made in the administration by the Dominion of the territory falling to be administered by the Dominion under the said agreement, and report thereon to this court.

"5. And this court doth reserve further directions until after the said registrar shall have made his report.

"6. This court doth make no order with respect to the question of costs in this action.

"(Sgd.) L. A. AUDETTE, Registrar."

The province appealed to the Supreme Court of Canada from both judgments and the Dominion cross-appealed for the amounts disallowed.

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Sir Æmilius Irving K.C., *G. F. Shepley K.C.*, *C. H. Ritchie K.C.* and *H. S. White*, appeared for the appellant, the Province of Ontario.

E. L. Newcombe K.C., Deputy Minister of Justice, and *W. D. Hogg K.C.*, appeared for the Dominion of Canada, respondent.

Ritchie K.C. opens for the appellant and deals first with the history of the proceedings in the Exchequer Court and with the general features of the Indian treaty. He then proceeds to argue that there was no liability on the part of the province to indemnify the Dominion Government for the financial burdens imposed by carrying out the treaty and goes on: The paramount object of the Dominion Government in entering into that treaty was not to extinguish the Indian title in favour of Ontario, but to enable the Dominion Government to carry out certain obligations into which it had theretofore entered. Under the "British North America Act" to the Dominion was assigned the obligation to maintain peace, order and good government throughout Canada. In addition to that, the care of the Indians and all responsibility in connection with the Indians was assigned to them; so that there were two obligations thrust upon them, the principal one being the maintenance of peace, order and good government throughout Canada. In 1870 the rebellion occurred and it was necessary to construct a route over which the troops might pass and they were most anxious to complete what was then known and is now known as the "Dawson Route." The rebellion cost Canada a very large amount of money to quell, and in 1872 and 1873, spreading over these

years from the time of the Riel Rebellion, there was a sense of uneasiness among all the Indians; they were disaffected more or less and there was also present to the Dominion Government the fear of another uprising among the Indians and they were, therefore, most anxious to do everything possible in order to effectually extinguish any ill-feeling that might exist on the part of these Indians.

IDINGTON J.—Is there anywhere in the legislation affecting that point or anything in the practice that has prevailed upon it, to shew that the Dominion would have a claim over against any particular province that derived some direct benefit from its steps, whatever they were?

Mr. Ritchie: Nothing whatever, my lord. The liability was cast upon the Dominion and it is a national question. It was cast upon the Dominion, as the Dominion, representing all the provinces. It was something that the Dominion and the Dominion alone was liable for. If they had not made this treaty and another rebellion had occurred, an uprising of these same Indians, it would have cost, no doubt, ten times the amount of money that they are paying under this treaty to have quelled that rebellion and restored peace and order and that obligation rested on the Dominion under the express provisions of the "British North America Act." So that it was not Ontario they were looking after; it was not the extinguishment of the Indian title so that Ontario might get a benefit; but they had the particular paramount object to which I have referred, as also other objects of a Dominion character, a national character, which they were obliged to carry out and in order to carry these out it was necessary for them to secure

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a passage through the territory occupied by these Indians, and to see that people passing over this line were not molested; it was also necessary for them to endeavour, as far as possible to obtain the good will of the chiefs of these tribes so as to get them to undertake that they would do all in their power to preserve peace and good will and to prevent subjects of Her Majesty crossing this territory, from being molested. That is shewn by the treaty itself. When you look at the last clause of the treaty, see what it is that they get from the Indians. The undertaking they get from the Indians is an undertaking that enures to the benefit of the Dominion and the Dominion alone. All the obligations undertaken by these Indians were obligations which it was necessary that the Dominion, in the national interests, should secure. After pointing out the presents they were giving, what they were to do in the way of maintenance of schools and so on, they take from the Indians the covenants which are the consideration for what they are giving. "And the undersigned chiefs on their own behalf and on behalf of all other Indians inhabiting the tracts within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract, and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or in-

terfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment, any Indians offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded." These are the covenants and promises of the Indians.

DAVIES J.—Are these considerations any different from the considerations which enter into the negotiation of all Indian treaties?

Mr. Ritchie: I am not able to say how that is. Probably similar stipulations have been put in other treaties. All I am emphasizing is that these are stipulations which enure to the benefit of the Dominion, to whom was assigned the obligation of maintaining peace, order and good government. Then, as I pointed out to your lordships, if a rebellion had broken out the cost of quelling that would rest upon the Dominion and be paid out of the Dominion Exchequer and no portion could be charged up against any of the provinces.

Then, after referring to the conventional boundary agreement and the surrender by the Hudson Bay Co. of their interest in these lands counsel proceeds as follows on the question of the obligation of the Dominion to build the Canadian Pacific Railway.

There is an Imperial order in council of 16th May, 1871, that after the 20th of July, 1871, British Columbia shall become part of the Dominion.

Clause 11 of that Imperial order in council is that the government of the Dominion undertake to secure the commencement simultaneously within two years of the date of the Union, the construction of

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a railway from the Pacific to the Rocky Mountains and from the east to the Rocky Mountains, and to complete that within ten years. The documents put in here shew that that is one of the objects they had in view. The documents shew, by the reports of those who were through there that the whole of this territory was not as valuable as 100 acres on the Red River.

Then there is a report of those who were negotiating, and at that time your lordships will bear in mind that they were negotiating for a right of way simply, and the report is that they can acquire the whole title of the Indians, giving them reserves anywhere, the whole title just as easily as they can get the right of way. In other words, they could get the whole title just as easily as they could get the easement. Now, there is a letter from the Lieutenant-Governor to the Dominion of the 7th April, 1871. He says, "practically you may count on having to deal with 1,000 savages in any treaty you make for a right of passage. Mr. Pither seems to think they would give up their rights to the whole country for much the same price they would ask for the right of way. If so, it would be useless to confine the purchase to a mere easement, though, after all, with the exception of the strip on Rainy River, they have no land worth owning." Up to that time they were negotiating for the passage of a right of way for an easement and they were negotiating for that easement in fulfilment of the obligations they had incurred in connection with this surrender and in connection with their obligations with British Columbia. Now then, what I say is that these are the reasons which operated upon the the mind of the Dominion in endeavouring to negotiate

the treaty at that time. Ontario, who owned the land, was not anxious to negotiate at that time. They had no idea of extinguishing the Indian title. They might not have done it for many years afterwards. They might have effected the surrender or extinguishment of that title on very much more advantageous terms than those obtained by the Dominion, and what right, I ask, has the Dominion to come in and simply say because for objects of their own in order to enable them to fulfil obligations they have entered into apart altogether from Ontario: We will negotiate this treaty on our own terms; true, we know you have claimed the land, but we will ignore that fact and we will go on and acquire that title, and if we find afterwards we get nothing by it we will turn around and ask you to bear the burden simply because you get the benefit of the extinguishment of the title?

DUFF J.—Would Ontario have had power without the concurrence of the Dominion to make any arrangement to extinguish the title?

Mr. Ritchie: Perhaps not unless they could get it under the Proclamation of 1763, which did allow them to make arrangements with any one representing the government. Of course Ontario would represent one branch of the government and under that proclamation probably any arrangement entered into between Ontario and the Indians would be valid and binding as an extinguishment of the Indian title, unless it was contended that inasmuch as the "British North America Act" assigned to the Dominion the exclusive right to deal with Indian affairs, that that to some extent overrode the terms of the proclamation and would require Ontario to obtain the assent of the Dominion to any agreement that might be entered into.

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However that may be, I suppose there is no doubt that we could not go in there and deal with the Indians apart from getting an extinguishment of their title in any shape or form. In connection with that, as to settlement and opening up of the land, it was just as much in the interest of the Dominion, I submit, to have that opened up as Ontario. At all events to a very great extent, because when opened up for settlement, settlers were coming in from time to time and the revenues of the Dominion would be increased; the customs and excise duties would be increased. There was an interest that the Dominion might very reasonably be supposed to have in view, because the greater the settlement the greater the amount of revenue they are likely to obtain.

Now let us consider the question on the admitted facts that the Dominion knew of the claim of Ontario to these lands; then without asking the assent of Ontario, having no mandate from Ontario and knowing, as I say, that Ontario was claiming the land as its own, the Dominion goes on and makes a treaty with the Indians, it being clear that there were many natives that would induce them to make this treaty, peculiar to the Dominion itself, and it turns out afterwards that the title they sought to acquire and which they thought might be a valid title, availed them nothing; can they turn around as a matter of law or equity and say to Ontario—who claimed these lands, who did not authorize the Dominion in any way to negotiate in respect of this territory—and say, because you have received some benefit you must assume the whole burden?

In other words, simply because two people are claiming to own a particular piece of property, why

should one arrogate to himself the right to say, I know you are claiming, but I don't think your claim is good, I will ignore you and I will make a bargain off my own bat, so to speak, I will make my own bargain, I won't consult you, I will pay whatever I please and if it turns out that I get nothing by that bargain then I saddle you with the burden I have created. I submit that to permit any doctrine of that kind to get abroad would be subversive of all the interests in connection with property. If a bargain is made under these circumstances, surely the man makes the bargain at his own peril; knowing that another person is claiming to own this particular property, he enters into some contract and under that he benefits this particular individual who owns the property; I submit there is no principal of law or equity upon which he is entitled to recover. On that point take the case, for instance, of co-tenants, tenants in common of property, where one co-tenant goes on and makes improvements on the property owned by both, which necessarily benefits the other. It has been held by the Court of Appeal in England, that if he does that without the assent of the other he cannot claim any contribution, although the other undoubtedly receives a benefit. That I submit is a stronger case than the present one.

The most recent case I have been able to find is directly in point and I will just read the head note. The principle is laid down in this way: "There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it." That is a decision of the House of Lords; I shall not take up your lordships' time in reading the case, but the cases are all collected there. That is *Ruabon Steamship Co.* v. *London Assurance*

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Co.(1). That is the statement of law laid down by the Lord Chancellor. That was a case where, during a voyage covered by a policy of marine insurance, the vessel was injured and put in dry dock; the loss had to fall upon the underwriters alone and could not be apportioned between them and the owners.

The learned counsel then analyzes at some length the judgment of the Exchequer Court, which is the subject of the appeal.

Shepley K.C. follows for the appellant; My lords, there are two or three observations which have fallen from the Bench during the argument of my learned friend as to which before dealing at all with the principal questions involved in the appeal, I desire to say a word or two. Perhaps the most important subject is that suggested by his lordship, Mr. Justice Duff, which, if I appreciate the point, was this: Assuming that the Indian right in these lands was a burden on the interests of the province within the meaning of the "British North America Act," and assuming further, that there was residing in some sovereign power, say the Imperial or Dominion, the right to deal with that interest, is there not implied a corresponding obligation on the part of Ontario to indemnify that sovereign power in whatever shape that Indian interest may be transmitted? Have I appreciated what your lordship said?

DUFF J.—May I carry it a little further, to indicate the idea in my mind at the time? Whether Ontario came under the implied obligation to assume the burden of extinguishing the title, whenever the Do-

(1) [1900] A.C. 6.

minion in the exercise of its powers should think it desirable to extinguish it.

Mr. Shepley: That is putting the question in another form.

IDINGTON J.—The way it struck my mind at the time was the possibly analogous case of a person who, having a trust to discharge and incurring some expense incidentally to the discharge of that trust, has to be indemnified.

Mr. Shepley: Out of the trust estate.

IDINGTON J.—That is the point. Where is the trust estate here?

Mr. Shepley: That is one of the answers I was going to attempt to make. But it seems to me there are two or three considerations that ought to be dwelt on briefly in this aspect of the case. In the first place the Crown—whether the Crown represented by the sovereign at home or the Crown represented by the Dominion—the Crown by the very terms of the "British North America Act," vested all the rights that the Crown had in these lands in Ontario. And as a Crown claim no such claim as this can possibly be maintained. It must be maintained, if at all, because the interest of the Indians, subject to which Ontario took the lands, has been transmuted in the claim to the Dominion and is recognizable as the interest of Ontario because it represents some form of the Indian interest. The first answer to that seems to me that by the decision of the Privy Council in the *St. Catharines Milling Case*(1) there never was any transmutation or transfer of that interest to the Crown or anybody else. There was the bare extinguishment of it and nothing more. Perhaps your lordships will let me dwell a

(1) 14 App. Cas. 46.

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little upon a passage in the judgment in the Privy Council at the top of page 60. Lord Watson said: "By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration and such other purpose as to Her Majesty might seem fit, 'to the Government of the Dominion of Canada,' for the Queen and her successors for ever. 'It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown." What is that but a statement that the argument was that the Indian right had been transmuted into something else in the hands of the Crown? "That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the Commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial statute of 1867." It occurred to us that that afforded a complete answer to your lordship's question; that it was not possible in the negotiation of this treaty for the Crown to set up anything arising out of these negotiations, or out of this treaty, by way of claim against the Province of Ontario. Then there is another consideration which I think your lordships have not clearly appreciated. It seems to us that the Dominion had put it out of its power to raise any such question as this by an issue

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which has been made and which is upon this record. In presenting the documents, my learned friend Mr. Hogg put in an agreement between the two Governments made on the 16th of April, 1894. It recites the treaty and it recites that by the treaty certain reserves were to be selected and laid aside for the benefit of the Indians; the Indians were, amongst other things, to have the right to pursue their avocations of hunting and fishing throughout the tract surrendered, subject to such regulation as might be made by the Government and saving such tracts as might be taken up for settlement and so on. Then it recites that the two boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the treaty and other territory north of the height of land with respect to which the Indians are understood to make a claim as being occupants thereof according to their mode of occupying and as not having yet surrendered their claim thereto or their interest therein. "And whereas before the true boundaries had been declared as aforesaid, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the said treaty and the said Government of Ontario was no party to the selection and has not yet concurred therein." Then it is stated that it is deemed desirable for the two Governments to come to a friendly understanding and it is therefore agreed between the two Governments as follows, "with respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes, and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered

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tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been made, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves." There is a declaration that in order to effectively deal with the question of reserves and therefore to effectively deal with any interest Ontario has in these lands or had in these lands, the consent of Ontario was necessary. That brings me to the second answer to your lordship's question, and that is, it is perhaps for this purpose necessary to admit—perhaps not at all undesirable to admit—that the Dominion had the sole treaty making power, that that power did not reside with Ontario; but inasmuch as the making of such a treaty involved the dealing with the property of Ontario, the consent and concurrence of Ontario would be necessary in the making of any such treaty.

The learned counsel then deals with the questions of the conventional boundary, the surrender of Rupert's Land by the Hudson Bay Co. and the acquirement of the whole territory instead of enough only for the right of way of the Canadian Pacific Railway because the land was of so little value. He then criticizes the judgment of the Exchequer Court reading from pages 482-5 of the report in 10 Ex. C.R. and proceeds.

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Here your lordships are called upon to administer the *lex loci,* because it is a contract with regard to lands in the Province of Ontario, and it is a law of Ontario that the Court of Exchequer and your lordships must administer in disposing of these questions. Then after referring to the statutes which the Dominion and the Province of Ontario passed and which enabled this controversy to be brought into the Court of Exchequer, his lordship says: "I agree with Mr. Shepley that the mere fact that there is a controversy does not give the court authority to decide against the province simply because it should think that as a matter of good conscience and honourable dealing the province, having derived the benefit from the treaty, should relieve the Dominion from a proportionate part of the burden arising therefrom; that it is not simply a question of what the court might think to be fair in the premises without regard to the principles of law applicable to the case."

So his lordship disclaimed any intention or right to adjudicate upon the grounds of conscience merely.

"At the same time," he said, "as Mr. Newcombe pointed out the question arises between governments, each of which within its own sphere exercises the authority of one and the same Crown. For that reason one cannot expect the analogies of the law as applied between subject and subject to be perfect or in every way adequate to the just determination of the case." I do not know just what his lordship means by that, but I think it answers itself in the subsequent part of the case because he comes to the conclusion that for the purposes of this controversy the Dominion and the province are upon the same footing as two subjects. Then after that he deals with the question of what was

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the result of the treaty. At pages 489-90 he says: "There is no question as to its validity. In the *St. Catharines Milling and Lumber Company* v. *The Queen*(1), Lord Watson stated that they had full authority to accept a surrender to the Crown; but that they had no authority or power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867. There can, I think, be no doubt of that authority to bind the Crown to make the payments stipulated for in the treaty. The case cited shews that the lands thereby surrendered were, or might fall, within the true construction of the words of section 91 (24) of the Act of 1867, 'lands reserved for the Indians,' p. 59." With that I venture respectfully to find fault. I think the whole course of that decision is absolutely contrary to any such idea as that. With the exception of the strong dissenting judgment of Mr. Justice Strong, in this court, I think every court that pronounced upon it declared that these lands were not, in any sense, lands reserved for Indians, in any sense in which those words were used in the statute. And I think the Privy Council agreed with that.

"The difficulty is that in one aspect of the matter they were, although it was not known at the time, dealing with the public lands belonging to the Province of Ontario, and removing a burden therefrom. It is argued for the Dominion that Ontario must be taken to have acquiesced in what the Dominion authorities did in negotiating this treaty, and that the province is bound by such acquiescence. I am not able to accede to that contention or to rest my judgment on that ground." So that that is excluded. He says:

(1) 14 App. Cas. 46.

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"The most that can be said on that branch of the case is, it seems to me, that while on the one hand the Government of Canada holding, in good faith, but erroneously as it turned out, the view that all the lands to be surrendered belonged to the Dominion, did not consult the Government of Ontario in respect of the negotiations with the Indians for the surrender of their title in such lands; on the other hand the Government of the province did not raise any objection to the matter so proceeding and did not prefer any request to be represented in the negotiation of the treaty."

I do not think it was shewn—I speak subject to correction, because there is a great deal of correspondence here—but I do not think it can be suggested on this correspondence that Ontario was made aware that negotiations were going on. I daresay individuals, perhaps those concerned in advising the Lieutenant-Governor, read in the press from time to time things that were going on, but that there was any official communication of any kind between the two Governments does not, I venture to think, appear anywhere.

Then comes the question which really lies at the root of this controversy. "Now, with regard to the contention that inasmuch as a part of the benefit arising from the surrender of the lands mentioned in the treaty accrues to Ontario that province should relieve the Dominion from a proportionate part of the obligations thereby created, it appears to me that that consideration is not, of itself, sufficient to make the province liable." He accedes to the argument of Ontario on that point, that you cannot create a liability merely because a burden has been removed or a benefit conferred. He says: "If the province had had any option in the matter, if it had been open to it to accept or de-

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cline such benefit, and it had accepted it, then the province would have been liable for its bare proportion. But that is not the case. The burden of the Indian title was removed from these lands before it was determined whether any part of them was within the province or not. When it was decided that a large proportion of such lands was within the Province of Ontario, there was nothing the province could do but accept the lands and administer them free from such burden."

Then he refers to the *Ruabon Case* (1) and he says the principle which that case lays down, "is, I think, as clearly applicable to the transaction of the Dominion and Provincial Governments as it is to those which occur between individuals."

So far your lordships will see that everything he has said is in favour of the contentions which we are making. Then he says: "If the Parliament of Canada should appropriate and the Government of Canada should extend public moneys of the Dominion for Dominion purposes, with the result that a province was benefited, and there was no agreement with the province or request from it, then it would be clear that the province was under no obligation to contribute to such expenditure or to indemnify the Dominion against any part thereof." That is at page 491. That is as strong a statement as anything that can possibly fall from us in the course of this argument. "Equally it seems clear that if the Parliament of Canada should appropriate and the Government of Canada should expend the public moneys of the Dominion for a provincial purpose for the benefit of a province, there being no agreement with the province or

(1) [1900] A.C. 6.

request from it, no obligation would arise on the part of the province to contribute towards such expenditure or to re-imburse the Dominion for any part thereof."

He carries it a step farther. He is assuming here that the Dominion had, with the intention of benefiting the province and, therefore, of carrying out some provincial purpose or some provincial object, expended moneys, there would be no right to contribution or indemnity against the province without the previous acquiescence of the province. "The principle would apply as well to expenditures made by a province, with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary and no obligation to contribute would arise."

Then comes the principle upon which he has decided this case and that I venture to criticize, respectfully but strongly. He says: "The present case appears to me to differ from those stated in some material respects. At the time when the treaty was negotiated the boundaries of the province were unsettled and uncertain." That is common ground, of course. "The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That, of course, did not affect Ontario's title to such part of the lands claimed by the company as were actually within the province. But on the admission of Rupert's Land and the North-Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had the right to administer. And with re-

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spect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analogous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person."

I have always been unable to understand why the Hudson's Bay surrender was adopted as the basis of this judgment. Every word that is said with regard to the Hudson Bay surrender is equally applicable to the Indian surrender. The Dominion did not acquire any title by either, but by either or both it thought that it got some title. I do not know why the Hudson's Bay Company surrender was the one picked out rather than the Indian surrender. Either would have answered the purpose which the Hudson's Bay Company surrender is made to do in this judgment. What he says is, it is true the Hudson's Bay could not give you any title, it is true you did not get any title but you got into the position of a *bonâ fide* possessor or purchaser of Ontario lands. By virtue of what? The transfer or the surrender of those lands by the Hudson's Bay Company to you. Then what follows? "The question of the extinguishment of the Indian title in these lands could not, with prudence, be deferred until such boundaries were determined." It could not, of course, having regard to the national objects to be served by the treaty. It could with reference to the provincial objects. As Mr. Justice Burbidge himself has said, the lands were not then wanted for settlement or any other purpose and the surrender was not obtained because of that; the surrender was obtained because it served the national purposes to which reference has been made. "It was necessary to the peace,

order and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion, and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection, and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person, in consequence of unskilful survey, or in the belief that the land is his own, makes improvements on lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor."

IDINGTON J.—If it existed in law already, why was there a necessity for this statute?

Mr. Shepley: That seems to me an entirely pertinent question. If there ever could have been a right at law, if there ever was, why were these statutes passed? The creation of any lien or right of that kind required a statute, but you cannot find in our law, in the law of Ontario or the law of England any such right apart from the statute.

Then, my lords, how does Mr. Justice Burbidge conclude? At page 495 after referring to what is laid down in *Beaty* v. *Shaw*(1), he says: "It appears, therefore, that if the question in issue were to be determined by analogy to the law of Ontario applicable to

(1) 14 Ont. App. R. 600.

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individuals, the province could not maintain its counterclaim for the moneys which the Dominion collected as revenue from the disputed territory, without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the charges incurred in extinguishing the burden of the Indian title; but that it is, to say the least, extremely doubtful if this equity could be enforced in an action by the Dominion against the province."

Let me pause there for a moment. My learned friend has already pointed out to your lordships how utterly foreign to this controversy is the question arising on the counterclaim. By the conventional boundary agreement the Dominion and the province mutually undertook with each other in the event of the boundary award determining or the boundary dispute resulting in shewing that the territory which had been administered did not belong to the person administering, to account for all the revenues they had derived from the territory during the course of that administration. It was just as simple as that, and our counterclaim says to the Dominion, in the course of our administration under the conventional boundary agreement, of the territory which that agreement assigned to your administration and management, you derived certain revenue and you undertook under that agreement to account, that is, if we turned out to be the owners of the land and entitled to those revenues, to account to us accordingly. That is our counterclaim. What has that to do with the Indian title or any question resting upon contract? If we brought an action against the Dominion upon a promissory note, could the Dominion say, your coming into court against us on that promissory note gives us an oppor-

tunity of setting up every equitable claim and having you refused relief unless you agree to it? Now that is what this case has been decided upon. That is the point which has been taken by Mr. Justice Burbidge and upon which the case has been decided.

Then, my lords, he goes on to deal with what is no doubt at the bottom of all this litigation. In the course of the delivering of the judgment in the *St. Catharines Milling Case*(1), Lord Watson used this language, and I will read the whole of two sentences here rather than confine myself to the one which is the foundation of this claim. "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercised their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit."

IDINGTON J.—Is there any track of that having been argued?

Mr. Shepley: I will tell your lordships how that is. I was reading from page 60 of the report. In order to determine the weight to be given to that, let us see what the St. Catharines litigation was about, what the issues in it were, and what place in the adjudication of those issues this obligation had. As I told your lordships, the Dominion, notwithstanding the adverse

(1) 14 App. Cas. 46.

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result of the boundary dispute, claiming to have acquired the paramount title to that of Ontario by virtue of the alleged transfer of the Indian title under this treaty, issued a license to cut timber to the St. Catharines Milling Company in territory which was within that in question. The Attorney-General of Ontario brought an action in the courts of Ontario against the licensee, alleging that the licensee was trespassing upon Crown lands belonging to Ontario and obtained an injunction restraining that trespass. The Dominion was no party to that at all and the sole question for adjudication there was whether or not the St. Catharines Milling Company, the licensees, setting up as it did the license of the Dominion, justified the acts of trespass. That is, in other words, whether the licensee had acquired a right to cut that timber as against the rights that Ontario had by virtue of the license issued by the Dominion. That was the sole question. I will give your lordships a reference to the case in its various stages. Your lordships will find it first in 10 Ontario, at page 196. That is the decision of the Chancellor, a very lengthy decision and your lordships are very familiar with it no doubt. I only refer to it because I want to shew just what the Chancellor had in his mind with regard to the very question which Lord Watson afterwards expressed himself upon. At page 235 of the report he says: "In the present case, my judgment is, that the extinction of title procured by and for the Dominion enures to the benefit of the province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the province to this as part of the public domain of Ontario.

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"Whatever equities—I use this word for want of a more suitable one—may exist between the two governments in regard to the consideration given and to be given to the tribes, that is a matter not agitated on this record."

That case went to the Court of Appeal and came to this court and then to the Privy Council and up to that time the Dominion had not been a party to the controversy at all. Of course it goes without saying that none of the evidence which is on the present record before your lordships was before either the Chancellor or either of the appellate courts. There was not a word of the evidence which Mr. Justice Burbidge heard or which is before your lordships to-day with regard to the circumstances under which the treaty was negotiated. The whole question was: Did the treaty confer upon the Dominion such a title as was paramount to that of Ontario, and by reason of that paramount title was the license of the alleged trespasser a license which authorized him to do what he did and which effectively answered the claim of the Province of Ontario for an injunction?

Then what happened in the Privy Council is this and it is stated in the judgment. I will take the statement from the judgment. At pages 52 and 53 Lord Watson says: "Although the present case relates exclusively to the right of the Government of Canada to dispose of the timber in question to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the Province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment

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of the court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case, raising the legal question in dispute. The Dominion Government elected to take the first of these courses and their lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario." They appeared upon that intervention; they intervened in the *St. Catharines Milling Company Case*(1) on that appeal and they argued that the St. Catharines Milling Company ought to succeed in that appeal; that is, that the St. Catharines Milling Company's license gave a valid right to cut the timber as against any right on the part of Ontario. The whole question was argued there and that is the whole question raised upon that record, and in the result the order that was made simply dismissed the licensees' appeal and no more. It made no declaration between the Dominion and the province. Your lordships have upon this record the formal judgment before you. All that the formal order of the Privy Council did was to dismiss the licenseholder's appeal. The whole thing done was to dismiss the appeal.

DUFF J.—Is there anything to shew, Mr. Shepley, that this statement of Lord Watson's was the result of any concession or confession made on behalf of the province?

Mr. Shepley: We thought we had here a copy of the shorthand notes of the argument; unfortunately we have not, but it can be found and given to your lord-

(1) 14 App. Cas. 46.

ships, or a reference to the sessional papers in which it will be found. I can tell your lordships from recollection—because of course we studied that matter very carefully—from time to time spasmodic attempts during the argument were made to introduce that discussion and, in the *St. Catharines Milling Co. Case*(1), invariably the court said, "We have nothing to do with that, that does not arise in this appeal; it has not to do with any question as to whether or not Ontario ought to bear any portion of the burden." That was during the argument. Then to say, my lords, in these circumstances, that the Privy Council has gone out of its way, without any evidence before it whatever and in a case where the question was not raised, to determine our rights, rights between the Dominion and the province, was going much farther than it was possible to go. No doubt that dictum is the foundation of this litigation and your lordships will find, I think, that the right of the Dominion in this statement of claim is in the words of the dictum. We say it cannot be binding between the parties in this controversy; that was not a controversy between the Dominion and the province and there was no estoppel.

DAVIES J.—What was the controversy? There must have been some or they would not have been allowed to intervene.

Mr. Shepley: Whether or not the right of Ontario against the licenseholder should be sustained. There was nothing before the Privy Council to indicate the circumstances under which the Dominion Government had extinguished the title, whether it had done that for the benefit of Ontario or for reasons such as are shewn to your lordships to-day. They could not have

(1) 14 App. Cas. 46.

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known whether Ontario acquiesced or was consulted or not.

My learned friends have found a good deal of comfort in the civil law, the law of *negotiorum gestor,* but that is not our law. Apart from that, there was no mandate, no commission from Ontario to the Dominion to go and extinguish this title on behalf of Ontario and no ratification.

DUFF J.—Except such mandate as the "British North America Act" would give the Dominion. Though that is going back to the same thing.

Mr. Shepley: Yes, my lord, perhaps that is coming back to the same point again. I have tried to shew how any mandate from the "British North America Act" can only be construed as a mandate to deal with the lands of Ontario with the concurrence of Ontario. You cannot go adversely to Ontario and deal with Ontario's rights. What Mr. Justice Burbidge says with regard to that statement, at page 496, is—and I find it very difficult to understand exactly what he means by it—"So far as the questions in this case relate to the extent to which the province is liable to contribute to the expenses incurred by the Crown in fulfilment of the obligations created by the treaty this case, no doubt, differs materially from the *St. Catharines Milling and Lumber Company's Case*" (1). That is what we say. We say the two cases raise entirely different issues. Then he goes on to say: "But with respect to the principal question at issue, namely, whether the province is liable to contribute anything, this case presents, I think, no new fact or aspect." I confess I am utterly unable to understand that. First he says that to the extent to which the province is

(1) 14 App. Cas. 46.

liable to contribute there is a new case, but with respect to the question of whether it is liable to contribute anything there is no new factor. I should have thought that neither of these issues was before the Privy Council. Then he says: "The province's main defence here is that it was not a party to the treaty." That is not our main defence. Your lordships have heard elaborated, at perhaps too great length, what we think our defences are, but your lordships have not, I am sure, got the idea that our main defence is that we were not a party to the treaty. That is one of our comments upon the situation, of course.

Then he says: "By the order which gave the appellants leave to bring the judgment of that court under review, Her Majesty was pleased to direct that the Government of the Dominion should be at liberty to intervene in the appeal or to argue the same upon a special case, raising the legal question in dispute. The Dominion Government elected to take the first of these courses, with the result that between the Dominion and the province there was no formal judgment on the questions at issue between them." Well, the question at issue between them was the question at issue between the province and the license-holder. There was no other question. You could not extend the record by mere intervention on the license-holder's appeal. The record could not be expanded by the intervention of the Dominion. Then he says further: "In the *St. Catharines Milling and Lumber Company's Case*(1) the Province of Ontario stood in the position of a plaintiff; and as between the province and the Dominion the views of their lordships as to the province's liability to indemnify the Dominion

(1) 14 App. Cas. 46.

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may, I think, with fairness, be taken as a part or condition of the judgment of the province. although such views found no place in the formal judgment pronounced." That again I am unable to understand. The judgment was a judgment dismissing the license-holder's appeal. I do not know whether Mr. Justice Burbidge means that they would have allowed the appeal if they had not imposed this condition upon Ontario. There is no indication of any such view in anything that I have been able to find in the record.

One other question I propose to trouble your lordships with and that is the question which has already been quite fully covered, perhaps, by my learned friend Mr. Ritchie, namely, whether or not upon the hypothesis of this judgment it was essential that the relative part played by the various considerations moving the Dominion to this treaty should have been played. In other words, in 1873, that all the elements entering into the negotiation of the treaty, which Mr. Justice Burbidge speaks of, the obligation imposed by the "British North America Act," the obligation imposed by the Hudson Bay Company's surrender, the obligation imposed by the terms made with British Columbia when British Columbia came into the Union and the surrender of the title to this barren piece of territory as it was supposed to be, that these considerations upon the theory of this judgment entered into the treaty. Then why is the Dominion to recover against Ontario any more than a measured proportion having regard to the respective values of these different considerations? Mr. Justice Burbidge acceded to that in the principal judgment; he said it was difficult of ascertainment, but further evidence might be given. Further evidence was given, but not upon that

point. The thing is incapable of measurement, that is why. The Dominion made no attempt to produce any evidence upon that subject. We venture to think that it is inherently incapable of measurement; that you cannot say at this time—that indeed at any time you could not have said—this great project the trans-continental road, the Canadian Pacific Railway Company, this great territory, Rupert's Land, that we want to open up and want a road to, the pacification of the Indians, the acquisition of the title to the few barren rocks that they have got here, you cannot put those together, you never could have put them together and said, so much for this and so much for that and so much for the other. The thing is unthinkable, that you can sit down and make a sum in arithmetic of propositions such as these. If that is so, how can the Dominion hope to recover anything here?

DAVIES J.—Does the extinguishment of the Indian title depend at all upon the value of the land? I suppose there would be some evidence of general dealing.

Mr. Shepley: That is a point that I had almost overlooked. It is said by Mr. Justice Burbidge that we know pretty generally what other treaties have cost; but we do not know what was the value of the lands those treaties covered, nor do we know the value of the lands covered by this treaty. You cannot compare the price paid for a farm in a county away north with the value of a farm situated along the River St. Lawrence. You must have some evidence. Supposing the fact to be—I do not say it is at all, but it is fair to test the question that way—that the whole of the 30,000 square miles of land which Ontario got the Indian title extinguished in, supposing the whole value of that was nothing whatever, that it was all

rocks like the north shore of Lake Superior without any valuable mineral, this judgment must have proceeded upon precisely the same principle and Ontario would have had to pay for land which she never would have opened up for settlement; she would have had to pay because the Dominion extinguished this title not for the purpose of getting the land at all, but for the purpose of the construction of these great national works.

Newcombe K.C. opens for the respondent. After referring to the material parts of the treaty and to the conventional boundary agreement the learned counsel combats the argument that the land surrendered was of no value, contending that the grounds on which it was based were not sufficient and then proceeds as follows.

Before going further with the question in difference here, let us consider what was the state of the title at Confederation and what sort of an asset did the Indians have in this territory. That has been pretty clearly defined by the numerous cases which have been before the courts and before the Judicial Committee, I think. The judgment of Chief Justice Strong in the *St. Catharines Milling Co. Case*(1), which was a dissenting judgment, is nevertheless a very instructive judgment with regard to the nature of the Indian title, and it is the judgment, of all the judgments which were pronounced in the *St. Catharines Milling Co. Case,* which came nearest to accord with that of the Judicial Committee. I mean to say, he took the view that the title was in the Dominion but, so far as considerations of Indian title, the quality of the Indian title, the

(1) 13 Can. S.C.R. 577.

nature of the Indian reserves and considerations of that sort are concerned, which are more or less material here, the view of the learned Chief Justice coincided entirely with that later expressed by Lord Watson in appeal.

Now it seems to have been supposed in the Ontario courts that the Indian title was nothing except such as might be recognized as a matter of grace; that they had no legal right; that they might be recognized or not, as the authorities determined. But that is not the case, as shewn by Chief Justice Strong. His judgment is a long one and I do not propose to refer to it at length.

Now, in the judgment in the *St. Catharines Milling Co. Case*(1), at pages 58 to 60, it is said: "The Crown has all along had a present proprietory estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the Union land vested in the Crown, subject to an interest other than that of the province in the same within the meaning of section 109, and must now belong to Ontario in terms of that clause unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." That is to say at Confederation this territory, in so far as it ultimately turned out to be within the boundaries of Ontario, was by force of the "Confederation Act" vested in Ontario subject to an interest other than that of Ontario therein. That is the Indian interest. Now that is further explained in *Attorney-General of Canada* v. *Attorney-General of Ontario*(2), known as the *Robinson Treaties Case,* and there Lord Watson said, at pages 210 to 211, that the expression in sec-

(1) 14 App. Cas. 46. (2) [1897] A.C. 199.

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tion 109, "an interest other than that of the province in the same appeared to their lordships to denote some kind of right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the province." Therefore, previous to this surrender, from the time of Confederation down to the time of the surrender the Indians had an interest in the land other than that of the province and an interest capable of being vindicated in competition with the beneficial interest of the province. So that, my lords, they had a title, as I submit, of occupation and possession; a title which made it legally impossible for the province to administer the lands, to make grants and administer the lands in the way in which they have administered them since the surrender was made.

Your lordships will see, too, by the proclamation of 1763, which is the evidence of the Indian title here, that the Government was prohibited from dealing with these lands, from making grants, or doing anything with them pending the cession of the Indian title. The proclamation declares that "no governor or commander-in-chief of any of the new colonies of Quebec, East Florida or West Florida do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the boundaries of their respective governments, or until our further pleasure is known, upon lands which, not having been ceded or purchased as aforesaid are reserved to the Indians or any of them. It is further declared to be our royal will to reserve under our sovereignty and protection all the lands not included within the limits of our said three governments or within the limits of the lands granted to the Hudson Bay Company." Therefore I

submit that the Indians had title inconsistent with the right of Ontario to do any of the things with this land which she immediately proceeded to do after this treaty was made.

Counsel then quotes at length from the speech of the Lieutenant-Governor on opening the legislature of Ontario, in January, 1874, in which he speaks of the boundary question and refers to these lands as "the important territory in dispute," and to a report from Mr. Laird to the governor in council dated June 2nd, 1874, quoting from it as follows:

"That as the Indian title of a considerable part of the territory in dispute had not then been extinguished, it was thought desirable to postpone the negotiations for a conventional arrangement, under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians."

That is very strong evidence, my lords, as to what was taking place. The project was the settlement and administration of this territory. There was the mineral wealth, the timber and the settlers going in and contention and strife to be avoided, and there was the question of the boundary to be settled. Negotiations had been begun and then, according to this report, by mutual consent between Ontario and the Dominion it had been conceded as expedient that those negotiations should be postponed pending the surrender of the Indian title, which, of course, the Dominion undertook to bring about as speedily as possible.

Then he says: "That barrier being now removed, the undersigned has the honour to recommend that as some considerable time must yet elapse before the boundaries of Ontario can be finally adjusted, it is desirable in the meantime to agree upon conventional

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boundaries, otherwise the development of that important portion of Canada lying between Lake Superior and Lake of the Woods will be seriously retarded, as applications to take up lands in that section are being constantly made, and the inability to obtain recognition of claims from either the Government at Ottawa or Toronto is impeding the settlement of the country."

Then there is a recommendation of the appointment of Commissioners and this report is communicated to Ontario under order in council printed on the following page and then there is a memorandum of supplementary agreement, the conventional agreement, where it is mentioned that Ontario acted on the suggestion of the Privy Council by appointing a Commissioner. They acted on the suggestion set out in this report of Mr. Laird. There is no question by Ontario that that does not represent the state of the facts as they existed.

There can be no doubt, it seems to me, that this project was mainly in aid of the settlement of the country. What sort of a position would it have been in? My learned friend says: "Oh, they wanted to build a railway through there; they wanted to build a railway and they might just as well take a release of the whole thing." Suppose they had stipulated with the Indians, as they might have stipulated with them, to get the surrender of the right of way of the Canadian Pacific Railway and gone through there with that and left the whole thing. How much less, I would like to know, would Ontario have had to pay if she waited and got a surrender from the Indians afterwards, after the settlers began to come in and the railway to go through there?

Then, after referring to a letter from the Under

Secretary of State to the Lieutenant-Governor of Ontario, dated July 15th, 1874, respecting the selection of Indian reserves under the treaty and asking for a schedule or plan of the mineral lands in the territory surrendered and the reply thereto on July 31st enclosing such plan he proceeds:

Now we pass from that to the statutory agreement, to the Dominion statute of which the agreement is a schedule. The statute I do not think is set out in the case, but the agreement is. The Dominion statute simply contained one section, that it shall be lawful for the Governor in Council, if he shall see fit, to enter into an agreement with the Government of Ontario, according to the schedule to this Act, and such agreement when entered into and every matter and thing therein shall be as binding on the Dominion of Canada as if set forth by statute. The Ontario Act I have not got, but presumably it is to the same affect.

Now this agreement is with respect to what we call the special reserves. Your lordships are aware that under the treaty by the first provision, the first covenant on behalf of the Crown, the Crown was to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the Indians. "Also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band of Indians." Then the Dominion proceeded to lay aside these reserves. You see the effect of the treaty or surrender as ultimately held by the

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Judicial Committee, was to vest the whole title in Ontario. The Indians did not reserve or except their special reserves; they surrendered their original Indian title, the title which existed under the proclamation; they surrendered the whole thing to the Crown and it enured to the benefit of Ontario. Therefore Ontario held the whole freed from their interests. The Indians reserved nothing, but they took a covenant from the Crown that the Dominion would give them special reserves. The Dominion did so without any special acquiescence by Ontario. I have shewn your lordships that there was some reference to the subject because they did not want to give them the mineral lands, but without Ontario becoming bound the Dominion laid aside these reserves, and then questions arose, Ontario claiming that we had set them aside out of their Crown lands in which the Indians had no interest, we had taken their Crown lands and made reserves of them. They said we had no right to do that. That was ultimately conceded, but the Indians had been put on these reserves and were occupying them in fact, and the situation had been dealt with and it was dealt with by this agreement. Now this agreement recites the treaty. "Whereas by articles of a treaty made on the 3rd of October, 1873, between Her Most Gracious Majesty the Queen, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of Manitoba and the North-West Territories," and so on, "the Ojibeway Indians, inhabitants of the country within the limits thereinafter defined and described by their chiefs chosen and named as thereinafter mentioned, of the other part, which said treaty is usually known as the North-West Angle Treaty No. 3, the Salteaux tribe of the Ojibeway Indians and all other Indians inhabiting the country therein defined and

described surrendered to Her Majesty all their rights, titles and privileges whatsoever to the lands therein defined and described on certain terms and considerations therein mentioned." Now that was the recital they made of it in 1894, and it is a correct recital. It states the effect of the treaty precisely, in a solemn agreement ratified by the statutes of both Governments; and it says what is apparent on the face of the instrument, that they did surrender these to Her Majesty on certain terms and considerations therein mentioned. That is, they gave up their title to the Crown and the Crown in consideration of that gave them certain covenants, and I am going to refer to that again. One of those covenants is as much a consideration for this transfer as another. There is no method of separating them. Then it goes on with further recitals and the last one is: "Whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, and the Governor-General of Canada in Council and the Lieutenant-Governor of Ontario in Council have given authority for the execution on their behalf respectively, pursuant to the said statutes of an agreement in terms of these presents." It is therefore agreed as follows: "With respect to the tracts to be from time to time taken up for settlement, mining, lumbering, or other purposes, and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not includ-

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ing the reserves to be made thereunder do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves."

There Ontario is saying that inasmuch as this treaty has been made, these lands have become provincial Crown lands and the Indian rights have been extinguished.

Now, by lords, there is the other agreement made with regard to these reserves. That is the agreement between Mr. Blake and myself made in London. "Agreement between counsel on behalf of the Dominion and Ontario, intervening parties upon the appeal to the Judicial Committee of the Privy Council in *Ontario Mining Co.* v. *Seybold et al.* (1).

"As to all treaty Indian reserves in Ontario (including those in the territory covered by the North-West Angle Treaty) which are or shall be duly established pursuant to the statutory agreement of 1894, and which have been or shall be duly surrendered by the Indians, to sell or lease for their benefit, Ontario agrees to confirm the titles heretofore made by the Dominion and that the Dominion shall have full power and authority to sell or lease and convey title in fee simple or for any less estate.

"The Dominion agrees to hold the proceeds of such lands when or so far as they have been converted into money upon the extinction of the Indian interest

(1) [1903] A.C. 73.

therein subject to such rights of Ontario thereto as may exist by law.

"As to the reserves in the territory covered by the North-West Angle Treaty which may be duly established as aforesaid, Ontario agrees that the precious metals shall be considered to form part of the reserves, and may be disposed of by the Dominion for the benefit of the Indians to the same extent and subject to the same undertaking as to the proceeds as heretofore agreed with regard to the lands in such reserves.

"The question as to whether other reserves in Ontario include the precious metals to depend upon the instruments and circumstances and law affecting each case respectively.

"Nothing is hereby conceded by either party with regard to the constitutional or legal rights of the Dominion or Ontario, as to the sale or title to Indian reserves or precious metals, or as to any of the contentions submitted by the cases of either Government herein, but it is intended that as a matter of policy and convenience the reserves may be administered as hereinbefore agreed."

This agreement was made and acted upon and it settled the differences existing between Ontario and the Dominion in that case, so that while it was argued by the parties it was not argued by the Dominion.

DUFF J.—I see that presents a point that did not occur to me before. You put it, but I did not appreciate it. The making of these reserves under the treaty involved giving the Indians an interest in the land which even after the *St. Catharines Milling Co. Case* (1) might have been contended at all events to be a

(1) 14 App. Cas. 46.

greater interest than they had before the treaty, than the original interest.

Mr. Newcombe: Yes, my lord.

DUFF J.—And that would necessarily involve Ontario?

Mr. Newcombe: Yes. I may be in conflict with some decisions, but not in conflict with any decision of the Judicial Committee—doubtless in conflict with the Chancellor of Ontario, at all events—but I submit that with regard to those special reserves which are set aside for the Indians uniformly upon the surrender of their original title in the large areas over which they claimed it, in those special reserves which are set aside, the Indians acquire a larger interest, a different interest from the interest which can be conveyed by surrender to the Crown for sale.

DUFF J.—That is a disputed point.

Mr. Newcombe: I admit it is a disputed point, but the reasons in favour of that proposition appeal very clear to me. What happened in the *Seybold Case* was this: One of these special reserves, "38B" which had been laid off for the Indians by the Dominion without any reference to Ontario and out of the Ontario Crown lands, was found to contain mineral and it was deemed desirable that it should be sold and converted into money so that the Indians might have greater enjoyment of their property. It was surrendered under the terms of the "Indian Act" to the Dominion and sold to this mining company who thereupon took up the mining, and Ontario made a grant, I think, of the same property. The question arose as to whether the Ontario patent was to prevail or whether the Dominion patent was to prevail. It was held or assumed that this was a good reserve. It was assumed by the courts

below, at all events by the Chancellor, and I think by this court too; it was not decided that it was a good reserve, but it was disposed of on the assumption that it was a good reserve. And it was said that when the Indians surrendered that to the Dominion for sale that a patent could only be made by Ontario and therefore the Dominion patent was no good, and the Ontario patent was good. Of course that was a serious question and upon that and upon the denial of Ontario that the Indians were to have the metal in these properties the Dominion intervened and proposed to argue that question in the Judicial Committee, but the settlement was made and the Committee decided what, of course, was the turning point of the case, that there was no reserve there, that Ontario had to acquiesce in the reserve, that the reserve never was laid off, and the point upon which the Chancellor had decided the case had never arisen.

Now, in dealing with this case and what I have to say in the following part of my argument, it must not be forgotten that it is not like an ordinary case between individuals. There is only one Crown and really only one party to the case; while we speak of Ontario and Quebec and the Dominion and so on, they are not separate and independent governments like the governments of the United States.

Each represents the same Crown in respect of separate departments of the same government. As illustrating that to some extent I want to refer to a case, *Williams* v. *Howarth* (1). That was a case where the Government of New South Wales, I think it was, sent a force of soldiers to the war in South Africa, and they had contracted with these soldiers to pay them

(1) [1905] A.C. 551.

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certain rates per day during the period of their enlistment. When these men reached South Africa they fell under Imperial command and Imperial regulations and they got certain allowances, certain pay from the Imperial Government for their services there. I do not remember what the amounts were, but we will suppose that the Government of New South Wales was to pay them ten shillings a day and they got four shillings from the Imperial Government. They went back, having served out the enlistment and one of these men brought his action claiming his ten shillings a day. They said, you have received four shillings a day from the Imperial Government and we only owe you six, and that was the question before the court. The courts in the colony held that there were two separate transactions altogether, that the Government of New South Wales had contracted with this man to pay him so much. But when it went to the Judicial Committee, the Committee held that this was all a transaction on behalf of the Crown, that there was one Crown, not a Crown for New South Wales and another for the Empire and that the man was entitled to what he had contracted for with the Crown, and he had got so much and he was entitled to the balance. The decision, doubtless, would have been different if it had been the case of an allied power, if it had been some foreign government. But here was a matter of the same Crown.

That illustrates the point that I make as to the indivisibility of the Crown. In these circumstances the Dominion claims that Ontario, who received the benefit of the treaty, shall assume and discharge the burdens of the treaty and this seems to be, I submit, a proposition founded in common honesty and justice.

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But we do not have to rely on that solely because the right has been affirmed both in the Judicial Committee and in this court. I remember in arguing this case below I quoted an observation from a very eminent judge that seems to me to apply to this case better than it does to most cases, perhaps. He said that the business of a judge was to find a legal reason consistent with the conclusions of common sense. If your lordships approach this case with the idea of finding a legal reason which will give effect to the common sense idea, to the view which would ordinarily be taken by the man in the street, I do not think there would be any difficulty about the result to which your lordships would come; because there was this very valuable territory with an encumbrance upon it which stands in the way of Ontario's enjoyment, removed at the expense of the Dominion by the payment of a comparatively very reasonable amount, Ontario entering in and taking the benefit and denying the obligation to make compensation.

Now let me refer to the words of Lord Watson in the *St. Catharines Milling Co. Case*(1). "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

GIROUARD J.—Is that a dictum?

Mr. Newcombe: No, my lord, we say not.

IDINGTON J.—How do you shew that it is not?

Mr. Newcombe: Will your lordship allow me to refer to the judgment of this court upon that point in

(1) 14 App. Cas. 46.

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the *Robinson Treaty Case*(1). That was the case of a treaty made in 1850, a case of a treaty very much the same as this, made between the Indians and the old Province of Canada, whereby the Indians surrendered a territory situate wholly in the Province of Ontario and there were annuities and continuing benefits to the Indians under that treaty which had to be discharged after Confederation. The Dominion became pledged to do that by reason of the "British North America Act." This was an obligation of the old Province of Canada which was cast upon the Dominion, but inasmuch as these payments constituted part of the excess debt over the amount limited by the "British North America Act," there was an express statutory obligation by Ontario and Quebec jointly to indemnify the Dominion. Now in this case the Dominion based its claim upon the *St. Catharines Milling Co. Case*(2), that is this very judgment of Lord Watson wherein he said, "seeing that Ontario receives the benefit she must bear the burden." The Dominion said that seeing Ontario got the benefit of the Robinson Treaty made in 1850, because the whole property fell to her afterwards at the division, at Confederation, she got the territory discharged from the Indian claim, and seeing that that property fell to Ontario she must bear the burden and, therefore, the Dominion was entitled to indemnity solely from Ontario and the claim was made against Ontario. The arbitrators held that Ontario was responsible. That was reversed in this court and the Privy Council upheld this court. Because of no reason other than the "British North America Act" had come in in the meantime and con-

(1) 25 Can. S.C.R. 434.

(2) 14 App. Cas. 46.

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verted this into a statutory obligation, it had put this obligation upon the new government of the Dominion and it provided that Ontario and Quebec, conjointly, should indemnify; therefore the proceeding had to be taken against Ontario and Quebec who, of course, had to indemnify conjointly, although Quebec, as far as that individual transaction was concerned, had no benefit whatever from the surrender. That was the action and it was argued in this court upon the authority of the *St. Catharines Milling Co. Case*(1). In the judgment of the court Chief Justice, Sir Henry Strong, says: "An argument against the Province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of the *St. Catharines Milling Company* v. *The Queen*(1). In that case there was an Indian surrender to the Crown, represented by the Dominion Government, made in 1873, subsequent to Confederation. The Privy Council held that this surrender enured to the benefit of the Province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the Province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the Province of Canada, which was to pay for them, and the present ques-

(1) 14 App. Cas. 46.

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tion only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities." In the case before the Privy Council the words are, "as between two departments of the government of the Crown" and "the most obvious principles of justice require." Now, my lords, there is no place here for the authorities which my learned friend quotes, that you cannot recover a payment made on behalf of a man unless it is made by his request. That is a general principle of the common law. The principle of the civil law is the other way. You can recover if a man gets a benefit. As between individuals you may say there are certainly exceptions in the common law to which I am going to refer. But you may say the general rule is to that effect and the general rule of the civil law is the other way. But here you have got a question between two departments of the same government and it is a question to be worked out according to the justice of the case.

Is this case going to be decided differently from what it would have been if the area had been in Quebec? Take the case of a restrictive building covenant and the division of the property afterwards, the one man getting a release. There is, perhaps, not so much difference, except in measuring the value of it. This question I submit is really one under the "British North America Act."

What we are doing here is to determine a controversy. Section 140 of the "Exchequer Court Act" founds the jurisdiction of this court. A statute passed by each giving the jurisdiction.

IDINGTON J.—On what ground are we to proceed under that Act?

Mr. Newcombe: You are to proceed, my lord, to

give effect to the principle that has been laid down heretofore by the Committee and by this court; to have regard to the "British North America Act" and the constitutional situation and the fact that there are two departments of the same government, with a controversy and you are to try to determine that controversy according to justice.

That being so the release or surrender having been brought about by the act of the Indians, concurred in and authorized by the Dominion, as it must have been, and upon considerations involving the payment of money which the Dominion undertook to execute, the lands were relieved of the Indian title for the benefit of the province, as the Judicial Committee has determined.

The liability of the province may rest upon either one or other of two views and I will put them both to your lordships. That is, it may rest upon some other views, some of the views which have been discussed, or it may rest upon the view which the learned judge has taken, although I am not going to argue that; I leave that with your lordships as to how far it may commend itself to your lordships' judgment. But this treaty I submit, may have operated to vest the title in Ontario and impose an obligation upon Ontario by virtue of the constitutional agency of the Dominion, in view of the peculiar circumstances of the case.

Either that or, the Dominion not being an agent in any sense, it made a contract which could only operate for the benefit of the province. And this contract being only capable of operation for the benefit of the province, became operative when the province came in and took the benefit of it, and, therefore, as a direct party became subject to the burden. Now these are

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the two views on either one of which the obligation may rest. I will deal with the first situation first.

Now, I submit that there is no constitutional anomaly or impropriety or anything which might not be fairly expected as the result of the perusal of a constitutional measure like the "British North America Act," in supposing that whether Ontario was a party to the surrender or not and irrespective of the measure of benefit, whatever that might be, derived by Ontario in the discharge of these lands from the Indian title, the payment of the consideration for the surrender should fall upon Ontario as the department of the King's Government in aid of whose title the surrender had been made. That is a no more extraordinary result I submit than that which took place in the case of *Williams* v. *Howarth* (1), about the soldier. What is the nature of the trust or interest other than that of the province in these lands arising out of the Indian title? The interest is in the Indians and the control and management of the lands and property is with the Superintendent-General of Indian affairs. That is, it is with the Dominion Government. The first legislation after Confederation with relation to Indians is the Act providing for the organization of the Department of State, 31 Vict. ch. 42, sec. 5. Section 5 says that the Secretary of State shall be the Superintendent-General of Indian Affairs and as such have the control and management of the lands and property of the Indians in Canada. Then by section 8 of the same Act it is provided that no release or surrender of lands reserved for the use of the Indians shall be binding except assented to by the chiefs in the presence of the Secretary of State or a

(1) [1905] A.C. 551.

person authorized by him and accepted by the Governor-General. That is to say, in the presence of an officer authorized by the government and who must be accepted by the government. Now there can be no doubt as to the legislative authority of the Dominion to pass these Acts, they being given the exclusive legislative authority over these lands which are reserved for Indians. That is, lands reserved for Indians within the meaning of that expression as used in the "British North America Act," as determined by the Judicial Committee in the *St. Catharines Case* (1). That had been a matter of debate. It was held otherwise by all the courts here, before that was determined. So that was the legislative position. Then section 10 of the same Act provided that no release or surrender of any such lands to any party other than the Crown shall be valid. That was in 31 Vict. Then in 1873 the Act was passed, assented to on the 3rd of May, 1873, establishing the Department of the Interior. Chapter 4, section 3, provides that the Minister of the Interior shall be the Superintendent-General of Indian Affairs and shall, as such, have the control and management of the lands and property of the Indians in Canada. The general purpose of that Act so far as the Indians were concerned was to transfer the administration from the State Department to the Interior Department. That was the legislation as it stood at the time this treaty was made and, of course, the whole thing is continued in the "Indian Act" at present. The present statute is chapter 81, R.S.C. 1906. Therefore in view of that legislation I say it was not competent to Ontario to make a treaty with the Indians or to obtain any trans-

(1) 14 App. Cas. 46.

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fer or surrender from the Indians. Neither has the Provincial Government the right to require the Dominion upon any terms to obtain a surrender or refrain from obtaining a surrender. The whole administration is exclusively in the hands of the Dominion Government.

Now, is it not possible to provide by the use of the legislative power that the Indians shall enjoy in some other form the interest which they have in their lands and can it not be provided that they shall have that in money rather than in lands even if the province is unwilling? Does not that follow? Wherein rests the jurisdiction, for instance, with regard to Indian lands similar to that which the Imperial Parliament exercises in passing a "Settled Lands Act," as to tenancies? A tenant for life, a settled estate and a remainderman, the tenant for life has his interest in the land which he can only enjoy as land until the legislature comes in, as it does, and says he can sell it and convey the whole interest and he enjoys the value of that estate in money. Is it not competent for the Dominion to do that with regard to the Indian title?

We find the obligation to recoup the Dominion in the general intention of the Act. The Indians were scattered all over the country, from one end to the other, in various provinces. The same band very often inhabited different parts of the same province. It was necessary no doubt that there should be a uniform policy in dealing with them and that they should be under one legislative power and one executive power. At the same time they owned their property, if we may call it so, their territories, under various provincial governments. The only way to work it out was to put the whole thing, so far as legislative and execu-

tive power is concerned, in the hands of the Dominion Government. That being so, why should not the province on the extinguishment of the title, within whose lands the area happened to be, bear the burden of the extinguishment of the title? Is it not fair and reasonable? Is it not that which you ought to read into this constitutional Act as the apparent intention.

Now, the other view simply involves this, that it takes two parties to make a contract. It takes two parties to make a treaty. The province had the beneficial interest in the lands subject to the Indian title. The Indian title could not be transferred or assigned, but while it existed and was recognized by the law it was only capable of being extinguished; that is as it were, transferred to the province, so as to merge in the paramount title. Now the Dominion had no interest in the lands and no interest in the transaction at all, except as the guardian of the Indians for the purpose of seeing that their interests were safeguarded in any surrender that might be made. Consequently, if Ontario desired to have this surrender made, she could go to the Dominion and ask the Dominion to negotiate, or stand by while she negotiated with the Indians for a treaty whereby the surrender would be made, the Indians surrendering through the Dominion and Ontario accepting. Now that might have been done; they might have done it in that way and I am not so sure that they did not do it in that way. If Ontario had gone to the Dominion, and said, we want to open up this territory but we cannot touch it because of the Indian title and we want you to go to work and get the Indian title surrendered, and then they had gone, the three parties together, the Indians and Ontario being the contracting parties, the Dominion present as the guardian and trustee of

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the Indians as it were, and a contract had been made just as was made in this case between the Indians on the one side and the Crown on the other, the obligation of the covenants to pay and provide which are in this treaty would unquestionably have fallen on Ontario.

Then it was said that in the circumstances here Ontario was not a party. The Dominion made a contract with the Indians that nobody had anything to do with except Ontario. It made a contract in the name of the Crown. The Crown is the name that stands for Ontario just as much as it stands for the Dominion. It took an assignment to the Crown of property, which could not operate except in favour of the Crown, represented by Ontario, and it assumed in the name of the Crown a number of obligations in consideration of that transfer. That transfer was taken, communicated to Ontario, and what does Ontario do? Does she say, it is unreasonable, we don't want this, we had no part in this? No, she said, that is just the thing we wanted, we wanted to go in there, it is ours, it belongs to us, and she took advantage of it, made her grants, sold her timber, made her mining leases, and has administered the property from that day to this.

I put it first, that it is a matter that rested wholly with the Dominion; that is the way I argued it first, and that the Dominion could negotiate the treaty independently, as it must, make its terms and provisions and stipulations and take the surrender which then operates for the benefit of the province, and the consequence of that is that the province has to bear the burden. That is the one view of it. The other view of it is that the province cannot be bound with-

out its consent and then you have the contract made which operates when the province consents, and here there is no doubt that both antecedently and subsequently the province was anxious to assume the administration. It has been designated a principle of universal application that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing the burden; the contract must be performed in its integrity. Accordingly where a person adopts a contract which was made on his behalf, but without his authority, he must adopt it altogether, he cannot ratify that part which is beneficial to himself and reject the remainder, he must take the benefit to be derived from the transaction, *cum onere*.

Then so far as the question of area is concerned, this is exactly what happened; the judge puts a paragraph in his judgment in this way: "Now it is to be observed that whatever moneys have been expended under this treaty by the Dominion Government have been expended in respect of the Indians inhabiting a tract of land part of which only is within the Province of Ontario, and it is suggested by Mr. Newcombe for the Dominion that the province should contribute to such expenditure in the proportion that the area of the surrendered territory within the province, bears to the whole area surrendered by the treaty. There is no other suggestion on that branch of the case, and I do not see that any fairer or better rule could be adopted." No one could pretend to say that an acre of this land or the whole of it within Ontario is proportionately of any greater or less value than that without. There is an area of 55,000 square

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miles purchased, presumably each square mile of the same value; and one-third of that goes to the Dominion and two-thirds to Ontario. It is to be paid for proportionately.

That is all I wanted to say about the area, because my learned friend referred to it. Then the other question is equally simple, I think.

I refer to the terms of the treaty again. The Indians having surrendered this territory to the Crown, Her Majesty undertakes and agrees for, I think, nine different things. In the first place to lay aside these special reserves. Secondly, with a view to shew the satisfaction of Her Majesty with the behaviour and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of $12. Thirdly, to maintain schools for instruction. Fourthly, to suppress the liquor traffic. Fifthly, to distribute and pay annuities of $5 per head, yearly. Then to expend the sum of $1,500 per year for the purchase of ammunition and twine. Then to furnish agricultural implements; and an annual salary of $25 to the chiefs. Now that is all done in consideration, so far as the basis of the treaty is concerned, of the surrender of these lands. Now, my lords, I say you cannot go outside of that and imagine other considerations. All these things are referable to the surrender. None of them would have been undertaken as and when they were or at all if it had not been for the surrender. The only asset the Indians had was their interest in the land. That was the occasion and the only occasion for going there and bargaining with them. The best evidence in the record, to which I have referred, shews that the object was to let the settlers in and to get rid of this title. In other words that the trans-

action was what it professes to be upon the face of it, a transaction whereby they, on the one part, parted with an asset which they had in consideration of certain obligations which the Crown undertook. Now, my learned friend wants to make the tail wag the dog, because he reads this last covenant here; the undersigned chiefs solemnly promise to be good and loyal subjects, to obey the treaty and observe the law and all that sort of thing. That is what he says is the principal consideration, but what is the fact; that form is the usual form; if they had printed forms of treaties that would be printed in every one of them. It is a common form of covenant which they put in, because it is a good enough thing, no doubt, to impress upon these Indians that they ought to obey the law, but does any one suppose if they had had no title to surrender that we would have gone up there and paid a lot of money to them to take a covenant from them to keep the peace?

Here is a treaty made in 1871. This is a book that is in evidence called the Indian Treaties and Surrenders. On page 293 is a treaty with another tribe of Indians altogether, with the very same term in it. Word for word the same. "Do hereby solemnly promise and engage to strictly observe the treaty and behave themselves as good and loyal subjects."

Here is one in 1781, the 21st year of George III. Here is another treaty that I open to off-hand. It says that the undersigned chiefs do hereby bind and pledge themselves and their people to observe this treaty and maintain perpetual peace between themselves and Her Majesty's white subjects and not interfere with the property or molest the persons of Her Majesty's white subjects.

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Is it a question of dividing the consideration? What does my learned friend's argument involve? Does it involve more than this, that the time this surrender was taken was an inexpedient time, that it was taken too soon. The present position is, we have got so far in the argument that we are considering now what is Ontario to pay. Ontario is to pay the consideration of this treaty. The consideration I mean of the surrender. There was only one thing surrendered, only one thing dealt with so far as the Indians were concerned, and that is their title to this real estate. That is what passed. On the face of the treaty, as I have said, all the covenants we enter into are relative to that.

Whatever the motive was that actuated the Dominion, that had nothing to do with the Indians; the Indian was selling that for the best he could. Now they may say, you bought that too soon. I say we are the judges of the time when it was to be bought. But to say we paid any more for it because we wanted to build a railway or settle Hudson Bay claims or anything of that sort, that is not so on this evidence and your lordships, I submit, cannot find it.

Hogg K.C. follows. Your lordships are now seized, I think, not only of the facts of this case, but also of the principles which underlie our claim and contention. My observations will be directed more to the cross appeal, taking it for granted that my learned friend, my leader, in his able argument has placed the matter so completely before you that it will not be necessary for me to take up time.

The cross appeal arises in this way. It has been explained to your lordships that first there was a

trial before the judge of the Exchequer Court, and the question that was then debated and decided was the question of general liability; whether there was a liability at all or not; whether Ontario was liable under the treaty. What his lordship found was this: "This court doth declare that the Province of Ontario is, in respect of the obligation incurred by the Dominion under the North-West Angle Treaty, No. 3, which involved the payment of money, liable to pay to the Dominion all sums paid by the Dominion which are referable to the extinguishment of the Indian title in the lands described in the said treaty in the proportion that the area of such land within the Province of Ontario bears to the whole area covered by the treaty," which we have discussed. Then followed a further consideration of the question of the classes of items under the treaty for which Ontario should be held liable, and what might be called a continuation of the trial took place. Evidence was taken upon the different items mentioned in the treaty itself, that is the different classes of expenditures which were undertaken by the Dominion, and upon that continuation of the trial, or as it was called, the further consideration of these questions, his lordship gave a judgment and by that judgment he decided as follows: that there was to be 305-493rds of specified expenditures made by the Dominion to or on behalf of the Indians, paid by Ontario. That direction has reference to the territorial area. In other words there was 49,500 square miles found by the evidence instead of 55,000 as it was generally stated, of which 30,500 miles were within Ontario. Then he says, these are the expenditures which the province should be liable to repay the Dominion (see p. 4). The judgment proceeds:

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"(*d*) In respect of the payments made by the Dominion for or on account of the present of $12 per head stipulated by the treaty to be paid to each man, woman and child of the bands of Indians represented at the treaty and claimed under the first item of Schedule A in the said statement of claim the sum of $5 per head."

Now we say that to the extent that he has allowed in favour of the Dominion, his judgment is right, but what we complain of is that he overlooked the instructions in the treaty and endeavoured to appropriate certain amounts which he said Ontario should be liable for and other amounts for which the Dominion should be liable itself, and he put it upon two grounds. One was that in any case where it had been the policy of the government of the Dominion or the policy of the Province of Canada to make allowances to the Indians as a matter of policy, in those cases Ontario should not be asked to pay.

Then the other ground that he places that judgment upon is that to the extent to which the payment of any of these amounts came within the proper administration of the Department of Indian Affairs, the province should not be liable. Now, of course, upon both of these his lordship was to some extent naturally and necessarily speculating. There was not evidence to support these exceptions which he made.

Take the question of schools. He excluded that, all expenditure for schools.

I say that upon the evidence there were no schools in this territory prior to 1873. There was nothing in the way of schools till this treaty was made, and then there were treaty schools or schools that were asked for by the Indians under the treaty.

Then again, while it is a fact that there were schools for Indians in other parts of the country, and while the government were allowing the Indians to have schools in other parts of the country, in the Province of Quebec and in other provinces, these were schools which were built and maintained out of funds which belonged to the Indians themselves. In other words, for many years, the Province of Canada and the Dominion were accepting surrenders from the Indians of parts of their reserves and selling for the benefit of the Indians and at Confederation a very large fund, a fund amounting to about two million dollars, had come into existence.

IDINGTON J.—As a result of sales of lands?

Mr. Hogg: Yes, as the result of sales of reserves; where the Indians did not require so big a reserve they gave up part of it and asked the government to sell. These were treated as Indian trust funds. This was a revenue-bearing fund—that is, the government were allowing interest upon it, and out of this revenue schools were maintained. While that was part of the policy of the government to allow the Indians to have schools, the Indians were having the schools and maintaining them out of their own money. So that it was not until we have this treaty, and I think one or two prior to it—the one of '71 my learned friend referred to—it was not until this treaty that the government agreed as part of the consideration for the surrender of the title to maintain schools when they were requested by the Indians. We say then that while it may have been a policy to educate the Indians and to guard their funds and to use their funds for the purpose of civilizing them, still that did not take away or make less the fact that the maintenance of

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schools under the treaty was a consideration for the extinguishment of the Indian title and whatever sum was expended in that way was, I submit, a payment which must be made by Ontario.

My learned friends on the other side have said that the question of twine, and fishing lines and so on should not have been allowed by his lordship. Well, I simply say that that is one of the considerations and that it should be allowed and that his lordship was right in that.

Then he has excluded the supply of cattle and the farming implements and all the things that were necessary to help the Indians to become farmers and civilized. Now these were expressly given by the treaty. It was one of the considerations, part of the general consideration for the extinguishment of the title. There is no good ground that I have ever been able to see why he should allow the twine and fishing tackle and exclude the cattle and implements of trade to make them civilized. It is said these things were given to them as a matter of policy and that, therefore, the judge was right in excluding them, but all the evidence really is that occasionally, for the purpose of relieving extreme distress, it was better to give them a gun and a pound of shot and some powder to carry on and make a living than to give them money. But here we have a case where the government are giving them cattle, tools and so on for the purpose of civilizing them and making them good citizens, and I can see no distinction between giving them $5 a head which has been allowed and which seems to have been assented to all round, $5 a head as an annuity, and giving cattle and implements of trade.

Then just a word with reference to the surveys.

I think I have finished now with reference to the classes of items that his lordship has excluded from his consideration. Now, my learned friends have stated in advance in answer to the cross appeal, that the amount for surveys should never have been allowed by his lordship. His lordship put it in this way. Following the making of the treaty they immediately, or very shortly afterwards, within the next year, I think, commenced to lay out the reserves, and they had communications, as my learned friend has read, of the necessity of these reserves being laid out and a map was sent shewing the areas in which mineral land occurred, which were to be excluded and, if possible, not taken into the reserves. They then went on and made these surveys; that is they went on to expend money in carrying out the objects of the treaty, and his lordship in the court below allowed these surveys.

There were surveys of two kinds, for the purpose of opening up the country for settlement and surveys consequent upon the making of the treaty; that is the laying out of certain reserves for the Indians. Now what his lordship said was this; that it is true there is an agreement that these reserves are to be consented to later on, but to the extent that you have made surveys for both purposes, these are a proper expenditure by the Dominion under the treaty, and outside of the treaty if you like; these are proper expenditures and it is only fair and right and the proper way to deal with that is to set it off against the counterclaim of the province. He does not allow it as one of the items which is chargeable against Ontario by the treaty, but he says it is a proper charge against Ontario's counterclaim and when

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you come to take your accounts the referee will take that into consideration.

Mr. Newcombe: My lord, I have my learned friend's permission, if your lordships will allow me to refer to one treaty which I intended to quote yesterday and which I omitted. It was on the point I made that this territory is vested in Ontario subject to an interest other than that of the province; that that interest constitutes a burden on the land which has to be discharged some time or another and whenever it is discharged that the obligation falls upon Ontario to pay the consideration for the discharge. That is under the "British North America Act." The fact that Ontario cannot herself bring about the discharge or that perhaps she has no voice in it or of the fixing of the consideration does not affect that situation. Section 109 I had referred to which provides that all lands, mines, minerals and realties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due, shall belong to the several provinces in which they are situate, subject to any trusts subsisting in respect thereof and to any interest other than that of the province in the same. Now that section fell to be construed in the *Robinson Treaties Case* (1), which I cited yesterday and I referred to what Lord Watson said at pages 210 and 211 of that case(1). In addition to what I read yesterday—I may read it again to make it clear—these words are from the judgment: "The expressions 'subject to any trusts existing in respect thereof,' and 'subject to any interest other than that of the province,' appear to their lordships to be intended to

(1) [1897] A.C. 199.

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refer to different classes of right. Their lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor. * * On the other hand, 'an interest other than that of the province in the same,' appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. Their lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties, any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly, if not wholly, based upon the provisions of section 109 with respect to trusts." That is pages 210 and 211. Now then during the argument in amplification of that and shewing what I think follows from the judgment, Lord Watson said this, and this is what I intended to read yesterday. Your lordships will find this, I may say, reported in Lefroy on Legislative Power in Canada, page 612 in the note, what I am going to read. The case is reported, but this is an observation made during the argument and your lordships will have to refer to Lefroy for that at page 612. "If the Crown right was subject to a burden upon the land, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown." There was no change in the position of the Crown, neither

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was there any change in the position of the Indians, at Confederation. "I think the whole effect of this clause is to appropriate to the Province of Ontario all the interest in lands within that province as vested in the Crown, subject to all the conditions under which they were vested in the Crown." * * "The policy of these sections of the Act, 109 and 112 and 111 and 142, when read together, appears to me to be generally this beyond all dispute. * * The intention obviously was to provide with regard to all those debts and liabilities of the old Province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of section 142. On the other hand to this extent it is made plain—at least I hold it to be made very plain under section 109—that any debt or liability which was made a proper charge upon any property or assets passing to the province under section 109, was to remain that charge, and was not to be satisfied by the Dominion Government under section 111."

Mr. Hogg: I said, my lords, that the judge of the Exchequer Court dealt with the expenditure on surveys by giving the Dominion the right to set-off the amount against the counterclaim of Ontario. That was the judgment of his lordship in the court below. Now we complain that that is one of the items which constitute part of the consideration referable to the extinguishment of the Indian title.

I have only now a reference to one other item and that is this present of $12 which was made to the Indians at the time the treaty was made.

No treaty could be made without giving them some present. In all these treaties you will find that they got some amount of money as a present for their good behaviour.

For several years efforts were being made to get a treaty; in '71 and '72 Commissioners were sent and they could not arrive at an agreement, and it appears they had grievances more because they had been trespassed upon, because their rights had been invaded and infringed, and it was true that for the purpose of the Dawson route some timber had been taken, I think to build a boat on one of the lakes and for other purposes of that kind.

DAVIES J.—The point is that the only way to settle that was to extinguish the right there quoad the land over which the road ran, or to extinguish the whole matter. Ontario had no interest in having it extinguished over a mere 50 foot road, therefore it had to be extinguished over the whole land or not at all. Your point is how far we are bound to hold all of these considerations mentioned in the treaty are necessarily attributable to the extinguishment.

Mr. Hogg: Yes, my lord, and his lordship below, as I say, divided them and we cannot see why that should have been done.

Ritchie K.C. in reply: From what has been developed on the argument I think it may be said to be reasonably clear now that the whole Dominion case is based on the dictum of Lord Watson in the *St. Catharines Milling Co. Case*(1). That that is a mere dictum and no part of the judgment and not necessary

(1) 14 App. Cas. 46.

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for the determination of the issues involved is, I think, abundantly clear.

Having regard to the record in that case, no evidence could have been adduced such as has been adduced here to shew the moving consideration, to shew the state of affairs as between the Dominion and the province. What could the Privy Council have known in 1888, when that case was before them, of what the state of affairs was in Canada in 1873? We know now here, that there was a fear of an uprising, and there were all these other considerations to which my learned friend Mr. Shepley has alluded, the contract with British Columbia, the contract with the Hudson Bay Company and all these other factors that have been adduced in evidence here. None of these were before the learned law lords.

I submit that expression was not at all necessary for the determination of the issues involved in that suit, and if that question had been in any way agitated on the record and if the Province of Canada had been represented there, all these considerations that are now presented to your lordships would have been presented to the Judicial Committee. I can say no more on that subject.

Then I propose to refer briefly to the conventional boundary agreement of 1874, and I desire to point out to your lordships that by that agreement what was stipulated for was that when the true boundary was ascertained the whole of the moneys received by the Dominion in respect of the particular portion that was found to be within Ontario should be paid over to the Province of Ontario. It was manifestly not intended at that time to put forward any claim on behalf of the Dominion in respect of the obligations assumed

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under the treaty. If there had been any such idea we would have found, no doubt, in this conventional boundary agreement a provision for deduction of such sums as Ontario might be liable for to the Dominion arising in any way out of the obligations assumed by the Dominion under that treaty.

In 1874 there was no stipulation in the agreement as to the liability of Ontario arising out of any obligation under the treaty. Then I pass on from that to the agreement of 16th April, 1894, some twenty years after the conventional boundary agreement, and some six years after the decision in the *St. Catharines Milling Co. Case*(1).

Now let us see what the provisions of that agreement are. I say the Dominion itself must have regarded that as a mere dictum or at all events they felt that they had no claim against Ontario, as I submit is evidenced by this agreement of 1894. They must have known of that dictum at that time, or at least of that statement, whether dictum or not, but what do we find them doing? We find this agreement entered into on the 15th of April in which they recite the treaty itself. Reference is made to the treaty; "and whereas by the said treaty out of the lands so surrendered reserves were to be selected and laid aside for the benefit of the said Indians, and the said Indians were, amongst other things hereinafter provided, to have the right of hunting and fishing" and so on, throughout the tract. "And whereas the true boundaries of Ontario have since been ascertained"—I am just giving the skeleton, not reading the clauses in full—"and whereas certain reserves have been laid out in intended pursuance of the said treaty and the

(1) 14 App. Cas. 46.

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said Government of Ontario was no party to the selection and has not yet concurred therein." "And whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters" and so on. "Therefore it is hereby agreed between the two governments, with respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario."

Then it is agreed that the concurrence of the Province of Ontario is required in the selection of the said reserves. Manifestly Ontario was taking objection to the treaty and simply said, these are our lands, you have no right to agree to reserve to the Indians any right of hunting or fishing over our territory, you have no right to select reserves there without our concurrence. These are the two matters affecting the property itself; Ontario objected and the Government of the Dominion acceded to it, and not only that, but they expressly entered into this agreement.

Then, my lord, we have clause 6: "That any future

treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario." There Ontario was manifestly asserting its right to this territory freed from any burden placed upon it by the Dominion of Canada under that particular treaty and we find the Dominion assenting to the position taken by Ontario, presumably for this reason, that the question arose, could they select these reserves without paying for them? They could not, of course, without legislation. But could they legislate so as to expropriate these lands for the purpose of reserves for these Indians without making just compensation for them? Presumably that was one of the matters that they were considering and they wished to get Ontario's acquiescence in the selection of these reserves, the Dominion not being required to pay Ontario anything for it.

Now we would naturally expect in reciting this treaty, if these large sums of money were due by Ontario to the Dominion in respect of the obligations entered into by the Dominion under that treaty, to find that matter dealt with by that agreement or dealt with at that time; but all these years have elapsed and from 1873 until 1903, the time the action is commenced, so far as I know, no formal demand has ever been made for this money. No pretence that the province is liable in any way to the Dominion in respect to the obligations assumed by the Dominion under that treaty. Now then, if, as a matter of fact, it is conceded, that they had no right to enter into an obligation as to hunting and fishing, no right to enter into an agreement to select and give reserves so as to

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bind Ontario, does it not follow from that that they had no right to enter into any obligations at all that would bind Ontario without Ontario's consent? I submit that the moment you concede that you must concede the rest, that without the consent of Ontario you have no right to impose a burden upon Ontario with respect to obligations entered into by the Dominion. The agreement, your lordships will observe, was not entered into until the 16th of April, 1894. The agreement is set out in full in the statute 54 & 55 Vict. ch. 5, the Dominion statute of 1891.

"It shall be lawful for the Governor in Council, if he shall see fit, to enter into an agreement with the Governor of Ontario in accordance with the terms of the draft contained in the schedule to this Act, together with any additional stipulations which may be agreed to between the two governments and such agreement shall be as binding on the Dominion of Canada as if the same were specified and set forth in an Act of this Parliament and the Governor in Council is hereby authorized to carry out the provisions of the agreement." I need not press my argument any further. I say the moment it is conceded that they had no right to bind Ontario in connection with the agreement as to hunting or fishing or in connection with their obligation to set aside special reserves, the moment that is conceded I say it follows that they had no right to bind Ontario by any of the other obligations which appear in that treaty.

Now in that connection I refer to *Ontario Mining Co.* v. *Seybold*(1), commencing at page 73, the judgment of the court as delivered by Lord Davey.

(1) [1903] A.C. 73.

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I refer particularly to pages 79 and 80 and to 82 and 83. Lord Davey says: "In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the 'British North America Act, 1867,' 'it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." The reference there is to the *St. Catharines Milling Co. Case*(1). Then Lord Davey says: "Their lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province." Then on page 80, speaking of this same surrender: "This surrender was made in accordance with the provisions of the 'Dominion Act,' known as the 'Indian Act, 1880.' But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises." Then he says, dealing with the *St. Catharines Milling Co. Case*(1) again: "By section 91 of the 'British North America Act, 1867,' the Parliament of Canada has exclusive legis-

(1) 14 App. Cas. 46.

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lative authority over 'Indians and lands reserved for the Indians.' But this did not vest in the government of the Dominion any proprietary rights in such lands or any power by such legislation to appropriate land which, by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their lordships repeat for the purpose of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Provincial Fisheries Case*(1), as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the government of the province, taking advantage of the surrender of 1873"—that is the very surrender that is before your lordships—"came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and therefore to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves." There he puts it as an honourable engagement; no suggestion that it is based upon any legal or equitable liability, but an honourable engagement. Then he says: "The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two governments."

"It is unnecessary to say more on this point, for, as between the two governments, the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. ch. 5), and the Legislature of Ontario (54 Vict. ch. 3), and subsequently signed (April

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

16th, 1894), by the proper officers of the two governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario have been ascertained and declared to include part of the territory surrendered by the treaty and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not concurred therein; and it is agreed by article 1 (amongst other things), that the concurrence of the Province of Ontario is required in the selection. By subsequent articles provision is made, 'in order to avoid dissatisfaction or discontent among the Indians,' for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last named government with any of the reserves already selected or in case of the selection of other reserves, for the appointment of a joint commission to settle and determine all questions relating thereto."

There your lordships will see the view that was taken. They certainly did not take the view that the question of legal liability had been settled by Lord Watson in the *St. Catharines Milling Co. Case*(1). He says: "Assuming that they came under an honourable engagement," not putting it under the question of liability at all, that honourable obligation was to be fulfilled because this agreement had been entered into and was validated by the Dominion and the province respectively.

Now my learned friend Mr. Newcombe relied upon

(1) 14 App. Cas. 46.

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the recitals in this treaty as to what was the true consideration. I point out to your lordships that Ontario is a stranger to it; Ontario is no party to it, and what is there to prevent a stranger to a treaty or a contract who is sought to be made liable in respect to some of the obligations contained in it, from shewing what the true consideration was, or that there were considerations other than those specifically entered in the treaty. Of course if he had been a party to it that would be an entirely different thing. But here the Dominion is seeking to make us liable in respect of these obligations and claiming that the only consideration was the surrender of this title. Surely it is open to us to shew that that, if it was a consideration, was only a very small part of the true consideration.

My learned friend also says that the Dominion had no interest except that of their wards, the Indians. I point out that they had a very much greater interest than that. The recital is that they wished to open up this particular tract for the purpose of settlement. That, of course, is quite true, they wished to open that up. But no one at that time ever thought that this land was land fitted for settlement in the ordinary way. What they wanted to do was to settle with the Indians so as to open a right of way to the fertile prairies of the west, in which the Dominion was interested. Moreover, they had an interest, as we now know, to the extent of about one-third of this surrendered territory, and they had the Dominion interest at large of opening up the Dominion for settlement and of increasing the population. The Dominion has as much interest in that as Ontario has.

Now my learned friend referred to the "Indian Act of 1868" and claimed that Ontario could not,

under any circumstances, have entered into any arrangement with the Indians for a treaty, and he relied upon section 8 of chapter 42 of the Act of 1868, that no release or surrender of land reserved for the use of the Indians or any tribe should be valid or binding except on the specified conditions the assent of the Dominion officials being required. I merely refer to it now to point out to your lordships that it only extends to a surrender of lands reserved for the use of Indians. These lands were not reserved for the use of the Indians within the provisions of that Act at all. By that was intended reserves set apart such as the Dominion undertook to set apart in this particular tract. Not lands over which the Indians had a right to roam, but lands specially set apart for the Indians and which became their property.

DUFF J.—Mr. Newcombe rather put it, or at least his argument proceeded, on the assumption that lands reserved for Indians, reserved for the use of the Indians in the statute, would have the same scope as the similar words in the "British North America Act" which the Privy Council held applied to the whole of this tract by reason of the proclamation of 1763. Is there anything whatever in the statute there that would restrict the use of the words?

Mr. Ritchie: No, my lord, I do not think there is.

DUFF J.—Why do you say these were not lands reserved then under that statute?

Mr. Ritchie: I had forgotten the construction placed upon the words in the "British North America Act." I do not know, I will ask my learned friend to look and see if there is anything. It struck me that lands reserved for Indians would naturally mean

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that, but if that is the decision under the "British North America Act" my argument goes for nothing.

No surrender of lands reserved for the use of the Indians shall be binding. I will have a search made to see if it is limited. Of course if it is not limited, I have to bow to the decision in construing similar words in the "British North America Act."

Now we have dealt with this case so far upon narrow grounds. I take the broad general ground now that under no circumstances, in no manner, shape or form could they impose the burden, the obligation which the Dominion incurred under this treaty, upon any province. Suppose, for instance, that the Dominion should, as a matter of national policy decide to agree with the Indians to have one large Indian reservation in either the North-West Territory or the Maritime Provinces or any other part of Canada; should agree to supply them with ammunition and twine and establish schools, enact laws and enforce them for the suppression of the liquor traffic, could it be contended that each province would have to contribute to the obligation assumed by the Dominion in proportion to the number of Indians in that particular province? I submit that under the "British North America Act" wherever there is a subject assigned to the Dominion to deal with and incur money obligations, in every case these money obligations were to be discharged and intended to be discharged out of the Dominion treasury. Now, amongst the special subjects assigned was Indians and lands reserved for Indians. That was one of the subjects specially assigned and in respect of which there was to be uniform legislation by the Dominion affecting these different bands of Indians and their

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lands, and I say it was contemplated that these expenditures, just in the same way as all expenditures for railways, canals, ferries, improvements to harbours, all these were to be paid out of the Dominion treasury. The scheme of Confederation never contemplated any such thing as a local improvement plan. It was never intended that each province should be assessed for the cost of a Dominion object in proportion to the benefit derived by it. Suppose that in the Maritime Provinces they expended a million dollars on the seashore for improvements. Could it be said that the whole of that should fall upon the Maritime Provinces? It is something that comes within the federal jurisdiction; they and they alone are authorized to legislate in respect of it. And I submit that it was contemplated under the "British North America Act" that all these expenditures that were to be made by the Dominion in furtherance of Dominion national policy were to be paid out of the Dominion treasury, and there is not to be found within the four corners of the "British North America Act" that any of these were to be assessed back on the provinces under what might be called a local improvement system.

Now we have presented to your lordships many reasons why this treaty should have been entered into and entered into at that particular time. The Dominion regarded the making of that treaty as one coming within their jurisdiction and as one coming within the scope of national authority. We find that they went on and made this treaty without ever consulting Ontario. Is not that the best evidence that they were not contemplating benefiting Ontario by the making of this treaty?

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They had no right to consider what the effect might be on Ontario, on any one province, whether a benefit or a burden. Their sole consideration was to legislate in the best interest of the Indians and their lands. They had the exclusive authority and when, without consulting any one of the provinces, they make this bargain, is it not manifest that they were making it under the jurisdiction conferred upon them by the "British North America Act?" The care of the Indians was assigned to them, they were charged with the maintenance of peace, order and good government throughout the provinces, we have the fact that there had been a rebellion and there was disaffection among the Indians. We have the additional fact that there was a highway to be built to connect the Province of Ontario with Manitoba and so on, a transcontinental railway to be built and in addition to that the further obligation which they had to discharge under their contract with the Hudson's Bay Company. I say that all these were considerations within the sphere of the Dominion Government and that the Dominion Government in pursuance of its powers and for these national objects entered into that treaty, and having entered into that treaty for these purposes, for the purpose of preserving the peace, order and good government of Canada, that they cannot assess against Ontario, Manitoba or any province any portion of the cost, but it must all come out of the Dominion treasury. It might be said that we get the benefit because these Indians who were roaming over our territory are removed to some locality far distant and will trouble us no more; they are taken off our lands. In order to accomplish that, the Dominion says we want all these Indians put in one place and

they select land for that in Manitoba. And suppose they were not obliged to give compensation, could Manitoba come back and say to Ontario, this land has been taken by the Dominion in pursuance of its powers under the "British North America Act" as a reserve for Indians; all the Indians in your territory have been removed, the Indians from Nova Scotia and Quebec have been removed there and we ask you and Nova Scotia and Quebec to contribute to the value of this land in proportion to the benefit you have derived by the removal of the number of Indians within your territory? I submit the case upon that broad ground alone and that is the view the Dominion has taken until 1893, and it was only after that that they ever dreamed of making this claim as against the Province of Ontario. I submit upon that broad general ground that nothing can be assessed as against this province and that the decision of this court may rest upon, as I submit, that broad ground, without going into all the arguments that have been advanced in connection with the burden and benefit and so on, all based, as I submit, upon what I conceive to be a mere dictum of Lord Watson's in the *St. Catharines Milling Co. Case*(1).

It is said that this is a benefit. The Canadian Pacific Railway going through Ontario was a very great benefit. It might just as reasonably be asked that Ontario should bear a portion of the cost of the construction of that railway having regard to the benefits derived under it. The same way as to any Dominion expenditure in respect of matters coming under Dominion control. The Dominion must first determine whether in the national interest a certain thing should be done, and having determined that in

(1) 14 App. Cas. 46.

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the national interest a certain thing shall be done, the cost of doing that must be paid wholly out of the Dominion treasury and cannot be apportioned upon the different provinces.

Then with reference to the cross-appeal. My learned friend has referred to schools and stated that there were no schools, of course, in this district—I apprehend that is quite correct—prior to the making of this treaty. But I point out that there was an Indian fund, something like, as my learned friend says, $2,000,000 at the time of Confederation, which was afterwards increased, and out of this, irrespective of whether Indians were treaty or non-treaty, schools were established at places where the government saw fit to establish them.

This was a general fund that the Province of Canada took over from the Imperial Government and that fund at Confederation, as you will see by the evidence of Mr. Scott, went to the Dominion and was not confined, as I submit, to the establishment of schools for Indians in any particular province.

My learned friend will admit that these were appropriations. They say, under this particular treaty they made an agreement to establish schools and instead of paying it out of this general fund as they otherwise would have had to do, they say, we won't take it out of this general fund, but we will go to Parliament and ask for an appropriation and that appropriation was charged against these particular treaties, but these expenditures within the boundaries of the reserves created were all under appropriations by Parliament and did not come out of the Indian fund.

Let us see what the legislation was with regard to that long prior to this treaty in 1873.

In 1860, the Legislature of the Province of Canada enacted that "the Governor in Council may direct how and in what manner and for whom the moneys arising from sales of Indian lands and the property held or to be held in trust for the Indians shall be invested from time to time and how the payments to which the Indians may be entitled may be made." I am reading, my lords, from the Act of 1860, ch. 151, sec. 8. They may do all these things and may from time to time pay out these moneys for repair of roads passing through such land and by way of contribution to schools frequented by Indians. That is, they were allowed to contribute to the support of these schools. That is followed up in 1868, ch. 42, sec. 11. This is after Confederation and it is carried in in the same terms.

That is all I have to say, my lords, on the question of schools.

Now one of the claims made there is for expenditure in connection with the enforcement of the liquor law; that is preventing the sale of liquor to Indians.

On that I refer your lordships to the Act of 1860, ch. 38, sec. 2, and the Act of 1868, ch. 42, sec. 9. These are laws for the suppression of the liquor traffic among the Indians. I shall not take up time more than giving references. I merely point to that to shew that long prior to the making of the treaty it was the policy of the Crown to enforce these laws and that, no doubt, would be done under the head of peace, order and good government.

Then my learned friend referred to farming implements and seeds. All I say on that point is to call your lordships' attention to the language of the treaty itself. "To be given once for all for the encouragement of the practice of agriculture among the Indians." The treaty itself, on its face, shews why that

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was done, for the encouragement of the practice of agriculture among the Indians. Surely that was something coming within the purview of the Indian authority and not referable at all to a benefit to the Dominion.

Then as to surveys. His lordship Mr. Justice Idington has referred to the fact that we have not yet concurred in them and they have not been set aside, and if there is any liability this action is premature in this respect. There were two classes of surveys; there were what are called block surveys, and surveys of the Indian reserves. As to the surveys of the Indian reserves, if there is any liability the action is premature. As to the block surveys, these were made in respect of Dominion property, the Dominion expecting the lands would belong to them, and their base lines were put in so as to connect the system with Manitoba and the West, instead of being designed to benefit Ontario in any shape or form. The evidence of Mr. Kirkpatrick shews that with some trifling exceptions they were absolutely useless to the province so that the province did not receive any benefit with respect to these.

GIROUARD J. (dissenting).—I agree with the opinion expressed by Mr. Justice Davies.

DAVIES J. (dissenting).—The two main questions to be determined upon this appeal are, first, the liability of the Province of Ontario to repay to the Dominion certain expenditures made by the latter under the treaty obligations assumed by it where it made the treaty with the Salteaux tribe of the Ojibeway Indians in October, 1873, known as the North-West Angle Treaty, No. 3, for the extinguishment of

the Indian title in the lands covered by the treaty; and secondly, whether if such liability does exist at all it extends to all of such expenditure incurred under the obligations of the treaty or to only part, and if part only, which part?

The learned judge of the Exchequer Court, the late Mr. Justice Burbidge, before whom the case was heard held that the liability of the province did exist, but limited that liability in his judgment to such expenditure as in his opinion could fairly be attributable to the extinguishment of the Indian title to the lands described in the treaty, and rejected the claim beyond that on the ground that it was expenditure incurred not simply in extinguishing the Indian title, but as part of the general policy of the Government of the Dominion in their administration of Indian affairs.

From this judgment so far as it imposes a liability upon it the Province of Ontario appeals and the Dominion cross-appeals against that portion of the judgment which rejects part of their claim.

The tract of land in which, under the treaty, the Indians surrendered their title covers the area from the watershed of Lake Superior to the North-West Angle of the Lake of the Woods and from the American border line to the height of land from which the streams flow towards Hudson Bay, and was proved at the trial to contain about forty-nine thousand three hundred (49,300) square miles.

Of this great area it was subsequently found when the boundaries of Ontario and Manitoba were finally adjusted that 30,500 square miles only were part of Ontario.

In 1873, however, when the treaty was made the

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westerly boundary of Ontario had not been determined, and this boundary was not definitely established until the Imperial order in council of 11th August, 1884, was passed.

The liability of the Province of Ontario was limited by the judgment to the expenditure made by the Dominion and which was found to be referable to the extinguishment of the Indian title in the treaty lands and in the proportion that the area of such lands within Ontario bore to the whole area covered by the treaty. If liability existed at all that seemed to be the only and proper way to adjust it.

After the treaty was entered into the Dominion commenced and continued to carry out its provisions and to pay the annuities and make the other expenditures mentioned therein and which on the face of the treaty formed the consideration to the Indians for the extinguishment of their title and the release of their claims.

In view of the fact that in consequence of the confirmation of the arbitrators' award with respect to its boundaries the benefit of the surrender of the Indian title to the lands within those boundaries accrued to Ontario, the Dominion contends that the province must be held liable for such a proportion of the amounts paid by it under and for the purposes of the treaty as the area of land within its boundaries relieved from the burden of the Indian title bore to the whole area released in and by the treaty.

At the time of the making of the treaty the Dominion no doubt entertained the view that no part of these lands were within the boundaries of Ontario, but that the whole of the tract covered by the treaty belonged to the Dominion, and as a fact no notice of their inten-

tion to enter into the treaty was given to Ontario, though it was contended that the province knew informally of such intention, and of the making of the treaty.

The Dominion subsequently adopted the position that by virtue of the surrender of the Indian title the beneficial ownership of the treaty lands had become vested in it; and this question and contention was litigated at great length in the courts until it was finally disposed of by the Judicial Committee of the Privy Council in favour of the Province of Ontario: *The Queen* v. *St. Catharines Milling and Lumber Co.* (1).

In the present action Ontario in its defence denied all liability alleging that the treaty was made without the privity of or any mandate from the province. It set up that the interests of the province were in no way involved in the considerations which induced the Dominion to undertake the negotiation of the treaty, and specified the laying out of highways and the building of railways to connect eastern and western Canada, and the relation of the Indians towards the Dominion as its wards or pupils as forming some of such inducing considerations.

It also set up as a reason underlying the treaty and in which Ontario was not concerned a condition contained in the surrender of its lands and rights by the Hudson's Bay Company to the Dominion made in pursuance of the Imperial Act, 31 & 32 Vict. ch. 105, by which condition the Dominion was bound to extinguish the Indian claims to the lands surrendered by the company, but as the Dominion was the only authority that could negotiate a treaty extinguishing the

(1) 14 App. Cas. 46.

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Indian rights, and as those rights had to be extinguished by treaty before the lands could be settled, I have not been able to see how this condition can affect the relative rights of the parties to this suit.

The proposition of law upon which Ontario relies for its exemption from liability for any of the expenditures incurred by the Dominion under the treaty in question is that no expenditure made for his own purposes by one will entitle him to contribution or indemnity from another because that other receives a material benefit from the expenditure, and in support of this the case of *Ruabon Steamship Co.* v. *London Assurance Co.*(1), and other cases cited in their factum were relied upon.

The Dominion does not in support of its claim controvert this proposition or any of the decisions referred to, simply denying their application to the facts and litigants of this case.

That claim, as I understand it, is based upon the relative rights, obligations and duties given to and imposed upon the Dominion and the provinces respectively by the "British North America Act, 1867," and upon the liabilities which may arise from one to the other from the discharge of those obligations and duties of government.

By section 91(24) the exclusive power to legislate with respect to "Indians and lands reserved for the Indians" was given to the Dominion, and in the *St. Catharines Milling Co. Case*(2) above referred to, these words were held by the Judicial Committee to be broad and comprehensive enough

to include all lands reserved upon any terms or conditions for Indian occupation. It appeared to their lordships to be the plain

(1) [1900] A.C. 6. (2) 14 App. Cas. 46.

policy of the Act that in order to ensure uniformity of administration all such lands and Indian affairs generally should be under the legislative control of one central authority.

The Dominion Parliament by its legislation of 1868, 31 Vict. ch. 42, prescribed the manner in which the Indian title to lands might be surrendered up or ceded. I take it that after this exercise of legislative power, the Dominion and the Dominion alone could act so as to extinguish the Indian title to any lands within the Dominion. As to the argument as I understand it put forward by the Province of Ontario that the Dominion could only act in this matter, so far as the lands within that province was concerned, when they were requested to do so by the province, and that if they did so act without such mandate or request and extinguished the Indian title to such lands their action could not impose any obligation or liability upon the province, I am not able to accept it.

The right and duty of determining when and the terms on which such title ought to be extinguished rests with the Dominion and with it alone. Considerations arising out of and affecting the peace, order and good government of Canada and other considerations affecting the best interests of the Indians may well have entered into the minds of that government when determining the times and seasons at which it was desirable or necessary to make such a treaty as the one made in the case before us.

It probably would act in all cases where the interests and rights of the province and the Dominion were concerned as a matter of policy in unison and conjunction with the Provincial Government interested, but the mandate or authority of that government to proceed would certainly not be necessary to the valid-

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ity of the treaty, nor it seems to me would the Dominion Government, entering into such treaty without the express mandate or request of the province, cease to be its constitutional agent for the purpose. As such constitutional agent, authorized by the law and having alike the power and the duty of entering into a treaty, I am unable to see why it could not in that way, when extinguishing the Indian title, impose upon the province for whose benefit it was extinguished a liability commensurate with the consideration agreed to be given to the Indians for the cession of their rights. In the case before us there was, of course, no mandate from the province to the Dominion to enter into the treaty, nor was the province consulted in the matter. No one knew at the time whether the lands formed part of the Province of Ontario or of Manitoba, or of the North-West Territory. The Dominion authorities believed them to form part of the North-West Territories, and no doubt entered into the treaty under that belief. The Province of Ontario did not know exactly where its western boundary line was. But everything was done *bonâ fide* and it was not till years afterwards when the boundary award was made and confirmed that the lands were found to form part of the territory of Ontario.

The fact that the Dominion Government after the treaty was made wrongfully claimed that the cession from the Indians of these treaty lands vested them in the Crown for its beneficial use and not for that of the province has, it appears to me, little or nothing to do with the question before us.

As far as I am concerned I am of the opinion that this court should feel itself bound by the clear and definite pronouncement made on the point now before

us by the Judicial Committee in the case of the St. Catharines Milling Co.(1), and I am not prepared to accede to the argument that such pronouncement was nothing more than a mere dictum of Lord Watson's which we should ignore as not correctly expressing the law on the subject.

That case as originally instituted and carried on in the courts of Canada was brought in the name of the Queen on the information of the Attorney-General of Ontario to test the validity of a license to cut timber granted by the Dominion Government to the St. Catharines Milling Co. on the treaty lands in question. The Dominion, as I have said, claimed that the legal effect of the extinguishment of the Indian title had been to transmit to it the entire beneficial interest in the lands as then vested in the Crown. The province claimed such entire beneficial interest had been transmitted to it. When the case reached the Judicial Committee on appeal that Board directed that the Dominion should be at liberty to intervene in the appeal or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to intervene and the case was most elaborately argued.

The Judicial Committee decided that the conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario were wholly dependent upon the provisions of the "British North America Act, 1867." After reviewing such of the sections of that Act as appeared to their lordships pertinent to the question in dispute and setting out section 108 in full, their lordships went on to say, p. 57:

(1) *St. Catharines Milling Co.* v. *The Queen*, 14 App. Cas. 46.

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The enactments of section 109 are in the opinion of their lordships sufficient to give to each province subject to the administration and control of its own legislature the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown with the exception of such lands as the Dominion acquired right to under section 108 or might assume for the purposes specified in section 117. Its legal effect is to exclude from the duties and revenues appropriated to the Dominion all the ordinary territorial revenues of the Crown arising within the provinces.

And further, on page 58, they say:

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer*(1) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has had all along a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was, at the time of the union, land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

Having decided that the lands in question became, within the meaning of section 109, on the extinguishment of the Indian title the property of Ontario in terms of that clause and giving their reasons for not assenting to the argument for the Dominion founded on section 91(24), their lordships go on, at page 60 of the report, to state their opinion of the effect of the extinguishment of the Indian title so far as the liability of the province was concerned for the considerations which the Dominion Government had paid or agreed to pay for that extinguishment in the following terms:

Seeing that the benefit of the surrender now accrues to her Ontario must of course relieve the Crown and the Dominion of all

(1) 8 App. Cas. 767.

obligations involving the payment of money which were undertaken by Her Majesty and which are said to have been in part fulfilled by the Dominion Government.

I do not look upon this as merely a dictum. It did not form part of the formal judgment, it is true. That was not absolutely necessary as between the parties to the original suit. But it was a clear and distinct pronouncement as between the two governments then before the court on the general question they were debating to the effect that neither of their contentions were unreservedly accepted, but that while the lands belonged to Ontario in terms of section 109 they did so subject to the obligation that the province should refund to the Dominion the considerations paid by the latter for the removal of the Indian title burden on these lands which they held to be within the terms of the section 109, "an interest other than that of the province in the same."

For me this clear and unambiguous expression of judicial opinion on the question what as between the two governments was the nature of the interest acquired by the province is sufficient. I feel that it is my duty, so far as this controversy before us is concerned, to give effect to that opinion. I feel the less doubt upon the point from the very strong expression of opinion given by Chief Justice Strong in the *Robinson Treaty case*(1), at page 505, as to the meaning and effect of the above statement of their opinion by the Judicial Committee. He there says:

An argument against the Province of Ontario is attempted to be deduced from the decision of the Privy Council in the case of the *St. Catharines Milling Company* v. *The Queen*(2). In that case there was an Indian surrender to the Crown, represented by the Dominion Government made in 1873, subsequent to Confederation. The Privy

(1) 25 Can. S.C.R. 434. (2) 14 App. Cas. 46.

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Council held that this surrender inured to the benefit of the Province of Ontario, and so holding it also decided that Ontario was bound to pay the consideration for which the Indians ceded their rights in the lands. I see no analogy between that case and the present. In the case before us no one doubts that the Province of Canada, which acquired the lands, was originally bound to pay the consideration. In the case before the Privy Council the question was, as it were, between two departments of the government of the Crown and the most obvious principles of justice required that the government which got the lands should pay for them. Here the lands were originally acquired by the Province of Canada, which was to pay for them, and the present question only arises on a severance of that government into two separate provinces and a consequential partition of its assets and liabilities.

So far, therefore, as the main question before us is concerned I would dismiss the appeal and confirm the judgment of the Exchequer Court.

With respect to the subordinate, but important question as to the extent of the liability of the province for these treaty obligations undertaken by the Dominion Government, I find it difficult to accept the reasoning by which the learned judge supports all of his conclusions.

The treaty expresses upon its face the considerations which the Indians were to receive in return for the extinguishment of their title. Some few of these considerations may be found to be in excess of those which in former years were accustomed to be given in analogous cases, and one or two of them may perhaps be held to be simply a declaration of the general policy of the government in their administration of Indian affairs. Some others may be new and additional for which precedents may not be found. But while I can gather from the evidence much to convince me that the Dominion Government was moved to enter into this treaty at the time it did by public considerations affecting alike the interests of the Indians as those of the Dominion and its peace, order

and good government, I am not able to say that I have any evidence on which I could determine that any of the considerations appearing on the face of the treaty, with the possible exception of the three subjects of expenditure for schools, agriculture and the liquor traffic, were agreed to or given for any other purpose than that of extinguishing the Indian title.

The facts that the government desired for broad public reasons to see highways and roadways running from east to west through the ceded territory as early as might be so as to enable the fertile prairies of the North-West Territories to be settled by way of Canadian territory instead of through a foreign country, or that they had entered into obligations with the Province of British Columbia for the construction of a transcontinental railway and desired to remove all possible impediments to the fulfilment, when the time came, of their obligation are not grounds, even if proved, which would justify me in assuming that greater obligations were incurred for the extinguishment of the Indian title than otherwise would have been. They merely indicate a condition of things which in the opinion of the Government made a treaty desirable and probably would determine them to forward its being entered into earlier than in the absence of such conditions it might have been. Nor can I draw any inference from the last clause of the treaty wherein the Indians agree "to obey and abide by the law and to maintain peace and good order between each other and also between themselves and other tribes" and other people, and not molest person or property in the ceded district or interfere with any person passing or travelling through it, etc., from which I would be justified in concluding

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that the considerations of the treaty had been agreed to for other purposes than those of extinguishing the Indian title. Such a clause appears to have been common to many, if not all, treaties with the Indians made by Canada.

I think it is not unfair to hold that while many public considerations may have existed at the particular season when the treaty was made for entering into it and may have had the effect of anticipating the time when such a treaty might otherwise have been made, none of them can be determined to have been the things or objects or purposes for which the considerations of the treaty were agreed to be paid.

And so on like reasoning I am not able to support the reduction of the $12 made as a present to each man, woman and child of the bands represented at the time the treaty was entered into down to $5.

Nor am I able to agree to the judge's refusal to allow the expenditures made for the salaries of the chiefs and for a triennial distribution of clothing to them. I think all these things should be allowed.

With regard to the expenditure for schools, the suppression of the liquor traffic and the encouragement of agriculture, I am inclined to think the learned judge's disallowance of all these items might be justified on the grounds stated by him. They were really intended when put in the treaty more as a declaration of the general policy of the government on these questions than as considerations referable to the extinguishment of the title and were, as the judge says, legitimate objects of administration.

I would therefore allow the cross appeal in part as above stated, and dismiss the main appeal with costs.

IDINGTON J.—We should, I think, first consider the nature of the jurisdiction given by section 32 of the "Exchequer Court Act" in assigning to that court the power to determine "controversies" arising between the Dominion and a province that has acceded thereto.

The language is comprehensive enough to cover claims founded on some principles of honour, generosity or supposed natural justice, but no one in argument ventured to say the court was given any right to proceed upon any such ground. It seemed conceded that we must find a basis for the claim either in a contractual or (bearing in mind that the controversy is the Crown against the Crown for both parties act in the name of the Crown) quasi-contractual relation between the parties hereto or on some ground of legal equity.

This is supplemented in the respondent's factum by an argument resting upon quasi-contracts of the civil law respecting which a long list of authorities is cited. But on argument that law and these authorities did not seem to be pressed.

Let us bear all this in mind when measuring the claims in question.

The appellant's counsel in opening had challenged the applicability of any law but that of Ontario, and pointed out that the contest arose out of dealings relative to land in Ontario and what was done in regard thereto; and might have added that the seat of each government concerned was and is in Ontario. Save a casual allusion to the authorities on civil law or French law as set forth in the factum of the respondent I heard no serious attempt to confute this claim for the law prevailing in Ontario as that proper to be observed herein.

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As to the civil law, invaluable as it often is to afford light upon the origin of what is found in much of the Civil Code of Quebec and the exceptional cases arising in that province, left unprovided for by that Code, it is no disparagement of the civil law to say that it is not of much direct service when we come to consider questions arising upon the "British North America Act," or upon legislation of the Dominion which usually applies uniformly to all the provinces; and of still less value is it when we have, as here, to consider the legislation of another province than Quebec.

The civil law is the ultimate origin of much that concerns property and civil rights in Quebec, but when these subject matters were relegated by the "British North America Act" to the respective jurisdictions of the provinces there was no longer need for its consideration as having any binding or operative effect in relation to the formation of the Government of the Dominion as a whole or its relation to its several parts or anything springing therefrom.

Moreover, such lessons as may be derived therefrom do not furnish to my mind much encouragement for the respondent here when due regard is had to the facts presented to us. Not only is that law inapplicable for the reason I point out, but that law does not furnish any basis upon which to rest a claim in favour of one acting, not for another, or as representing another, or instead of another, but for itself solely, in direct hostility to that other, discards that other when and where present and in defiance of the other's claim proceeds to expend accordingly; not in ignorance of fact or want of opportunity to know the law and the fact.

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I think we therefore must assume that the law in force in Ontario is to govern the rights between the parties hereto, so far as we are given any authority to pass upon them.

I might add that having regard to the possible technical difficulty arising from each power representing or being represented by the same Crown when we come to work out the statutes assigning this jurisdiction and seek for the law applicable, we may well assume and hold it to have been designed by each enacting power to treat each actor, Dominion and province, as a separate and independent legal entity, capable of legal relations notwithstanding the technical difficulty that I allude to, which would be swept away by thus interpreting the said statutes.

The claim in the case made by the Dominion (which by the way rests on transactions had seven years before these statutes) is to be re-paid moneys disbursed in procuring and in observing the terms of a treaty made on the 3rd of October, 1873, with Indians and known as the North-West Angle Treaty No. 3. How did this treaty come about? A brief historical reply to this question ought to go far to solve the question of liability raised here.

The negotiations leading up to the treaty spread over three years and kept pace, as it were, with some of the events to be referred to.

A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown.

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That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.

In these surrendering treaties there generally were reserves provided for Indians making such surrenders to enter into or be confined to for purposes of residence.

The history of this mode of dealing is very fully outlined in the judgment of the learned Chancellor Boyd in the case of *The Queen* v. *The St. Catharines Milling Co.*(1).

The North-West Angle Treaty No. 3 made by the Dominion is of that class.

Important as it was at all times to secure the continuation of the policy I have referred to the Confederation of the provinces, in 1867, rendered it doubly so because it was anticipated then that Rupert's Land and the North-West Territory, a land of vast extent and Imperial possibilities, yet roamed over by Indians, would soon become part of the Dominion.

Provision was made in section 149 of the "British North America Act" for such event.

It was thus well known then, that instead of the Indian problem being likely soon to diminish in importance or the burthens incident to it become less, the contrary was almost certain to be the case and hence as a matter of the greatest importance for the welfare of Canada as a whole the subject was assigned to the Dominion by section 91, sub-section 24, of the "British North America Act," which is as follows:

Indians and lands reserved for the Indians.

(1) 10 O.R. 196.

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In the first session of the first Parliament of the Dominion the Senate and Commons of Canada adopted an address to Her late Majesty praying that she would be graciously pleased by and with the advice of Her Most Honourable Privy Council under the section 146 I have already referred to of the "British North America Act," to unite Rupert's Land and the North-West Territory with the Dominion and to grant to the Parliament of Canada authority to legislate for their future welfare and good government, and assuring Her Majesty of the willingness of the Parliament of Canada to assume the duties and obligations of government and legislation as regarded those territories.

In that address a special paragraph relative to the Indians was inserted as follows:

> And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

In pursuance of this address and the agreement of the Dominion with the Hudson Bay Company, arrived at with the concurrence of the British Government, for the surrender of those territories to Her Majesty, upon the understanding that upon their transfer to the Dominion the latter should pay the company £300,000, and also of an Act of the Imperial Parliament assented to on the 31st of July, 1868, they were transferred by an order in council on the 23rd June, 1870, to come into force on the then ensuing 15th of July.

It was supposed by many concerned in these proceedings that these territories extended over a very

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large part if not all of those lands now in the Province of Ontario and in part respect of which the treaty now in question was arrived at.

The Province of Manitoba was created out of part of the new acquisition of territory. A rebellion broke out there. It becomes necessary to send troops through a long stretch of wilderness forming part of the land in question on which only Indians dwelt or over which they roamed. Many of those who had risen in rebellion were partly of Indian blood. It was thus brought home to those who had to deal with such a situation that the sooner these Indians roaming over the lands looked upon by them as their land and across which the troops had been transported were settled with the better for Canada.

Prior to this rising the negotiations pursuant to section 146 of the "British North America Act," for British Columbia becoming a Province of Canada, had so taken shape that the terms of that project were practically settled. British Columbia thus became part of Canada from first of July, 1871. The terms of this acquisition imposed upon the Dominion the obligation to build within a few years the Canadian Pacific Railway which of necessity must pass through the same territory I have already referred to as having to be crossed by the troops.

Contemporaneously with the progress of these events leading to these annexations to the Dominion a waggon road, known as the Dawson route, was built by the Dominion, through parts of the same territory to aid in travel to the North-West.

In the course of doing so, as well as of the transportation of troops, timber was cut and incidentally the land used as of right, and the Indians complained

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of these invasions of their territory and the incidental cutting of what they claimed was their timber.

The items allowed them, by the treaty, to soothe their wounded feelings in respect of these last mentioned grievances, form part of the claims now in question.

The chief items, however, are for the price paid for the extinction of what for want of a better term is spoken of as the Indian title, and of which in the case of *The St. Catharines Milling Co.* v. *The Queen*(1), at p. 54, Lord Watson said that

the tenure of the Indians was a personal and usufructary right dependent upon the good will of the Sovereign.

The extinction of this Indian title, shadowy as it was, no doubt was a most substantial advantage to Ontario.

But what was there in that which of necessity would give to any one extinguishing it the legal right to be re-paid the money expended in bringing its extinction about?

The extinction of the Hudson's Bay Company's title was directly and indirectly of tenfold more importance to Ontario.

The removal of that shadow from Ontario's title paved the way for the removal of the other.

If benefits derived from acts of, and money expended by, government were to be held, without more, a legal basis for directing re-payment to the government of money or part of money expended, a share of the £300,000 paid the Hudson Bay Co. might as well be held due. Then where would the matter end? Where should the line be drawn?

(1) 14 App. Cas. 46.

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It is not pretended that there was anything said or done on behalf of Ontario that induced the Government of the Dominion to move in the matter of negotiating the Indian treaty; nor is it pretended that there was any actionable legal obligation resting on the Dominion towards Ontario to discharge this burthen; nor can it be maintained that, in the largest sense which a trust can have in law such as indicated by Lord Selborne in *Kinloch* v. *Secretary of State for India*(1), at pp. 625 and 626, in truth a trust existed out of which or the execution of it or something incident to such execution of it, there could arise a legal or equitable claim to be repaid by any one money expended as the moneys in question were expended; nor can it be claimed now, even if there was some reason for claiming so before the decision of the *St. Catharines Milling Co.* v. *The Queen*(2), that the Indian title passed to the Dominion; nor can it be as put in an argument I may not have properly grasped, that, as the land thus freed has been from time to time occupied by Ontario as the Indians receded in consequence of being compensated, Ontario has become under some legal obligation as a result thereof; nor can it be that the Dominion erred through ignorance of any of the facts that bore on the matter in any way, upon discovery of which by any imaginable circuity of actions for which this may be taken as a substitute it could recover for money paid by mistake.

I confess I seem to myself chasing shadows for the utmost pressure could not induce any one in argument to put the claim on any legal principle of law or equity that is usually recognizable. I have tried to reduce what was said as possibly falling within any of

(1) 7 App. Cas. 619. (2) 14 App. Cas. 46.

these possible or impossible grounds. In light of the details of the history of which I have given only an outline, the agency theory put forward, I respectfully submit, seems altogether without foundation in law or fact.

So far from acting as an agent or as representing another, not only was the Dominion by virtue of its obligations to British Columbia and by other reasons of interest and duty which I will advert to later on, impelled to settle with the Indians, but was also so careful to exclude any such notion that it purposely awaited, as the report of the Minister of the Interior shews, its entering into contractual relations with Ontario on the very subject of these lands pending the negotiations of the treaty until after it had been finally agreed to.

The boundary between Ontario and Rupert's Land and the North-West Territory had never been well defined. The Hudson Bay Company's claims covered nearly, if not the entire, land that became the subject of this North-West Angle Treaty, No. 3.

As things turned out Rupert's Land and the North-West Territory covered, according to the judgment appealed from, about two-fifths and Ontario three-fifths of that land.

The matter of fixing this boundary of Ontario was ultimately referred, by the parties hereto, to arbitration and determined by an award made on the 3rd of August, 1878.

The negotiations leading to this result were begun in July, 1871, and continued for some years before the arbitrators were appointed.

On the 26th July, 1874, the parties hereto entered into an agreement for the establishment of a conven-

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tional boundary pending the ultimate result of the determination of the true boundary and for the issuing of patents for lands on either side of this conventional boundary; those to the east and south thereof to be issued by the Government of Ontario, and those to the west and north thereof to be issued by the Dominion Government, and that when the true boundaries had been definitely adjusted each government should confirm such patents as had been issued by the other and should also account for the proceeds of such lands as the true boundaries when determined might shew to belong of right to the other.

But why if it ever had been supposed that in any event any such claims as those now set up could be conceivable were they not provided for when the parties concerned were dealing with what was the actual corrollary of the very transactions which had so recently given rise to such claims, if at all possible?

And above all why should such a claim be recovered in a judgment founded, as that appealed from appears to be, on the assertion of the rights this very agreement gives rise to? The one was deliberately adopted and we are left to infer the other was either not supposed to exist or almost as deliberately abandoned.

If ever such a claim as now set up had arisen in law it existed then, and if a court had existed to try it and this action could conceivably have been brought then I venture to think the considerations I have adverted to would have furnished a complete answer thereto.

It may be interesting to follow its later history.

It is alleged Ontario entered into possession and therefore must pay.

It always had been in possession. Its civil laws and administration of justice reigned over it all. The administration of criminal justice so far as needed devolved upon that province. Its inhabitants hunted and fished there as well as the Indians, and when the cloud was removed the duty devolved, as of course, on its government to facilitate the land's development. It is alleged the land had turned out rich in minerals and timber. Is the obligation one turning upon the nature of the soil? Or would it not exist if timber and gold had not been found there, but only a vast barren waste?

Nor did the province come to the court seeking aid as against the Dominion or any one else to recover possession of the lands in question. The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things when given a chance.

We have not, therefore, any ground upon which to say that in seeking equity it must do equity.

Indeed, the province has not yet got any actual, but only in a limited legal sense, possession of much of the land over which the Indian roams in his hunting and fishing as he had done before. His reserves, of a more limited character, are not yet finally selected. If, contrary to my impressions, any contract could be implied as suggested in the argument I have already referred to, from the Dominion doing something and the province entering into and accepting that, it has not yet been completed, for the contract

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of 1894, hereinafter referred to, defines how that is to be done, and it appears it is not yet done.

But we are told the liability has been already passed upon by the judgment of the Privy Council in a dictum found in the case of *The St. Catharines Milling Co.* v. *The Queen*(1).

It seems to me there are two answers to this: One that it is mere dictum; and the other that the parties concerned by their action I am about to refer to so recognized it and proceeded to agree upon such an entirely different view of it from that now pressed by one of them that it is hardly open to the respondent to rely much on such a contention.

Let us appreciate the true value of that dictum for our present purpose by considering what happened.

The boundary award, after confirmation by the Privy Council to which it was submitted, was confirmed by the parties hereto under such circumstances as I need not state in detail, but finally so in 1883.

In that year the Dominion Government issued a license to the St. Catharines Milling Co. to cut timber on the land found by this award to have been part of the Province of Ontario and also forming part of the land over which the Indian title had been extinguished by the said Treaty No. 3.

Ontario claimed the land in question fell within section 109 of the "British North America Act," and hence was the absolute property of that province and began in the name of the Crown a suit against the Milling Co. to restrain its cutting of timber there.

The Milling Co. asserted that by virtue of the surrender of the Indian title (to the Dominion as the

(1) 14 App. Cas. 46.

claim was put) the Dominion was the absolute owner of the timber.

This suit already referred to was tried in 1885 by the learned Chancellor of Ontario and decided in favour of Ontario's contention.

The respondent was not a party to that suit. But when the case had passed through its various stages of trial, appeal to the Court of Appeal for Ontario, and an appeal to this court, with the result that each court maintained the contention of the present appellant in its claim that the timber belonged not to the present respondent, but to the appellant, it was carried by way of appeal to the Judicial Committee of the Privy Council.

When the case reached there the now respondent, for the first time, asked leave to intervene, and the result of such application was that counsel for the present respondent were heard.

No change took place in the record raising new issues. The issue raised here was not and could not appear on that record.

We are told that sometime during the argument the counsel thus representing present respondent attempted unsuccessfully to introduce the question of the right of the Dominion to be recouped what it paid to the Indians to procure the extinction of the Indian title.

It appears from the judgment already referred to that counsel also set up the entirely different claim that the Indian title had been acquired by the Dominion, and hence possessed the property in the timber in question. In the closing part of the judgment of Lord Watson the following sentences occur:

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Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown, and the Dominion, of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

This has been pressed strongly upon us as an authoritative exposition of the law if not an absolute decision of the actual point raised in this case.

On such a case as and so presented can we accept as binding the dictum I have quoted from the judgment of Lord Watson?

It does not seem to me we can escape by that easy means the responsibility resting upon us.

The case as presented to us was not before the Judicial Committee; the arguments now presented were not possible for full presentation there, and the limitations that bind our jurisdiction were not and could not be, so far as I can see, present to the mind of that court.

If it had been intended by the court to have it held as binding I would have expected in the later case of *The Ontario Mining Co.* v. *Seybold*(1), to have found direct language to the effect that such had been the declared result or at all events was then the opinion of the court. The language used falls far short of any such thing.

I infer that on this latter occasion the court neither felt bound by the dictum nor quite sure that it contained that exposition of the law which it would expect to be observed by us as matter of course.

(1) [1903] A.C. 73.

With great respect I venture to submit that the expression in the first sentence of the dictum "must, of course, relieve the Crown, and the Dominion" does not indicate (if I am permitted to draw an inference from the habitual accuracy of the writer) that consideration had been had to the peculiarity that it was as the representative of the Crown that Ontario had succeeded.

It indicates clearly enough, I submit, that the peculiar limits of our jurisdiction to decide between two (shall I say departments of government or branches of sovereignty), of which each represented the Crown, had not been fully and finally considered, much less the definite character of the obligation, if any.

I conclude that we have a duty to discharge and are not relieved by this dictum, which must be held *obiter*, yet received with that respect due to the first impressions of such high authority, and given due consideration.

Following the decision in that case and the dictum now rested upon came an agreement entered into on the 16th of April, 1894, between the parties hereto, not hastily, not as part of routine work of departments of the Government, when attention had not been drawn to the full import of the step taken, but as the deliberate result of each government and of Parliament and legislature having given due consideration thereto.

This agreement on its face purports to be in pursuance of the Statute of Canada passed in the 54th and 55th years of Her Majesty's reign, chaptered 5, and the Statute of Ontario passed in the 54th year of Her Majesty's reign, chaptered 3.

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It is provided by the first operative clause of it that as the Crown lands in the surrendered territory have been decided to belong to Ontario or Her Majesty in right of said province, the Indian rights of hunting and fishing, throughout the tract surrendered, not including the reserves to be made thereunder, do not continue so far as regards lands required for settlement, lumbering, mining and other purposes, by the Government of Ontario, "and that the concurrence of the Province of Ontario is required in the selection of the said reserves."

The 6th paragraph is as follows:

> That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

Not a word appears in this agreement in regard to these claims now made, though, if due to-day they had been for great part, if not the most part, then due for twenty-one years. One might have expected them if weak originally, to have attained their majority and full strength and to speak then or forever be silent when an abandonment so complete and utter of all old contentions was about to be thus deliberately made.

The dictum now relied upon had then been standing before all concerned for about six years, with the rights of the parties fully cleared up. But nothing is done for nearly eight years more.

Then when the case of *Ontario Mining Co.* v. *Seybold*(1) was pending before the Judicial Committee of the Privy Council and the Dominion was represented by counsel, besides those representing the parties, the

(1) [1903] A.C. 73.

dictum, I have no doubt, was pressed and evoked the reply I have already referred to.

Six months after we have these claims now in question presented for the first time and action brought.

Leaving out of view one thing to which I will advert later on, what would be said of such a claim if presented by one private individual as against another at such a length of time from its origin and with such a history of opportunities to put it forward yet kept in abeyance?

The probable answer to this question may be left to meet and cover the rather vague, but wide and persistent, demands for a kind of justice that does not fall within the narrow limits of the law.

I think we must, to appreciate the legal nature of this claim, have regard above all else to the terms of the "British North America Act" and understand the obligations arising thereunder and resting upon each actor and their relations to each other, and especially so in regard to these matters antecedent to the origin of the claim.

The case as it presents itself to my mind is that the Dominion was assigned by the "British North America Act," sec. 91, sub-sec. 24, quoted above, the high, honourable, and onerous duties of the guardians of the many races of Indians then within or that might at any future time fall within the borders of Canada; that these duties were to be discharged as occasion called for, having in mind always the peace, order and good government of Canada and, as part and parcel thereof and not the least factor in promoting all implied therein, the due observance of those duties towards the Indians, which the policy of the British Crown had rendered of paramount im-

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portance; that the discharging, in a statesmanlike way, when the several occasions I have recited called for, these high duties of national importance they were discharged all the better by being freed from the trammels of being confined within the narrow views that the provincial range of vision might have restricted action to, if the needs and wishes of a single province were to be considered, or even the dominant factor used as a guide, perhaps to the detriment of national interests; and that there arose on the part of Ontario no contractual or equitable obligation enforceable in a suit at law to make good any moneys expended in the way claimed. Nay, more, I am unable to see how short of an express understanding there ever could have arisen from the discharge by the Dominion of its responsibilities under sub-section 24 any such legal liability on the part of any province.

I think the appeal should be allowed, the cross-appeal be dismissed and the judgment for appellant on its counterclaim stand.

MACLENNAN J.—I concur in the opinion stated by Mr. Justice Duff.

DUFF J.—The "Exchequer Court Act" confers upon that court jurisdiction to decide a controversy such as this. It says nothing about the rule to be applied in reaching a decision; but it is not to be supposed that (acting as a court) that court is to proceed only upon such views as the judge of the court may have concerning what (in the circumstances presented to him) it would be fair and just and proper that one or the other party to the controversy should do. I think that in providing for the determination

of controversies the Act speaks of controversies about rights; pre-supposing some rule or principle according to which such rights can be ascertained; which rule or principle could, it should seem, be no other than the appropriate rule or principle of law. I think we should not presume that the Exchequer Court has been authorized to make a rule of law for the purpose of determining such a dispute; or to apply to such a controversy a rule or principle prevailing in one locality when, according to accepted principles, it should be determined upon the law of another locality. This view of the functions of the court under the Act does not so circumscribe those functions as greatly to restrict the beneficial operation of the statute. Whatever the right of the Dominion in such a case as the present it is difficult to see how the province could (apart from the statute and without its consent given in the particular case) be brought before any court to answer the Dominion's claim. The statute referred to and the correlative statute of the province once for all give a legal sanction to such proceedings, and provide a tribunal (where none existed) by which, at the instance of either of them, their reciprocal rights and obligations touching any dispute may be ascertained and authoritatively declared.

The claim which is made in this action is that Ontario shall be declared to be liable to indemnify the Dominion in respect of the money payments assumed by the Dominion on behalf of the Crown under the treaty in question. In the view I take of the case it will not be necessary to distinguish the different undertakings. I think the claim fails in *toto*.

The learned trial judge, who has in part sustained the Dominion contention bases the liability upon this

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reasoning. He says it is a settled principle of law of England that where a person having the legal title to land and believing himself to be the true owner, makes improvements at his own expense, the equitable owner suing for possession and *mesne* profits in a court of equity may be compelled to make, as against his claim for *mesne* profits, an allowance for the cost of the improvements so made. That principle, he thinks (by reason of the counterclaim of the Dominion) comes into operation here.

Assuming this principle applicable in the circumstances, I am unable to follow the learned judge in the reasoning by which it is made the basis of his judgment. The receipts for which the Dominion is asked to account amount, roughly speaking, to something like $150,000. The judgment imposes upon Ontario a liability which, as regards past payments, is much greater than this sum and consequentially establishes an obligation extending to payments which may be spread over an indefinite period in future. That is a form of relief far beyond any mere allowance by way of set-off and is an extension of the principle invoked for which with great respect I can see no warrant.

But the rule has, I think, no sort of application to this case.

Admittedly the benefit of the treaty expenditures in part accrued to the Dominion. Admittedly, at the time they were made, the Dominion had full notice of Ontario's claim to the territory. In this state of facts the agreement on which the counterclaim is based was made, that is to say, after the obligation to make the expenditures had under the treaty been incurred, and while the claim of Ontario to the territory was being actively asserted; and that agree-

ment is silent upon the treaty obligations. With full knowledge of the equity, so called, which is now set up the Dominion undertook by an unqualified undertaking to account to Ontario for the sums now claimed by that province. Observe now that for our present purpose *ex hypothesi* the claims asserted by the Dominion were of such a character that in respect of them, independently of the alleged right of set-off, no liability rested upon Ontario. I cannot then imagine anything more repugnant to equity than to say in these circumstances, to the province: This agreement of yours cannot be enforced until you have satisfied claims of the Dominion (otherwise unenforceable) which were fully known to the Dominion at the time the agreement was made, but were not asserted until twenty years afterwards. The parties agreed irrespective of the alleged equities that in the contingency which occurred the payments should be made. The court is asked to declare that the Dominion is not liable to make these payments except upon the terms of satisfying those self-same unenforceable equities. If this, the true meaning of the parties had been put in words as I have put it, the true effect of the contention I am dealing with would at once appear, viz., that the court is asked, in order to give effect to these claims, to reform the bargain between the parties.

On the argument Mr. Newcombe supported the judgment upon other grounds.

First, he broadly asserts the right of the Dominion upon the principle (recognized in the civil law and applied by Story J. in *Bright* v. *Boyd*(1)) under which a *bonâ fide* possessor of real estate believing himself to be the true owner is entitled as against the

(1) 1 Story 478.

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owner seeking to recover possession to be repaid the sums paid by him in discharging an encumbrance.

The principle thus broadly stated has, as the learned judge says, no place in English law or in the law of Ontario except in the qualified sense of certain statutes which have no application here. It cannot, therefore, I think, be applied to this case because such a claim would plainly be governed by the *lex sitûs*.

But, assuming the principle to be applicable, consider briefly in the light of the evidence the circumstances which led to the treaty. The learned judge thus recounts them:

The question of obtaining the surrender of the Indian title in the lands described in the North-West Angle Treaty No. 3, was in 1870, when Rupert's Land and the North-Western Territory were admitted to the union, a very urgent and pressing one, not because such lands were at that time required or deemed to be desirable or available for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada and the great and fertile western territory that was added to the Dominion. At that time a line of communication, known as the Dawson Route, was being opened up through such lands. During the summer of that year it became necessary to send through this territory a military force to maintain the Queen's authority, and establish order in the country about the Red River. Early in the year the Government of Canada had sent an agent to Fort Frances "to keep up a friendly intercourse" with the chiefs and Indians who assembled there, and to "disabuse their minds of any idle reports they might hear as to the views and intentions of the Government of Canada in reference to them." In May the government sent Mr. Simpson to the same place to secure from the Salteaux Indians a right-of-way for the troops and to prevent any interruption of surveying parties during the summer. The demands that the Indians made were considered so excessive that Mr. Simpson did not come to any agreement with them. They, however, stated that it was not their intention to try and stop the troops from passing through their lands on their way to the Red River, but that if Mr. Dawson was to make roads through their country they expected to be paid for the right-of-way. In the next year another attempt was made to arrive at a settlement with these Indians. But on this occasion it was not a question of obtaining merely a right-of-way through their lands, but of acquiring a surrender of the Indian title therein so that such

lands would be open for settlement. By a commission issued under the Great Seal of Canada, and bearing date the 27th of April, 1871, and in which it was recited that the Indian title in the lands therein mentioned had not been extinguished, and that such lands were required for settlement, Her late Majesty appointed Mr. Simpson, Mr. Dawson and Mr. Pither commissioners to make a treaty with the several bands of the Ojibeway tribe of Indians occupying and claiming the lands in that portion of her North-Western Territory lying and being between Lake Shebandowan and the North-West Angle of the Lake of the Woods. The commissioners, as appears from their report of the 11th day of July, 1871, entered into negotiations with the Indians and settled, as they thought, "all past claims" that the Indians had, but "various causes prevented them from entering into a formal and permanent arrangement" with the Indians at that time. On the 20th day of July, 1871, by an order in council passed on the 16th day of May in that year, British Columbia was admitted into the union. By the terms of the union the Government of Canada, among other things, undertook to construct a railway "to connect the seaboard of British Columbia with the railway system of Canada." That involved the construction of a railway through the lands for the surrender of the Indian title in which the Government of Canada was in that year negotiating. It afforded another reason, if another were needed, for the early extinguishment of such title. It is put forward on behalf of Ontario that the conclusion of a treaty with these Indians was a prime necessity in the carrying out of the railway policy necessary to implement the agreement of the Dominion with the Province of British Columbia. That the construction of the Canadian Pacific Railway would in the course of time have made it necessary to extinguish the Indian title in these lands, or at least in so much thereof as was needed for a right-of-way through the same, cannot admit of doubt. But it is not at all clear that this matter was in 1871 pressing or urgent if anything were thought to turn upon that point. But it is, it seems to me, clear that for a number of reasons, either relating or deemed by the Government of Canada to relate, to the administration of the affairs of the Dominion, it was at the time necessary that the Indian title in these lands should be extinguished.

This latter the evidence clearly shews was only a means to an end. It was deemed advisable to provide a passage through this territory for immigrants into the newly acquired North-West. It was necessary if the obligations of the Dominion undertaken in the terms of union with British Columbia were to be fulfilled to arrange for the immediate commencement

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and prosecution of the construction of a line of railway between Eastern Canada and that province. These were objects of Dominion policy affecting the Dominion as a whole. To attain these objects it was necessary to induce the Indians to abandon their pretensions to occupy the whole territory in question to the exclusion of whites and to settle on more limited reservations. Upon this necessity the Dominion acted, hence the treaty.

The traditional policy in Canada respecting the Indians themselves pointed in the same direction. That policy was that when the progress of advancing settlement brought with it danger of collision between white settlers and Indians still in a savage and pagan state, to induce, if possible, the Indians to settle on limited areas and by slow degrees to lead them into the ways of civilized life. The responsibility in respect of all these matters is by the "British North America Act" cast upon the Dominion; and it is quite clear, I think, that if in the judgment of the Dominion apart from the considerations of policy above mentioned the time had arrived when in the interests of the Indian as well as of the settlers and to secure tranquillity, this course was to be taken—the evidence leaves no room for doubt that an essential condition of success would be that the rights the Indians believed they possessed in the larger area should be given up; and, that in order to procure the surrender of those rights something in the nature of compensation must have been promised, as always had been done in previous arrangements of the same character. The acquisition of the Indian title was not, I should think, in itself even in the slightest degree at that time an object of Dominion policy. Not until a date

much later than the treaty does it appear to have occurred to anybody that the Dominion had acquired any territorial rights under the treaty. The surrender of the Indian interest was in truth a mere incident in a large policy looking to the settlement of that part of Canada lying between the Great Lakes and the Pacific, the prosecution of which necessarily required an arrangement with these Indians after the traditional practice.

In these circumstances, I cannot conceive on what principle a court of equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations undertaken by the former. It is a case very different from the simple case of the extinction by payment of a pecuniary charge; that there should be a right of indemnity in such a case is at least intelligible. Here we have a usufruct which, conceived as mere burden on the title, cannot be appraised; and we have the case of a petitioner who, to serve his own ends, to meet his own obligations, to protect his own interests, has been obliged to procure the surrender of the burden, and who, to procure that surrender, has, without consulting the owners, compounded for it in money on his own terms. Has a court of equity any rule or principle which will serve to effect a just distribution between the owner and the petitioner of the burden?

Or if we add, as we must to complete the parallel, that these ends, obligations and interests have no special relation to any interest in the land and that everything is done pending an active dispute with the true owner concerning the title and that the petitioner is not in possession—at all events has no better possession than the owner—can there really be any principle of justice upon which it can be averred that the

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whole of the burdens thus assumed by the petitioner must be borne by the true owner?

I think Mr. Newcombe's argument mainly rested, however, on his contention that in concluding the treaty and, therefore, in undertaking the obligations referred to the Dominion acted as the agent of Ontario. This contention was based on three grounds which are: 1st, the acquiescence of Ontario; 2nd, ratification by Ontario; and 3rd, a constitutional agency arising out of the powers and duties with which the Dominion is invested and burdened by the "British North America Act."

Of the first and second of the three grounds it is, I think, enough to say that the Dominion did not in concluding the treaty profess to act as the agent of Ontario and that the treaty having been concluded Ontario did nothing but accept what has been declared to be the legal result of it irrespective of any action or inaction on her part. In these circumstances it is difficult to see how in any sense *germane* to the question of the existence or non-existence of agency either acquiescence or ratification can be imputed to the province.

The third ground raises a question of the utmost general importance. It is a question which, I think, must be answered in a sense opposed to Mr. Newcombe's contention. It is, I think, true—as Mr. Newcombe argues—that the Dominion alone was competent to authorize the treaty in question. In that matter the Dominion, in other words, represented the authority of the Crown. But in what sense was the Dominion the agent of Ontario? I think the argument seems to come to this, that because the whole authority of the Crown in respect of the Indians and

the Indian lands is committed to the Dominion, the Dominion may in the course of exercising that authority in the prosecution of Dominion policy conceived in the interest of the Dominion as a whole undertake on behalf of a province without its consent and thereby effectively bind the province to an obligation involving the payment of money. That is a far-reaching proposition, and one which I think cannot be maintained.

The Crown on the advice of the Legislature of a province (acting within the limits prescribed by the "British North America Act") may authorize the undertaking on behalf of the province of a financial or other obligation. I do not think the Act creates any other agency having authority to fasten upon a province as such any such obligation. The view advanced on behalf of the Dominion, as I have just indicated it, is, of course, the negation of this; but, as I conceive, that view is incompatible with the true view of the status of the provinces under the "British North America Act."

The status is thus explained by Lord Watson who, speaking on behalf of the Judicial Committee in *The Liquidators of the Maritime Bank* v. *The Receiver General of New Brunswick*(1), at pp. 441 and 442, said:

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion

(1) [1892] A.C. 437.

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Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government * * *.

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme.

The independence of the provinces as regards their control of the property and revenues appropriated to them by the Act has been emphasized in a series of decisions; and it has been frequently pointed out that the parts of the Act in which property and revenues are declared to "belong to" or to be "the property of" the provinces import simply that the public property and revenues referred to while continuing to be vested in the Crown are made subject to the exclusive disposition of the provincial legislatures. Thus Lord Watson in *St. Catharines Milling Co.* v. *The Queen*(1), at p. 56:

In construing these enactments it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or to the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown * * *.

And again at pp. 57 and 58:

The enactments of section 109 are, in the opinion of their lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the union were vested in the Crown, with the exception of

(1) 14 App. Cas. 46.

such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the provinces.

In *Attorney-General of Ontario* v. *Mercer*(1) Lord Selborne referring to the section just mentioned uses these words:

The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and government to the provinces in which they are situate, or arise.

And in the *Attorney-General of Canada* v. *Attorney-General of Ontario et al.*(2) Lord Herschell delivering the judgment of the Judicial Committee after a full argument in which all the provinces participated, said, at pp. 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 proprietary 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 again at p. 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.

(1) 8 App. Cas. 767, at p. 778. (2) [1898] A.C. 700.

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I am unable to reconcile these views touching the constitutional position of the provinces and the measure of control conferred upon the provincial legislatures respecting the property and revenues vested in them with the contention that the grant to the Dominion of legislative power in respect of the subjects enumerated in section 91 implies the right in the exercise of that power to dispose, indirectly (without the consent of the provincial legislatures) of such properties and revenues by fastening upon the provinces without any such consent obligations of a financial character. This view, if accepted, would, I think, be simply destructive of what Lord Watson in the passage quoted above describes as "the independence and autonomy of the provinces."

It remains to consider the observation of Lord Watson in the course of the judgment delivered in *The St. Catharines Milling Co.* v. *The Queen*(1), and that of Strong C.J. in the *Robinson Treaty Case*(2). The observation of Strong C.J. (being a dictum founded upon the observation of Lord Watson) will not require separate consideration.

The observation of Lord Watson forms, I think, no part of the decision of the Privy Council. The question which it touches upon was not raised upon the record nor discussed at the hearing or considered by the learned trial judge; it was neither raised nor considered before this court; it was not argued as one of the points in dispute before the Judicial Committee. The formal judgment of that tribunal does not mention it. These circumstances in themselves are, I think, sufficient to shew that it cannot be treated as a term of the judgment in favour

(1) 14 App. Cas. 46.

(2) 25 Can. S.C.R. 434, at p. 505.

of the province; and as the consideration of any equities between the province and the Dominion arising out of the obligations assumed by the Dominion under the treaty was, obviously, not regarded by Lord Watson as in any way germane to the sole question decided (and the sole question litigated)—the legal title to the lands affected by the surrender—it should seem that the remark in question ought not to be regarded as indicating one of the grounds on which the decision proceeded.

It is, I suppose, needless to say that any observation of Lord Watson whether strictly authoritative or not (even a passing expression of opinion) is entitled to and would always receive the most careful and respectful consideration of this court; but when such an observation is addressed to an unargued question depending to some extent upon the consideration of facts and circumstances not brought to the attention of the court one cannot, I think, relieve one's self from one's responsibility by treating it as immediately decisive.

There are two reasons why, with great respect, I think the dictum in question should not govern our decision in this case. The first is based upon the circumstance I have just mentioned, viz., that the facts now before us were not all before the Privy Council in the *St. Catharines Milling Co. Case*(1), and even upon such as were before them there was no argument touching their bearing upon the point now in issue.

The second is that it is, I think, at least doubtful whether Lord Watson was in that observation intending to pass upon any question of legal right. The question of the legal right of the Dominion to in-

(1) 14 App. Cas. 46.

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demnity from the province had not, as I have said, been litigated; and it was consequently still open to the Dominion to raise it in another proceeding. I do not think that in these circumstances Lord Watson could have intended to anticipate the action of the courts in respect of a question which they might be called upon to decide in an appropriate proceeding and commit the Judicial Committee to an opinion upon it in a proceeding in which that question had not been discussed. The preferable view of the import of the remark seems to be that upon the facts as they appeared as a matter of fair dealing Ontario would be expected to assume the obligations in question. In the view I have expressed concerning the functions of the Exchequer Court in deciding controversies such as this, such an opinion, even if one should not, upon a consideration of all the circumstances, differ from it, would not be conclusive of this appeal.

The appeal should be allowed and the action dismissed without costs.

Appeal allowed without costs.

Solicitor for the appellant: *Æmilius Iriving.*

Solicitor for the respondent: *W. D. Hogg.*

1909
* March 10.
* May 4.

PRICE BROTHERS & CO. (PLAINTIFFS) .... APPELLANTS;

AND

PIERRE TANGUAY AND ANOTHER (DEFENDANTS) .... RESPONDENTS.

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

Appeal—Jurisdiction—Rivers and streams—Right of floating logs—Servitude—Faculty or license—Possessory action—Injunction—Matter in controversy—Practice—Costs.

In the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal.

The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice.

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

The plaintiffs complained that they were impeded in the right to drive logs down the course of a river and brought suit for a declaration of their right to do so, for an injunction and an order for the removal

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

of a movable boom placed across the river by the defendants. No claim was made for damages.

The final judgment on the merits of the case, delivered by Mr. Justice Larue at the trial, declared that the parties had, according to law, the common right of using the river for the transmission of timber, subject to the obligation, the one towards the other, of respecting the free exercise of that right, made absolute the interlocutory injunction issued in the case on the 8th of June, 1906, and ordered that the defendants should afford free passage down the river for the plaintiffs' timber. The plaintiffs' action was maintained with costs, and their right of further action to recover damages was reserved to them. By the judgment appealed from the Court of King's Bench reversed the judgment at the trial, set aside the injunction and order, and dismissed the action with costs, Bossé and Blanchet JJ. dissenting.

G. G. Stuart K.C. appeared for the appellants.

A. Lemieux K.C. and *Ernest Roy* for the respondents.

During the hearing of the appeal the court, of its own motion, raised a question as to its jurisdiction to entertain the appeal, and, after hearing counsel upon that question, reserved judgment and enlarged the hearing on the merits of the case until the question of jurisdiction had been disposed of. The question was whether or not, under the above circumstances, the court had jurisdiction to entertain the appeal.

At the following session of the court the appeal

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was quashed for want of jurisdiction, the judgment of the court being rendered by

THE CHIEF JUSTICE.—At the argument a question of jurisdiction was raised by the court. It appeared by the statement of counsel on the opening that the appellant company are the owners of timber limits and of a saw-mill on the Rivière du Sud in the County of Montmagny, Quebec; that they were prevented from exercising their right to drive logs cut on the limits to the mill (a distance of several miles) by a boom stretched across the river by the respondents, riparian proprietors on the same river, between the limits above and the mill below, and this action is brought complaining of this infringement of their rights. The appellants ask for a declaration that they are entitled to float their logs from the limits to the mill and for an order on the defendants to cease troubling them and for the removal of the obstruction, a movable boom. The appellants' right to float logs down the river is not denied by the respondents. The only question for us to decide is whether or not, on these facts, we have jurisdiction to hear this case. There is no question of future rights or of title to property at issue in my opinion. The right of the riparian owner to use the water which passes by or crosses over his property for the purposes mentioned in art. 503 C.C. is not involved either in this appeal. Appellants' counsel in answer to the objection made by the court put forward the contention that this is a possessory action and that we have jurisdiction to hear it and *Delisle* v. *Arcand*(1), was referred to. It was

(1) 36 Can. S.C.R. 23.

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held in that case that we have jurisdiction to hear a possessory action because in such an action titles are in issue in a secondary manner. In the same case it was decided, when the case was finally disposed of on the merits(1), that the possessory action lies only in favour of persons in exclusive possession *"à titre de propriétaire."*

This is not a possessory action; it is merely an action on the case for a nuisance infringing plaintiffs' rights and there is no claim made for actual ascertained damages. The plaintiffs have no exclusive right of property in the running waters of this natural stream and they have no right to the use of them beyond that enjoyed by the general public. This is not a right of use such as is provided for in arts. 487 and 381 C.C.

Curasson, "Action possessoire," p. 150:

L'action possessoire ne peut être exercée qu'autant que la prescription afin d'acquérir ou de perdre un droit immobilier peut résulter de la possession.

In France it is settled law that the waters of such a stream are of the class of things which have no owner and the use of which is common to all (*res communes*) and there can be no possession of the running waters of a stream in its natural state which could lead to prescription and give rise to a possessory action. Dalloz, 1891, 1, 291.

Pothier (ed. Buquet), vol. 9, p. 131:

Le fluide, l'eau prise comme élément, est une chose commune qui appartient à tous les hommes sans qu'aucun puisse s'en dire le propriétaire tant qu'elle reste en cet état.

Girard, "Droit Romain," p. 338:

(1) 37 Can. S.C.R. 668.

Les *res communes* (v.g. l'air, l'eau) sont celles qui sont à l'usage de tous les hommes parce qu'elles échappent à toute appropriation privée,

and article 585 C.C.

In the Province of Quebec it has been held that the public have a right to all the advantages which a river in its natural state and its banks can afford but there can be no exclusive right of property or of user in the running waters of a natural stream which can only be appropriated by severance. M.C. arts. 868, 891. *McBean* v. *Carlisle*(1); *Tanguay* v. *Canadian Electric Light Co.*(2). This right, or rather this faculty or license which the public enjoy, because it is not properly a right, *non jus sed fas,* has been called at times a servitude; *Atkinson* v. *Couture*(3), and *Ward* v. *Township of Grenville*(4); but, I respectfully and with much deference submit, improperly. There can be no servitude over a thing which is not susceptible of becoming the object of a private right of property or the use of which can only be enjoyed by the individual claiming the right as one of the public.

This supposed right or privilege which is merely, I say, a faculty or license vested at common law in the general public has received formal legislative sanction in Quebec. Article 2972 R.S.Q.; 54 Vict. ch. 25, sec. 1; 4 Edw. VII. ch. 14, sec. 2. Subject to the right of the riparian owners to improve watercourses running or passing across their property these statutes authorise any person, firm or company, during the Spring, Summer or Autumn high waters to float and transmit timber, rafts, etc., down the rivers, lakes, ponds, streams and creeks in the Province of Quebec. But no

(1) 19 L.C. Jur. 276.
(2) 40 Can. S.C.R. 1.
(3) Q.R. 2 S.C. 46 at p. 49.
(4) 32 Can. S.C.R. 510.

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exclusive right of possession *à titre de propriétaire* is conferred by them upon those who use the waters to drive their timber which could be the foundation of a possessory action.

Carré, vol. 1, p. 91;

Il faut pouvoir maintenir qu'on possède la chose à titre de maître *non tanquam alienam, sed animo domini.* Il faut aussi que la chose possédée soit susceptible d'être acquise par la prescription, c'est-à-dire par la continuation de la possession durant le laps de temps fixé par la loi.

See arts. 2192, 2193 C.C.; 1064 C.P.Q.

The principle may be briefly stated:

Point de possession, point de possessoire; il faut une possession qui à la longue conduit à la propriété.

No public right can be acquired by private user.

There can be no possessory action where the plaintiff has not such possession as if enjoyed for a sufficient length of time would result in a title being acquired to the thing possessed by prescription. Running water is undoubtedly *res communes.* As there can be no exclusive possession of a thing that is at law the common property of all there can be no private right of property in the waters of this stream. The most interesting case on this subject is to be found reported in S.V. 1902, 2, 1, in a note to which Mr. Saleilles, the eminent French jurist, says (S.V. 1902, 2, 2):

Remarquons enfin que les riverains qui usaient de ce droit de circulation à travers les propriétés voisines ne l'exerçaient pas à titre de fait constitutif de servitude et susceptible de leur acquérir un droit spécial à l'encontre des droits des autres propriétaires riverains, mais à titre de simple faculté rentrant dans le droit d'usage général de la communauté, et ne pouvant fonder, à l'encontre d'autrui, ni possession ni prescription. Pour pouvoir donner lieu à prescription, il aurait fallu que les faits de circulation pussent constituer un empiètement sur le droit d'autrui, alors que, dans la pensée de celui qui les exerçait, et dans la réalité juridique elle-même, au moins dans le système de la jurisprudence, ils n'étaient que l'exercice d'un droit.

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Id. p. 3. En résumé, il n'est ni raisonnements ni fictions qui puissent porter atteinte à cette réalité de fait que les rivières sont par destination naturelle et sociale des moyens de circulation collective; et cela est vrai, même des petites rivières incapables de se prêter à une navigation régulière. Si peu d'importance qu'elles soient, elles peuvent rendre encore quelques services qui ne sont pas de pur agrément, et qui profitent au flottage de certains matériaux, ou facilitent la rentrée des récoltes. Il faut prendre ces agents naturels tel qu'ils sont, en tant qu'ils sont ouverts à tout le monde et qu'ils constituent un bien de la communauté. Les droits de la propriété individuelle ne peuvent prétendre à détruire la propriété commune.

See also M. Claro's note to same *arrêt* reported in Dalloz 1902, 2, 201.

The same principles, in almost the same words, are laid down in *Bell* v. *Corporation of Quebec*(1).

The appeal should be quashed but without costs as the objection was not taken by the respondent as provided by the Rules of Practice.

Appeal quashed without costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondents: *Turgeon, Roy & Langlais.*

(1) 5 App. Cas. 84 at p. 100.

1909
* May 5.
* May 10.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF QUEBEC WEST.

WILLIAM PRICE (RESPONDENT)......APPELLANT;

AND

EDWARD NEVILLE, JUNIOR.... (PETITIONER)...................... RESPONDENT.

WILLIAM POWER (RESPONDENT).... APPELLANT;

AND

WILLIAM PRICE (CROSS-PETITIONER). RESPONDENT.

ON APPEAL FROM THE DECISIONS OF CHIEF JUSTICE LANGELIER AND McCORKILL J.

Election law—Election petition—Preliminary objections—Cross-petition—Sufficiency of charge of corrupt acts—Particulars.

By a preliminary objection to an election petition it was claimed that the petitioner was not a person entitled to vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day.

Held, that the second objection was not merely explanatory of the first but the two were separate and independent; that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not *ipso facto;* and that the first objection should not have been dismissed the respondent to the petition being entitled to give evidence as to the status of the petitioner.

The respondent, by cross-petition, alleged that the defeated candidate personally and by agents "committed acts and the offence of undue influence."

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

Held, that it would have been desirable to state the facts relied on to establish the charge of undue influence but as these facts could be obtained by a demand for particulars a preliminary objection was properly dismissed.

APPEAL from judgments rendered, respectively, by Langelier C.J. and McCorkill J. in the Controverted Elections Court, in the matter of the controverted election of a member for the Electoral District of Quebec-West in the House of Commons of Canada.

The member returned as elected, Price, the respondent to the petition to avoid his election, appealed from the judgment of Sir François Langelier C.J. maintaining a motion to quash his preliminary objections to the petition against his return and dismissing those objections with costs. On a counter-petition filed by Price, acts of corruption were charged against the defeated candidate, Power, and his disqualification was prayed for, and he appealed from the judgment of Mr. Justice McCorkill dismissing his preliminary objections to the counter-petition.

A statement of the case appears in the judgment now reported.

Flynn K.C. for the appellant and respondent, Price.

C. E. Dorion K.C. for the respondent Neville, and the appellant Power.

The judgment of the court was delivered by

ANGLIN J.:—The respondent to an election petition appeals from the judgment of Sir François Langelier C.J. allowing a motion to quash preliminary objections taken by him to the petition. Upon the argu-

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ment the court expressed its view that with the exception of the objections numbered 4 and 5, as to which judgment was reserved, the preliminary objections were properly quashed.

Objections numbers 4 and 5 are as follows:—

4. Because the said petitioner is not a person who had a right to vote at the election to which the petition relates, and respondent expressly denies the allegations of paragraph one of petition.

5. Because, moreover, the said petitioner had no right to vote at the said election, for the reason that he was then disqualified as such voter by the fact that, on the polling day, he being an hotel-keeper, gave and caused to be given to numerous voters of the said Electoral District of Quebec-West, on account of such voters having voted, and being about to vote, drink and refreshments, and became thereby guilty of a corrupt practice consisting of treating on polling day.

The learned Chief Justice treated objection number 5 as merely a statement of the particular ground upon which the respondent intended to challenge the right of the petitioner to vote at the election, put in issue by objection number 4. He says: "Le paragraphe 5 explique le paragraphe 4."

So treating it he held that if the allegation of fact made in the fifth objection were established, it would not prevent the petitioner from proceeding with his petition.

With great respect I am unable to agree in the view that paragraph 5 is merely an explanation or particularization of the lack of qualification to vote charged by paragraph 4. Paragraph 4 deals with an absence of qualification such as the omission of the voter's name from the voters' list. Paragraph 5 deals not with lack of qualification but with disqualification due to some act of the voter, which, although he otherwise possessed the requisite qualification of a voter, would invalidate any vote that he might cast. The introduction of the word "moreover," in paragraph 5, makes

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it perfectly clear that by that paragraph the respondent intended to challenge the status of the petitioner upon a ground entirely distinct from that raised in paragraph 4.

The motion before the learned Chief Justice was in the nature of a demurrer and was disposed of without any evidence being taken to establish the facts alleged by the preliminary objections. The objections could properly be so disposed of only upon the assumption that if the facts alleged in them were proved they would not constitute valid objections to the petition. As to the allegation in paragraph 4 that

> the said petitioner is not a person who had a right to vote at the election to which the petition relates,

it is manifest from the mere statement of the objection that, if established, it would be fatal to the petitioner's status. The respondent is clearly entitled to have this objection disposed of on the merits. The motion to quash it should not have prevailed. I venture to think that it succeeded only because the learned Chief Justice construed paragraph 5 as a specification of the objection to the petitioner's status taken generally by paragraph 4.

But when we come to consider paragraph 5, the same authority which establishes the right of the respondent to raise these questions as to the status of the petitioner by preliminary objections—*The Cumberland Election Case*(1)—also establishes that such an objection as that taken in paragraph 5 would not if established render the petitioner ineligible. The judgment of Mr. Justice Girouard and that of Mr. Justice Davies, in which Mr. Justice Nesbitt con-

(1) 36 Can. S.C.R. 542.

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curred, determine that a corrupt practice such as that charged in the 5th paragraph disqualifies only from the date of a conviction of the offender by a court of competent jurisdiction or of a finding of such a court that the offence has been committed, and that a petitioner, though guilty of such an offence, is not a person who had not a right to vote at the election within the meaning of the section declaring the requisite qualifications of a petitioner. This decision is of course binding upon us.

It follows that the judgment in appeal must be sustained as to the 5th objection, but that, as to the 4th objection, it must be vacated. In view of the very limited extent of the appellant's success, there should be no costs to either party.

The respondent to a cross-petition appeals from the judgment of McCorkill J. dismissing his preliminary objections. The appeal is confined to the overruling of the 5th objection, which is in the following terms:—

5. The allegations contained in paragraph 11 of said petition do not disclose any actual act of undue influence and are in law insufficient to have the respondent declared guilty of such offence.

Paragraph 11 of the cross-petition is as follows:—

11. And your petitioner also says that the said William Power, during the said election, directly and indirectly, by himself and by his agents, with his actual knowledge, consent and privity, has committed acts and the offence of undue influence.

While this paragraph is objectionable on the ground that it states a conclusion of law, and although it is no doubt desirable that a petitioner preferring a charge of undue influence should state the facts upon which he relies to establish the charge, it is manifest

that these facts can readily be obtained by a demand for particulars, and where that is the case the taking of a preliminary objection upon such a ground should be discouraged. For this reason the learned judge overruled this objection. I think that in doing so he was well advised and that this appeal should therefore be dismissed with costs.

Appeal in Price v. *Neville allowed in part without costs. Appeal in Power* v. *Price dismissed with costs.*

Solicitor for the appellant and respondent, Price: *E. J. Flynn.*

Solicitors for the respondent, Neville: *Dorion & Marchand.*

Solicitors for the appellant, Power: *Dorion & Marchand.*

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* May 4.
* May 11.

ELFRIDA SVENSSON (DEFENDANT) .... APPELLANT;

AND

CHARLES BATEMAN (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal — Jurisdiction — Commitment of judgment debtor — Final judgment—Manitoba King's Bench rules 748, 755—*"Matter or judicial proceeding"—Supreme Court Act, s.* 2 (*e*).

An order of committal against a judgment debtor, under the Manitoba King's Bench rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of subsection (*e*) of section 2 of the Supreme Court Act but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis*, 3 Can. S.C.R. 258, referred to.

MOTION to quash an appeal from the judgment of the Court of Appeal for Manitoba(1) affirming the order made by Mathers J. committing the appellant to twelve months' imprisonment under the authority of the Manitoba Court of King's Bench, rule 755. A statement of the case is given in the judgments now reported.

W. L. Scott supported the motion.

Trueman contra.

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

(1) 18 Man. R. 493.

THE CHIEF JUSTICE.—This appeal is quashed with costs fixed at $50. I agree in the opinion stated by Mr. Justice Duff.

GIROUARD and DAVIES JJ. also agreed with DUFF J.

IDINGTON J.—There is not sufficient resemblance in the language establishing or the scope and purpose of the establishment of the respective courts of appeal in England and Ontario to that in the Supreme Court Act defining our jurisdiction to render the cases cited to us relative to the distinctions drawn between final and interlocutory judgments of much help herein.

Nor do I think the cases determining and distinguishing the nature and quality of the acts or offences committed by persons under examination which had involved them in imprisonment under orders of judges in chambers are much more helpful in leading to a right conclusion on this motion.

Assuming for argument's sake that the offence in question herein was criminal brings us to consider whether or not it is so in the sense of the section of the Supreme Court Act prohibiting, (unless upon certain terms and following certain conditions of things), an appeal here. I have no hesitation in saying that it was not a criminal offence in the sense used in that section.

But how far does the finding it, if we do find it, a criminal offence in the sense in which local laws punishing specified acts with imprisonment, lead such acts to be spoken of as criminal offences bring us? Is it any more appealable when thus looked at than if merely held to be a contempt of court in the ordinary sense; that is in the presence and face of the court?

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There formerly prevailed many cases of enforcing by imprisonment obedience to orders of courts in order that justice should be done between parties and for which alternative methods are now substituted.

For example, the attachment of the person to enforce an interim order for costs is replaced by ordinary execution; the refusal to attend or submit to examination for discovery by an order striking out the defence or dismissing the action and the vesting order takes the place of the former process. Are any such orders appealable to this court?

Suppose the former practice or law and practice restored and imprisonment directed instead of any such order would appeal lie here? Any appeal of that kind involving mere procedure would, I venture to think, be met by the practice adopted here long ago and consistently followed of refusing to hear the appeal unless there appeared some violation of the principles of natural justice.

How can this case be distinguished from those? What is this if not matter of procedure?

I have always supposed that the legislation of Ontario, from which that of Manitoba now in question was evidently copied, was but a substitution for the right which the judgment creditor formerly had to issue, as of course, a writ of *capias ad satisfaciendum*. Imprisonment for debt was abolished but I rather think the intention was and at all events the practical result was not to extend this amelioration of the law to the case of the fraudulent debtor but, in his case, to leave it in the discretion of the court or judge conditioned upon satisfactory answers being made upon examination. I will not say that this view has always prevailed or that the later cases are clearly consistent

with the earlier ones. The order for a writ of *ca. sa.* was more common at one time as the result of such examinations, than later when it became so fruitless partly as the result of continued amendments as to the effect to be given the writ, that the order therefor fell into disuse.

The order to commit was effective and the power to make it formed part of the same section.

Another power to make orders for examinations of debtors was that brought in with the Common Law Procedure Act in order to found proceedings for garnishee proceedings.

It was quite usual and I think properly so in asking for an order to commit under either such Acts to treat the subject matter of the complaint as one for contempt of court implied in the disobedience of the order.

It was often just as much so as the other instances I have adverted to which subjected the party to attachment.

It was competent for a judge to take and he sometimes did take the examination before himself.

In the cases of *Henderson* v. *Dickson*(1), and *Baird* v. *Story* (2), such eminent judges as the late Sir John Beverley Robinson, Chief Justice Draper and Hagarty J., afterwards C.J., all living in the times when these changes were made and knew what they involved or implied, either directly or impliedly deal with the matter as one of contempt.

But again, how far does holding them matters of contempt clear matters up for us?

Thirty years later the rules, which are statutory in

(1) 19 U.C.Q.B. 592. (2) 23 U.C.Q.B. 624.

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character, enabled the creditor to have the examination before certain officers of the court without any order, but merely an appointment. And such seems to be the nature of the Manitoba rule now in question.

Such being the history of the law, does it not indicate that it is a matter of indifference whether the substance of the offence be treated as contempt or the proceeding be held in aid of the execution or as substitute for execution by way of *ca. sa.*, or whatever we choose to call the proceeding and order made? They are but in the nature of procedure and, hence, even if within the jurisdiction of the court, something the court has uniformly refused to hear unless there appeared something done in violation of natural justice.

It seems, moreover, as something hardly within the general purview of the Supreme Court Act to suppose it intended thereby to have such orders appealable here.

I should have had no hesitation in holding either on this latter and broad ground that there was no jurisdiction to hear such an appeal or that, in any event, it being in the nature of matter of procedure should not be heard, but for the cases of *Wallace* v. *Bossom*(1), where an appeal allowed from an order setting aside an execution, *Mackinnon* v. *Keroack* (2), a capias case but which took the form of pleadings and an issue to be tried, and the case of *In re O'Brien*(3).

These cases I think each and all distinguishable. The first is, perhaps, in principle the least possible of being distinguished. But the facts are far from being the same and the case an early one inconsistent with

(1) 2 Can. S.C.R. 488. (2) 15 Can. S.C.R. 111.
(3) 16 Can. S.C.R. 197.

the later jurisprudence of the court, as, for example, the case of *Martin* v. *Moore*(1), and *McGugan* v. *McGugan*(2).

And the others seem of the same nature as interpleader in being proceedings quite independent of those involving the rights of the parties in the issues raised in the action.

I incline very much, subject to reservation of opinion, as it was not argued as other points above referred to were, to hold also as the result of much consideration of the case in all its bearings that the order was discretionary and, hence, not the subject of appeal. Suppose the converse case of an appeal because the Court of Appeal had set aside an order, or both judge and appellate court refused to make an order, would we not answer, that they had merely exercised their discretion?

No necessity exists to rest upon this point of discretion for, in my view, the grounds I have just stated are sufficient to enable me to hold the appeal will not lie or ought not to be heard as being a matter in the nature of procedure.

There is in support of this latter ground also this, that on its face the appeal involves only costs and would be fruitless, for the appellant is now discharged.

The acquiescence relied on would but for the peculiar facts be also fatal, but, on account of such facts, I say nothing as to that.

Carter v. *Molson*(3) is instructive as to the scope of the appellant's right intended. There it was held no appeal would lie as of right to the Privy Council from an order for *ca. sa.* in a similar case in Quebec,

(1) 18 Can. S.C.R. 634.
(2) 21 Can. S.C.R. 267.
(3) 8 App. Cas. 530.

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where the statute limiting appeals from Quebec to the Privy Council is identical with that defining as to that province, appeal to this court.

The express provision for appeal in case of habeas corpus in other than criminal cases provided for by section 39, sub-section (*c*) of the Supreme Court Act rather implies that such an appeal as this is not intended. In case habeas corpus would apply that is the proper mode of relief, if beyond the power of the court to make the order.

The appeal should be quashed with costs.

DUFF J.—The Court of Appeal for Manitoba, by the judgment appealed from, dismissed an appeal from an order of Mathers J. committing the appellant to gaol for twelve months under the authority of rule 755 of the Court of King's Bench. The order is expressed to be based upon an adjudication that the appellant was "guilty of contempt" in not making satisfactory answers "upon her examination as a judgment debtor" under rule 748 "as to her property or her transactions respecting the same."

I think this order is not a final judgment within sub-section (*e*) of section 2 of the Supreme Court Act. That sub-section is as follows:—

(*e*) "Final judgment" means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding in finally determined and concluded.

The order of Mathers J. did, it is true, finally dispose of the matter in question upon the application before him; and, if that application was a "matter or other judicial proceeding" within the meaning of the definition just quoted, the order disposing of it must be held to be a final judgment within that definition.

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The point for determination is whether the application was such a "matter or other judicial proceeding."

I think it is not such a "matter or other judicial proceeding"; and I base my opinion upon the short ground that a proceeding under rule 755 is merely ancillary to the proceedings by which a judgment creditor is authorized to obtain execution of his judgment. The examination under rule 748 is designed to enable the creditor to obtain, (through the oral examination of the debtor), discovery of the debtor's assets which are subject to execution in satisfaction of his judgment. By rule 755, the court is invested with power to commit the debtor for failing to make, upon such an examination, a full and true disclosure respecting his property and his dealings with it. *Taylor's Case*(1), *per* Lord Eldon; *Re Courtney*(2); *Dougall* v. *Yager*(3); *Hobbs* v. *Scott*(4), *per* Draper C.J.; *Lemon* v. *Lemon*(5), *per* Strong V.-C.; *Graham* v. *Delvin*(6), *per* Boyd C.; *Ross* v. *Van Etten*(7), at page 600, *per* Taylor C.J. The rule 755 is thus but the necessary complement of rule 748; and a proceeding under it is not, to use the language of Sir James Colville, speaking for the Judicial Committee in *Goldring* v. *La Banque d'Hochelaga*(8), referring to the proceedings under the articles of the Civil Code of Quebec relating to *capias ad respondendum*, "so severed from the general suit that" it is "to be treated as something separate" in its nature, "and not as incident to the suit"; on the contrary "from its nature" it is "merely incidental to the suit and in the nature of process therein."

(1) 8 Ves. 328.
(2) 11 Ir. Ch.R. 410.
(3) 2 U.C.L.J. (N.S.) 161.
(4) 23 U.C.Q.B. 619.
(5) 6 Ont. P.R. 184.
(6) 13 Ont. P.R. 245.
(7) 7 Man. R. 598.
(8) 5 App. Cas. 371, at p. 373.

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A proceeding thus incidental to the principal action, and not touching the rights of the parties in respect of the matters in controversy in that action, cannot be treated as a "matter or other judicial proceeding" within the enactment under consideration. To hold otherwise would lead to the result (which it is impossible to suppose Parliament could have contemplated) that any order made in the course of an action—though touching exclusively the course of the proceedings and having no relation to the merits of the controversy in the action itself—is a final judgment within the Supreme Court Act as finally disposing of the particular application in which it was pronounced.

There is, perhaps, some reason to think that this view is in conflict with the view of Strong J., as indicated in his observation in *Danjou* v. *Marquis*(1), that the phrase "final judgment" as used in the Supreme Court Act comprehends any order or judgment which is

final as regards the particular motion or application and not necessarily final and conclusive of the whole litigation.

I do not think the learned judge could have meant to say that every order disposing of an interlocutory proceeding in the course of an action is, as such, a final judgment and appealable under the Supreme Court Act; if so, I must, with respect, dissent from that view. Other cases which may, at first sight, appear inconsistent with the opinion above expressed will be found, on examination, to be either, (1) cases in which, by the order or judgment appealed from, the rights of the parties in respect to some distinct

(1) 3 Can. S.C.R. 251, at p. 258.

ground of action or defence in the principal proceeding have been determined; or (2) cases in which the proceeding in which the order or judgment in question was pronounced, (although bearing some relation to another proceeding), was held by this court to be, in substance, independent.

I think the appeal should be quashed with costs.

ANGLIN J. agreed with Duff J.

Appeal quashed with costs.

Solicitors for the appellants; *Bonnar, Timmant & Thorburn.*

Solicitors for the respondent: *Hull, Sparling & Sparling.*

1909
* May 4.
* May 28.

LA COMPAGNIE D'AQUEDUC DE LA JEUNE-LORETTE (DEFENDANTS) .... APPELLANTS;

AND

JOSEPH ALEXIS VERRETT (PLAINTIFF) .... RESPONDENT.

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

Appeal—Jurisdiction—Matter in controversy—Municipal franchise—Demolition of waterworks—Title to land—Future rights.

The action, instituted in the Province of Quebec, was for a declaration of the plaintiff's exclusive right under a municipal franchise to construct and operate waterworks within an area defined in a municipal by-law, for an injunction against the defendants constructing or operating a rival system of waterworks within that area, an order for the removal of water-pipes laid by them within that area, and for $86 damages. On an appeal from a judgment maintaining the plaintiff's action:

Held, Girouard and Idington JJ. dissenting, that, as it did not appear from the record that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec nor that any title to lands or future rights were affected, an appeal would not lie to the Supreme Court of Canada.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, maintaining the plaintiff's action with costs. The nature of the relief sought by the plaintiff's action is stated in the head-note. By the

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

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judgment in the Superior Court (affirmed by the judgment appealed from) it was declared that the plaintiff had the exclusive right, under a municipal by-law, of placing water-pipes on certain streets in the Village of St. Ambroise de la Jeune-Lorette (the *mise-en-cause*), for the purpose of supplying water to part of the municipality during twenty-five years from the 10th April, 1893, and that the defendants had infringed that privilege by placing water-pipes, in connection with their rival system of waterworks, on those streets to the injury of the plaintiff, and it was ordered that the water-pipes so placed by the defendants should be removed; the defendants were enjoined against operating waterworks within the area in question, condemned to pay to the plaintiff the sum of $50 damages, with costs, and the right was reserved to the plaintiff to take such further action as he might be advised for the recovery of damages subsequent to the date of his action. At the hearing of the motion to quash the appeal to the Supreme Court of Canada for want of jurisdiction, affidavits were filed, on behalf of the appellants, shewing that the total value of their system of waterworks was from $20,000 to $25,000; that the actual value of their works in the Village of St. Ambroise de la Jeune-Lorette, apart from the value of the land, was $16,000; that the portion ordered to be demolished was capable of returning them an annual revenue of $500 or $600 from one part of the municipality and that the remainder, which would be destroyed in consequence of the judgment, was of the value of from $8,000 to $10,000 and capable of producing an annual revenue of $600.

E. J. Flynn K.C. supported the motion.

C. E. Dorion K.C. contra.

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The Chief Justice.

THE CHIEF JUSTICE.—This is a motion to quash the appeal for want of jurisdiction. This action was brought by Verrett against La Compagnie de l'Aqueduc and the corporation of the Village of St. Ambroise *mise-en-cause*. By his action the plaintiff asks for a declaration that certain rights and privileges to construct an aqueduct granted to him by the municipal corporation, defendant, were exclusive; and that in constructing another aqueduct La Compagnie de l'Aqueduc de la Jeune-Lorette had infringed his rights and should be enjoined and restrained from constructing their aqueduct, and he also asks for a condemnation against the defendant for $86 for special damages. The franchise is not in question and the water company may, by diverting their line, still carry on their operations. The action was maintained in the Superior Court and the judgment was affirmed by the court of appeal. Respondent says that no appeal lies here. The amount claimed is not within the appealable limit and no title to land or rights in future are involved.

I would grant the motion with costs fixed at $50.

GIROUARD J. (dissenting).—The matter in dispute in this case exceeds $2,000 as the value of the works to be demolished, as proved in the action, is more than $2,000. What we have to consider is not only the few pipes to be demolished, but also how far the whole aqueduct will be affected by the judgment. If those pipes be removed the whole value of the aqueduct is involved and it was admitted before us that it exceeds $2,000.

I think, therefore, that we have jurisdiction.

DAVIES J.—I concur with the opinion of the Chief Justice.

IDINGTON J. (dissenting).—I cannot see how to distinguish this case in principle from that upon which this court proceeded to hear the case of *Rouleau* v. *Pouliot*(1).

In that as here the existence of a franchise and extent thereof was all that was in question.

There a toll bridge franchise created by 58 Geo. III., ch. 20 (L.C.), was invoked by the grantee thereof to have another and competitive bridge demolished.

Here the respondent as owner of a water supply franchise has got a judgment of demolition against the appellant in respect of a water supply pipe the municipal authorities had permitted to be laid down in the street to or over which the respondent's franchise extended.

The one owner's property earned for him profits by tolls on travel and the other by tolls on water supplied.

Moreover, *Rouleau* v. *Pouliot*(1), followed *Galarneau* v. *Guilbault*(2), which was the case of a toll bridge plus a ferry.

I think the jurisprudence of this court has determined by these and numerous other cases not so directly, but yet in principle alike thereto the meaning to be attached to the words ("other matters or things where rights in future might be bound") in section 46, sub-section (*b*), of the "Supreme Court Act," and that they thereby cover this case.

The motion should be therefore dismissed.

DUFF and ANGLIN JJ. agreed in the opinion stated by the Chief Justice.

(1) 36 Can. S.C.R. 26.

(2) 16 Can. S.C.R. 579.

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Appeal quashed with costs.

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

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

THE PROVINCE OF QUEBEC........APPELLANT;

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* April 5, 6.
* May 28.

AND

THE PROVINCE OF ONTARIO......RESPONDENT.

IN RE COMMON SCHOOL FUND AND LANDS.

ON APPEAL FROM THE AWARD OF DOMINION ARBITRATORS IN THE ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Arbitration and award — Statutory arbitrators — Jurisdiction — Awards "from time to time"—Res judicata.

The statutes authorizing the appointment of arbitrators to settle accounts between the Dominion and the Provinces of Ontario and Quebec and between the two provinces, provided for submission of questions by agreement among the governments interested; for the making of awards from time to time; and that, subject to appeal, the award of the arbitrators in writing should be binding on the parties to the submission.

The provinces submitted to the arbitrators for determination the amount of the principal of the Common School Fund to ascertain which they should consider not only the sum held by the Government of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2 the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause were shewn for non-collection should be deemed moneys received by Ontario, and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 the Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Quebec to have Ontario declared liable for the purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Quebec for inclusion therein of the amounts found due from Ontario for remissions and non-collections and

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

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held that they had exceeded their jurisdiction in determining such liability. On appeal from this determination embodied in the final award:—

Held, Fitzpatrick C.J. and Duff J. expressing no opinion, that the arbitrators had no jurisdiction to determine the liability of Ontario for moneys remitted or not collected. *Attorney-General for Ontario* v. *Attorney-General for Quebec* ((1903) A.C. 39) followed.

Held, also, Fitzpatrick C.J. and Duff J. dissenting, that awards Nos. 2 and 4 in so far as they determined this liability were absolutely null, and, therefore, not binding on Ontario.

APPEAL from an award of the arbitrators appointed to settle the account between the Dominion of Canada and the Provinces of Ontario and Quebec respectively, by which they decided that awards Nos. 2 and 4, relating to the common school fund determining that Ontario was liable to accounts for sums remitted on the purchase money of school lands and the price of lands patented which had not been collected had been made in excess of their jurisdiction.

The following is the award appealed against, dated the sixth day of January, A.D. 1908, omitting the formal parts.

"Whereas by an agreement made on the tenth of April, 1893, on behalf of the Government of Canada of the first part, the Government of Ontario of the second part, and the Government of Quebec of the third part, it was, among other things, agreed by and between the said several Governments, parties thereto, that the following questions, among others, mentioned in the order of the Governor-General in Council of the twelfth day of December, eighteen hundred and ninety, be, and they were thereby referred to the said arbitrators for their determination and award, in accordance with the said statutes, namely:—

'The ascertainment and determination of the amount of the principal of the Common School Fund,

the rate of interest which should be allowed on such fund, and the method of computing such interest.

'In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold.'

"And whereas certain questions respecting the Common School Fund were submitted to the said arbitrators, and among others a claim made on behalf of the Province of Quebec that the Province of Ontario is liable to the Common School Fund for the following amount:

"1. Moneys collected by Ontario which they have omitted to credit to the Common School Fund in their accounts as rendered	$ 9,468.59
"2. Deductions made by Ontario on balances due in capital and interest on sales of land prior to the 30th June, 1867	260,445.19
"3. Deductions on balances due in principal and interest on sales made subsequent to the 1st July, 1867........................	2,975.99
"4. Balances due in principal and interest on lots sold prior to the 30th June, 1867, patents having been issued by the Ontario Government to the occupants of lots without payment of any money......................	7,270.62

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"5. Amounts due in principal and interest on sales made prior to the 30th June, 1867, but subsequently cancelled and re-sold by Ontario at reduced rates	20,662.58
Total................	$300,822.97

"And whereas dealing with that claim, among others, and exercising their authority to make an award in respect thereof, the said arbitrators did, on the sixth day of March, 1896, among other things (Sir John Alexander Boyd dissenting from so much of the award as made the Province of Ontario liable for any sums of money remitted to or not collected from the purchaser of any common school lands and for interest on any sums so remitted or not collected) award and adjudge in and upon the premises as follows, that is to say:

'2. That in computing the amount of principal money of the Common School Fund for which the Province of Ontario is liable, the following sums shall be deemed to be and shall be treated in all respects as moneys received by the province from or on account of the common school lands set apart in aid of the common schools of the late Province of Canada, that is to say:

'(*a*) Any sum of money due for principal or interest from any purchaser of said common school lands, remitted by the Province of Ontario to the purchaser, unless it be shewn by the province that such remission was made in a fair and prudent administration of the common school lands and fund; and

'(*b*) Any sum of money due for principal or interest from any purchaser of said common school lands,

at the time when letters patent for such lands were issued to him by the Province of Ontario, and not collected by the province, unless it be shewn by the province that there was good cause for not collecting the same.

'3. That where, in a fair and prudent administration of the common school lands, any sale of such lands has been cancelled by the Province of Ontario, and the same re-sold at a price less than that first obtained, the province shall not be liable for the loss resulting therefrom.'

"And whereas the parties having proceeded further with the said claims, and having filed statements shewing the particulars thereof, and having submitted evidence in respect thereto; and the said arbitrators having heard the parties and considered the evidence, did, on the 21st day of October, 1899, make a further award in the premises whereby they did, among other things, award, order, and adjudge as follows, that is to say:

'1. That subject to any revision and correction of the amount of the item in each case (which shall be ascertained by accountants, to be appointed by the arbitrators, in case the parties themselves do not otherwise agree) that may appear necessary and proper in the further taking of the accounts, that the Province of Ontario shall be debited with the sum of $9,468.59 hereinbefore mentioned for moneys collected on account of the common school lands and not credited to the Common School Fund in the accounts as rendered. This amount, being the difference in sums omitted to be credited to that fund and sums wrongly credited thereto, the several items as they appear in the statement prepared by Mr. Hyde and laid before us are

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(subject to such revision and correction) allowed as claimed by Quebec.

'2. That subject to such revision and correction as aforesaid, the Province of Ontario shall be debited, and the Common School Fund credited, with the several items and amounts shewn in the said statement prepared by Mr. Hyde, that go to make up the amount of $260,445.19 hereinbefore mentioned, and for which the Province of Quebec claims that the Province of Ontario is liable, with the exception of an item of $359.31, which appears at page 54 of the said statement in connection with sale numbered 9762.

'3. That subject to such revision and correction as aforesaid the Province of Ontario shall be debited and the Common School Fund credited with the several items and amounts shewn in the said statement prepared by Mr. Hyde that go to make up the sum of $2,975.99 hereinbefore mentioned, and for which the Province of Quebec claims that the Province of Ontario is liable.

'4. That subject to such revision and correction as aforesaid the Province of Ontario shall be debited and the Common School Fund credited with the several items and amounts shewn in the said statement prepared by Mr. Hyde that go to make up the sum of $7,270.62 hereinbefore mentioned, and for which the Province of Quebec claims that the Province of Ontario is liable.

'5. In respect to the amount of $20,662.58 hereinbefore mentioned, and for which the Province of Quebec claims that the Province of Ontario is liable in respect of the cancellations of certain sales of land and the re-sale thereof at reduced rates, that the Province of Ontario, subject to such revision and correction as

aforesaid, be debited and the Common School Fund credited with certain items amounting in the whole to the sum of $6,230.35. * * *"

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"And whereas no final award and declaration of the amount for which the Province of Ontario is liable to the Common School Fund as mentioned in the submission of the 10th day of April, 1893, has been made, and counsel for the Province of Quebec have moved the said arbitrators to give, among other things, orders and directions as to the method of making up the accounts of the Common School Fund referred to in the said agreement of submission, brought down and extended to the 31st December, 1892, inclusive, carrying into the same all the items and figures resulting from the various awards or orders of the Board made or to be made affecting the said Fund;

"And whereas on that motion the question has arisen as to whether in the final award and disposition of the said matter effect should be given to the directions and provisions mentioned and contained in the second and third paragraphs of the said award of the 6th day of March, 1896, and in the second, third, fourth and fifth paragraphs of the said award of the 21st day of October, 1899, as being within the jurisdiction and authority of the arbitrators under the submission of the 10th day of April, 1893;

"And whereas the parties have been heard in respect to the said question;

"Now, therefore, we, the said John Alexander Boyd, George Wheelock Burbidge and Francois Langelier, the said arbitrators, exercising our authority to make a separate award at this time respecting the said matter, and proceeding upon our view of a disputed question of law, do answer the said question in the

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negative, and do award, order and adjudge in and upon the premises that the directions and provisions mentioned and contained in the second and third paragraphs of the said award of the 6th day of March, 1896, and in the second, third, fourth and fifth paragraphs of the said award of the 21st day of October, 1899, were in excess of the authority and jurisdiction of this Board under the said submission of the 10th day of April, 1893, and that no effect should be given to such directions and provisions in the final award and declaration of the Board as to the amount for which the Province of Ontario is liable to the Common School Fund.

"The Honourable Sir Francois Langelier dissents from the present award on the grounds that the Board of Arbitrators had jurisdiction to deal with claims heretofore allowed in the awards of the 6th day of March, 1896, and the 21st day of October, 1899, and is of opinion that the said awards should not be disturbed."

Paragraphs 2 and 3 of the award of the sixth of March, 1896, which the arbitrators held in their final award to be in excess of their jurisdiction are as follows:

"Now, therefore, we the said arbitrators, exercising our authority to make a further award at this time respecting the same do award and adjudge in and upon the premises as follows, that is to say:

"2. That in computing the amount of principal money of the Common School Fund, for which the Province of Ontario is liable, the following sums shall be deemed to be and shall be treated in all respects as moneys received by the province from or on account of the common school lands set apart in aid of the

common schools of the late Province of Canada, that is to say:

"(*a*) Any sum of money due for principal or interest from any purchaser of said common school lands, remitted by the Province of Ontario to the purchaser, unless it be shewn by the province that such remission was made in a fair and prudent administration of the common school lands and fund; and

"(*b*) Any sum of money due for principal or interest from any purchaser of said common school lands at the time when letters patent for such lands were issued to him by the Province of Ontario, and not collected by the province, unless it be shewn by the province that there was good cause for not collecting the same.

"3. That where in a fair and prudent administration of the common school lands any sale of such lands has been cancelled by the Province of Ontario, and the same re-sold at a price less than that first obtained, the province shall not be liable for the loss resulting therefrom."

And the award No. 4 dated the 21st day of October, 1899, of which paragraphs 2, 3, 4 and 5 were also held to be beyond the jurisdiction of the Board contained the following recitals and determinations:

"Whereas we did, among other things (Sir John Alexander Boyd dissenting, from so much of the award as made the Province of Ontario liable for any sums of money remitted to or not collected from the purchaser of any common school lands and for interest on any sums so remitted or not collected) award and adjudge in and upon the premises as follows, that is to say:

'That in computing the amount of principal money of the Common School Fund for which the Province of

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Ontario is liable, the following sums shall be deemed to be and shall be treated in all respects as moneys received by the province from or on account of the common school lands set apart in aid of the common schools of the late Province of Canada, that is to say:

'(*a*) Any sum of money due for principal or interest from any purchaser of said common school lands, remitted by the Province of Ontario to the purchaser, unless it be shewn by the province that such remission was made in a fair and prudent administration of the Common School Lands and Fund;

'(*b*) Any sum of money due for principal or interest from any purchaser of said common school lands, at the time when letters patent for such lands were issued to him by the Province of Ontario, and not collected by the province unless it be shewn by the province that there was good cause for not collecting the same.

'That where in a fair and prudent administration of the common school lands any sale of such lands has been cancelled by the Province of Ontario, and the same re-sold at a price less than that first obtained, the province shall not be liable for the loss resulting therefrom.'

"And whereas it is claimed on behalf of the Province of Ontario that the Common School Fund should be debited and the Province of Ontario credited with certain refunds of money collected, or received on deposit, on account of certain common school lands and credited to the said fund, amounting in all to the sum of $11,558.24.

"And whereas the parties have proceeded further with the said claims made by the Provinces of Quebec and Ontario, and have filed statements shewing the

particulars thereof, and have submitted evidence in respect thereto, and in respect of the value of the school lands which had not at the date of the said agreement of submission been sold;

"And whereas we have heard the parties and considered the evidence;

"Now, therefore, we the said Louis Napoleon Casault, and George Wheelock Burbidge, two of the said arbitrators exercising the authority given to make an award at this time, and deciding, not according to strict rules of law, but upon equitable principles (the said John Alexander Boyd dissenting as hereinafter mentioned) do award, order and adjudge in the premises as follows, that is to say:

"1. That subject to any revision and correction of the amount of the item in each case (which shall be ascertained by accountants to be appointed by the arbitrators, in case the parties themselves do not otherwise agree) that may appear necessary and proper in the further taking of the accounts, that the Province of Ontario shall be debited with the sum of $9,468.59 hereinbefore mentioned(1), for moneys collected on account of the common school lands and not credited to the Common School Fund in the accounts as rendered. This amount being the difference in sums omitted to be credited to that fund, and sums wrongly credited thereto, the several items as they appear in the statement prepared by Mr. Hyde and laid before us are (subject to such revision and correction) allowed as claimed by Quebec.

"2. That subject to such revision and correction as aforesaid the Province of Ontario shall be debited and the Common School Fund credited with the several

(1) See p. 163, *ante*.

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items and amounts shewn in the said statement prepared by Mr. Hyde, that go to make up the amount of $260,445.19 hereinbefore mentioned(1), and for which the Province of Quebec claims that the Province of Ontario is liable, with the exception of an item of $359.31 which appears at page 54 of the said statement in connection with sale numbered 9762.

"3. That subject to such revision and correction as aforesaid the Province of Ontario shall be debited and the Common School Fund credited with the several items and amounts shewn in the said statement prepared by Mr. Hyde that go to make up the sum of $2,975.99 hereinbefore mentioned(1), and for which the Province of Quebec claims that the Province of Ontario is liable.

"4. That subject to such revision and correction as aforesaid the Province of Ontario shall be debited and the Common School Fund credited with the several items and amounts shewn in the said statement prepared by Mr. Hyde that go to make up the sum of $7,270.62 hereinbefore mentioned(1), and for which the Province of Quebec claims that the Province of Ontario is liable.

"5. In respect to the amount of $20,662.58 hereinbefore mentioned(2), and for which the Province of Quebec claims that the Province of Ontario is liable in respect of the cancellations of certain sales of land and the re-sale thereof at reduced rates, that the Province of Ontario, subject to such revision and correction as aforesaid, be debited and the Common School Fund credited with the following items and amounts:

"Here follows the items amounting to $6,230.35."

(1) See p. 163, *ante*. (2) See p. 164, *ante*.

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Lafleur K.C. and *Aimé Geoffrion K.C.* for the appellant. The arbitrators had jurisdiction to determine the liability of Ontario to account for amounts remitted to purchasers of school lands. Consideration of the judgment of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Quebec* (1), shews that this matter is very different from the one in question in that case and does not fall within the principle of the decision.

If the arbitrators had jurisdiction Ontario, of course, is liable. *In re Bourne*(2).

In any case, as no objection to the jurisdiction of the Board was taken until long after the awards were made, and as they were acquiesced in and acted upon by Ontario, the objection cannot prevail now.

Sir Æmilius Irving K.C. and *Shepley K.C.* for the respondent. Under the submission Ontario can be made liable for moneys actually received and for those alone.

The case of *Attorney-General for Ontario* v. *Attorney-General for Quebec*(1), concludes the matter against the appellants.

Hogg K.C. for the Dominion of Canada did not wish to be heard.

THE CHIEF JUSTICE (dissenting) agreed with Duff J.

DAVIES J.—The substantial questions raised in this appeal are whether or not the arbitrators appointed under certain identic statutes of Canada, Ontario and

(1) [1903] A.C. 39.

(2) 22 Times L.R. 417.

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Quebec, for the ascertainment and determination of the amount of the principal of the Common School Fund of the late Province of Canada had jurisdiction to entertain and decide upon the claim of Quebec against Ontario with respect to portions of the price for which certain of the common school lands had been sold and which Quebec alleged Ontario had improperly remitted to the purchasers of those lands; and secondly, assuming the submission under which the arbitrators acted was not wide enough to confer such jurisdiction upon them, whether or not the arbitrators in making their final award were concluded and estopped by their previous interim award upon the said claim and unable to rectify their error in assuming such jurisdiction.

The first question depends upon the proper construction of the agreement or submission defining the scope and extent of the arbitrator's jurisdiction made between the three Governments of the Dominion, and of the Provinces of Ontario and Quebec.

That agreement of submission was entered into on the 10th April, 1893, pursuant to the terms of identic legislation passed by the Parliament of Canada and by the legislatures of the two Provinces of Quebec and Ontario.

The powers of the arbitrators are therefore statutory and it is important to bear this in mind in view of one of the arguments pressed by the Province of Quebec in support of its appeal as to the arbitrators being concluded by a previous award they had made whether strictly within the terms of the submission or not to which I will refer later on.

The terms of the deed of submission of the 10th April, 1893, so far as they relate to the questions arising on this appeal, are as follows:

3. It is further agreed that the following matters shall be referred to the said arbitrators for their determination and award in accordance with the provisions of the said statutes, namely:

(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest.

(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the common school lands which have not yet been sold.

The question as to the true meaning and construction of the terms of this submission came before this court in the year 1901 on an appeal from an award made by a majority of the arbitrators holding that they had no jurisdiction to entertain a claim of the Province of Quebec that the Province of Ontario should be debited with such part of the uncollected balances of the sale price of the common school lands theretofore sold as the arbitrators should determine was under the circumstances right, fair and just.

I was a member of this court at that time and concurred in the judgment delivered by Chief Justice Strong, (1), at page 529, holding that the arbitrators had jurisdiction to entertain such claim. The Chief Justice speaking for the majority of the court said:

The clear and distinct words of the reference which require the arbitrators "to take into consideration the amount for which Ontario is liable" seems to us to make it impossible that a claim that Ontario is liable for uncollected balances of purchase moneys as well as for the wilful default and neglect of its officers can possibly be outside the terms of the reference.

On appeal to the Judicial Committee of the Privy Council, this judgment was reversed and the award of

(1) 31 Can. S.C.R. 516.

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the majority of the arbitrators declining jurisdiction affirmed.

The reasons of their lordships for reversing and for holding that the Board of Arbitrators had not jurisdiction to entertain Quebec's claim for any portion whatever of the uncollected balances of purchase money were delivered by Lord Robertson,(1). They seem to me conclusive against the present appeal in so far as it asserts jurisdiction in the Board of Arbitrators to entertain a claim of Quebec to charge Ontario with remissions to the purchasers of the purchase price of the common school lands sold to them whether made in the course of wise and prudent administration or otherwise.

Lord Robertson in delivering the reasons of the Judicial Committee says:

In ascertaining the true nature of the claim of Quebec, it is necessary to observe that the claim relates to the uncollected prices of lands sold by Ontario and to nothing else. The case, be it understood, is that of lands sold but no title to which has yet been granted. The gravamen is that those sales ought to have been completed and the prices ought to have been collected long ago, and that those prices have not been collected. Apart from this, Quebec has no case and does not profess to have one. The respondent endeavoured to make out that he was not necessarily committed to the very strong statements made in the claim of wilful violation of duty. Now, while it may not be of the essence of the claim to advance, as the respondent has done, the theory that those moneys have not been collected because it is the settled purpose of Ontario to keep them in the province, the facts set out in the claim amount to a case of wilful neglect and default and to nothing else, and the remedy sought is that those moneys which are not in the hands of the defaulter shall be treated as if they were and shall be debited against him. This is the gist of the claim—a claim against a trustee who, whether from intention or from negligence, leaves moneys uncollected which he ought to have in his hands. The remedy claimed by Quebec is that Ontario shall be debited with a specific sum, to wit, $485,-801.65, interest to run on it from a stated date. This is an appropriate remedy for breach of trust, but it can be justified on no other ground.

(1) [1903] A.C. 39, at p. 41.

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Now the question is whether such a claim falls within heads (*h*) and (*i*) of the submission. "The Common School Fund" the principal of which is to be "ascertained and determined" according to the conception of the statutes which relate to it, consists of moneys in the hands of Government. Now, the substance of the claim of Quebec is that the Ontario Government is to be debited with what in fact is not in their hands, and is alleged to be uncollected owing to the fault of that Government. Their lordships are unable to hold that a claim of this nature is to be found within the language of arts. (*h*) and (*i*) of the submission when there is no recital or suggestion of it in the rest of the submission. The question is not whether the claim is suitable for arbitration, but whether it has been submitted by this instrument. As their lordships read the claim, it is a claim founded on wilful neglect and default and of the nature of damages, and is heterogeneous to the questions which are clearly included in the submission. The specified matters which the arbitrators are to take into consideration do not include the present claim, and the fact that they are mentioned makes it impossible to suppose that the parties would have omitted to mention the matter now in question, if it had been within the scope of the reference.

I agree with the majority of the Board of Arbitrators that this reasoning is entirely applicable to the claims for remissions allowed in the awards of 1896 and 1899, now under review in this appeal and that the Judicial Committee's declaration of the law as to the scope of that submission is conclusive and binding upon us. On the question of the construction of the submission and the jurisdiction of the arbitrators I am quite unable to distinguish between a claim by Quebec to charge Ontario for a loss of the Common School Funds arising out of the improper refusal or wilful neglect of the Ontario Government to collect the purchase price of the school lands sold by them and a similar claim for a loss arising out of the improper and unjust abatement or remission to the purchasers of part of their contract price of purchase. In each case alike the moneys have not been received by the Province and each alike comes within the words of Lord Robertson

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a claim founded on wilful neglect and default, and of the nature of damages and is heterogeneous to the questions which are clearly included in the submission.

Holding, therefore, as I do that the decision of the Judicial Committee above referred to covers the question of the arbitrators' jurisdiction over improper and unjust remissions of the purchase money for which the lands were sold as well as for wilful neglect and default in not collecting such purchase moneys, I would be prepared to dismiss this appeal.

There remains, however, for consideration the second question raised by the Province of Quebec, namely, that the Board of Arbitrators were incompetent to decline jurisdiction in making their final award with respect to the sums remitted to the patentees (after the grants of their patents) out of the purchase moneys of such lands because they had already decided that Ontario was chargeable with such remissions up to an ascertained amount specified in a previous interim award made by a majority of them and the question was *res judicata.*

I confess myself entirely unable to appreciate this argument. Once it is conceded that the powers of the arbitrators were statutory, it seems to me to follow as a necessary consequence that anything they did beyond what they were authorized to do could not be binding upon the parties to the statutory submission or have any possible effect. If there was no jurisdiction in the Board of Arbitrators to consider and determine the question of Ontario's liability for remission of the purchase price of the lands, how can it possibly be maintained that an award made on the false assumption of such jurisdiction can be binding on the arbitrators or on any or on either of the Provinces parties to the submission?

When, as in the case now before us, the Board was invited by the Province of Quebec to make a final award and to carry into that final award the interim award it had already made with regard to these remissions of the purchase prices at which the lands had been sold it surely was open to them to decline doing so when they found that the highest judicial court of the Colonial Empire had determined that the scope of the statutory submission made by the Dominion and the two Provinces was not broad enough to enable them to deal at all with these questions of remissions. It is true that in its answer to Quebec's statement of claim charging Ontario with these remissions, Ontario had not raised any objection to the Board's jurisdiction over the claim although Chancellor Boyd, one of the arbitrators, dissented from the award on that ground.

But the absence of protest by Ontario against the Board assuming jurisdiction could not alter or enlarge the scope of the submission nor operate to estop the Province from disputing the jurisdiction of the arbitrators when it was found afterwards that the scope of the submission has been misunderstood. When Quebec moved the arbitrators in terms of the motion set out at page 34 of the case and practically asked them to assemble in a final award the results of their interim awards upon the subject of the Common School Fund including the awards Nos. 2 and 4 holding Ontario liable for purchase moneys of such lands improperly forgiven or remitted to the patentees it was clearly in my opinion open to Ontario to protest against the Board of Arbitrators doing so on the ground of want of jurisdiction. It does seem to me reasonably clear that if the submission did not authorize the arbitrators to deal with these remissions their

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attempts to do so in their interim awards Nos. 2 and 4 were nullities as being beyond their statutory powers, and that any further attempt to give vitality to their interim awards would necessarily be *ultra vires*. The jurisdiction of this court to hear an appeal from the award of the arbitrators is dependent upon the fact that the arbitrators should certify that in making the award they proceeded upon their view of a disputed question of law. In the present appeal the arbitrators did so certify upon the face of the award and our jurisdiction therefore to hear the appeal cannot be questioned.

It may be true also that Ontario did not until long after the rejected interim awards were made protest against the jurisdiction of the arbitrators to entertain the claim, and that after making award No. 4 the arbitrators declined on application made to them to certify that in making that interim award they had proceeded upon their view of a disputed question of law, and so an appeal against it to this court was defeated. But I am not able to see what these facts combined have to do with this question now before us. None of them nor all of them combined could operate either to extend the scope of the statutory submission or create a power in the arbitrators which it did not confer. The Board of Arbitrators now called upon by Quebec to make their final award and incorporate in it the interim awards they had previously made refuse in the light of the fuller knowledge they had gained of their jurisdictional powers to repeat the mistakes they had previously made. They formally decline to exercise a jurisdiction which they now learn they never possessed and never should have attempted to exercise and substantially award, order and adjudge that their awards Nos. 2 and 4 so far as they relate to this claim

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for remissions were made in excess of their authority and jurisdiction under the submission of the 10th April, 1893. In doing so I think they acted properly and are not estopped by their previous action. There is no principle upon which a Board of Arbitrators or a court acting under statutory authority can be called upon, by reason of some supposed estoppel, to assert a jurisdiction which it does not possess, merely because the tribunal, in a previous and interlocutory stage, had deemed itself jurisdictionally seized of the subject matter. The rule is that absence of jurisdiction must invalidate any proceedings, at any stage, and the arbitrators, being asked in their final award to bring in and include a liability over which they had, at a previous interlocutory stage, erroneously deemed themselves to have jurisdiction, were not only justified in correcting the previous error, but were in my judgment bound to do so.

Then with respect to the argument pressed upon us so energetically by Mr. Geoffrion arising out of the passing by Ontario of the Act 35 Vict. ch. 22, which professed to authorize in certain cases a reduction or an abatement in the prices of common school lands without affecting the share or interest of the Province of Quebec, I confess I find it difficult to understand the principle upon which the Act can be relied on as conferring any additional jurisdiction on the Board of Arbitrators. I gather from the reasons of Chancellor Boyd and Mr. Justice Burbidge for the award made by them and now under appeal, that it was common ground for both parties when awards Nos. 2 and 4 were made that this statute had never been acted upon and that the remissions and reductions in price of which Quebec complained were not authorized by it.

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But even if I was to go so far as to assume, contrary to the conclusion I have reached, that this statute and its amendments of 1877 could be invoked as applicable to the actual remissions made, it is difficult to see how that would assist the argument that the Board had jurisdiction over the claims in question. The moneys claimed were not in fact received by Ontario whether the failure to receive them is referable to the Act in question or not; and whether such failure is attempted to be justified by Ontario under that Act or otherwise, the foundation of the claim of Quebec is not altered. It is a claim as put by Mr. Shepley based upon neglect or default with or without the sanction of the *ex parte* legislation of Ontario and so stamps itself as "heterogeneous" to the questions included in the submission of 10th April, 1893, made by the Dominion and by the two Provinces of Ontario and Quebec to the Board of Arbitrators.

IDINGTON J.—The submission now in question received the interpretation in the case of *Attorney-General for Ontario* v. *Attorney-General for Quebec*(1), which binds us.

It was held there that it did not authorize the arbitrators to adjudicate upon the liability of the respondent herein to account for moneys that might but for its wilful neglect or default have been collected.

The words "but also the amount for which Ontario is liable" which are used in the submission and pressed herein on our attention were under consideration in that case. Though they are possibly, if unlimited in any way, of wide enough import to have included the uncollected moneys then in question and also to in-

(1) [1903] A.C. 39.

clude those now in question, yet the court held they did not when limited as the court found cover the case of moneys uncollected yet collectable.

It is easy to distinguish the facts of that case from those of this case but impossible to distinguish the interpretation adopted from that which must govern us herein. It is not an argument founded on reason to say that because the court properly and with due regard to accuracy limited its decision to the actual facts before it we must infer it intended to hold that the interpretation adopted and applied should be limited in its operation only to identical facts.

The court was careful not to embarrass by including other possible cases not before it.

For that obvious reason as well as the observation of a safe rule of judicial expression not to presume or seem to decide anything but the case in hand or needlessly extend by anticipation the principles necessary for its decision the court left it open to appellants ably to argue in many ways here that the other cases thus distinguishable in fact and circumstances are not to be governed by that case.

When however we look at the judgment in that case to find why the comprehensive words of reference are not to extend so far as they at first blush seem to imply we observe that the entire legal history of the trust is outlined in the judgment; that by the award of the 3rd September, 1870, it was laid down that the moneys received by Ontario since the 30th June, 1867, from the common school lands should be paid to the Dominion subject to certain deductions; that a new set of questions having arisen this submission now in question was made, and thereupon there had been raised a question of the jurisdiction of the arbitrators to ad-

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judicate in respect of a claim of the now appellants that from the long delay of a quarter of a century to get in from sales of said land the uncollected balances of principal and interest they

> ought to be and be deemed held and treated in all respects as moneys received by Ontario from or on account of the common school lands and as part of the Common School Fund or moneys in the hands of Ontario.

It was held by the arbitrators that they had not jurisdiction but upon appeal to this court such decision was reversed and hence the appeal cited above.

It was thereupon decided that such a claim put in the mildest form it was possible in law to state it was but

> a claim against a trustee who, whether from intention or from negligence leaves moneys uncollected which he ought to have in his hands, * * * and the remedy sought was an appropriate remedy for a breach of trust.

And it was held accordingly that such an issue was beyond the language of the submission or suggestion of it in the rest of the submission.

How can the refusal to collect now in question be held to be different in quality from the wilful neglect there? Both are covered by the express words above quoted of "intention or from negligence."

The intention is made clear in regard to the remissions now in question. The twenty-five years of failure there in question was almost as expressive of intention as of neglect. But the questions of intention as well as of neglect are classed as of the same kind as a legal basis for complaint or reason for remedy and held beyond the submission.

I cannot understand, notwithstanding the argument so lucidly and so well put, how the moneys now in question can be held any more than those there in question to be deemed as money received.

The legal wrong done if any is of the same character. The appropriate legal remedy sought here is absolutely the same.

Can it make any difference what the reason or motive leading to the intention was? If the remedy is not to be found in the one case in the exercise of the powers conferred I fail to see how it can be found in the other by looking at the motive which formed the foundation for the act complained of.

It is said there was a statute passed by the Ontario Legislature which expressed what was to be done but as the statute never was observed and never formed part of the constituting instruments establishing the trust I fail to see how it can in any case be relied upon by the appellant.

Much less can we find in its non-observance reason for holding that its existence can constitute in law the remission of moneys, within or without its provisions as a receipt of said moneys.

The failure to receive remains but an intention or neglect such as passed upon in the case I have cited.

Nor can I see how the granting of titles to the purchasers thus relieved from payment can convert the legal wrong as regards the appellant, if any, into anything but wilful default.

As regards the theory strongly urged of "constructive receipt" as the embodiment of results following Ontario legislation it seems but a twin brother to the conception put forward in the former case that the moneys should be "deemed * * * as moneys received by Ontario." Neither seems more than an ingenious hypothesis. I cannot find the one more workable than the other.

I am not passing upon this whole matter any opinion of whether or not a legal wrong in truth exists.

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It may or may not have been. We have nothing for that but a tribunal unauthorized to pass upon it. If there was no power in the tribunal that passed upon it to do so its findings in that regard must be treated as null.

And if through oversight they did pass upon it I fail to see how or why they cannot so declare and refrain from giving any countenance to its validity.

Nay more, on the face of each award there appears clearly set forth the ground (now found prohibited as ill-founded ground), upon which they proceeded.

I might add that of any or of the whole of the means suggested (outside of the actual receipt of the money) to rectify the matter each ends when analyzed in a reconstitution of the trust the Dominion has to execute.

We are asked in substance to find that the Dominion remain not as the trust declared the trustee of the fund to pay out its whole income in certain defined proportions but become as to a part a trustee for Quebec only.

This equalizing method was to my mind much more clearly beyond the range of the submission than anything I have already dealt with.

I think the appeal must be dismissed.

DUFF J. (dissenting).—I think the appeal should be allowed. Upon the point of law raised by Ontario the Board was it seems to me concluded by its previous deliverances. The claim of Quebec was that Ontario be charged with the sums remitted to patentees (after the grant of their patents) out of the purchase money of patented lands as well as with the unpaid balances of purchase money due in respect of such lands. The

Board had already decided that Ontario was chargeable in respect of these moneys. These adjudications had been embodied in two formal instruments in which the arbitrators declare they "award and adjudge" upon the points in issue. Assuming these documents to be "awards" within section 5 of the identic statutes under which the submission took place the argument in favour of the view that they were binding on Ontario seems difficult to answer. The statutes authorize the submission of certain questions to the Board; empower the Board to make awards from time to time; provide that where the Board decides upon a disputed question of law the question shall be stated on the face of the award; and that an appeal shall lie from the decision of the Board upon any such question to the Supreme Court of Canada and thence to the Privy Council. The statutes further declare, subject to any such appeal, that "the award of the arbitrators in writing" shall be binding on the parties to the submission.

Now it has not been doubted that a question touching the scope of the submission would be a question of law which if disputed the arbitrators should state in their award and in respect of which the appropriate mode of questioning their decision would be by the appeal provided by the statutes. The language used is quite broad enough to embrace such a question; and in *Attorney-General for Ontario* v. *Attorney-General for Quebec*(1), the question of the competence of the arbitrators to entertain the claim of Quebec was treated as, and indeed expressly declared, at page 42, to be a question of law within these provisions. Section 8, moreover, seems to make any award under the

(1) [1903] A.C. 39.

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statute binding on the parties notwithstanding it should involve the determination of some question of law which not having been disputed or stated on the face of the award could not be raised by way of appeal under the statute.

There is nothing startling in the view that this section extends to questions relating to the scope of the submission, when one considers the character of the tribunal and the fact that where there is a dispute upon a question of law the arbitrators are peremptorily required to state it—and that in such cases an appeal is given as of right. When the Governments concerned agreed to constitute a tribunal empowered to dispose finally of the questions arising on the settlement of the accounts in question, it is not, I think, to be supposed that the final award of this tribunal (to be composed as the statute provided, exclusively of judges, one of whom should be nominated by each of the Provinces, and one by the Dominion and each of whom should be approved by all the Governments) was to be open to dispute by any one of the parties on the ground that some matter had been taken into consideration by the tribunal which was outside of the scope of the submission (unless indeed the question raised by the objection should be stated in the award in the manner provided for by the enactments). On the contrary it would seem that one might confidently assume all parties to have intended that any such objection (escaping both the vigilance of counsel and the attention of the tribunal) should be finally set at rest by the award of the tribunal. Consider the effect of the opposite view. Let us suppose the very objection which was the subject of the adjudication in question on this appeal to be taken by Ontario for the first

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time after the final (*i.e.* the last) award of the arbitrators; that in other words, Ontario should then for the first time dispute the validity of the award on the ground that the claims to which the objection is directed were outside the scope of the submission. There would be no court to which such a controversy as between Ontario and Quebec could be submitted without the consent of both parties. It could only be determined, therefore, by a submission to another arbitral tribunal or with the consent of all parties to one of the courts of the country. Is it really conceivable that the parties could have intended that such a second submission should in any circumstances be necessary? It seems to me that to state the question is to answer it. Finality upon all questions as to the scope of the submission was just as important as finality upon other questions of law and upon questions of fact. The importance of the questions involved, and the composition of the tribunal, were such as to make it in the last degree improbable that any serious objection to any claim as being outside the submission would be overlooked. It must be essential to finality that any such objection if overlooked should be set at rest by the adjudication of the arbitrators upon the claim; and we should not, I think, be justified in so limiting the language of section 8 as to give to that section a construction which would have the effect of frustrating the common purpose which all the legislatures plainly had in view in agreeing to the constitution of the Board.

I do not understand Sir John Boyd to have raised, by his dissent, the question of the competency of the Board, under the submission, to pass upon the point on which his dissent was based. The awards, moreover, have not been attacked in the only way in which, if I

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am right in the views above expressed, they could be attacked, namely by appeal under section 6 of the constituent statutes.

Nor (with great respect to the learned Chancellor of Ontario) do I think there is any room for the implication he finds in the legislation to the effect that until the last award should be made, the "interim awards" so called should be open to review. The enactment seems explicit. The Board is empowered to make "awards" from time to time; and "the award in writing" of the arbitrators, it is declared, is to be binding on the parties. Morover if on this ground open to review on a question of law any such adjudication must (pending the final settlement of the precise sum payable by Ontario) be open on any question of fact; and having regard to the character of the inquiry, it is difficult to suppose that the legislatures could have intended that.

I think also that the instruments in which the adjudication upon the point under consideration is embodied are "awards" within the meaning of the statute.

It was argued by Sir Æmilius Irving that being in their nature interlocutory deliverances having only a temporary operation they lack the essential features of awards. I do not think that is the character of them. The Board does not in these documents profess to be regulating the proceedings or making provisional rulings upon the subject of the dispute: it, (as already mentioned) deals with the rights of the parties and in respect of their rights "awards and adjudges" languages which does not seem consonant with the intention that those pronouncements should have only a provisional effect. The circumstance alone that the instruments in question did not deter-

mine the precise sum which should be chargeable against Ontario in respect of the heads of controversy under which that Province was held to be liable does not I think effect the finality of the adjudications upon the points dealt with; *Re Herbert Reeves & Co.*(1), at pages 32-33; *Ex parte Moore*(2), at pages 633-34; the precise sum had in fact been determined pursuant to the directions contained in the awards long before the question of competency was raised.

If I am right in the view I have expressed that the statutes empowered the Board to decide finally and conclusively from time to time upon such controversies as those dealt with in the instruments in question then on this branch of the case the only remaining point upon which controversy could arise would be whether the Board has in these instruments manifested an intention of so deciding. That, as I have already said, seems to me very plain on the face of the instruments.

ANGLIN J.—Two distinct questions are presented by this appeal—one a question of the jurisdiction of the Board of Arbitrators; the other a question of *res judicata,* or estoppel.

By an award, dated the 6th March, 1896, (known as No. 2) the arbitrators determined (Boyd C., dissenting) that the following should be deemed moneys received by Ontario, viz.: (*a*) moneys remitted to purchasers of school lands, except in so far as Ontario should shew that the remissions were made in fair and prudent administration; (*b*) purchase moneys not collected by Ontario for lands for which patents have issued, unless Ontario should shew good cause for such non-collection. This adjudication was made upon a

(1) [1902] 1 Ch. 29. (2) 14 Q.B.D. 627.

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claim submitted by Quebec, and entertained by the arbitrators without any exception to their jurisdiction being taken by Ontario. The representatives of Ontario accepted the award and proceeded with the trial of the issue thereby defined, adducing evidence by which they sought to justify the reductions in and non-collection of purchase moneys. A further award, dated 21st October, 1899 (known as No. 4) determined the amounts with which Ontario should be charged in respect of the liability declared by the earlier award, subject only to a revision of the figures which were declared to be complete on the 21st of August, 1901.

Meantime Ontario had sought to appeal from both these awards. Neither award contained a declaration by the arbitrators that they had proceeded on their view of a disputed question of law. Upon this ground a motion by Quebec to quash the appeal prevailed.(1).

In 1899, Quebec brought before the arbitrators a supplemental claim that Ontario should be held liable to pay, as part of the Common School Fund, purchase moneys of school lands yet unpatented, but which Ontario had allowed to stand uncollected for upwards of 25 years. By her plea to this claim Ontario contested the jurisdiction of the Board to entertain it. The decision of a majority of the arbitrators that they had not such jurisdiction, set aside by the Supreme Court(2), was restored by the Judicial Committee(3).

In December, 1907, Quebec moved the Board for directions as to the inclusion in its final award of the amounts found due from Ontario in respect of remission and non-collections, interest upon the same, etc. On the return of this motion Ontario raised the question whether the awards of the Board as to remissions

(1) 30 Can. S.C.R. 306.
(2) 31 Can. S.C.R. 516.
(3) [1903] A.C. 39.

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and non-collections of purchase money in the case of patented lands were within its jurisdiction. The arbitrators (Sir François Langelier, dissenting) held that in making these awards the Board had exceeded its jurisdiction by dealing with matters not within the submission, and that, as to them, in the final award effect should not be given to the former awards. From this determination, embodied in an award, dated 6th January, 1908, in which the arbitrators stated that they proceeded upon their view of a disputed question of law, Quebec has taken the present appeal.

Counsel for Ontario maintain that the matter of jurisdiction is conclusively determined in her favour by the decision of the Judicial Committee in the matter of the "Uncollected Balances" (1). The question in that case was whether or not the arbitrators had jurisdiction to entertain the claim that Ontario should be charged with balances of purchase moneys of lands not yet patented, which she had failed to collect. The answer to this question depended, in the judgment of the Privy Council, upon whether or not Quebec's claim fell within the terms of the submission. The function of the arbitrators in regard to the principal of the Common School Fund was

> the ascertainment and determination of its amount, taking into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable.

Lord Robertson answers the contention, that the latter words confer jurisdiction to entertain the claim for "uncollected balances," by pointing out first that the Common School Fund "consists of moneys in the hands of Government"—according to article IX. of the award of 1870, moneys then in the hands of the Dominion and moneys theretofore or thereafter re-

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ceived by Ontario as proceeds of the sale of common school lands—and secondly that

the substance of the claim of Quebec is that the Ontario Government is to be debited with what in fact is not in their hands and is alleged to be uncollected owing to the fault of that Government * * * a claim founded on wilful neglect and default and of the nature of damages * * * heterogeneous to the questions which are clearly included in the submission.

The Judicial Committee determined that the words, "the amount for which Ontario is liable," (having regard to the nature of the Common School Fund, to the matters specified in the submission and to its recitals and general tenor) extend only to moneys received by Ontario from sales of school lands and do not include moneys uncollected "from intention or from negligence," which she ought to have in her hands—"moneys which are not in the hands of the defaulter" through her "wilful neglect or default," and which it is sought to treat as if they were in her hands and to debit against her. "This," say their lordships,

is an appropriate remedy for breach of trust, but it could be justified on no other ground.

In effect conceding that, under the decision of the Privy Council, the submission does not empower the Board to entertain claims against Ontario in the nature of claims for damages for breach of trust, counsel for Quebec maintain that the sums representing purchase moneys remitted or not collected in respect of patented lands should be deemed moneys constructively received by Ontario. In support of this contention they refer to Ontario legislation of 1872(1), whereby the Lieutenant-Governor in Council was

(1) 35 Vict. ch. 22.

authorized to reduce the prices of school lands sold prior to the 1st July, 1867, and to abate interest on unpaid instalments of purchase money,

provided that such reductions and abatements be made only in respect of and in proportion to the shares of Ontario and do not in any wise extend to or affect the share or interest of Quebec in such lands or the price thereof.

The statute further provided that a reduction or abatement should be affected by paying the amount thereof to the person entitled out of the Consolidated Revenue Fund, on his paying the full amount of the purchase money and interest, and it enabled the Lieutenant-Governor by Order in Council to confer on the Commissioner of Crown Lands authority to make such reductions or abatements.

The admitted facts are that no reductions or abatements in purchase money or interest were made by the Lieutenant-Governor in Council; all were in fact made by the Commissioner of Crown Lands; and there never was an Order in Council conferring authority on him pursuant to the statute. The position, having regard to what was actually done, is the same as if the statute had contained a provision that it should not come into force until declared operative by an Order in Council and such Order in Council had not been passed. Without an Order in Council conferring them upon him, the Commissioner could not exercise these statutory powers. Whatever he might do would not be done under the statute. No payments were ever made out of The Consolidated Revenue Fund, and, where there were reductions or abatements, the full purchase money and interest was not paid by the settler, but only the reduced amount.

The statute of 1872 was carried into the revisions

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of 1877 and 1887, the provisions as to payment in full and repayment out of The Consolidated Revenue Fund being omitted.

For Quebec it is contended that, although the statute was not complied with, the reductions and abatements made by Ontario should be deemed to have been made under its authority and that her liability and accountability should be the same as if the statute had been strictly carried out. I do not pause to inquire whether this position is now taken by Quebec for the first time, or whether it is or is not consistent with the allegations in her statement of claim. I assume that Quebec is within her right in presenting her present contention.

Ontario has always maintained that the reductions and abatements were made not as a matter of grace or favour to her settlers under the statute, but in the course of fair and prudent administration and for the advantage and benefit of both *cestuis que trustent.*

Notwithstanding one or two allusions to it in a couple of early letters from the Commissioner of Crown Lands, referred to by Mr. Lafleur, it is clear that the Act of 1872 was not acted upon, and I am unable to perceive why its mere presence upon her statute books should estop Ontario from so asserting.

The arbitrators have not found upon what authority Ontario purported to make reductions and abatements. Sir John Boyd states that the statute was never acted upon. Mr. Justice Burbidge, who had formerly said that Ontario should be deemed to have acted under it, though its terms were not followed, in his reasons in support of the award now in appeal, says:

Whatever view one may take of this statute, it is clear of course that the moneys in question have never been received by Ontario, and

by the award of 1870 the province is liable to the Common School Fund for moneys received, and a claim to have the fund augmented by moneys not so received is, as their lordships have pointed out, in the case of *The Attorney-General for Ontario* v. *The Attorney-General for Quebec*(1), a claim in the nature of damages for some neglect or default which, as decided in that case, is heterogeneous to the questions included in the submission of the 10th of April, 1892.

Sir François Langelier, the dissenting arbitrator, in his reasons makes no reference to the Ontario statute.

While it is, therefore, quite correct to say that the arbitrators have not in fact determined that the reductions and abatements were not made, or professedly made, by Ontario under the authority of the legislation of 1872, the admitted fact, that the reductions and abatements in question were all made by the Commissioner of Crown Lands without the authority of an order in council, appears to render that conclusion so clearly inevitable that it would seem supererogatory to require a formal statement of it by the arbitrators.

Even if the Commissioner of Crown Lands had assumed to act upon the authority of the statute of 1872, he having in fact acted without its authority and in a manner quite inconsistent with its provisions, a case of constructive receipt by Ontario of the amounts by which the purchase moneys were reduced or interest thereon was abated, could not, in my judgment, be made out. Had the order in council necessary to clothe the Commissioner with the statutory powers been in fact passed, the situation would have been very different. All that Quebec would then need to ask would be that the Commissioner's acts should be ascribed to the exercise of powers which he actually possessed. She is, however, asking that he should be

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deemed to have exercised powers which he did not possess. This, in my opinion, cannot be done.

No other ground has been suggested upon which it could be held that these moneys not actually received by Ontario should be treated as having been constructively received. Unless actual or constructive receipt of the moneys is established, any claim that Ontario should account for them as if they had been so received must be a claim "founded on wilful neglect or default and in the nature of damages,'" and as such not within the scope of the reference.

I fully realize that in the Privy Council judgment Lord Robertson defines precisely the immediate subject of the appeal and carefully points out that the claim then under consideration was not for moneys remitted or abated and not for moneys uncollected in respect of patented lands, but only for uncollected balances of purchase moneys of "land sold but no title to which had yet been granted." I do not read this portion of the judgment as meaning that the principles upon which it proceeds have no application to the case of reductions and abatements of purchase money of patented lands, but merely as pointing out that that particular question was not then presented for adjudication.

I am of opinion that the majority of the learned arbitrators were right in concluding that the awards Nos. 2 and 4 dealt with matters *dehors* the submission upon which they were founded.

If Ontario should be held bound by awards of the arbitrators as to matters not within the terms of the submission formally approved of by her Government by order in council, it must be either because a further parol submission binding upon her has been made

by the acts or conduct of her representatives and what has been thus submitted is now *res judicata*, or because she is estopped by her representatives and the arbitrators having, owing to a misconception of its scope, treated the matters now in question as within the terms of the formal submission.

As against the subject the terms of a written submission may be enlarged by acts of the parties and an award upon matters not within them may be supported by a parol submission so made. The scope of the submission is deemed to be thus widened although the extraneous matters have been dealt with only because, by common mistake of parties and arbitrators, they were assumed to be within it. *Thames Iron Shipbuilding Co.* v. *The Queen*(1), cited with approval in Russell on Awards (10 ed.) p. 54, and in Redman on Awards (3 ed.) p. 165.

But we are here dealing with a statutory reference and it is against the Crown that an estoppel is asserted.

The reference, according to the Acts of Ontario and Quebec, is of such "questions as the Governments of the Dominion and of the two provinces shall mutually agree to submit"; and, according to the Dominion Act,

> of such questions as the Governor-General and the Lieutenant-Governors of the said provinces shall agree to submit.

The three Acts were intended to be identic and, read together, they authorize the submission only of such questions as the several Governments with the concurrence of their respective heads, the Governor-General and Lieutenant-Governors, shall approve. Action by a Governor-General and his Government, or by a Lieutenant-Governor and his Government is invari-

(1) 10 B. & S. 33.

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ably taken by order in council. Its constating Acts, therefore, restrict the functions of the Board to matters the submission of which is sanctioned by orders in council, and the Governments themselves could not empower their representatives to submit, or the arbitrators to entertain, matters the submission of which had not been so authorized.

Moreover, apart entirely from the provisions of these statutes, executive acts in matters of such importance must be authorized by order in council. Todd's Parliamentary Government (2 ed.), Vol. II., p. 673. In these matters acts of representatives of the Crown not so authorized—even acts of individual ministers—will not bind the Government. *Reg.* v. *Lavery* in 1896(1), at page 322; *Reg.* v. *Waterous Engine Works Co.* in 1893(2), at pages 235-6-7; see, too, *Jacques Cartier Bank* v. *The Queen* (3), at page 92. It would be exceedingly dangerous if, where a Government has taken the precaution to determine and define by order in council the terms of a reference, matters not covered by the order in council could be brought within the jurisdiction of the arbitrators and the scope of the reference intentionally or unintentionally enlarged by the acts or conduct of counsel or solicitors. Neither counsel nor solicitors representing it could bind the Government of Ontario by a parol submission of matters not included in the formal submission ratified by order in council. Their deliberate acts beyond the tenor of their instructions would have no effect upon the rights of the Crown. Neither can their mistakes or accquiescence estop it, since the Crown may not be held bound by estoppel or be prejudiced by the

(1) Q.R. 5 Q.B. 310.
(2) Q.R. 3 Q.B. 222.
(3) 25 Can. S.C.R. 84.

laches, mistakes, or defaults of its servants or agents. The failure of its representatives to call in question the jurisdiction of the arbitrators and their subsequent acquiescent attitude towards the awards now said to have been made without jurisdiction cannot therefore be successfully invoked against Ontario.

The 5th section of the Ontario statute authorizing the submission empowers the arbitrators, or any two of them "to make one or more awards," and the 8th section provides that

the appointment of the arbitrators by order in council and their award in writing shall bind this province save in case of appeal on questions of law as hereinbefore mentioned.

The corresponding sections of the Quebec and Dominion statutes are couched in the same language. But these provisions, when read with the other sections of the statute, seem plainly to be applicable only to awards within the terms of the submission. Otherwise, although the statute by its first section restricts the scope of the arbitration to questions which "the Governments * * * shall mutually agree to submit," they might find themselves bound by an award in which the arbitrators had disposed of matters not merely dehors the submission, but which neither parties nor counsel intended should be dealt with, and such an award would not be subject to appeal unless the arbitrators had certified that in making it they had proceeded "on their view of a disputed question of law." A consideration of the results which would follow from holding that the words "awards" and "their awards in writing," in sections 5 and 8, respectively, include awards upon matters outside the submission and, therefore, made without jurisdiction, makes it clear, in my opinion, that the operation of these sec-

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tions is confined to awards which the arbitrators had jurisdiction to make and that it is such awards only which are declared binding.

Counsel for Quebec also argued that, because Ontario did not raise the question of jurisdiction in her statement of defence as required by the third of the general rules regulating their proceedings promulgated by the arbitrators, she cannot now be heard to say that awards Nos. 2 and 4 were made without jurisdiction. This is tantamount to saying that, unless their jurisdiction has been contested in the manner which the arbitrators have prescribed, it is to be deemed established as to all matters of claim dealt with by their awards. A sufficient answer to this contention seems to be that a Board constituted with defined statutory jurisdiction cannot by promulgating rules without statutory sanction enlarge that jurisdiction.

If the arbitrators were not *functi officiis* in regard to Quebec's claims in respect of reductions and abatements, Ontario was not precluded, however late in the proceedings, from raising before them the question of their jurisdiction, for "the King shall not be concluded if he has matter to serve him." (Brown on Estoppel, p. 206.) That Quebec did not consider the Board to be *functus* in regard to the matters covered by awards Nos. 2 and 4, is made reasonably clear by her application to the arbitrators on the 18th of December, 1907, for "an order and directions as to the method of making up the accounts of the Common School Fund * * * carrying into the same all the items and figures resulting from the various awards or orders of the Board, etc." It was on this motion that the question of jurisdiction arose. What the arbitrators have done is not to reconsider a question upon which they had formerly pronounced (this question of jurisdiction was not then

raised), but merely to refuse to perform a fresh act which, had their former awards been valid, might have been requisite to carry them into effect—an act, the performance of which would involve a further assumption by them of a jurisdiction with which they are now satisfied that they have not been clothed.

But, though the award now in appeal should be regarded as a re-consideration by the arbitrators of questions upon which they had already passed and a reversal of decisions which they had already formulated, the position taken by them would, in my opinion, be correct. To support it, it does not seem to me to be necessary to consider whether awards Nos. 2 and 4 are interim awards or final awards. The power of a Board of Arbitrators to re-consider matters within its jurisdiction and upon which it has definitely pronounced, although it has not made an award finally disposing of all matters submitted, may possibly be questionable. But that, which has been merely *coram non judice,* cannot be *res judicata.* An award made entirely without jurisdiction is absolutely void, and it is therefore unnecessary to set it aside. Whenever the nullity of their former action becomes apparent arbitrators not only may, but must, decline to hold themselves bound thereby. As to any future action on their part their duty in this respect is the same whether their former action be regarded as interim or as final in its character. Made without jurisdiction awards Nos. 2 and 4 are simply null and must be ignored. Nor does their nullity at all depend upon its declaration by the last award. That declaration may be viewed as a statement by the arbitrators of their reason for refusing to act upon awards Nos. 2 and 4, and the last award may itself be treated as merely a refusal so to act. In substance and reality it amounts to that. From what

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I have said it follows that in my opinion, such refusal was fully justified.

For these reasons, which are perhaps stated at unnecessary length, I am of opinion that the appeal fails and should be dismissed.

Appeal dismissed with costs.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

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* May 18.
* May 28.

AND

ARTHEMISE LACHANCE AND OTHERS (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Negligence—Operation of railway—Damages—Solatium doloris—Verdict—New trial.

The court refused to order a new trial or reduction of damages, under the provisions of articles 502, 503, C.P.Q., where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies J. dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.

Quœre.—In an action under article 1056 C.C. can a jury award damages *in solatium doloris? Robinson* v. *The Canadian Pacific Railway Co.* ([1892] A.C. 481) referred to.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal(1), affirming the judgment of the Superior Court, District of Saint Francis, entered by Demers J. upon the verdict of the jury at the trial, awarding the plaintiffs $4,000 damages with interest and costs.

In their answers to the questions submitted to them the jury found that the defendants had been

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

(1) Q.R. 35 S.C. 494.

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guilty of negligence which was the cause of the death of the deceased, and awarded damages which they assessed and distributed as follows: $300 to one of the sons of the deceased, aged 20 years and 7 months at the time of the accident; $700 to another son aged 14 years, and $3,000 to the widow. At the time of the accident by which deceased lost his life he was in his sixty-third year and, during the last year of his life, he had earned $600 in his employment as a car-repairer in the defendants' railway yard at the City of Sherbrooke, Que.

The material questions for decision on the appeal are stated in the judgments now reported.

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

Panneton K.C. for the respondents.

THE CHIEF JUSTICE.—In my opinion this appeal should be dismissed with costs for the reasons given in the court below.

GIROUARD J. agreed with Duff J.

DAVIES J.—The substantial question upon this appeal was whether or not the damages awarded by the jury to the widow and younger son were so "grossly excessive" within the meaning of those words as used in article 503 of the Code of Civil Procedure for Quebec as to justify the granting of a new trial.

So far as the damages awarded to the widow ($3,000) and the younger son ($700) are concerned I will not, after reflection, dissent from the view entertained by the rest of my colleagues that they are not

so grossly excessive as to make it evident that "the jurors had been influenced by improper motives" in fixing those amounts, though they are certainly much more than if I were a juror I would feel justified in awarding. We have not before us in the record any notes of the charge of the trial judge, and I am therefore unable to say whether the jury were "led into error" in awarding the sums they did.

With respect, however, to the $300 awarded the eldest son, Albert, I am not able to agree with the rest of the court. At the time of the accident this son was twenty years and seven months of age, and there is no proof in the record that he sustained any damage by reason of his father's death.

At the time of the accident he was working in Sherbrooke on the street railway there receiving $1.50 a day. Subsequent to his father's death he went to Montreal and entered an architect's office accepting, in order to learn his chosen profession, a much smaller wage than he was receiving at Sherbrooke.

His voluntary action in giving up after his father's death his wages of $1.50 a day and accepting a smaller wage in order to learn the profession of an architect is no reason why he should be made to benefit by that death.

No evidence of any kind was called to our attention shewing that if the father had lived he would have contributed to his son's support, and I do not think the condition of life of the parties, the wages they were respectively earning and the general circumstances of the case justify us or justified the jury in assuming that to be a fact upon which no evidence was offered and which cannot be said to be a fair inference deducible from the facts as proved.

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Duff J.

Under the circumstances I cannot agree that this part of the verdict can be upheld.

IDINGTON J. agreed with Anglin J.

DUFF J.—The only question presented by the appeal which requires discussion is that involved in the contention of the appellants that the verdict should be set aside as awarding damages which are unreasonably excessive.

It is not necessary to consider whether (a point which received some attention during the argument) in an action based upon article 1056 of the Civil Code a sum of money may be given as damages *in solatium doloris.* The decision of this court in *The Canadian Pacific Railway Co.* v. *Robinson*(1), to the effect that in such an action compensation for mental distress is not recoverable was supported upon grounds which are no doubt to some extent shaken by the later judgment of the Privy Council in the same case(2); whether so much shaken as to justify us in treating the question as open for reconsideration in this court may be left for determination when a case arises in which the point actually requires decision. The jury may unquestionably take into consideration every other loss and every other disadvantage which are in the natural and ordinary course attributable to the death out of which the action arises and can fairly be appraised in money. Here the compensation awarded is not so much out of keeping with the circumstances of the parties as to justify the presumption that in computing it the jury have taken into

(1) 14 Can. S.C.R. 105. (2) [1892] A.C. 481.

account as an element of loss anything which does not fairly fall within that description.

I would dismiss the appeal.

ANGLIN J.—The defendants appeal from the judgment of the Court of Review affirming the judgment for the plaintiffs entered at the trial upon the findings of the jury. The appeal is taken upon the grounds that the jury erred in negativing contributory negligence and that the amount of the verdict is excessive.

During the argument the court expressed its view that the finding of the jury upon the question of contributory negligence had not been successfully attacked.

While the amount of the damages awarded by the jury is greater than I would have allowed if myself making the assessment, I cannot say that the verdict is so grossly excessive that a new trial should be ordered under article 502 of the Code of Civil Procedure, or the verdict reduced under article 503. If the only element for consideration in estimating the damages in this case were the actual wages or earnings of the deceased, the task of the appellants in impeaching the verdict would be less difficult. But for loss of his services at home—of his care and protection of his wife and family—of his assistance in husbanding the family resources—for the loss of these and other kindred and substantial benefits and advantages of which the death of the husband and father has deprived them, the plaintiffs were justified in asking compensation from the jury under article 1056 C.C., which declares them entitled to recover "all damages occasioned by such death." While I have not disregarded the construction put upon this article in *The Canadian Pacific Railway*

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Co. v. *Robinson*(1), I express no opinion upon the question how far that decision should be deemed an authority since the judgment of the Privy Council in the same case(2).

It is only in very clear cases that I should feel warranted in interfering with the verdict of a jury on the ground that the amount of damages awarded is either excessive or inadequate. The able argument of counsel for the appellants has not made it clear to me that

> the amount awarded is so grossly excessive * * * that it is evident that the jurors have been influenced by improper motives or led into error. Art. 502, C.P.Q.

I would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Cate, Wells & White.*
Solicitors for the respondents: *Panneton & Leblanc.*

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(1) 14 Can. S.C.R. 105. (2) [1892] A.C. 481.

THE CITY OF MONTREAL (DEFENDANT) .... } APPELLANT;

1909
* May 5.
* May 28.

AND

JOSEPH P. BEAUVAIS AND OTHERS (PLAINTIFFS) .... } RESPONDENTS.

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

Constitutional law—Legislative jurisdiction—"Early closing by-law" —Municipal affairs—Property and civil rights—Local or private matters—Regulation of trade and commerce—B.N.A. Act, 1867, *s.* 91, *s.-s.* 2; *s.* 92, *s.-ss.* 8, 13, 16—57 *V. c.* 50 (*Que.*).

Provincial legislation authorizing a municipality to regulate the closing of shops of a particular character within its limits, is a subject which falls within the classes of matters enumerated as being within the exclusive jurisdiction of provincial legislatures under sub-section 13 or sub-section 16 of section 92 of the "British North America Act, 1867," and is not an interference with the exclusive legislative jurisdiction of the Parliament of Canada conferred by the second sub-section of section 91 of that Act.

Unless a by-law, enacted in good faith under the authority of the Quebec statutes, 57 Vict. c. 50, and 4 Edw. VII. c. 39, appears to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council it should not be set aside.

Judgment appealed from (Q.R. 17 K.B. 420) reversed.

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

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

(1) Q.R. 17 K.B. 420. (2) Q.R. 30 S.C. 427.

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The action was to set aside a by-law of the City of Montreal, enacted under the authority of the statutes of the Province of Quebec, 57 Vict. ch. 50, and 4 Edw. VII. ch. 29, and providing that all shops and places or business, with certain exceptions, within the city where merchandise was offered for sale by retail, should be closed at seven o'clock in the afternoon on certain days of each week, throughout the year, and should remain closed until five o'clock on the following mornings. At the trial Mr. Justice Archibald gave judgment in favour of the plaintiffs and his decision was affirmed by the judgment now appealed from.

The questions at issue on the appeal are stated in the judgment of Mr. Justice Duff now reported.

Atwater K.C. and *J. L. Archambault K.C.* for the appellant.

Bisaillon K.C. and *H. R. Bisaillon* for the respondents.

THE CHIEF JUSTICE.—This appeal is allowed with costs. I concur in the opinion stated by Mr. Justice Duff.

GIROUARD J. also agreed with the opinion stated by Duff J.

IDINGTON J.—Whatever possible implications may rest in the words "regulation of trade and commerce" as used in the "British North America Act," section 91, sub-section 2, I do not think, having regard to the scope and purposes of that Act, they ever were in-

tended to cover powers of legislation of the purely local and municipal character in question herein.

Nor do I find the by-law in question either exceeds the power given by this legislation or infringes any of the principles of reasonableness or impartiality often applied as tests of what a by-law must conform to in order to avoid any abuse of a statute conferring the authority to make by-laws.

I think the appeal should be allowed with costs.

DUFF J.—The principal question raised by this appeal concerns the competency of the legislature of Quebec to pass section 1 of 57 Vict. ch. 50, and section 1 of 4 Edw. VII. ch. 39. The last named enactment merely authorized the imposition of a penalty for breaches of by-laws passed under the first named, which is in the following words:

> In every city and town, the municipal council may make, amend and repeal by-laws ordering that during the whole or any part of the year, stores of one or more categories in the municipality be closed and remain closed every day or any day of the week, provided the times and hours fixed and determined for that purpose by the said by-laws shall not be sooner than seven o'clock in the evening and later than seven o'clock in the morning.

Applying the established canon the first step in examining the constitutional validity of this legislation is to ascertain whether the subject matter of it *primâ facie* falls within any of the categories which as subjects of legislation are assigned to the provinces by section 92 of the "British North America Act"; that is to say, whether reading the provisions of that section, as they stand without reference to section 91 the given subject-matter falls within one or more of those categories.

The judgment of the Judicial Committee in *Attor-*

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ney-General for Ontario v. *Attorney-General for Canada*(1), at pages 363 and 364, makes it plain that the power given to the provinces by sub-section 8 of section 92

> simply gives (to quote Lord Watson's words) provincial legislatures the right to create a legal body for the management of municipal affairs. * * * The extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the powers of section 92 other than 8.

With great respect, however, to the learned judges below who have taken the opposite view it appears to me that in the sense above indicated the subject-matter of the legislation in question falls within either sub-section 13 or sub-section 16; whether it falls within sub-section 13 may be a more debatable question, but, assuming it does not, then I must say I have great difficulty in finding any sound reason for holding that it is not a "local matter" within sub-section 16. The latest authoritative pronouncement respecting the criterion to be applied in ascertaining whether a given subject-matter of legislation falls within sub-section 16 is to be found in the judgment delivered by Lord Macnaghten, on behalf of the Judicial Committee, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders Association*(2), at page 79:

> The judgment (meaning the judgment of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada*(1)) therefore as it stands (says his lordship) and the report to Her late Majesty consequent thereon shew that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province—matters which are of a local or private nature "from a provincial point of view," to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, how-

(1) [1896] A.C. 348. (2) [1902] A.C. 73.

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ever carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

It seems clear that the matter of the hours at which shops of specified classes shall close in particular localities in the Province of Quebec is a matter which is substantially of local interest in the province and which in itself is not of any direct or substantial interest to the Dominion as a whole. Such being the case it is made clear in the passage quoted that we may leave out of consideration any of the indirect and collateral effects so strongly dwelt upon by counsel for the respondent which may be supposed to result from the legislation.

We have still to consider whether the enactment falls within any of the classes of legislation committed to the Dominion by the "enumerative heads" of section 91. Counsel for the respondent vigourously argued that it is an invasion of the field defined by sub-section 2, "The Regulation of Trade and Commerce." If the enactment were in its essential character an attempt to regulate trade and commerce within the meaning of that sub-section then, of course, it could not be sustained as an exercise of any of the provincial powers of legislation. A province cannot (it is probably needless to say) by simply restricting the operation of it territorially, validly enact legislation that, in its real scope and purpose, deals with a subject committed exclusively to the Dominion. *Union Colliery Co.* v. *Bryden* (1).

The meaning of the words "regulation of trade and commerce" in sub-section 2 of section 91, was con-

(1) [1899] A.C. 580, at p. 587.

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sidered by *The Citizens Insurance Co. of Canada* v. *Parsons*(1), at pages 112 and 113, and they were there held not to extend to the regulation of the contracts of a particular business or trade in a single province. Without defining the limits of the authority conferred their lordships expressed the view that the words quoted

> would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.

It would not, I think, be consistent with the views indicated by their lordships in this case (or with their subsequent decisions in the cases to which I have already particularly referred) to hold that legislation regulating the hours of the closing of shops of one or more classes in a particular province any more than legislation regulating the hours of labour in particular kinds of employment in one province alone would fall within the scope of the powers conferred by sub-section 2.

The by-law in question is also impugned as unreasonable and oppressive. To establish this contention in any sense *germane* to the question of the validity of the by-law it was necessary that the respondents should make it appear either that it was not passed in good faith in the exercise of the powers conferred by the statute or that it is so unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers. *Slattery* v. *Naylor*(2); *Kruse* v. *Johnson*(3).

(1) 7 App. Cas. 96. (2) 13 App. Cas. 446.
(3) [1898] 2 Q.B. 91.

In the last mentioned case Lord Russell of Killowen said, at page 99:

I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

In this case I can see nothing in any of the circumstances relied upon indicating that the municipal council have exceeded the bounds of the discretion which the law has committed to them.

ANGLIN J.—I agree with Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appellant:
Ethier, Archambault, Lavallée, Damphouse, Jerry & Butler.

Solicitors for the respondents: *Bisaillon & Brossard.*

1907
*May 29.

ARMOUR v. TOWNSHIP OF ONONDAGA.

Appeal per saltum—Jurisdiction.

MOTION for leave to appeal *per saltum* from the judgment of Riddell J., in the King's Bench Division of the High Court of Justice for Ontario(1), refusing to quash a by-law of the municipality.

The objection to the by-law was that it assumed to affect an Indian Reservation over which neither the corporation nor the Legislature of Ontario had any municipal authority. The appellant had, through no fault of his own, as he contended, been too late to appeal to a Divisional Court and leave for an extension of time was refused. Counsel supporting the motion admitted that he had no right to appeal to the Court of Appeal for Ontario.

The motion was refused by the Supreme Court of Canada, *Ottawa Electric Co.* v. *Brennan*(2) being followed.

Motion refused with costs.

Mackenzie for the motion.

Brewster contra.

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

(1) 14 Ont. L.R. 606. (2) 31 Can. S.C.R. 311.

GREEN v. GEORGE.

1907
*Nov. 13.

Appeal—Jurisdiction—Dismissing appeal.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of a Divisional Court (2), which had sustained an order made by Britton J., to set aside a judgment entered by default for non-appearance and allow the defendant to come in and defend the action. In delivering the judgment appealed from, Osler J., at page 580, states that an issue was directed by the Master in Chambers on an application made by the defendant (Green) on 17th March, 1906, to set aside a judgment entered against him on 6th October, 1890, and that the question to be determined on the appeal was whether or not the defendant, the plaintiff in the issue, was entitled to have the judgment set aside and vacated.

On motion, on behalf of the respondent, to quash the appeal to the Supreme Court of Canada, after hearing counsel the appeal was dismissed with costs.

Appeal dismissed with costs.

Charles Millar for the appellant.

C. A. Moss for the respondent.

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

(1) 14 Ont. L.R. 578. (2) 13 Ont. L.R. 189.

1907

*Nov. 25, 26.

SYDNEY AND GLACE BAY RAILWAY CO. v. LOTT.

Operation of tramway—Negligence—Injury to infant—Reckless running of car.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) reversing the judgment of Meagher J., at the trial, and maintaining the plaintiff's (respondent's) action with costs.

Upon seeing a child (aged one year and eleven months) approaching the tracks, the motorman sounded the whistle of the car he was driving; the child stopped for a moment and looked towards the car; the motorman then applied full speed without waiting to see whether the child retreated or making any effort to remove it from the dangerous position; the child moved quickly towards the tracks, was struck by the car and received the injuries for which damages were claimed by the action. By the judgment appealed from, it was held that the conduct of the motorman was recklessness for which the company was liable, that failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time-table and preventing delay to passengers and that the failure of the company to provide its car with a fender was evidence of negligence.

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

(1) 41 N.S. Rep. 153.

After hearing counsel on behalf of the appellants and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Mellish K.C. for the appellants.

W. B. A. Ritchie K.C. and *Tobin* for the respondent.

1908
*May 11.

REAR v. THE IMPERIAL BANK OF CANADA.

Banks and banking—Customer's cheque—Evidence of presentation—Refusal to pay—Action for damages.

APPEAL from the judgment of the Supreme Court of British Columbia(1) affirming the order made by Clement J., at the trial, who withdrew the case from the jury and dismissed the action with costs.

The action, by the present appellant, claimed damages from the bank for alleged wrongful refusal to cash the plaintiff's cheque upon his deposit account at the office of the bank where the cheque was presented for payment, there being, at the time of presentation, at the credit of his account sufficient funds to meet the amount of the cheque, which was duly drawn and indorsed. The defence was non-presentment. It appeared that a clerk from the bank which held the cheque presented it at the office of the defendant bank upon which it was drawn, but at the wrong ledger-keeper's wicket, and was directed to present it at another wicket to the clerk there who had charge of the ledger containing the drawer's account. There was no evidence that this was done, but the bank which held the cheque sent out a telegram stating that the drawer had no account. At the close of the plaintiff's evidence the trial judge withdrew the case from the jury for want of sufficient evidence, and his order was affirmed by the judgment appealed from.

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 13 B.C. Rep. 345.

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BANK OF
CANADA.

After hearing counsel on behalf of the appellant and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Lafleur K.C. for the appellant.

Bicknell K.C. for the respondent.

1908

*June 10.

DUMPHY v. MARTINEAU ET AL.

Negligence—Builders and contractors—Carelessness of workmen—Liability of employer—Dangerous appliances—Electric wires—Volunteer—New trial.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, sitting in review at Montreal, which dismissed the plaintiff's (appellant's) motion for a verdict *non obstante veredicto* or, alternatively, for a new trial, and dismissed her action, upon the findings of the jury at the trial.

The appellant's husband witnessed an accident which happened to an employee of the respondents, engaged in building operations on one of the public streets of the City of Montreal. A wire cable used on a derrick coming in contact with high voltage wires of the Montreal Light, Heat and Power Co., the employee received an electric shock and was being assisted by the foreman of the contractors. The appellant's husband rushed to their assistance and, in trying to extricate the employee, both were killed by electricity passing through the cable. The appellant brought a joint and several action, on behalf of herself and her children, against the contractors and the Montreal Light, Heat and Power Co.(2), for damages and charged the contractors with negligence in placing

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 17 K.B. 471.

(2) See *Dumphy* v. *Montreal Light, Heat & Power Co.*, [1907] A.C. 454; Q.R. 15 K.B. 11.

and operating the derrick in dangerous proximity with the live wires. The jury exonerated the appellant's husband from blame in voluntarily going to the rescue of the men who were in contact with the electric current, and found the company at fault for neglecting to protect their live wires, but found, also, that the contractors were not to blame for the accident. On these findings, in respect to the contractors, the case was referred by the trial judge to the Court of Review which dismissed the action against the contractors with costs. This decision was affirmed by the judgment now appealed from, Trenholme J. dissenting.

After hearing counsel on behalf of the parties, the Supreme Court of Canada allowed the appeal with costs in the Supreme Court of Canada and in the Court of King's Bench and ordered a new trial, the costs of the first trial in the Superior Court, District of Montreal, to abide the result.

Appeal allowed with costs.

Lafleur K.C. and *J. M. Ferguson K.C.* for the appellant.

Lamothe K.C. and *R. A. E. Greenshields K.C.* for the respondents.

1908
*Oct. 6.
*Oct. 7.

EMPEROR OF RUSSIA v. PROSKOURIAKOFF.

Jurisdiction—Service out of jurisdiction—Attachment—Manitoba King's Bench Rules 201, 202—*Non-resident foreigner—Detention of goods pending suit—Substitutional service—Consolidating appeals to Supreme Court of Canada—Questions of practice.*

APPEAL from judgments of the Court of Appeal for Manitoba(1) affirming, by equal division of opinion, the judgment of Mathers J.(2), setting aside two orders of the referee in chambers, one for an attachment and the other for substitutional service of the statement of claim.

After the judgment of the Court of Appeal, Richards J.A., in chambers, made an order consolidating the two appeals to the Supreme Court of Canada(3).

MOTION, on behalf of the respondent, was made to quash the appeal for want of jurisdiction. After hearing counsel for the parties the court reserved judgment, and, upon a subsequent day, the motion was granted and the appeal was quashed with costs.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal involving the consideration of questions of practice and procedure and this court has invariably refused to interfere

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

(1) 18 Man. R. 56. (2) 18 Man. R., at p. 59.
(3) 18 Man. R. 143.

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EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF.

The Chief Justice.

in such cases. See *Williams* v. *Leonard*(1), *per* Strong C.J., at page 410; and *Green* v. *George*(2), decided by this court on the 13th of November, 1907.

The motion is granted with costs.

Appeal quashed with costs.

Chrysler K.C. for the motion.

O'Connor contra.

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(1) 26 Can. S.C.R. 406. (2) 42 Can. S.C.R. 219.

1908
*Oct. 12.
*Nov. 10.

BRIDGMAN v. HEPBURN.

Sale of land—Principal and agent—Commission for procuring purchaser—Sale to person introduced by broker.

APPEAL from the Supreme Court of British Columbia(1) affirming the judgment of Irving J. which dismissed the appellant's (plaintiff's) action with costs.

The respondent, defendant, applied to the appellant for a loan of $58,000, but negotiations to that end and for the sale of certain lands for $56,000 failed. Subsequently the person with whom the appellant was negotiating was introduced by the prospective purchaser's banker to the agent of the mortgagees, and a sale was brought about for $50,000, the respondent paying the agent a commmission. An action by the appellant for a commission for having procured the purchaser was dismissed by Irving J. at the trial and his judgment was affirmed by the judgment appealed from, Morrison J. dissenting, and it was held that as the appellant had been engaged to find a purchaser at a certain price and having failed to do so he was not entitled to a commission on the sale subsequently made to the person originally introduced by him at a lower price. It was held by Hunter C.J. that when, *primâ facie,* the agreement is to pay a commission on a named price it is for the agent to shew in the clearest way that the intention of the parties was to pay a commission on any sum at which a sale might be effected.

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

(1) 13 B.C. Rep. 389.

1908

BRIDGMAN
v.
HEPBURN.

After hearing counsel for the parties on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Bodwell K.C. for the appellant.

Ewart K.C. for the respondent.

1908
*Oct. 14.

MEY v. SIMPSON.

Sale of land—Misrepresentation—Deceit—Contract—Warranty.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Cameron J., at the trial, which ordered a non-suit to be entered.

The defendant, on negotiations for the sale of wild lands, represented to the plaintiff's, appellant's, agent, that they were fairly good for farming. He had not seen the lands and did not state that he had done so. It turned out that a large portion of the lands was not good enough for farming purposes. By the judgment appealed from it was held that the plaintiff could not succeed in his action for the recovery of damages by reason of the defendant's misrepresentations, which should be considered merely as expressions of opinion not amounting to a warranty. *DeLasalle* v. *Guildford* (2) was followed.

On the appeal to the Supreme Court of Canada, after hearing counsel on behalf of the appellant and without calling upon counsel for the respondent for any argument, the court dismissed the appeal with costs.

Appeal dismissed with costs.

Phillips for the appellant.

H. A. Burbidge for the respondent.

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

(1) 17 Man. R. 597.

(2) (1901) 2 K.B. 215.

THE BANK OF OTTAWA v. HOOD.

1908
*Nov. 5.
*Dec. 1.

Contract—Delegation of payment—Revocation of authority.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal(1), affirming the judgment of the Superior Court, District of Montreal (Doherty J.), by which the appellant was ordered to account to the respondent for certain moneys received by it from the Government of Canada in connection with a contract for the construction of public works by the firm of Brewder & McNaughton.

The firm of Brewder & McNaughton, contractors for the works to be constructed for the Government, sublet their contract to the respondent. After assuming the contract, the respondent raised a question as to the manner in which payments for the works were to be made to him, on progressive estimates, and this formed the subject of correspondence between Brewder & McNaughton and the appellant, that firm having already given the Ottawa Branch of the bank a power of attorney to draw these moneys from the Government. The respondent wished to be furnished with an undertaking by the bank to pay to him in Montreal the moneys it received under the power of attorney, and the bank's manager, at Ottawa, wrote a letter to Brewder & McNaughton stating that "as each payment is made to the bank by the Government it will, with your con-

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

(1) Q.R. 33 S.C. 506.

1908
BANK OF OTTAWA v. HOOD.

sent, be forwarded to William Hood & Son in payment of their work." This arrangement having been assented to by Brewder & McNaughton, the bank wrote to the respondent in regard to drawing the moneys in Montreal, referred to the correspondence with Brewder & McNaughton and enclosed a copy of their letter assenting to the arrangement above mentioned. The moneys received by the bank from the Government were credited to the firm of Brewder & McNaughton and, upon their instructions, certain of the payments were forwarded to the respondent, none being so forwarded except those so authorized. Subsequently, Brewder & McNaughton notified the bank to make no more payments to the respondent and, on their order, some payments were made to another person. In August, 1901, Brewder & McNaughton became insolvent, the Government cancelled their contract and the last payment received from the Government by the bank was placed to their credit. On refusal by the bank to recognize the respondent's demands for payments made from time to time, he brought action against the bank for $3,300 alleged to be due to him out of $3,500 alleged to be in possession of the bank, and for an account of all moneys received by the bank from the Government. The defence to this action was, in substance, that the only agreement the bank made was with Brewder & McNaughton, that this contract was entered into in Ontario and was governed by the law of that province under which there existed no privity of contract between it and the respondent. The respondent's action was maintained at the trial and affirmed, on an appeal, by the Court of Review.

After hearing counsel on behalf of the parties on the present appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, delivered

judgment allowing the appeal and reversing the judgment appealed from with costs.

THE CHIEF JUSTICE and GIROUARD and MACLENNAN JJ. were of opinion that the appeal should be allowed with costs, but delivered no notes of reasons for judgment.

IDINGTON J. delivered notes of his reasons in which he discussed the evidence adduced and concluded that it did not shew that the bank had become a party to any contract with the respondent by which it was bound to account to him for the moneys received from the Government.

DUFF J. agreed with Idington J.

Appeal allowed with costs.

Shepley K.C. and *G. M. MacDougall K.C.* for the appellant.

Aimé Geoffrion K.C. and *R. A. E. Greenshields K.C.* for the respondent.

1908
*Nov. 10.
1909
*Feb. 12.

THE GREAT NORTHERN RAILWAY CO. OF CANADA v. FURNESS, WITHY & CO.

Construction of contract—Traffic agreement—Furnishing cargoes—Freight rates—Failure to find full cargoes—Vis major—Damages.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec(1), which maintained the plaintiffs' (respondents') action, in part, and increasing the amount awarded by that judgment to $3,992, with interest and costs.

The action was for the recovery of damages for breach of a contract to provide cargoes for the respondents' steamers, sailing from Quebec to Manchester, at current rates from Montreal. The alleged breach charged against the appellants (defendants) was that they failed to obtain freight rates for the vessels at Montreal rates and to provide freight for 60,000 cubic feet of unfilled space in the vessels. The items which made up the damages claimed were as follows:

SS. "Austriana."—Difference between Quebec and Montreal rates........	$ 635 02
SS. "Manchester Engineer."—Difference between Quebec and Montreal rate	1,073 16
SS. "Manchester Engineer." — 60,000 cubic feet of unfilled space......	2,284 00
	$3,992 18

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 32 S.C. 121.

The defence denied the contract as alleged; set up that the defendants had never been placed in default to settle and determine the freight rates obtainable in Montreal; that they were prevented from fulfilling their contract by a fortuitous event, the destruction of a bridge on their line of railway; that they could not be held responsible for the empty space without having been first put in default to fill the same, which had not been done, and that there was misjoinder, the plaintiffs' causes of action not being susceptible of being united. In the Superior Court, the action was maintained as to the items for differences in freight rates only, but, on appeal, the full amount of the plaintiffs' claim was allowed by the judgment now appealed from.

Alex. Taschereau K.C. appeared for the appellants.

T. Chase-Casgrain K.C. for the respondents.

The judgment of the court was delivered by

GIROUARD J.—The judgment should be slightly reduced. The appellants are responsible for the difference between the Quebec and Montreal freight rates, but only to the extent of forty per cent. of the cargo of the ship, in accordance with the letter of the 3rd of February, 1903. For this reason, I would deduct $533.25 from the amount of the judgment. We do not grant costs as the appeal fails on the substantial points. The judgment, reduced in amount as above stated is confirmed, without costs.

1909
GREAT NORTHERN RY. CO. OF CANADA v. FURNESS, WITHY & CO.

Judgment appealed from varied.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Casgrain, Mitchell & Surveyer.*

CANADA WOOD SPECIALTY CO. v. MORITZ.

1908

*Nov. 13.

Breach of contract—Place of performance—Foreign judgment—Action.

APPEAL from the judgment of the Court of Appeal for Ontario(1), which, in part, affirmed the judgment of Riddell J., at the trial.

The appellants (defendants) agreed to supply to the respondent, in London, Eng., a quantity of dowels or rungs for chairs, and, failing to do so, respondent obtained a judgment against them in England. He then brought action against them in Ontario, claiming on his judgment and also for damages for breach of contract. The plaintiff succeeded in all the courts below mainly on the ground that the goods to be supplied were of a special kind that could not be procured elsewhere. The appellants contended that there were plenty similar goods on the market and also that the plaintiff had not proved special damages.

After hearing counsel for the parties on the appeal, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Lynch-Staunton K.C. for the appellants.

Kirvan Martin for the respondent.

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 17 Ont. L.R. 53.

1908
*Dec. 15.

TORONTO RAILWAY CO. v. MILLIGAN.

Appeal—Jurisdiction—Amount in controversy—Addition of interest to amount of verdict—Stay of execution.

MOTION to quash an appeal from the decision of the Court of Appeal for Ontario(1), dismissing an appeal from the judgment of a Divisional Court, which affirmed the judgment in favour of the plaintiff entered by Clute J. upon the findings of the jury at the trial.

The action was to recover damages for personal injuries alleged to have been sustained through the negligence of the company in the operation of their tramway. At the trial the jury answered the questions submitted to them favourably to the plaintiff and assessed damages at $1,000, for which amount judgment was, some time subsequently, entered for the plaintiff. This judgment was affirmed by the judgment from which the appeal was sought. On 24th November, 1908, Maclaren J., in chambers, approved the security offered upon the proposed appeal to the Supreme Court of Canada(2), taking the view that interest from date of judgment on the verdict at the rate of five per cent. per annum, allowed by section 116 of the "Judicature Act," R.S.O. 1897, ch. 51, amounting to $43.50, should be added to the amount of the judgment and that, consequently, an appeal would lie.

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

(1) 17 Ont. L.R. 530. (2) 17 Ont. L.R. 370.

1908
TORONTO RY. CO. v. MILLIGAN.

G. F. Henderson K.C., in supporting the motion, referred to *City of Ottawa* v. *Hunter*(1); *Foster* v. *Emory*(2); *Dufresne* v. *Guévremont*(3); *Bresnan* v. *Bisnaw*(4), and cases there cited; Master's S.C. Prac., (3 ed.), p. 48, and cases there cited; *London County Council* v. *Schewzik*(5), at page 700; Beale, Cardinal Rules of Legal Interpretation (2 ed.), p. 32.

Chrysler K.C. contra, urged that the judgment on the verdict had been entered long before the decision of the Court of Appeal(6), and contended that the amount of $1,043.50 was the true amount in controversy on the present appeal. He also applied for a stay of execution to enable the company to apply for special leave to appeal, in case such leave was thought necessary.

The court granted the motion and quashed the appeal with costs, holding that the amount in controversy was, by the judgment appealed from, that at which damages had been assessed by the verdict of the jury and as interest had not been included in nor made part of such judgment it could not be added in order to bring the controversy involved within the amount limited by the "Supreme Court Act" in respect to appeals from the Province of Ontario.

The application for stay of execution was refused.

Appeal quashed with costs.

NOTE.—On a subsequent application to the Court of Appeal for Ontario, special leave to appeal was refused(7).

(1) 31 Can. S.C.R. 7.
(2) 14 Ont. P.R. 1.
(3) 26 Can. S.C.R. 216.
(4) Cout. Cas. 318.
(5) (1905) 2 K.B. 695.
(6) 17 Ont. L.R. 530.
(7) 18 Ont. L.R. 109.

1909
*Feb. 22.
*May 28.

HORNE ET AL. v. GORDON.

Partnership—Division of profits—Collateral business affairs—Trust —Account—Findings of fact.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Morrison J. and maintaining the plaintiff's (respondent's) action with costs.

The action was for the dissolution of an alleged partnership and an account and division of the profits derived from the sale of lands. The plaintiff, Gordon, and two of the defendants (the Hollands), were partners as real estate brokers and, aside from the agency business, entered into investments on their own account in the purchase of three lots of land, making a payment on account of the price. When instalments of the balance became due they took Horne into the transaction, it being agreed that he was to pay 85% of the price and the others to contribute 15%, and that the profits should be divided between them. Horne took over the agreements for the purchase and the lots were eventually conveyed to him. Under a verbal agreement, if a sale of the lands could be effected before the second instalment became due and netted 15% profit, the old partnership was to share in the profits equally with Horne. This sale was not made, but four months after the instalment fell due Horne sold a half interest. At the trial Morrison J. held

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

(1) 14 B.C. Rep. 138.

that no partnership had been proved and dismissed the action. By the judgment appealed from, it was held by Hunter C.J. and Clement J. that Horne was a trustee for the partnership consisting of the plaintiff, himself and his co-defendants. Irving J. was of opinion that Horne could not be called upon to account until he had been re-imbursed the money he had put into the transaction. The defendant Horne appealed to the Supreme Court of Canada in order to have the judgment of Morrison J. restored.

After hearing counsel on behalf of the parties to the appeal the Supreme Court of Canada reserved judgment and, on a subsequent day, the appeal was allowed with costs, Girouard and Idington JJ. dissenting. The majority of the court considered that the question being one of fact depending upon the proper view of conflicting testimony the judgment of the trial judge should not have been disturbed.

Appeal allowed with costs.

Lafleur K.C. and *W. S. Deacon* for the appellant.

Wallace Nesbitt K.C. and *Ladner* for the respondents.

1909
*March 8.

CONNOLLY v. GRENIER.

CONNOLLY v. MARTEL.

Ships and shipping—Perils of the sea—Unseaworthy ship—Evidence —Warranty—Inspection of shipping—Certificate of seaworthiness—Construction of statute—R.S.C. 1906, *c.* 133, *s.* 342*—Drowning of sailors—Negligence of master—Liability of owner.*

APPEAL from judgments of the Superior Court, sitting in review at Montreal(1), affirming the judgments of the Superior Court, District of Montreal, which maintained the actions with costs.

The actions were brought against the owner of the tug "Mersey" which was wrecked near Pointe Outarde, on the Lower St. Lawrence, in August, 1903, to recover damages in consequence of the drowning of two of her crew. At the formal investigation into the causes of the foundering of the ship, the wreck commissioner, assisted by two nautical assessors, reported that the ship was seaworthy when she left Quebec on her last voyage; that her life-boat and appliances were sufficient to have saved all lives on board had the master made proper use of them, and that the evidence did not explain the cause of the casualty by which these sailors' lives were lost. It was also found that the master and mate had been guilty of cowardice and desertion of the ship and their certificates were cancelled. The actions were first brought in the District of Quebec, but the court declared itself incompetent and referred the case to the Superior Court for the

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

(1) Q.R. 34 S.C. 405.

1909

CONNOLLY
v.
GRENIER.

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MARTEL.

District of Montreal. In the latter court the defendant (appellant), pleaded prescription, a year having elapsed before the actions came before a court of competent jurisdiction, that deceased were not passengers, but were engaged as part of the ship's crew, that the ship was seaworthy and that the disaster was due to the perils of the sea. At the trials and by the judgments appealed from the plea of prescription was dismissed and judgments were entered in favour of the plaintiffs, respectively. The defendant raised the same questions on the present appeals.

After hearing counsel on behalf of the appellant and without calling upon counsel for the respondents for any argument, the Supreme Court of Canada dismissed the appeals with costs.

Appeals dismissed with costs.

Perron K.C. for the appellant.

Beulac for the respondents.

1909
*March 15.
*April 5.

PETERS v. PERRAS ET AL.

Practice—Evidence—Impeachment of testimony—Notice of imputations—Promissory note—Fraud—Suspicious circumstances—Transfer of negotiable instrument.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Scott J., at the trial(2), which dismissed the plaintiff's action with costs.

The action was upon a promissory note, which had been obtained by fraud and had been transferred by the payee to the plaintiff, who sought to recover upon it as a holder in due course for valuable consideration without notice of invalidity. At the trial Scott J. dismissed the action, holding that the makers were not liable, that the note, on its face, shewed that interest thereon was overdue at the time of the transfer, and, consequently, that the transferee was put upon inquiry before purchasing it, and that, this circumstance, coupled with other suspicious circumstances, prevented the plaintiff being deemed a holder in due course. The Supreme Court of Alberta, *in banco,* affirmed this decision by the judgment appealed from, and held that the burden of proving affirmatively that he became holder of the note in question honestly and in good faith had not been satisfied by the plaintiff, and that his neglect to make inquiries, though not inconsistent with good faith, constituted some evidence of bad faith.

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

(1) 1 Alta. L.R. 201. (2) 1 Alta. L.R. 1.

1909
PETERS
v.
PERRAS.

After hearing counsel for the parties on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, allowed the appeal and maintained the action with costs, the Chief Justice and Idington J. dissenting. The majority of the court were of the opinion that the courts below were not justified, under the circumstances of the case, in refusing to accept the uncontradicted testimony of a witness, (examined abroad under commission), as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon as sustaining or pointing to the imputation of bad faith and no opportunity afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based. *Browne* v. *Dunn*(1) applied; *Union Investment Co.* v. *Wells*(2) followed.

Appeal allowed with costs.

Wallace Nesbitt K.C. for the appellant.

S. Beaudin K.C. and *Belcourt K.C.* for the respondents.

(1) 6 R. 67. (2) 39 Can. S.C.R. 625.

1908
*June 3.
*Oct. 6.

PENSE v. THE NORTHERN LIFE ASSURANCE CO.

Life insurance—Construction of policy—Payment of premium—Time for payment—Forfeiture.

APPEAL from the decision of the Court of Appeal for Ontario(1), reversing the judgment of Mabee J., at the trial(2), in favour of the plaintiff, and dismissing the plaintiff's action with costs.

The plaintiff's action was upon two life insurance policies for $1,000 each assigned to him by the insured.

The first policy provided that if, after the payment of three full years' premiums the policy should lapse for non-payment of any premium, the insurers would, upon application, payment of all indebtedness and the surrender of the policy and the last renewal receipt, within three months after such lapse, issue a non-participating paid-up policy "for as many twentieth parts of its principal amount as complete annual premiums shall have been paid or apply the same towards the purchase of extended insurance in accordance with a schedule indorsed; secondly, that if, after the payment of five full years' premiums, the policy should lapse as aforesaid, the insurers would, upon application, etc., within three months after such lapse, pay to the holder of the policy the cash surrender value shown in the schedule, or, at the option of the holder, lend him any sum, not exceeding the sum shown in the schedule, for one year." The premiums on the policy were paid for

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 15 Ont. L.R. 131. (2) 14 Ont. L.R. 613.

five years; those for the sixth and subsequent years were not paid when the insured died. The trial judge held that the holder of the policy had a right to have it extended under the first of the above provisions without an application therefor and compliance with the other conditions, as the insurers were bound to apply the moneys in hand to his credit, and that the policy, therefore, was in force when the insured died. This the Court of Appeal reversed, holding that the application, payment, etc., applied to all the benefits to be given to the holder under these conditions, that the policy had lapsed when the insured died and there was no right of action.

The question on the second policy was whether or not the premiums after the first two years were payable in advance. The policy was dated 31st March, 1903, and provided that "in consideration of the application * * * and of the sum of $17.95, being the premium for one year's term insurance, to be paid in advance to the company, * * * on the delivery of this policy and the further sum of $33.90 payable annually for an additional term of nineteen years, the first of such additional payments to be made on the 20th day of March, A.D. 1904, insured the life, etc." The premiums were paid up to the year 1905. The insured died in November, 1906. If the premium was due in advance, in 1906, the policy had lapsed for non-payment. The trial judge held that this provision of the policy, not being clear and explicit, should be construed most favourably to the insured and so as to avoid a forfeiture, and, so reading it, his conclusion was that only the first two years' premiums were payable in advance and that, therefore, the policy was in force when the insured died. The Court of Appeal

1908
PENSE
v.
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ASSURANCE
Co.

reversed this holding also, deciding that every year's premium was payable on the 20th of March, and that there was no policy, therefore, in existence, in November, 1906, when the insured died.

The action was dismissed as to both policies.

After hearing counsel for both parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs. Girouard, Maclennan and Duff JJ. adopted the reasoning of Meredith J., in the Court of Appeal, and Davies J, was of opinion that the appeal should be dismissed for the reasons given by the Court of Appeal. Idington J. could see no reason to disturb the conclusions reached by the Court of Appeal.

Appeal dismissed with costs.

A. B. Cunningham for the appellant.

Purdom K.C. for the respondents.

McCLELLAN v. POWASSAN LUMBER CO.

1909
*May 19.

Easement—Private way—Unity of ownership—Subsequent severance —Revival of easement—Reservation.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), which set aside the verdict for plaintiff at the trial and dismissed the action.

In 1891 two parcels of land, on one of which was a grist mill and the other a saw mill, theretofore owned by different persons, became vested in one owner who, in 1894, conveyed away to defendants' (respondents') predecessors in title both parcels except certain lots including that on which stood the grist mill which was afterwards conveyed to the plaintiff. A road from the highway over a part of the saw mill property had been used for access to the grist mill from the time it was built, but was obstructed by the defendants in 1906, and an action was brought for an injunction to restrain them from continuing such obstruction and for damages.

The plaintiff succeeded at the trial, but the judgment in his favour was reversed by the Divisional Court, which held that the easement was extinguished by the unity of ownership in 1891, and that, as the subsequent conveyances contained no reservation, express or implied, of the right to use the road, the plaintiff could not recover. This judgment was affirmed by the Court of Appeal.

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

(1) 17 Ont. L.R. 32. (2) 15 Ont. L.R. 67.

1909

McClellan v. Powassan Lumber Co.

After hearing counsel for both parties the Supreme Court of Canada dismissed the appeal for the reasons given by the courts below.

*Appeal dismissed with costs.**

Laidlaw K.C. for the appellant.

Armour K.C. and *McCurry* for the respondents.

*Leave to appeal to the Judicial Committee of the Privy Council granted 29th June, 1909.

ANDERSON v. FOSTER.

1909

*May 6.
*May 28.

Sale of land—Contract for sale—Time of essence—Delay of vendor —Description—Statute of Frauds—Specific performance.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), which set aside the verdict for defendant at the trial and ordered specific performance of a contract for the sale of land.

The plaintiff, Foster, made an offer by letter to purchase defendant's land in Toronto, describing it as "No. 22 Ann Street," and stating the dimensions. The deed was to be prepared at vendor's expense and there was a provision that "time shall be of the essence of this offer." The defence to the plaintiff's action for specific performance of the contract to purchase was that plaintiff had not performed his part within the time limited by the offer and that the description of the property being defective, as there was no lot on Ann Street numbered 22, the Statute of Frauds was not complied with.

The Court of Appeal held that time was of the essence of all the terms of the contract and did not relate only to the acceptance of the offer as held by the Divisional Court; that the delay by the plaintiff was due to defendant's failure to prepare the deed and was, therefore, no answer to the action; and that as the property was sufficiently described without reference

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

(1) 16 Ont. L.R. 565. (2) 15 Ont. L.R. 362.

1909

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v.
FOSTER.

to the number of the lot the Statute of Frauds was complied with.

After hearing counsel on behalf of both parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal.

Appeal dismissed with costs.

Watson K.C. for the appellant.

Marsh K.C. for the respondent.

CHARREST ET AL. v. MANITOBA COLD STORAGE CO.

1909
*May 12, 13.
*May 28.

Bailment—Negligence—Evidence—Damages—Storage of meat.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Dubuc C.J., at the trial, by which the plaintiffs' action was dismissed with costs.

The decision of the case depended upon evidence as to the condition of frozen meat placed in cold storage by the plaintiffs in the defendants' warehouse for safekeeping. The trial judge found that the evidence established that the meat was in good and sound condition when delivered at the defendants' warehouse; that the warehouse was properly constructed for the purpose of cold storage, the plant of first-class modern type and sufficient power; that it was operated with proper care and by men of sufficient knowledge to conduct the business in an ordinary satisfactory manner, and that the actual cause of the spoiling of the meat, for which damages were claimed, had not been disclosed by the evidence. The judgment dismissing the plaintiffs' action was affirmed by the judgment now appealed from.

After hearing counsel for the parties on the appeal, the Supreme Court reserved judgment and, on a subsequent day, the appeal was dismissed with costs.

Appeal dismissed with costs.

Wallace Nesbitt K.C. for the appellants.
Ewart K.C. for the respondents.

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

(1) 17 Man. R. 539.

1909
*May 19, 20.
*Oct. 5.

THOMAS A. LOVELESS (DEFENDANT) .... APPELLANT;

AND

FREDERICK ARDIEL FITZGERALD AND OTHERS (PLAINTIFFS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Covenant not to assign—Assignment to co-partner—Right to renewal—Notice.

Where partners are lessees of a term for years and have covenanted not to assign or sub-let without the consent in writing of the lessor an assignment by one of his interest in the lease to his co-partner without such consent is a breach of such covenant. *Varley* v. *Coppard* (L.R. 7 C.P. 505) followed.

The lease provided that, having performed all their covenants and agreements contained in the lease the lessees on giving six months' notice in writing to the lessor before the expiration of the term that they required it, would be entitled to a renewal.

Held, that a breach (after the said notice was given) of their covenant in the lease not to assign without leave caused a forfeiture of the right to renewal.

Judgment appealed from (17 Ont. L.R. 254) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the plaintiffs.

In 1904 the appellant Loveless and one Barbour, partners in business, became assignees of a lease for a term to expire in August, 1907, and signed an agree-

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

(1) 17 Ont. L.R. 254 *sub nom. Fitzgerald* v. *Barbour*.

ment to pay the rent and observe all the obligations, stipulations and agreements contained therein. The lease contained a covenant by the lessees not "to assign or sub-let without leave," and provided that the lessors, in case the lessees had kept and performed all their covenants and agreements and should give notice in writing to the lessors six months before the term expired that they required it, would grant a renewal of the lease for a further term of five years.

The six months' notice for renewal was given, but before the term expired the partnership between the lessees was dissolved and Barbour, without leave of the lessors, assigned all his interest in the lease to his co-lessee Loveless. When the term ended the lessors refused to renew and brought an action for possession of the premises.

The two questions raised for decision in the case were: 1. Was the assignment by Barbour to his co-partner a breach of the covenant not to assign without leave? 2. If it was, having been made after the notice was given did it work a forfeiture of the right to a renewal?

The trial judge and Court of Appeal held that there had been a breach of the covenant not to assign, which entitled the lessors to re-enter and take possession of the premises. The lessee Loveless appealed from the judgment of the Court of Appeal to the Supreme Court of Canada.

Gibbons K.C. and *Geo. S. Gibbons* for the appellant. As soon as the notice was given, no breach having occurred up to that time at all events, the term was

1909

LOVELESS v. FITZGERALD.

extended. 24 Cyc., p. 1008; *Finch* v. *Underwood*(1); *Bastin* v. *Bidwell*(2).

The breach, if any, was waived by the subsequent acceptance of rent. Foa on Landlord and Tenant (4 ed.), pp. 263 *et seq.; Davenport* v. *The Queen*(3); *Croft* v. *Lumby*(4).

A transfer to a co-partner is not a breach of the covenant not to assign. *Grove* v. *Portal*(5); *Corporation of Bristol* v. *Westcott*(6).

Varley v. *Coppard*(7) is not an authority against the present appellant. In that case there was no privity of covenant between the lessor and the assignee of the term, while here the retiring partner, Barbour, still remains liable to the lessor on his covenants. Moreover, later cases have shaken its authority. See *Langton* v. *Henson*(8); *Horsey Estate, Limited* v. *Steiger*(9).

Shepley K.C. and *Judd K.C.* for the respondents. The lessees were tenants in common only. R.S.O. [1897] ch. 119, sec. 11.

No case of waiver is made out. The trial judge decided against appellant on the point and his decision was affirmed by the Court of Appeal.

Varley v. *Coppard*(7) is conclusive in our favour. It has been followed in England and was discussed in *Munro* v. *Waller*(10), where the distinction was made between parting with possession and assigning.

(1) 2 Ch. D. 310.
(2) 18 Ch. D. 238.
(3) 3 App. Cas. 115.
(4) 6 H.L. Cas. 672.
(5) [1902] 1 Ch. 727.
(6) 12 Ch. D. 461.
(7) L.R. 7 C.P. 505.
(8) 92 L.T. 805.
(9) [1898] 2 Q.B. 259; [1899] 2 Q.B. 79.
(10) 28 O.R. 29.

THE CHIEF JUSTICE was of opinion that the appeal should be dismissed for the reasons given in the court below.

DAVIES J.—During the argument I was inclined to the opinion that Mr. Gibbons has successfully distinguished *Varley* v. *Coppard*(1). Subsequent reflection and consultation with my colleagues however convinced me that I was wrong, and that in this appeal that case should be treated as correctly stating the law applicable to the facts before us. I have read the opinion of Mr. Justice Anglin and concur in his reasoning and conclusion.

IDINGTON J. and DUFF J. agreed with Anglin J.

ANGLIN J.—The defendant Loveless appeals from the judgment of the Court of Appeal for Ontario affirming the judgment of Meredith C.J. awarding to his landlords possession of certain leasehold premises in the City of London.

The original lease of these premises, made for a term of five years to N. F. Yeo and A. P. Yeo, was assigned by them with the approval of the lessor to the defendants Barbour and Loveless, who were partners in trade. It contained a provision for extension for a further term of five years upon the tenants observing all their covenants and giving written notice six months before the expiration of the original term of their desire for such extension. The lessees had covenanted not to assign without leave. The tenants, Barbour and Loveless, gave due notice of their desire for an extension. After the notice had been given and before the expiry of the original term they dissolved

(1) L.R. 7 C.P. 505.

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partnership and thereupon Barbour, without the leave of the landlords, assigned his interest in the lease to Loveless. This, the plaintiffs maintain, was a breach of the covenant not to assign without leave, and entitled them to refuse the extension demanded. The tenant Loveless refusing to quit the premises on the expiry of the original term, this action was brought to recover possession from him.

The defendant rests his appeal upon two grounds: (1) that the transfer without leave, upon dissolution of the partnership, of the interest of his erst-while partner in the leasehold premises, which had been occupied by the partnership, did not constitute a breach of the covenant against assignment without leave; (2) that if it were such a breach of covenant it would not disentitle him to the benefit of the extended term because it occurred after he and his former partner had given to the landlords notice of their intention to exercise their option for an extension of their term; that an assignment thereafter could operate only—if at all—as a ground of forfeiture, and that as a ground of forfeiture it had not only not been taken advantage of, but had been waived by the landlords' acceptance of two gales of rent.

The first point is, in my opinion, concluded against the appellant by *Varley* v. *Coppard*(1). The only differences between that case and this are, first, that there the lease was made originally to a single tenant and was afterwards assigned to two partners in trade, while in the present case there were two original lessees, who, with the landlords' consent, assigned to the appellant and his partner; and, second, that in

(1) L.R. 7 C.P. 505.

Varley v. *Coppard*(1) there was merely privity of estate between the landlord and the assignees of the lease, whereas here the appellant and his partner had covenanted directly with the landlord for payment of rent, etc.

The rights and obligations of assignees of a lease, who hold subject to a covenant against assignment without leave, must in my view be the same, whether the lease was originally made to a single lessee or to several lessees. I find nothing in the slight difference in this respect distinguishing the present case in principle from *Varley* v. *Coppard*(1).

That there is privity of covenant between the landlord and the assignees in the present case and that the assignor therefore remained liable to the landlord for the rent of the premises for the remainder of the term, notwithstanding the assignment, whereas in *Varley* v. *Coppard*(1) there being no such privity of covenant but only privity of estate, the assignor's liability to the landlord for rent ceased upon the assignment, seems at first blush a difference of substance. But the covenant not to assign without leave cannot mean one thing where the liability of the assigning tenant to pay rent depends merely upon privity of estate and quite another where that liability rests also upon covenant. What amounts to a breach in the one case must likewise constitute a breach in the other. The adventitious circumstance that the out-going partner remained liable for rent because of his covenant to pay rent during the term cannot affect the construction of the entirely independent covenant not to assign without leave. The transfer may be less palpably

(1) L.R. 7 C.P. 505.

injurious to the landlord—indeed, it may be that it does not injure or prejudice him at all—yet, if *Varley* v. *Coppard*(1) is rightly decided, it is none the less a breach of the covenant and entitles the landlord to exercise whatever rights accrue to him upon such a breach.

In *Corporation of Bristol* v. *Westcott*(2) Jessel M.R., referring to *Varley* v. *Coppard*(1), said:

> I do not know that I should have decided even that case in the same way for the deed was not in point of law an assignment,

a remark which is relied upon as casting some doubt upon the earlier case. But in *Langton* v. *Henson*(3), Buckley J. points out that this was said "by way of dictum," and he adds:

> Where one of two joint tenants assigns to another, or, as Sir George Jessel prefers to call it, releases to the other, he does most effectually deal with the estate; he destroys the privity of estate between himself and his lessor; the estate is affected; something has been parted with. The case of *Corporation of Bristol* v. *Westcott*(2), in my opinion, leaves *Varley* v. *Coppard*(1) altogether unaffected.

Hawkins J. expresses the same view in *Horsey Estate, Limited* v. *Steiger*(4).

As partners, the appellant and his former partner were not joint tenants, but tenants in common of the leasehold premises which were partnership property, and therefore a conveyance of the interest of one to the other must be by assignment and not by release.

Varley v. *Coppard*(1), decided in 1872, has been accepted by leading text-writers as authority for the proposition that an assignment without leave by one of two lessee-partners to the other is a breach of a covenant not to assign without leave. Woodfall (18

(1) L.R. 7 C.P. 505.
(2) 12 Ch. D. 461, at p. 465.
(3) 92 L.T. 805.
(4) [1898] 2 Q.B. 259, at p. 264.

ed.), p. 755; Foa (4 ed.), p. 278. It has been followed since the *Bristol Case*(1) in what appears to be a carefully considered case by a Divisional Court in Ontario, *Munro* v. *Waller*(2), and should, I think, be now regarded as an accepted authority.

The right of the lessees to the further term is made to depend upon the fulfilment of two conditions precedent—one, their giving six months before the expiration of the term originally created written notice that they require a further term; and the other, performance by them of all covenants in the lease. No question arises as to the first condition; the requisite notice was duly given at a time when there had been no breach of covenant by the tenants.

The appellant maintains that the second condition means not that the lessees must as a condition precedent fulfil their covenants throughout the entire original term, but that observance of them shall be required as a condition precedent only up to the time when notice requiring a further term is given and that a breach thereafter is not of a condition precedent, but merely of an ordinary covenant giving to the landlord a right of forfeiture of the further term vested in the tenants by their notice. It is obvious that if this contention should prevail, the lessees, by giving the requisite notice for extension immediately after taking their lease, would entirely eliminate observance of their covenants as a condition precedent to their right to have such extension.

This certainly was not the intention of the parties, and I find nothing in the agreement to warrant such a construction. The agreement is that the lessor "will

(1) 12 Ch. D. 461. (2) 28 O.R. 29.

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allow the lessees to occupy the said premises for a further term of five years commencing at the expiration of the term hereby created," "if the lessees have duly kept and performed all the covenants, provisos, and agreements in these presents contained." These words clearly import observance of covenants, etc., up to the time at which the lessor agrees to permit occupation for the further term to begin, which is at "the expiration of the term hereby created."

The appellant relies upon a statement of Mellish L.J. in *Finch* v. *Underwood*(1), to the effect that such a condition is satisfied if the covenants "have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for." Kay J., quoting this language in *Bastin* v. *Bidwell*(2), at p. 250, says: "That must mean, I suppose, at the time when the notice was given."

In neither of these cases was it necessary to determine this point. In both the lessees had broken their covenants to repair before the notice for renewal was given, and the state of disrepair actually subsisted at the date of the notice. I must respectfully decline to follow this mere *obiter dictum* of Mellish L.J., as interpreted by Kay J.

The cases of *Hersey* v. *Giblett*(3), and *Nicholson* v. *Smith*(4), cited by the appellant upon this point do not appear to be at all relevant.

The assignment by Barbour to Loveless constituting a breach of a covenant at a time when its observance was still a condition precedent to the right of extension, the landlord was justified in refusing the extension demanded. The appellant is therefore an

(1) 2 Ch. D. 310, at p. 315.
(2) 18 Ch. D. 238.
(3) 18 Beav. 174.
(4) 22 Ch. D. 640.

overholding tenant and is subject to ejectment at the suit of his landlord.

The appeal fails, and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Meredith, Judd & Meredith.*

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*Oct. 5.
*Oct. 6.

ALPHONSE ST. HILAIRE (DEFENDANT) .... APPELLANT;

AND

MATHIAS LAMBERT (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Appeal—Jurisdiction—Alberta Liquor License Act—Cancellation of license — Persona designata — Curia nominatim — "Originating summons"—Court of superior jurisdiction.

On an application for the cancellation of a liquor license issued under the "Liquor License Act" of the Province of Alberta, a judge of the Supreme Court of Alberta, in chambers, granted an originating summons ordering all parties concerned to attend before him, in chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada,

Held, that the case came within the principle decided in *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse* (16 Can. S.C.R. 606), and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal.

MOTION to quash an appeal from the judgment of the Supreme Court of Alberta reversing an order by Beck J., in chambers, and ordering that a liquor license issued to the appellant should be cancelled.

The circumstances material to the question raised upon the motion are stated in the head-note.

C. A. Grant, for the motion. The controversy involved on this appeal did not arise in a court of super-

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

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ior jurisdiction. The "originating summons" was issued under section 57 of the "Liquor License Ordinance," by Beck J. merely as *persona designata* or *curia nominatim,* and, in hearing and deciding the appeal from his order, the full court was acting in a similar capacity. There was no "action" taken within the meaning of the definition contained in the second section of the Alberta statute, 7 Edw. VII. ch. 3. This court, consequently, has no jurisdiction to entertain the present appeal. The matter in controversy arose before the Board of License Commissioners, appointed under the "Liquor License Ordinance," and the subsequent proceedings, under section 57 of that ordinance, were merely the summary procedure provided thereby in reference to the license granted by them. We rely upon the decisions in *Angus* v. *The Calgary School Trustees*(1); *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse*(2); *The James Bay Railway Co.* v. *Armstrong*(3), and *The Montreal Street Railway Co.* v. *The City of Montreal*(4).

Chrysler K.C. contra. The "originating summons" was taken in this case in the manner provided by Order 40, Rules 469 to 474, of the "Judicature Ordinance" (1898), and was an independent proceeding in the Supreme Court of Alberta, the court of superior jurisdiction in that province. Reference should be made also to the Acts amending that ordinance, 7 Edw. VII. ch. 3, sec. 9 (Alta.), and 8 Edw. VII. ch. 7. We rely upon the decision in *The North British Cana-*

(1) 16 Can. S.C.R. 716.
(2) 16 Can. S.C.R. 606.
(3) 38 Can. S.C.R. 511.
(4) 41 Can. S.C.R. 427.

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dian Investment Co. v. *The Trustees of St. John School District*(1), and the 44th and 36th sections of the "Supreme Court Act," R.S.C. 1906, ch. 139.

The judgment of the court was delivered, as follows, by

THE CHIEF JUSTICE.—The majority of the court are of opinion that this case comes within the principle decided in *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse*(2), and that we are without jurisdiction.

The motion to quash is granted, with costs which are taxed at fifty dollars.

Appeal quashed with costs.

Solicitor for the appellant: *Louis Madore.*

Solicitors for the respondent: *Bishop, Grant & Delavault.*

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(1) 35 Can. S.C.R. 461.

(2) 16 Can. S.C.R. 606.

AHEARN & SOPER, LIMITED (OPPOSANTS) .... APPELLANTS;

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*May 10, 11.
*Oct. 5.

AND

THE NEW YORK TRUST COMPANY (CONTESTANTS) .... RESPONDENTS.

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

Privileges and hypothecs—Tramway—Operation on highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute, 3 *Edw. VII. ch* 91 *(Que.)—Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code.*

A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture-bonds hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture-holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern:—

Held, that whether, at the time of such sale, the cars in question were movable or immovable in character the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution.

Per Girouard J.—Duff J., *contra.*—After the cars in question had been delivered to the tramway company and used by it in the operation of their tramway, they became immovable by destination.

In the result, the judgment appealed from (Q.R. 18 K.B. 82) was affirmed.

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*PRESENT:—Girouard, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Quebec, by which the appellants' *opposition afin de conserver* was dismissed with costs.

The property of the Lévis County Railway Company, consisting of certain real estate and other property, including an electric tramway and the cars used in the operation of the tramway system, was sold in execution and the appellants filed an *opposition afin de conserver* claiming the right to be paid, by privilege as unpaid vendors, the amount due to them by the railway company for the price of a number of the tramcars, a rotary plough and a tower-waggon which they had sold and delivered to the railway company some time previously. The cars, etc., were operated by the company as part of their electric tramway system upon rails laid, by permission of the municipal corporation, upon public streets, the title to which remained vested in the municipality, the railway company never acquiring any title as proprietor to the soil in these streets which were public highways of the municipality.

The opposition was contested by the trust company, which claimed the whole amount levied by the sheriff as prior mortgagees or hypothecary creditors. Their claim was based upon a deed of hypothec by which, under art. 5132 R.S.Q., the railway company, in order to secure the payment of an issue of debenture-bonds held by the trust company, mortgaged and hypothecated to the trust company certain parcels of land and the electric railway of the company with all

(1) Q.R. 18 K.B. 82.

the real property thereof, * * * the rails, cars * * * rolling stock and equipment appurtenant thereto or used in connection therewith; and, further, to secure the interest on the bonds, the company transferred to the trust company all its movable property and all its present and future revenues. This deed and the issue of the debentures were validated and ratified by the statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), prior to the sale of the cars, etc., by the appellants.

By the judgment appealed from, the judgment of Mr. Justice Lemieux dismissing the opposition was, in effect, confirmed. In rendering his judgment in the court below (not printed in the report), Mr. Justice Cross concludes as follows: "It is contended for the appellant that the cars, etc., of which the price is claimed were movables and I incline to think that, as regards the cars, though perhaps not as regards the tower-waggon and sweeper, this view would be the correct one, if it were merely a case of determining in a general way whether these objects fell within the terms of article 384 C.C. or within those of article 379 C.C. These cars can be taken from place to place and it is common enough for such vehicles to be found from time to time in use on the lines of other railway companies, so that they are such objects as are mentioned in article 384. However, even if they be considered movables, the special statute has declared them to have been validly pledged, and, this being so, the privilege of the unpaid vendor would, by article 2000 C.C., have been subordinated to the right of the pledgee. The correct conclusion appears to be that the mortgage was intended to be a charge upon the railway company's undertaking

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as a "going concern" and that, in so far as may be necessary to give effect to the intention, the cars, sweeper and tower-waggon are to be considered as having been made part of the realty. I would, consequently, confirm the judgment."

G. F. Henderson K.C. and *Cannon,* for the appellants.

G. G. Stuart K.C., for the respondents.

GIROUARD J.—Article 2000 of the Civil Code does not apply. The thing sold is not in the same condition. Before delivery the cars were movable property; after delivery and being operated as part of a railway system they became immovable by destination. Art. 379 C.C. Therefore the appellants fail in their appeal and in dismissing the same we merely follow the well settled jurisprudence of the Province of Quebec, especially the following cases: *Wallbridge* v. *Farwell* (1); *Lainé* v. *Béland*(2) and *Redfield* v. *Corporation of Wickham,* in 1888(3). At all events the mortgage deed, ratified by statute, gives a preference to the holders of the debentures over the vendors.

IDINGTON J.—In *Toronto Railway Co.* v. *City of Toronto*(4) the Privy Council was asked to hold cars to be real estate and their Lordships, at p. 814, say

they cannot accede to the argument addressed to them or adopt the reasoning of Osler J. in *Kirkpatrick's Case*(5) (where such a proposition was maintained) without doing violence to the English language and to elementary principles of English law.

That case is not decisive of this one, but is most suggestive.

(1) 18 Can. S.C.R. 1.
(2) 26 Can. S.C.R. 419.
(3) 13 App. Cas. 467, at p. 473.
(4) [1904] A.C. 809.
(5) 2 Ont. L.R. 113.

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There was not, when the earlier Quebec cases relied on herein were decided holding locomotives to be immovable property when owned and used by a railway company, so much difference between the English law and the law of Quebec as to what *constituted real property* (widely different as the respective laws of these provinces *governing* real property were and are) that we should expect to find now such a wide divergence as will result from following in Ontario cases the reasoning in the Privy Council above referred to, and in Quebec cases the reasoning of certain cases in the courts of that province and in this court in the cases of *Wallbridge* v. *Farwell*(1), and *The Ontario Car and Foundry Co.* v. *Farwell*(1).

It is not expedient that such a divergence should be needlessly developed.

The agreement relied upon by the respondent was validated by the competent authority of the Legislature of Quebec and the charges it was intended to secure declared binding to all intents and purposes in comprehensive language that needs no support from any judicial theories as to the development of art. 379 of the Civil Code.

When we see the rather absurd results these theories may, if adopted, produce in the case of interprovincial railways and other cases, we should, I respectfully submit, refrain from helping to embarrass by saying that which may do so.

That article cannot cover the quite possible case of a street railway that never was the proprietor of any real estate on which to place its cars. But what of such a railway which had parted with its real estate and yet continued to run cars? On the theory put

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

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forward would the cars after the company's sale of its real estate be possessed of exigible or inexigible real estate whilst running by virtue of a temporary license on His Majesty's highway?

I by no means feel that the last word has been spoken in this court on the question. It may be quite as open to the Privy Council to find that what has been said in Quebec and in this court did as much violence to the elementary principles of Quebec law and to the language of the Civil Code as that court declared the reasoning above referred to did the English law and language.

In view of all that I do not desire to commit myself to any expression of opinion upon the bearing of the decision and emphatic expression of the law in the judgment in the case of *Toronto Railway Co.* v. *The City of Toronto*(1), upon the case now in hand. Indeed, I do not think it has much to do with it. I prefer to rest on the safe ground the validating statute above referred to gives.

The appellant seeks to enforce, after the time for revendication had elapsed, a privilege in respect of the proceeds of a judicial sale of property which the legislature had, by validating the deed, in effect declared charged with the payment of other liabilities; and which became operative and charged on the property now in question the moment the appellant had delivered the goods or immediately after its rights of revendication were gone. Moreover, I incline to hold it may fairly be inferred their condition had changed and they had not remained, as required by the art. 2000 C.C. giving the privilege in the same state as when sold. The privilege is given by the Code on the

(1) [1904] A.C. 809.

proceeds of sale. But the validating Act provides specifically for the distribution of the proceeds in question and thereby overrides the general law by words that ignore such a privilege. It provides for superior *liens* which I take it means liens upon the property.

This privilege claimed herein can hardly be held to fall within the term "liens on the property."

The point raised of the intention of the legislature in a private Act, such as this now in question, in regard to the rights of parties concerned but not named does not seem to me to have much force when we find the claim rested on transactions taking place long after the passing of the Act.

If the privilege had been in existence or the transaction out of which it might have arisen had taken place before the passing of the Act I think the point taken might have been more arguable.

I hardly think the rule of interpretation invoked to except this case could ever have been intended to apply to a non-existent class of persons or personal rights.

The claim set up anent the payment to debenture-holders of interest in preference to the current expenses does not seem to be open in this proceeding, and the opinion expressed in the case of *Farwell*(1) above cited seems to indicate might fail in any proceeding.

The appeal should be dismissed with costs.

DUFF J.—There are two questions raised by this appeal; first: Were the cars in respect of which the appellants claim a preference *immeubles par destina-*

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

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tion at the time of the sale of them? And secondly: If not, is the right of the respondents under their mortgage superior to the preference to which the appellants are entitled as unpaid vendors?

The first question must, I think, with great respect, be answered in the negative. Article 379 provides as follows:

> Les objets mobiliers que le propriétaire a placés sur son fonds à perpétuelle demeure, ou qu'il y a incorporés, sont immeubles par destination tant qu'ils y restent;

and it is well settled law that this *immobilization par destination* takes place only when the *"propriétaire"* of the *fonds* is also the *propriétaire* of the *meuble* affected. The weight of the opinion appears to be to the effect that in this provision the word *"propriétaire"* is to be construed *stricto sensû.*

Thus Laurent, at Vol. V., No. 437:

> Du principe que nous venons de poser, suit que le locataire et le fermier ne peuvent pas immobiliser les objets mobiliers qu'ils placent sur le fonds, ni par destination agricole ou industrielle, ni par perpétuelle demeure. Aubry et Rau t. II., p. 12, note 33, et les auteurs et arrêts qui y sont cités. Il en est de même des detenteurs qui ont un droit réel sur la chose; l'usufruitier, l'emphytéote, le superficiaire ne peuvent pas immobiliser.

The other authorities are referred to in 2 Mignault, p. 417. Does it appear that the railway company was the *propriétaire* of a *fundus* upon which the cars in question were placed by it *à perpétuelle demeure?* There is here, of course, no question of incorporation. The railway company was empowered to operate an electric railway in the town of Lévis; that is to say, they were authorized to lay their tracks and run their cars in the streets and so on. They were the owners, doubtless, of depots where the cars would be when not in use; when in use, they would be upon the company's tracks which would mainly be situated in the streets.

Now it seems quite impossible to hold in respect of the depots where they were put when not in use that the cars were placed there *à perpétuelle demeure* within the meaning of this article. One might as well say that the pictures in a gallery built for their reception become *immeubles par destination;* or the taximeters in a garage. The car, no more than the automobile, is the accessory of the building which serves to protect it when not in use; rather the inverse. And there is a stronger case for the *immobilization* of the pictures than that of the cars; for the car does not perform its normal function while within the car barns. Then: Did the track constitute a *fundus* of which the company was the *propriétaire* and to which the car became attached *à perpétuelle demeure?* That cannot, I think, be affirmed because the track was mainly in the highway and I am unable to doubt that the agreement between the company and the municipality and the statute ratifying that agreement did not confer upon the company any proprietary interest in subsoil or surface of the highway. Precisely what the rights of the company in respect of the highway were it may not be easy to say; probably they cannot with accuracy be expressed in the terms of the Civil Code. They were statutory rights and, I should prefer to say, *sui generis.* I can, however, entertain no doubt, having regard to the settled legislative policy declared in article 752 of the Municipal Code (under which alienation of any part of a municipal road is forbidden), that the statute and agreement cannot fairly be read as investing the company with any proprietary interest in the streets upon which its tracks might be laid. The legislature could have departed from its settled policy, of course; but

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the *concessionaires* who contend they have done so must, in support of this view, point to language much more clearly exhibiting such an intention than any found in the agreement under which the company was operating.

It cannot, moreover, be said, without blinking the facts, that the cars were accessory to the tracks. The truth plainly is that depots, cars, track, all were means employed in working an enterprise of transportation. Each of these instruments was in a practical sense essential to the enterprise. They were all accessories to it; as among the instruments themselves it involves, I think, some glossing of the actual facts to describe any one of them as an accessory in relation to another.

On principle, therefore, I think the *immobilization* of these cars is not established. There are, however, authorities which my learned brother Girouard thinks decide the point, and in the opposite sense. The cases bearing on the point are referred to in *Ontario Car and Foundry Co.* v. *Farwell*(1). I do not, of course, question the authority of that decision so far as it goes. But, with great respect, I do not think it can be held to involve any principle governing the determination of the question actually before us. The decision in *Farwell's Case*(1), as well as the decisions of the Quebec courts upon which it was founded, related solely to railways owning the land upon which their cars would normally be in use. The first of the objections indicated above obviously would have no application in such a case and is, therefore, I think, not met by those decisions.

The appellants, however, fail, I think, on the second point.

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

There is some difference of opinion respecting the legal character of the preference attached to the claim of an unpaid vendor by art. 2000 C.C. The preferable view, I think, is that it is not in the nature of a *droit réel* in the thing itself since it affects no dismemberment of the property and confers neither any dominion over the thing nor the *droit de suite*, but is merely a right incidental to the vendors' personal claim resting upon a *privilegium inter personales actiones;* 3 Aubry et Rau 256; 2 Planiol 2548.

By the text of the law it yields to the express *nantissement* of the pledgee and to the implied pledge of the lessor (art. 2000 C.C.); and it obviously cannot successfully be asserted against the *droit de retention.* The question is: Ought it to prevail against a security of the character constituted by the respondents' mortgage? With great respect I have a good deal of difficulty in holding that this security falls within the class described as pledge in art. 2000 C.C.; but putting that question aside I think the security created by the mortgage is such that by its very nature it must prevail as against the vendor's preference.

The mortgage unquestionably establishes a *droit réel* in all the personal as well as the real property of the company. The property in the *meubles* in question passed to the company and it is this property which by the express terms of the instrument is transferred to the mortgagees as security for the company's indebtedness. It would, I think, require an express text to justify the recognition of a preference resting as I have said upon a mere *privilegium inter personales actiones* as superior to such a security.

It was vigorously argued that we ought not to give to the legislation ratifying the mortgage such a mean-

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ing and effect as would prejudice pre-existing rights. But to that there seem to be several answers. The appellants' right to a preference had not accrued when the statute was passed and might never accrue. In these circumstances it may be questionable whether the rule invoked could have any application at all. Then the rule is only a canon of construction and must yield when a contrary intention sufficiently appears. Now under the "Railway Act" the company was expressly authorized to "mortgage" its movable property. Used in the context "hypothecate, mortgage and pledge" the word imports a legal process differing from both that of hypothecation and that of pledging; and having regard to the well known practice throughout Canada in respect of railway mortgages, of which one cannot suppose the legislature to have been ignorant, there can be no doubt that it imports the power to transfer the property as security while retaining the possession. Nobody would, of course, doubt the power of the legislature to create a form of security unknown to the common law of Quebec; and the legislative sanction of a security of the kind indicated implied an authority to the company to burden its *meubles* (while retaining possession of them) with charges superior to the preference of the unpaid vendors. It would unduly strain the principle invoked to hold that legislation validating the particular form in which that had been done was inoperative in respect of claims of preference advanced after the date of the legislation solely on account of such preference arising out of sales which took place before the statute was passed.

ANGLIN J.—Assuming that the opposants have a right of appeal from the interlocutory judgment upon

demurrers dealt with in the Court of King's Bench, I am of opinion that upon this part of their appeal they must fail. I find nothing in the instrument of hypothecation or in the statute by which it was ratified, which confers upon them any right of preference over the claim of the respondents. It is not revenue of the company (upon which working expenses may be a prior charge), but proceeds of the sale of its property with which the court is dealing. The respondents' mortgage is no doubt in the form of a trust deed, but the appellants are not *cestuis que trustent* and the deed certainly does not create any lien in their favour superior or equal to that of the bond-holders, whom the respondents represent.

If we were here dealing with cars of a railway system operating upon a right of way of which the railway company was the proprietor, I would deem this case concluded by the decisions of this court in *Ontario Car and Foundry Co.* v. *Farwell*(1), and *Lainé* v. *Béland*(2), approving and adopting what has been uniform jurisprudence of half a century in the Province of Quebec.

The law of Quebec upon the question of immobilization is derived not from English, but from French sources; *Morrison* v. *Grand Trunk Railway Co.*(3), at p. 319; and in the *Farwell Case*(1) Strong J., for that reason, guards himself against being taken to establish a precedent in cases arising in provinces subject to the English system of law. The decision of the Privy Council in *Toronto Railway Co.* v. *City of Toronto*(4), which proceeded upon the principles of English law in force in Ontario, was not intended to

(1) 18 Can. S.C.R. 1.
(2) 26 Can. S.C.R. 419.
(3) 5 L.C. Jur. 313.
(4) [1904] A.C. 809.

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be and, in my opinion, is not an authority upon the law prevailing in the Province of Quebec and would not warrant this court in treating its own decisions in the *Farwell Case*(1) and in *Lainé* v. *Béland*(2), as overruled. But, in the case of a street railway operated upon highways of which the tram company is in no sense proprietor, it may well be that the foundation for an application of the provisions of art. 379 C.C. is lacking; and, in some future case in which it may be necessary to deal with that question, the status of the rolling stock of such a railway may be held not determined by the decisions of this court which have been cited.

In the present case whatever the character of the rolling stock in question—whether movable or immovable—the language of the respondent's security is sufficiently comprehensive to include it. The efficacy and the validity of that security have been declared by an Act of the legislature. It contains provisions for the distribution of the proceeds of a sale of the property covered by the security which seem to be inconsistent with the existence in regard to that property of such a right as the appellants assert. Upon this ground I concur in the judgment dismissing this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Pentland, Stuart & Brodie.*

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

(2) 26 Can. S.C.R. 419.

THE SHAWINIGAN CARBIDE COMPANY (DEFENDANTS) .... } APPELLANTS;

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AND

JEAN DOUCET (PLAINTIFF) .... RESPONDENT.

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

Negligence—Dangerous works—Defective appliances—Evidence—Onus of proof—Presumption—Art. 1054 *C.C.—"Res ipsa loquitur."*

In an action to recover damages for injuries sustained by him in consequence of an accident in the company's calcium carbide works, the plaintiff's evidence shewed that a furnace operated upon a new system had been recently installed, that he was employed with other workmen to charge the furnace, draw off the liquid carbide when it was ready through openings in the base of the furnace, clean the orifices and re-plug them with moist mortar preparatory to re-charging. While the plaintiff was in the performance of his work in re-plugging one of these orifices an explosion occurred which caused the injuries complained of. There was no evidence of contributory negligence.

Held, Duff and Anglin JJ. dissenting, that, apart from any presumption arising under article 1054 C.C., the fact of the explosion occurring under such circumstances sufficiently established actionable negligence on the part of the company.

Per Fitzpatrick C.J. and Anglin J. (Girouard and Duff JJ. *contra*, and Idington J. expressing no opinion upon the question), that, under article 1054 of the Civil Code of Lower Canada, masters and employers, as well as other persons, are responsible for damages caused by things under their control or care where they fail to establish that the cause of the injury was attributable to the fault of the person injured, to *vis major* or to pure accident, or that it occurred without fault imputable to themselves.

Judgment appealed from (Q.R. 18 K.B. 271) reversing the decision of the Court of Review (Q.R. 35 S.C. 285), affirmed, Duff J. dissenting.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, sitting in review(2), and restoring that of Cannon J., at the trial, whereby the plaintiff's action was maintained with costs.

The material facts of the case are stated in the head-note.

G. G. Stuart K.C. and *Howard*, for the appellants.

S. Beaudin K.C. and *Martel K.C.*, for the respondent.

LE JUGE EN CHEF.—J'emprunte le récit des faits de la cause aux notes du juge Archambault à la cour d'appel.

L'appelante possède, à Shawinigan Falls, Province de Québec, une manufacture de carbure.

En 1906, l'intimé était à son emploi. Il était tenu, avec un autre compagnon de travail, nommé Larochelle, de surveiller une fournaise qui servait à fondre le carbure.

Cette fournaise était chauffée au moyen de l'électricité et fonctionnait jour et nuit.

L'intimé et Larochelle faisaient le travail de nuit, de sept heures du soir à sept heures du matin.

Leur ouvrage consistait à remplir la fournaise de charbon et de chaux, et à la vider chaque heure, pour en faire couler le carbure.

Cette opération se faisait par trois ou quatre orifices qui se trouvaient au bas de la fournaise, et par lesquels s'échappait le carbure en fusion.

Une fois la fournaise vidée, on nettoyait l'orifice par lequel le carbure venait de couler; puis, avant de

(1) Q.R. 18 K.B. 271.

(2) Q.R. 35 S.C. 385.

remplir la fournaise de nouveau, on le bouchait au moyen de tampons de mortier.

Larochelle plaçait un tampon à l'entrée de l'orifice, et l'intimé poussait le tampon jusqu'au fond de l'ouverture, à l'aide d'une longue tige de fer terminée par une plaque circulaire.

Le 27 juillet 1906, l'intimé et Larochelle se rendirent à leur ouvrage, comme d'habitude, à sept heures du soir.

La fournaise avait été remplie par les deux ouvriers de jour, et lorsque le moment fut arrivé de la vider, l'intimé et Larochelle firent couler le carbure; puis l'intimé nettoya l'ouverture par où le carbure venait de sortir, Larochelle plaça un tampon de mortier à l'entrée de cette même ouverture, et pendant que l'intimé l'y poussait avec sa tige de fer, il se produisit tout à coup une explosion, les deux ouvriers furent renversés par terre, et il s'échappa de l'orifice un jet de carbure liquide et enflammé qui atteignit l'intimé à la figure, et lui brûla complètement les deux yeux.

L'intimé réclame de l'appelante $10,000 de dommages-intérêts pour l'accident dont il a été victime.

La cour de première instance a maintenu l'action, et lui a accordé $4,000 de dommages.

L'appelante en appela à la cour de revision qui annula le jugement et débouta l'intimé de son action.

De la cour de revision la cause fut portée à la cour d'appel qui rétablit le jugement de la cour de première instance.

Le jugement de la cour de première instance est basé sur le fait que la fournaise qui a causé le dommage étant sous la garde de la compagnie cette compagnie était responsable des dommages et que au surplus il y avait preuve de faute.

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La cour de revision, au contraire, déclare que cette fournaise était sous le contrôle de Doucet et ajoute que ce dernier n'a montré aucune faute de la part de la compagnie appelante et qu'il était tenu de faire cette preuve pour avoir un recours en dommages-intérêts contre cette dernière.

A la cour d'appel, la majorité des juges semble avoir décidé en fait que la faute était établie et en droit que la preuve de faute n'était pas nécessaire vu qu'il était démontré que la fournaise était sous la garde de l'appelante, attendu que la faute est alors présumée par la loi.

Pour ma part je suis d'avis que la fournaise était sous la garde de l'appelante qui l'utilisait à son profit et qui tirait un bénéfice du risque qu'elle a créé. Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers doit s'attendre à réparer le préjudice que cette machine causera. "Ubi emolumentum ibi onus." D. 1900, 2, 289: D. 1904, 2, 257. Notes de M. Josserand.

J'accepte donc sur le fait de la garde la conclusion tirée de la preuve par le juge Cannon en première instance et adoptée à la cour d'appel. La fournaise appartenait à l'intimée qui l'exploitait à son profit et s'en servait en vue de réaliser des bénéfices dans son industrie.

Etant admis que la fournaise était au moment de l'accident sous la garde de l'appelante, je pense comme le juge de première instance; le fait même de l'accident et ses diverses circonstances, révélés par le témoignage, fournissent toute la preuve de négligence que pouvait et que devait nécessairement produire le demandeur Doucet. Le cas actuel relève, à mon avis, des mêmes principes que celui de *Mc-*

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Arthur v. *The Dominion Cartridge Co.*(1). Il est abondamment prouvé qu'il n'y eut ni faute, ni négligence de la part de l'ouvrier et aucune explication ni aucun essai d'explication de l'accident ne sont donnés par la compagnie appelante. Son surintendant, Porcheron, entendu comme témoin à décharge, dit qu'il ignore comment arriva l'accident, bien qu'il surveillât lui-même la fournaise où se produisit l'explosion. A supposer, ce que d'ailleurs il n'est pas nécessaire de décider pour les fins du présent litige, que dans un cas relevant de l'article 1053 du code civil, il faille pour créer la responsabilité la preuve positive d'une faute, je ne puis justifier l'application de ce principe au cas d'un individu poursuivi comme responsable de dommages causés par une chose inanimée dont il a la garde, ce qui est arrivé dans le cas présent. En un mot, en face de l'article 1053 qui d'après certains auteurs et la jurisprudence fait de la faute ou de la négligence la base de la responsabilité je place l'article 1054 al. 1 *in fine* qui est à mon avis le seul applicable et d'après lequel "on est responsable des choses que l'on a sous sa garde." Le sens que je donne à ce dernier texte c'est que tout propriétaire est responsable en raison même de sa qualité de propriétaire du dommage causé par sa chose lorsqu'elle est sous sa garde. Le principe de responsabilité établie par cet article est l'idée de garde. J'ajoute si faisant à cette cause une fausse application de l'article 1053 C.C. on dit: le principe essentiel est que sans faute point d'obligation, même alors, au dire de Lord Macnaghten parlant au nom du comité judiciaire, dans la cause de *McArthur* v. *The Dominion Cartridge Co.*(1), il ne serait pas raisonnable de l'appliquer en toute

(1) [1905] A.C. 72.

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rigueur, vu les circonstances; en effet, comme dans l'affaire *McArthur*(1), l'accident cause du dommage fut l'œuvre d'un instant; l'œil humain n'en put découvrir l'origine ni en suivre le développement. *"In lege aquilia, et culpa levissima venit."* Domat, Lois Civiles, 1ère partie, livre II., tit. VIII., sec. 4, *n.* I. (édit. Rémy, I., p. 480); Baudry-Lacantinerie, Obligations, vol. 3, No. 2868. La faute la plus légère suffit pour faire encourir la responsabilité édictée par l'article 1053 C.C.

J'ai lu avec le plus grand intérêt le jugement très soigné et, s'il m'est permis de le dire, très complet et très savant de mon collègue Duff; et, tout en admettant une grande partie de sa thèse, j'hésite à donner à l'article du code civil de Québec (1054) qui pose, je le répète, le principe de responsabilité applicable au cas qui nous occupe, une interprétation différente de celle que les plus hautes autorités françaises donnent aujourd'hui à l'article correspondant du code Napoléon. Je suggère que mon savant collégue ne donne pas au membre de phrase qui se trouve à la fin de l'article 1054 C.C. al. 1 cité plus haut tout son effet. Que ces mots soient restés inaperçus, comme le dit Planiol, pendant près d'un siècle explique peut-être l'erreur doctrinale sur laquelle est basée la jurisprudence qu'il invoque.

Dans leur rapport, les commissaires disent (p. 16) que la série des articles 1053-1056 C.C. ne diffère pas ou ne diffère que par l'expression des articles correspondants du code Napoléon. Dans ces circonstances, nous devons attacher la plus haute valeur à l'interprétation donnée aux articles du code français par les tribunaux et par ses commentateurs les plus autorisés; et, dans toutes les questions de droit où la doctrine et

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la jurisprudence tombent d'accord, après des années de conflit et de discussion, je me sens presque forcé d'accepter leur conclusion commune et définitive.

Il me suffit, pour le but que je me propose ici, d'exposer les trois systèmes qui ont prévalu tour à tour, en France, et en Belgique, sur cette question. Je les trouve énoncés avec une clarté et une concision admirables dans Pas. 1904, 1, 246 (argument de l'avocat général) :

Nous croyons inutile de vous remémorer l'état de la doctrine et de la jurisprudence, tant en France qu'en Belgique, sur la question de droit que nous avons à résoudre (c'est-à-dire la responsabilité du fait des choses inanimées que l'on a sous sa garde) ; nous nous bornerons à rappeler que trois systèmes principaux ont été suivis tour-à-tour :

"1. La responsabilité est encourue du moment où il est établi que le dommage a été causé par la chose, sans qu'il soit besoin de démontrer soit le vice de la chose, soit la faute du gardien;

"2. Cette responsabilité n'existe que si le gardien a commis une faute; mais l'article 1384, paragraphe 1er, établit quant à cette faute une présomption légale;

"3. Cette responsabilité ne peut être prononcée que si la victime de l'accident causé par la chose démontre l'existence d'une faute dans le chef du gardien."

Et le système exposé dans le second paragraphe, comme j'aurai l'occasion de le montrer, a finalement triomphé en France à la cour de cassation, chambre civile et chambre des requêtes, mais, pour emprunter le langage de la cour d'appel de Chambéry (12 juillet 1905, D. P. 1905, 2, 417) je dirais:

Sans entrer dans les controverses doctrinales soulevées sur cette question par ceux qui veulent voir dans l'art. 1384 une présomption de faute, il y a lieu de reconnaître que, sainement compris, le point de vue auquel, selon nous, s'est placée la loi, est conforme à la justice et à l'équité, puisque celui qui détient une chose et en tire avantage doit, par suite d'une légitime réciprocité, supporter les charges corrélatives à cet avantage; qu'une théorie contraire, en cas de survenance d'accident, présenterait le grave inconvénient de méconnaître les garanties de sécurité et de réparation auxquelles, dans une société bien organisée, a droit la personne humaine.

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Je ne puis admettre que le mot "faute" soit employé dans l'article 1054, par. 1, du code civil, pour signifier exclusivement un acte illicite et dommageable du fait de l'intention ou de la négligence. Saleilles dans "Les accidents du travail" dit (p. 69):

> Je rappellerai tout d'abord certaines définitions anciennes qui ne laissent apparaître que le caractère purement objectif de l'idée de faute. Je les trouve dans Doneau, le grand initiateur parmi les anciens. Il définit la faute dans des termes auxquels notre article 1382(1) semble avoir été emprunté et qui, pas plus que lui, ne laissent apparaître aucune idée de recherche subjective. C'est tout fait non prévu et exercé sans droit qui a causé dommage à autrui, *culpa est omne factum inconsultum quo nascitur alii injuria;* donc une qualification matérielle du fait, un fait qui n'a pas été prévu, et l'on sous-entend qu'on aurait pu prévoir, et un fait qui ne soit pas l'exercice d'un droit positif.

Au surplus, quand on lit cet article 1054 C.C., il est impossible d'étendre le sens du mot "faute" aux objets inanimés. On ne saurait supposer que les rédacteurs du code aient jamais voulu dire que toute personne est responsable du dommage causé par la faute d'une chose inanimée dont elle a la garde; l'expression ne serait pas juridique.

Je ne puis non plus interpréter les derniers mots du paragraphe en question dans le sens que celui qui a la garde ou le soin d'une chose n'est responsable des dommages qu'au cas où l'on prouve que l'accident résulte ou peut résulter d'un défaut de construction dans l'objet, ou du fait de son fonctionnement. Ces mots pris dans leur sens littéral expriment une vérité juridique que l'on retrouve dans toutes les législations "rien de ce qui appartient à quelqu'un ne peut nuire impunément à un autre."

La partie prétendue responsable peut n'avoir ni la connaissance du défaut de construction, ni le moyen de s'en rendre compte; mais, si elle en a le soin et la

(1) Art. 1053 *et seq.*, Code Civil de Quebec.

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garde, alors, d'après les termes de l'article, elle est responsable des dommages causés par la chose dont elle a la garde. Cette interprétation qui applique la même règle de responsabilité et au propriétaire ou gardien d'une chose inanimée, et au propriétaire d'un animal, en vertu de l'article 1055, est la plus raisonnable du monde.

Si, au lieu d'une machine, un animal eût causé le dommage dont on se plaint ici, il y aurait eu présomption de responsabilité contre le propriétaire. Au nom de quel privilège pouvons-nous établir une distinction entre la chose mobilière inanimée et la bête sans raison? (Planiol, vol. 2, p. 283, no. 917, *fin*). De plus, pourquoi n'y aurait-il pas, dans le cas du gardien d'une chose, la même présomption que celle qui existe dans le cas de celui qui a la tutelle d'un enfant, d'un aliéné; la surveillance d'écoliers, d'apprentis? Toutes ces personnes sont visées par le même article. Il n'est pas là question de faute. Le fait de la tutelle ou de la surveillance est le seul motif qui lie leur responsabilité et le seul point sur lequel le gardien, le parent, le tuteur ou le maître soient tenus en droit de rendre raison. La responsabilité sans la faute n'est pas inconnue au code civil de Québec; par exemple, outre le cas visé par l'article 1055, l'article 1487 stipule que le vendeur d'une chose qui ne lui appartient pas est responsable des dommages à l'égard de l'acheteur, sans allusion aucune à la faute.

Quant à l'argument tiré de la théorie de l'ancien droit français, tel qu'énoncé par mon collègue le juge Duff, citant Esmein, je m'en rapporterai à Baudry-Lacantinerie, "Obligations," vol. 3, *n.* 2968.

M. Esmein(1) ajoute que, suivant toutes les vraisemblances, les rédacteurs du code n'ont admis que les cas de responsabilité du pro-

(1) Note S. V. 1897, 1, 19.

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priétaire, *déjà connus dans notre ancien droit,* c'est-à-dire la responsabilité du propriétaire d'un animal et celle du propriétaire d'un bâtiment. Et il renvoie aux ouvrages de Bourjon et de Domat. Selon nous, si nos anciens auteurs n'ont pas fait d'autre application du principe général, il ne faut point en conclure qu'ils n'ont pas reconnu l'existence de ce principe, mais simplement que les applications prévues par eux étaient les seules qui, de leur temps, eussent un intérêt pratique. Il est incontestable qu'au XVIIe et au XVIIIe siècles, les choses mobilières dangereuses étaient incomparablement moins nombreuses qu'à notre époque. Néanmoins, avant de parler de la responsabilité du fait des animaux, Domat pose la règle dans les termes les plus généraux. La façon dont il s'exprime mérite qu'on la remarque: "L'ordre qui lie les hommes en société, dit-il, ne les oblige pas seulement à ne nuire en rien par eux-mêmes à qui que ce soit, mais il oblige aussi chacun à tenir *tout ce qu'il possède* en un tel état que personne n'en reçoive ni mal ni dommage; *ce qui renferme* le devoir de contenir les animaux qu'on a en sa possession, de sorte qu'ils ne puissent ni nuire aux personnes, ni causer dans leurs biens quelque perte ou quelque dommage." *On voit que, pour Domat, la responsabilité du fait des animaux n'était qu'une application de la responsabilité du fait des choses en général.* Cela résulte nécessairement de ces mots "ce qui renferme."

Je l'accorde; autrefois, en France, la doctrine absolument en vigueur voulait qu'il n'y eût responsabilité que là où la faute était clairement prouvée. D. 1870, 1, 361. Mais cette doctrine, attaquée vivement et depuis longtemps, par d'éminents juristes tels que Laurent, Labbé, Lyon-Caen, Glasson, Esmein, Saleilles, Josserand, Marcadé, Demolombe, Baudry-Lacantinerie et Huc est définitivement abandonnée. Il est admis, aujourd'hui, par tous les tribunaux français que quand, comme dans notre cas, un accident arrive à un ouvrier, la responsabilité retombe sur le propriétaire de la machine qui a fait le dommage; sauf dans les cas d'événements dus au cas fortuit ou dans ceux de force majeure; ou encore lorsque l'accident est imputable à la faute de la personne lésée. D. 1905, I., 417; D. 1908, I., 217. Dans une note relative au dernier arrêt, Josserand donne ce commentaire:

L'arrêt ci-dessus rapporté marque une nouvelle et importante étape de l'évolution: dans les motifs de sa décision, mais très nette-

ment, la chambre des requêtes reconnaît qu' "aux termes de l'art. 1384 c. civ. on est responsable du dommage causé par le fait des choses que l'on a sous sa garde." Et si cette proposition pouvait paraître obscure, sa signification serait mise en pleine lumière par la suite de l'arrêt: "* * * Cette *présomption* cède * * *," ajoute la cour de cassation. C'est donc bien une présomption de responsabilité que la chambre des requêtes lit dans l'article 1384, une responsabilité *par le fait des choses*, donc une responsabilité libérée—partiquement tout au moins et quant à la preuve jadis imposée à la victime—de l'exigence de la faute aquilienne.

Préalablement la cour de cassation, chambre civile, s'était prononcée dans le même sens (S.V. 1897, I., 17). Le tribunal constate bien dans ce cas l'existence d'un vice de construction dans la machine; mais elle ne le fait que pour écarter l'hypothèse du cas fortuit ou de la force majeure et non pas pour placer son arrêt sous la protection de l'article 1386 C.N. (1053 C.C.) Sourdat "Responsabilité" (5 ed.), Nos. 1432 (*ter*) par. 3, et 1483 (*ter*) par. 3.

C'est seulement dans ces dernières années que les tribunaux français ont appliqué le principe de l'article 1054 C.C., concernant la responsabilité du gardien d'un chose inanimée non immobilière, à des cas comme celui qui nous occupe. A la fin de l'al. 1er de l'art. 1384, C.N., se trouve un petit membre de phrase qui, dit Planiol, vol. 2, n° 916, est resté à peu près inaperçu pendant près d'un siècle. Il y est dit qu'on est responsable du dommage causé "par le fait * * * des choses que l'on a sous sa garde." Autrefois le principe de la responsabilité était censé reposer sur l'article 1053 ou sur l'article correspondant du code Napoléon. Ce fait peut, dans une certaine mesure, expliquer l'incertitude qui a régné jusqu'ici dans la jurisprudence française. Pour les fins de cette cause, j'adopte donc l'interprétation que la cour de cassation de France a, dans ses décisions récentes, donnée à l'article 1384 du code

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Napoléon auquel correspond l'article 1054 du code civil. J'avoue qu'en ce faisant, je m'écarte de l'ancienne jurisprudence des tribunaux de Québec. A la suite de la jurisprudence française du temps, ils soutenaient que la faute est la condition et la mesure de la responsabilité.

Au moment de la première promulgation du code civil français, en 1804, il était impossible à ses auteurs de prévoir les développements extraordinaires que l'industrie moderne allait emprunter aux applications de la vapeur et de l'électricité et le nombre infini de cas où l'ouvrier a cessé d'être le maître pour devenir lui-même l'outil de cet immense ensemble de machines qui de nos jours forme un établissement industriel moderne. Les progrès, les exigences de l'industrie, qui, d'après les juristes français, ont contribué à la transformation de la jurisprudence française, existent aussi chez nous. Ils justifieraient, dans la même mesure que là-bas, l'adoption par notre cour des principes de la nouvelle jurisprudence qui faisant une juste application des mots employés par nos codificateurs, et qui paraissent avoir été mis en oubli au Canada comme en France, reconnaît les garanties de sécurité et de réparation auxquelles dans une société bien organisée a droit la personne humaine. En nous écartant de l'ancien système d'interprétation, nous suivrions le précédent créé, dans notre cour, en ce qui touche la répartition des dommages-intérêts pour le cas où le demandeur aurait de sa part été coupable de négligence. Autrefois, à Québec, l'employé coupable par négligence de participation à l'accident ne pouvait même pas partiellement obtenir gain de cause (*Canadian Pacific Railway Co.* v. *Cadieux*(1); *Desroches* v. *Gauthier*(2), jugements de Dorion J.C. et

(1) M.L.R. 3 Q.B. 315. (2) 3 Dor. K.B. 25.

Ramsay J.); mais les décisions des tribunaux ont changé cela. Notre cour, suivant la jurisprudence française si équitable a, par un jugement définitif, statué que, lorsque les deux parties sont en faute, les dommages-intérêts sont partagés proportionnellement à la faute de chacune (*Price* v. *Roy*(1)).

Toute la question est si pleinement développée dans les jugements savants et approfondis de mes collègues qu'il m'est inutile d'insister davantage. Je dirai seulement à ceux qu'intéresserait une étude plus détaillée de la question qu'ils peuvent suivre l'évolution de la jurisprudence française dans les causes suivantes que je joins à celles déjà citées: Cour de Cassation, 16 juin 1896 et 30 mars 1896 (Dal. 1897, 1, 433), note Saleilles; Sir. 1897, 1, 419, note Esmein; C. de Paris (6e ch.), 5 nov. 1904. (Rec. Gaz. des Tribunaux, 1er avril 1909) et plus particulièrement dans les deux œuvres admirables de Saleilles "Responsabilité du fait des choses" et "Etude sur la théorie générale des Obligations," puis dans la "Revue Critique de la Législation," 1901, p. 592.

Attendu donc que le jugement attaqué a fait à la cause une exacte application des principes qui régissent la matière je déclare l'appel non recevable, dépens contre l'appelante.

GIROUARD J.—Je suis étonné qu'à cette époque de notre jurisprudence l'on aît encore à se demander ce que c'est que le quasi-délit. Voilà bientôt un demi-siècle que la code civil du Bas-Canada est en force et pendant ce long espace de temps, même avant, des centaines de procès causés par des quasi-délits, et particulièrement des accidents du travail, ont été examinés et étudiés devant les tribunaux; et cependant

(1) 29 Can. S.C.R. 494.

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il paraîtrait, dit-on, que jusqu'à ces derniers jours avocats et juges étaient dans une profonde ignorance de la loi et que jamais ils n'ont donné aux articles du code le vraie interprétation. D'après quelques juges et, disons-le, ils paraissent très peu nombreux, la faute qui est la base du quasi-délit serait présumée dans certains cas prévus par l'article 1054 C.C.

On affirme que les dispositions de cet article sont différentes de celles du code français. Pour ma part, je ne vois de différence que quant à la rédaction ou phraséologie. Les codificateurs nous en ont avertis eux-mêmes. Quant à la substance, ils me paraissent semblables. Les deux codes sont basés sur la faute non pas présumée mais établie. L'article 1382 du code Napoléon dit que

tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer.

Le Code de Québec déclare que

toute personne * * * est responsable du dommage causé par sa faute à autrui * * *.

Le code ne peut exiger moins lorsque cette personne agit par des agents ou représentants. Aussi, l'article 1054 C.C., ajoute:

Elle est responsable non-seulement du dommage qu'elle cause par sa propre faute mais encore de celui causé par la faute de ceux dont elle a le contrôle et par les choses qu'elle a sous sa garde.

Puis le législateur énumère certains cas où certaines personnes répondent des actes de ceux dont elle a le contrôle, le père, la mère, les tuteurs, les curateurs, l'instituteur et l'artisan. Enfin l'article continue:

La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est a sujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage.

Le texte anglais traduit "la responsabilité ci-dessus" par les mots "the responsibility in the above cases"

et je crois qu'il exprime mieux la pensée du législateur. Il ne s'agit ici, en effet, que de certains quasi-délits énumérés, où le législateur fait une exception en faveur du maître qui doit l'invoquer et la prouver. Il est inutile d'ailleurs de nous arrêter sur ce point, car la présente espèce n'est pas un de ces cas.

Il s'agit ici de la responsabilité des maîtres et commettants pour leurs domestiques et ouvriers

dans l'exécution des fonctions auxquelles ces derniers sont employés.

A l'égard de ces derniers, il importe peu qu'ils puissent prouver qu'ils n'ont pu empêcher le fait qui a causé le dommage. Qu'ils puissent le prouver ou non, ils demeurent responsables, si leurs préposés étaient dans l'exercice de leurs fonctions.

Nulle part le code n'a exprimé la moindre intention de changer la nature de la responsabilité. Toujours et dans tous les cas elle résulte de la faute qui doit être établie par le demandeur, soit par une preuve directe ou par des présomptions.

C'étaient les dispositions du droit romain et du vieux droit commun de la France en force dans la province de Québec et que l'on trouve résumé dans Pothier, "Traité des Obligations," au titre des *Délits et Quasi-Délits,* Nos. 116 à 122. Pothier nous dit que

le quasi-délit est le fait par lequel une personne, sans malignité, mais par une imprudence qui n'est pas excusable, cause quelque tort à une autre.

Il ajoute que

on rend aussi les maîtres responsables du tort causé par les délits et quasi-délits de leurs serviteurs ou ouvriers qu'ils emploient à quelque service. Ils le sont de même dans le cas auquel il n'aurait pas été en leur pouvoir d'empêcher le délit ou quasi-délit, lorsque les délits ou quasi-délits sont commis par les dits serviteurs ou ouvriers dans l'exercice des fonctions auxquelles ils sont employés par leurs maîtres, quoiqu'en l'absence de leurs maîtres; ce qui a été établi pour rendre les maîtres plus attentifs à ne se servir que de bons domestiques.

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Ces principes ont reçu leur application dans la présente cause devant au moins deux cours, la cour supérieure et la cour d'appel. Elles ont considéré que les officiers préposés par l'appelante au fonctionnement de ses fournaises n'étaient pas de bons ouvriers; qu'ils n'avaient pas pris les précautions nécessaires pour éviter l'accident dont le demandeur a été la victime. Leur jugement n'est aucunement appuyé sur la faute présumée:

Considérant que le jugement de la cour de première instance est bien fondé;

voilà le seul motif donné par la cour d'appel. Il n'y a que deux juges qui parlent de la faute présumée et encore ils n'invoquent pas cette raison comme étant la seule qui les engage à supporter le jugement de la cour; ils trouvent aussi que le demandeur a prouvé la faute de la part de la défenderesse. Ce jugement, comme celui de la cour de révision et de la cour supérieure, sanctionne les principes que nous venons d'énoncer. Voici le texte du jugement de la cour supérieure qui est confirmé en appel purement et simplement:

Considérant que d'après la preuve, les circonstances dans lesquelles l'accident est arrivé au demandeur établissent que les ingrédients avec lesquels la défenderesse fabriquait le carbure contenaient des matières explosibles qui, en faisant explosion dans la fournaise devant laquelle le demandeur travaillait rejetaient avec violence par l'orifice que le demandeur devait boucher avec du mortier qu'il poussait avec un tisonnier, le carbure à l'état liquide et enflammé.

Considérant que la défenderesse était responsable de cette fournaise qu'elle avait sous sa garde.

Considérant qu'en droit d'après une jurisprudence constante, les patrons ont le devoir de veiller à la conservation de leurs ouvriers et de les protéger contre les périls qui peuvent être la conséquence du travail auquel ils les emploient; que sous peine de faute, ils doivent prévoir les causes possibles d'accidents et prendre et faire prendre par leurs agents toutes les mesures de précautions pouvant les prévenir ou les éviter;

Considérant que, dans l'espèce, pour protéger le demandeur contre un accident comme celui dont il a été la victime, la défenderesse

devait pourvoir le demandeur et les autres ouvriers qui faisaient le même ouvrage de lunettes et de masques;

Considérant que le demandeur n'était aucunement protégé contre l'explosion qui a eu lieu, sans qu'il y aît aucune faute de sa part, et qui a eu pour résultat de lui brûler la figure et de lui faire perdre complètement la vue.

M. le juge Cannon, qui a rendu le jugement, nous avoue qu'il a été guidé par la jurisprudence jusqu'alors suivie dans la province de Québec.

J'ai suivi (dit-il), surout une décision dans la cause de "*Asbestos and Asbestic Company* v. *Durand*"(1), décision de la cour suprême, dont le jugement de première instance, rendu par M. le juge Lemieux, a été confirmé par la cour d'appel, et confirmé plus tard par la cour suprême, rapportée au trentième volume des rapports de la cour suprême. Aussi une cause "*La Corporation de la Cité de Montréal* v. *Gosney*"(2), jugement rendu par M. le juge Lavergne. Ce jugement a été confirmé par la cour d'appel. Voir aussi un arrêt dans Sirey pour l'anné 1897, premier volume. Cet arrêt paraissait si bien résumer notre loi, telle qu'interprétée par nos tribunaux et notre jurisprudence, que je me suis servi des mêmes termes dans le considérant où je détermine la responsabilité de la compagnie défenderesse.

En révision, Cimon, Pelletier and Lemieux JJ. ont renversé ce jugement, non pas parce que les principes qu'il applique étaient mal fondés, mais parce que la preuve faite démontrait que

le demandeur avait le contrôle et la garde des choses qui ont produit les dommages réclamés,

et que par conséquent s'il y avait faute, c'était la sienne propre et non celle de la défenderesse.

Il me semble, observe M. le juge Cimon dans une opinion très élaborée, que le dommage n'a pas été causé par une chose sous la garde de la défenderesse; mais que ce dommage est le résultat de l'opération faite par le demandeur, opération absolument sous son contrôle: il était responsable envers la défenderesse de cette opération, c'était à lui de surveiller, de soigner, de bien faire cette opération. Cette opération et les choses dont il se servait pour la faire étaient alors sous sa garde particulière.

(1) 30 Can. S.C.R. 285.   (2) Q.R. 13 K.B. 214.

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Puis le savant juge conclut en insistant sur l'application des principes énoncés plus haut:

> Sous ces circonstances, la défenderesse ne peut être tenue responsable, à moins que le demandeur montre une faute spéciale de la défenderesse, faute qui aurait causé l'accident, et il n'y a aucune preuve de telle faute.
>
> Et il ne faut pas oublier que la jurisprudence de la cour suprême, jurisprudence qui paraît ferme et absolument arrêtée, exige toujours de la part du demandeur, en pareil cas, la preuve d'une faute de la défenderesse, faute qui aurait produit le dommage.

En appel, (Taschereau J.C., Lavergne, Cross, Archambault et Carroll JJ.), le jugement a renversé celui de la cour de revision, non pas parce qu'il y avait faute présumée en loi, ce qui paraît être l' opinion individuelle de M. le juge Archambault et de M. le juge Carroll, mais parce qu'il y avait preuve de faute, ainsi que le juge Cannon l'avait jugé.

Remarquons bien que dans la cause de *McArthur* v. *Dominion Cartridge Co.* (1), le conseil privé n'a pas déclaré que la doctrine de la cour suprême (2), était trop absolue ou erronée, mais qu'elle avait fait une fausse appréciation de la preuve qui fournissait des présomptions de fait suffisantes pour justifier le verdict du jury, confirmé par deux cours en faveur du demandeur. Le conseil privé ne dit pas un mot de la prétendue faute présumée en l'article 1054 C.C.; c'était cependant le moment de le faire si elle était fondée.

Voilà ce que la jurisprudence de la province de Québec nous enseigne à l'unanimité, au moins jusqu'à ces derniers jours. L'on nous dit qu'elle ne répond plus à la situation du monde industriel. C'est possible. Mais qui doit donner le remède? Est-ce le juge ou le législateur? Notre code civil commande aux

(1) [1905] A.C. 72. (2) 31 Can. S.C.R. 392.

juges de suivre dans l'interprétation de ses articles les lois en force lors de sa promulgation(1) ; et pour ma part je ne me laisserai certainement pas guider par les théories de quelques auteurs contemporains qui paraissent dominés par des raisons qui nécessiteraient un changement de la loi. Nous sommes ici non pas pour faire des lois, encore moins les changer.

On cite la décision de cette cour dans *Price* v. *Roy* (2). Dans cette cause nous n'avons pas voulu changer l'ancien droit français ou les lois qui existaient lorsque le code a été promulgué; nous avons tout simplement rétabli une ancienne règle de droit qui, pendant quelques années, avait été ignorée par des juges trop imbus des principes de la loi commune anglaise qui ne donne aucune action dans le cas de négligence commune ou contributoire, principe tout à fait différent de l'ancien droit français et du droit romain. A tout événement, et ceci n'est pas sans importance, dans *Price* v. *Roy*(2), cette cour n'a pas tenté de renverser sa propre jurisprudence, comme nous sommes invités à le faire dans la présente espèce, bien qu'elle soit consacrée par au moins une demi-douzaine de décisions.

Nous voilà donc en face de deux jugements rendus par deux cours sur une question de fait, savoir, la faute ou la négligence de la compagnie appelante, tel que développée par le juge Cannon dans le texte de son jugement. Dans ces circonstances, je ne crois pas que j'aurais raison de juger qu'il n'y avait pas faute et de renverser ces deux jugements. Voir *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*(3), page 326.

Je suis donc d'avis de renvoyer l'appel avec dépens.

(1) Art. 2615 C.C.
(2) 29 Can. S.C.R. 494.
(3) [1908] A.C. 323.

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IDINGTON J.—Whether the doing so or not rested upon him the respondent having duly shewn to the satisfaction of the learned trial judge that he had followed such instructions as his employers gave him and was otherwise blameless, the questions raised herein are reduced to a narrow compass.

Passing for the present other alternatives about to be referred to, it seems to me that we must infer upon the general evidence given of the relevant surrounding circumstances, coupled with such a finding that the explosion was the result of a defect in the thing or things in appellant's charge, or the result of faulty methods (by which I mean such as due care had not been taken to avoid fault in respect of), in its use of them or some of them. In this I include, of course, all done by those for whom appellants stand responsible.

We have no serious effort on the part of appellants to determine and inform the court of the true cause of the explosion. I, therefore, conclude this suggested inference stands good.

If one lawfully passing upon the highway were injured by a building falling for which fall there was no apparent cause except inherent defects, I do not think it would be necessary in an action for damages to determine exactly whether the fall thus obviously resulting from age or ill-construction came about by reason of defect in the nature of the mortar which had been used in its walls or from too great weight of superstructure having been placed thereon by the builders selected by the owner, or otherwise exactly what was the cause thereof.

Assuming, for argument's sake, the much discussed part of article 1054 C.C. blotted out, how does the proof of liability arising from the use of a machine,

perhaps a new or untried machine, causing actionable damage differ in regard to the nature of proof from what is needed in the case of the falling house? The Code deals with each of them in separate articles which, I take it, are, though of different origins, subsidiary to and illustrative of the comprehensive rule that precedes both in article 1053 C.C.

Surely the good sense and reason embodied in the maxim *"res ipsa loquitur"* may, in either case, be allowed operation and suffice to solve the questions arising when, once general evidence has been given, reducing the question to one of fair inference.

With great respect, it seems to me idle to suggest that this oven or furnace or both and all connected therewith were, as between the parties hereto, in charge of the respondent, in the sense claimed herein and so as thus to relieve the appellants.

If, on the other hand, it be said the inference above suggested is unwarranted because the work of the respondent was known to be of a dangerous character and explosions were to be anticipated as something not unlikely to happen, I submit that, in such case, there clearly arises the alternative inference that the nature of the respondent's work was known to the appellants, or by due care of the appellants ought to have been known to them, to involve just such risks of explosion, or as the evidence suggests, were of an experimental character in the handling of what were highly dangerous forces likely or liable to produce explosions of a dangerous character, and, therefore, in any such alternative or alternatives, of a like nature, the appellants had clearly neglected the plain duty of giving the necessary instructions and warning and (or) of furnishing such adequate protection as obviously would be necessary in such a case.

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In any way we can look at the case, unless the learned trial judge's finding in regard to absence of fault in the respondent be set aside, which is not suggested, the conclusion seems irresistible either that the learned trial judge and the court below are absolutely right or, at all events, not so clearly wrong that we are entitled to reverse it.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal arises out of an action brought by the respondent against the appellants to recover damages for the injuries suffered by him in consequence of an accident in the works of the appellants, who are manufacturers of calcium carbide at Shawinigan Falls.

The trial judge gave judgment for the respondent; this judgment was reversed by the Court of Review (1), unanimously, but restored by the Court of King's Bench(2), (Cross J. dissenting).

The Court of King's Bench proceeded upon a view of the effect of art. 1054 C.C., which it will be necessary to examine, as well as upon the view that the injury of which the respondent complains was due to the fault of the appellants in failing in one manner or another to exercise the degree of care which the law requires in the protection of their employees.

Both of these views are in controversy on this appeal, and I proceed to discuss the questions thus raised in the order mentioned.

The view of art. 1054 C.C., upon which the court below acted, as indicated in the leading judgment (that of Archambault J.), is that the first paragraph

(1) Q.R. 35 S.C. 385. (2) Q.R. 18 K.B. 271.

of that article embodies a self-sufficient rule of general application—subject only to an exception to be found expressed in the 6th paragraph. Stated in the terms of these two paragraphs, the rule is as follows:

1054. He is responsible not only for the damage caused by his own fault but also for that caused by the fault of persons under his control and by things which he has under his care; * * * The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which caused the damage.

This language, however, does not perhaps at first sight convey the full significance which in the opinion of the court below it really bears. The words "things which he has under his care" are, in this view, taken to embrace every inanimate thing not an immoveable used or worked for one's behoof, whether by one's self or by others; so that even though the complainant should have within his own hand the actual custody of the thing causing the harm in respect of which redress is sought, and even though he alone should consequently be in a position to give an account of the train of events actually leading to the injury, yet the onus is upon the defendant to bring himself within the exception; and this principle applies of course not only where the relation of master and servant exists, but wherever one person suffers an injury which is "caused" by "a thing" that another "has under his care" in the sense explained. Such is the effect of the extracts from Mons. Josserand, at p. 275, and of the learned judge's own observations in the following passage:

Dans le présente cause, la fournaise appartenait à l'intimée elle était exploitée par cette dernière *qui s'en servait en vue de réaliser des bénéfices dans son industrie. C'est elle, par conséquent, qui en avait la garde,* et c'est elle qui est responsable des dommages qu'elle a causés.

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Nos annales judiciaires, et celles des autres pays, fourmillent de décisions rendue en matière d'accidents du travail dans lesquels un ouvrier, mécanicien ou autre, a été tué ou blessé par l'explosion ou par le fonctionnement d'une machine ou d'un mécanisme, et *jamais on n'a songé à dire que la machine ou la chose se trouvait sous la garde de l'ouvrier et non sous celle de la compagnie ou de la personne qui l'exploitait ou qui s'en servait pour son avantage et pour son profit.*

I shall first give my reasons for thinking that this construction of article 1054 C.C., is not in harmony with the law of delicts and quasi-delicts as it has actually been expounded and applied by the Court of King's Bench and by this court in passing upon appeals from the Province of Quebec.

In examining the decisions of the provincial courts it is necessary to keep clearly in view the distinction between decisions based upon a statutory presumption, or presumption arising from some specific legal rule such as that which the court below finds declared in art. 1054 C.C., and decisions based upon inferences or presumptions which can be justified only as inferences of fact legitimately arising out of the facts established by the evidence. Whether in a given case a presumption of the last mentioned character is or is not well founded is not a question of law at all; but merely a question of sound reasoning to be tried by the same tests, whether the tribunal sit to administer the civil law, or to administer the common law; and judicial decisions, in so far as they involve inferences of fact only, although often useful as affording illustrations of judicial methods are not in the strict sense, legal precedents at all. Some misapprehension as to the real bearing of the decisions of the Court of King's Bench has, I think, arisen from not attending sufficiently to this distinction.

Of the decisions of the Court of King's Bench, I

will take three—each separated from the others by a considerable interval of time—and all dealing with the precise point in question here, the question of the burden of proof where an employee claims reparation for loss suffered in consequence of an injury inflicted by an explosion or otherwise through the immediate agency of something used for the benefit of the employer in the business in which the employee was engaged.

St. Lawrence Sugar Refining Company v. *Campbell* (1) in 1885. The grounds of this decision are stated by Dorion C.J., page 295, in these words:

> *There is no responsibility unless there is fault, and fault must be proved.* Here, two men were engaged in some work for the company. There is no proof that there was any danger in what they were doing. But *an explosion occurred by which the plaintiff was injured,* and the other workman killed. There is not a single witness who states how the accident occurred, nor is there anything to shew that the company was in fault, or that the other workman was in fault. *It cannot be presumed that the accident occurred through their fault. The respondent's action, therefore, must fail in the absence of any evidence adduced by him to support it.*

In a subsequent case, *Dominion Oil Cloth Company* v. *Coallier*(2), Dorion C.J., at page 269, states the ratio of the decision just cited in these words:

> *The respondent was injured by an explosion, and there was no evidence of the cause of the accident, or of fault on the part of the employers,* the judgment was also reversed and the action dismissed.

In *Mercier* v. *Morin*(3), in 1892, it appeared that the plaintiff had been injured by the collapse of a "chaussée" on which he was working. The Court of Queen's Bench held that the employers, in the absence of evidence that the accident was due to some fault on their part, were not liable. Bossé J., delivering the

(1) M.L.R. 1 Q.B. 290. (2) M.L.R. 6 Q.B. 268.
(3) Q.R. 1 Q.B. 86.

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judgment of the majority of the court (Baby, Bossé, Blanchet and Würtèle JJ.), said:

Dans ces circonstances, *la règle me parait facile à appliquer. Elle résulte des articles* 1053 *et suiv., l'impéritie, la négligence et l'inhabilité de toute personne capable de distinguer le bien du mal, si ce fait, cette impéritie, cette négligence ou cette inhabilité ont causé des dommages, créant l'obligation de réparer des dommages.* Tel est notre texte, et, dans l'application de ce principe, *il a été constamment et avec raison jugé que le maître est tenu de fournir, aux ouvriers qu'il emploie un local sûr et machines, engine et outils construits et aménagés suivant les règles de l'art et de la prudence.* Ainsi, un câble défectueux, une bouilloire mal aménagée, des lisses de chemin de fer mal placées, et généralement un vice de construction ou d'installation quelconque, cause du dommage, que le maître connaissait ou aurait dû connaître, entrainant responsabilité. Nos tribunaux en ont fait à maintes fois l'application.

Mais lorsqu'il n'est pas prouvé qu'il y a eu vice de construction ou d'installation; lorsqu'il y a absence de preuve de faute ou de négligence, notre jurisprudence a toujours déclaré qu'il n'y a pas lieu au recours en *dommages par l'employé contre le maître.*

Pas de preuve de faute ou de négligence, pas de lien de droit et pas d'action.

En ce sens, vide *Dominion Oil Cloth Co.* v. *Coallier*(1); *St. Lawrence Sugar Refining Co.* v. *Campbell*(2); *Compagnie de Navigation du Richelieu et Ontario* v. *St. Jean*(3); *Lavoie* v. *Drapeau*(4).

In *Canadian Pacific Railway Co.* v. *Dionne* (in 1908) (5), the precise point before us was formally decided by the court of appeal (Taschereau C.J., Bossé, Trenholm, Lavergne, Cross JJ.). The plaintiff's husband, an employee of the Canadian Pacific Railway Company, was run down by a shunting locomotive at a point near a place where he had been engaged in shovelling snow for the company. At the trial, before Langelier C.J., the company was held liable, the ground of liability being thus expressed:

Considering that on the 18th of February last the said Elzéar Doinne had been for several years in the employ of the defendant

(1) M.L.R. 6 Q.B. 268.
(2) M.L.R. 1 Q.B. 290.
(3) M.L.R. 1 Q.B. 252.
(4) 31 L.C. Jur. 331.
(5) Q.R. 18 K.B. 385; 14 Rev. de Jur. 474.

to work in its yard near its station at Quebec, and that on the day in question he was working at shovelling snow in the said yard under the order and direction of one Ouellette employed by the defendant as foreman of this work; considering that while the said Elzéar Dionne was in the said defendant's yard he was killed by a locomotive owned by the defendant and under its care.

On appeal this judgment was reversed and the principle upon which the Court of King's Bench proceeded was stated in the formal judgment as follows:

Considering that the respondent failed to prove the material allegations of her declaration, and in particular, failed to prove that the death of her husband, Elzéar Dionne, which occurred at Quebec on the 18th February, 1907, was due to fault, negligence or imprudence on the part of the appellant or of its servants:

Considering that, before defendant from whom damages are demanded by reason of quasi-offence on his part or on the part of his servants, can be held responsible, it is incumbent upon the plaintiff to establish affirmatively not only the existence of the damage claimed, but also the fault, negligence or imprudence on the part of the defendant, *and that the fact of the injury alleged having been caused by a thing under the control of the defendant, has not in law of itself the effect of placing upon the defendant the burden of proving that the injury was caused without fault on the part of the defendant or his servants.*

The decisions in the Province of Quebec relied upon in the judgment of the learned judge who delivered the judgment of the majority in the court below do not, with great respect, appear to me to impugn the principle stated in the cases to which I have just referred. The observations of Andrews J. in *Dupont* v. *Quebec Steamship Co.*(1), at page 194 (a decision of the Court of Review), are, it is true, capable of construction supporting the learned judge's views, but it is a well-known principle that such observations must be construed with reference to the facts of the case to which they relate—*secundum subjectam materiam;* and the facts of that case appear to have

(1) Q.R. 11 S.C. 188.

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afforded ample ground for drawing the inference that the tackle which failed had been negligently set up, or that there had been some lack of inspection, and that, I think, is in substance the process by which the Court of Review reached its conclusion.

The decisions referred to by Andrews J. in the course of his opinion (*Ross* v. *Langlois*(1), and *Corner* v. *Byrd*(2)) lend support to this reading of it. In *Ross* v. *Langlois*(1) the decision was put expressly upon the ground that the defendants had used defective tackle, without taking the care, before using it, to ascertain its condition. In the judgment of Jetté J. (see page 284 of the report), there is the finding that the hook which gave way was of

bad quality, in a bad state, and insufficient to support without danger, the burden put upon it; and, moreover, that the condition of the hook had not been ascertained before using it for the purpose to which it was applied.

That is a virtual finding of negligence; and with that finding the court of appeal agreed. In *Corner* v. *Byrd* (2), the ground of the decision is stated by Dorion C.J., at page 271, in these words:

It was one of those accidents for which the appellant is liable, because it could have been *prevented by care* on his part.

To come to the decisions of this court: In *Paquet* v. *Dufour*(3), Girouard J. states the law conformably to the second *considérant* quoted from the judgment of the Court of King's Bench in *Dionne* v. *Canadian Pacific Railway Co.*(4), and to the views expressed in the judgment of Dorion C.J. and Bossé J. in the two preceding cases.

Before closing, I wish (says the learned judge), to point out a *considérant* of the trial judge to which I cannot subscribe:

(1) M.L.R. 1 Q.B. 280.
(2) M.L.R. 2 Q.B. 262.
(3) 39 Can. S.C.R. 332.
(4) Q.R. 18 K.B. 385; 14 Rev. de Jur. 474.

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"Considérant que le dite explosion *ayant été causée par de la dynamite dont le défendeur était le propriétaire et dont il avait la garde*, il doit être tenu responsable des dommages qui en sont résultés pour le demandeur, à moins qu'il n'ait prouvé qu'il lui a été impossible de l'éviter."

We have so often decided in our court that proof of fault, whether by direct evidence or by presumptions, rests upon the plaintiff, that it is not necessary to quote authorities.

This passage, I think, with great respect, summarizes with accuracy the effect of a long series of decisions in this court on appeals from the Province of Quebec. I will mention some of them. In *Cowans* v. *Marshall*(1), it was shewn that the plaintiff while employed in the defendants' iron-works was injured in consequence of an explosion caused by molten lead coming in contact with oakum in a wet condition. This raised precisely the point in hand, the accident being exactly one of that class to which, if the view under discussion be a sound one, the suggested presumption would apply. It was held, however, that the onus was on the plaintiff to prove negligence, and that onus not having been satisfied the complainant must fail. In *The Canada Paint Co.* v. *Trainor*(2), it was shewn that the plaintiff had in some unexplained manner come in contact with the machinery of a printing press at which she was employed in the defendants' establishment, and the defendants were charged with failure to make proper provision for the protection of their employees. The Court of Queen's Bench held that the plaintiff had made out her case by establishing affirmatively such want of care. Here again it is clear that upon the proposed construction of art. 1054 C.C., the defendants would be charged with the onus of relieving themselves from the presumption of negligence by shewing that they could not have prevented

(1) 28 Can. S.C.R. 161.

(2) 28 Can. S.C.R. 352.

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the accident. This court held, however, (directly negativing the view now advanced) that although the plaintiff had unquestionably been injured by the machine, she had failed to satisfy the burden upon her to shew that the injury was due to some fault of the defendants.

In *Dominion Cartridge Co.* v. *Cairns*(1), it appeared that the plaintiff was injured by an explosion originating in the pressing machine of the defendants, who were manufacturers of cartridges. This court reversed the judgment of the Court of Queen's Bench, and held (a ruling quite irreconcilable with the theory under review) that the onus was on the plaintiff to trace the explosion to some fault of the defendants.

It is unnecessary to multiply examples; the course of decision has been clear and uniform; but there remains the question of the effect of the decision of the Privy Council, in *McArthur* v. *Dominion Cartridge Co.*(2), which it appears has been assumed in some of the decisions of the Quebec courts to be inconsistent with the views on this point to which this court has consistently given effect.

This court had held in that case that no negligence had been proved—that there was no direct evidence, and nothing upon which a presumption of fact could be founded. It had been further held that assuming negligence, the rule applied by the French courts in such cases requiring *certain proof* of a causal relation between a fault on the part of the defendants and the injury complained of was sufficient to defeat the plaintiff's claim. In the judgment of the Privy Council delivered by Lord Macnaghten it is not suggested that the onus was not upon the plaintiff to shew that

(1) 28 Can. S.C.R. 361. (2) [1905] A.C. 72.

the injury was due to some fault of the defendants; on the contrary, the judgment proceeds upon the assumption that it was. It was held, however, that there was sufficient evidence to justify a verdict by the jury that the defendants had been negligent and that this negligence was the cause of the explosion to which the injury was attributable.

At the same time the Privy Council negatived the existence as a part of Quebec law of any rule (of general application) of the character indicated above (that the law exacts "proof of a fault which *certainly* caused the injury"); holding it to be sufficient to adduce evidence from which the tribunal may fairly infer both the existence of the fault and the connection between that fault and the injury complained of.

There is nothing, therefore, in the decision in that case to cast any doubt upon the principle upon which the Court of King's Bench and this court have hitherto acted.

I should not be prepared to give my adherence to the view that it is open to this court to accept (as a part of the law of Quebec) a principle the exact reverse of that upon which this mass of high judicial authority is based; but assuming the question raised to be still open for examination it would require very cogent reasons to lead me to hold that all these decisions are erroneous and must be overruled. A careful examination of these reasons adduced in support of this view satisfies me that the great weight of argument lies in the opposite scale.

The first step in considering the construction accepted in the court below is to ascertain what is the proper method of interpretation. I do not think it is a proper method to apply one's self to an examination

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of the language of art. 1054 C.C., in such light only as may be had from an exclusive consideration of the words of the article itself, and the immediate context, disregarding the history of the law on the subject of which it treats. In *Robinson* v. *Canadian Pacific Rway. Co.*(1), at page 487, Lord Watson, speaking for the Judicial Committee, applied to the Civil Code generally the rule enunciated by Lord Herschell in *Bank of England* v. *Vagliano*(2), at page 144, the effect of which is that when the Code contains provisions of doubtful import, resort is to be had to the pre-existing law. The previously uniform current of decision of the two Canadian courts of appeal having jurisdiction over the Province of Quebec in the sense opposite to the decision below affords at least some ground for thinking that the construction upon which that decision is based does not yield the single exclusive meaning attributable to the language employed, and *primâ facie*, that in itself would seem in accordance with Lord Watson's canon to be a good reason for not ignoring the pre-existing law.

A far stronger reason against excluding the pre-existing law from consideration is afforded by the terms of the enactments under the authority of which the Code came into force as law which evince very plainly the intention to declare, in arts. 1053, 1054 and 1055, the law as it then stood. There was first an Act of the Province of Canada (20 Vict. ch. 43), authorizing the appointment of commissioners and directing that they should embody in the Code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force, giving the authorities on which their views

(1) [1892] A.C. 481. (2) [1891] A.C. 107.

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should be based, but stating separately any proposed amendments. Then (the Commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioners as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain specified amendments eliminating and altering the provisions of it only so far as should be necessary to give effect to these amendments; and providing that the Code so altered should, on proclamation by the Governor, have the force of law.

It hardly seems necessary to comment on the effect of this legislation. It very manifestly exhibits the intention of the legislature that the provisions found in the roll referred to were not, excepting in so far as they should be affected by the amendments specified, to effect any substantial alteration in the law then actually in force in Lower Canada. Among the provisions contained in this roll (and untouched by the amendments sanctioned) are arts. 1053, 1054, and 1055 C.C.; and in construing them we have therefore this clear and important guide to the intention of the legislature.

It is proper to observe that in *Robinson* v. *Canadian Pacific Railway Co.*(1), the Privy Council had to consider art. 1056 C.C., which does not appear in the report of the Commissioners and to which, therefore, these considerations do not in their full force apply. Furthermore, in the construction of such a statute as the "Bills of Exchange Act," which the House of

(1) [1892] A.C. 481.

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Lords had to consider in *Bank of England* v. *Vagliano* (1), one has no such key by which to ascertain whether the legislature in enacting a particular provision intended thereby to change or leave unchanged the existing rules of law upon the topic dealt with; and, consequently, one can only proceed upon the construction of the words themselves. In such a case the pre-existing law is an extraneous thing and only as an extraneous circumstance can be brought into play for the purposes of interpretation; while on the contrary in the case before us the legislature has itself, in effect, declared its purpose of embodying the existing law in the provision to be construed.

I am not disposed to question that if these articles were framed in language reasonably capable of only one meaning, it is not easy to see how, conformably to the postulate of the constitution touching the supremacy of Parliament, a judicial tribunal could refuse to accept as the law existing when the Code was framed that which in unmistakable terms a competent legislature had declared that law to be; but neither do I doubt that if the state of the law these articles were intended to declare be not itself seriously open to question, and the articles can reasonably be read in such a way as to bring them into conformity with it, we cannot be required to give them a reading (though the words themselves should be capable of that reading also) out of harmony with the ascertained intention of the legislature.

It is probably unnecessary to consider at length the state of the common law of Quebec upon this point at the time of the adoption of the Code. It will not be disputed that the passages already quoted from Dorion

(1) [1891] A.C. 107.

C.J. and Girouard J. and Bossé J. state it correctly. In France there has been a great deal of discussion upon the construction of the corresponding article (1384) of the Code Napoléon; but all schools of interpretation seem to be agreed in this that under the common law non-contractual liability was based upon delict or quasi-delict, and except in the specific cases provided for in art. 1055 C.C. (1385 C.N.), the burden of proof was upon the complainant.

Mons. Esmein, the eminent authority on the history of French law, in a note, Sirey, 1897, 1, 17-19, states the traditional view thus:

A. Le patron propriétaire se pourrait être responsable envers ses employés de l'accident survenu qu'autant que celui-ci résulterait de sa faute personnelle ou d'une faute de ses préposés. C'est l'obligation délictuelle ou quasi-délictuelle fondée sur les art. 1382 et 1383 C. civ. La faute alors doit être démontrée, et le fardeau de la preuve incombe à celui qui réclame les dommages-intérêts, * * *.

Notre ancien droit français ne connaissait que deux cas dans lesquels le propriétaire était tenu, par une obligation quasi-délictuelle, de réparer le préjudice causé par la chose. C'étaient "l'action contre celui dont le bâtiment, par sa chute totale ou par portion, a blessé quelqu'un," et "l'action contre le maître d'un animal qui a causé quelque dommage." (Bourjon, *Le Droit commun de la France et la Coutume de Paris,* liv. 6, tit. 2, ch. 6 et 7; cf. Domat, Les Lois civiles, tit. 8, sec. 2, et. 3.)

Pothier ne parle ni de l'un ni de l'autre cas dans son *Traité des Obligations.* Sans doute, on entendait assez largement la chute d'un bâtiment; on donnait l'action lorsque la blessure avait été causée par la chute d'un entablement, ou d'une seule tuile, mais on n'allait pas plus loin; la responsabilité du propriétaire n'était point étendue à d'autres hypothèses.

Indeed, for the greater part of the 19th century, such was the effect which the French tribunals gave to the provisions of the Code Napoléon dealing with this topic. Mons. Josserand, at pp. 5 and 6 of his monograph "Responsabilitité du fait des choses inanimées," says:

Au contraire, la dernière source de responsabilité, le fait des choses inanimées, a été fort négligée jusqu'à ces dernières années.

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On reconnaissait bien que nous sommes responsables parfois du dommage causé par les choses dont nous avons la propriété ou la garde; l'article 1384, 1°, le déclare formellement. Mais sans creuser la nature de cette responsabilité, sans s'arrêter même au texte fondamental qui en consacre le principe, on se contentait de lui appliquer le droit commun en maitère de délits; on faisait rentrer la responsabilité du fait des choses dans la théorie plus large de la faute Aquilienne, l'article 1384, 1°, n'étant ainsi qu'une application de l'article 1382, le dommage causé par notre chose n'étant pas autrement traité que le dommage directement causé par notre personne même. C'était le triomphe complet de la faute délictuelle, le règle souverain de l'article 1382 qui commandait ainsi au chapitre II. tout entier. La théorie avait donc le mérite de l'unité et les conséquences en étaient claires; le victime d'un accident occasionné par une chose inanimée ne pouvait obtenir une indemnité que si le propriétaire avait commis une faute, et seulement à la condition d'établir cette faute; *actori incumbit probatio.*

Pendant trois quarts de siècle on se contenta de cette conception.

The view of article 1384 C.N., advocated by M. Josserand and Mons. Saleilles—the doctrine of "le risque professionnel"—proceeds upon the hypothesis that the common law was altered by the positive enactments of the Code Napoléon. Josserand, "Responsabilité du fait des choses inanimées," pp. 90-95.

Such having been the state of the common law the question would appear to be concluded; unless indeed it can be maintained, in face of the decisions already cited, that the words of art. 1054 C.C., will not reasonably bear a construction consistent with the principles which *ex hypothesi* it was intended to embody.

That question I proceed to consider, first taking the English version of the article alone. The first paragraph of the article declares that every person

is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care.

Then follow four paragraphs declaring responsibility in the cases of parents, curators, tutors and artisans (for acts of apprentices) respectively:

2. The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

3. Tutors are responsible in like manner for their pupils;

4. Curators or others having the legal custody of insane persons, for the damage done by the latter;

5. Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care.

Assuming the first paragraph to state, as held in the court below, a rule of law of general application under which one is liable in every case for damages caused by the fault of persons under one's control—then nobody will be disposed to question that each of these four succeeding paragraphs states a special application of that rule. In other words, paragraphs 2 to 5 declaring the responsibility of parents for their children, and so on, embody *particular cases* within the general rule.

Coming now to paragraph 6; we have these words

The responsibility attaches in the above cases only when the person subject to it fails to establish he was unable to prevent the act which has caused the damage.

Some difficulties are to be noted here as arising from the construction proposed. First, if this paragraph (the 6th) embodies an exception which attends the rule stated in the first paragraph throughout its whole extent—and which applies, therefore, to cases falling under the rule other than the cases mentioned in paragraphs 2 to 5—why was the exception placed at the end of the 5th paragraph, and not stated at once as an exception to the rule? Secondly, why is the exception made applicable in express terms to the "above cases" only, and not stated as an exception to the rule itself? Both position and phraseology seem natural and appropriate, if the exception was to affect the four preceding cases alone; neither is natural or appropriate upon the alternative hypo-

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thesis. Again, how shall we read the seventh paragraph? Is that not a "case" under the general rule? If so—and it seems the more natural reading to treat it as such—are we to read the sixth paragraph as applying to it?

But the last words of the sixth clause seem to create a more serious and, I venture to think, an insurmountable difficulty. Under that clause the person sought to be charged may escape responsibility, in the cases to which it applies, by shewing that he was unable to prevent—not the damage—but "the act which has caused the damage."

The effect of these words in the view of the court below is that, *primâ facie,* one's responsibility arises from the circumstance alone that damage occurs through the immediate instrumentality of something which is being used or worked for one's profit; and upon the construction proposed the phrase "act which caused the damage" must be read as descriptive of the fact that damage has thus occurred.

That is attributing to the words "act which caused the damage" a sense quite out of keeping with the true meaning of them; and is to assume on the part of the Commissioners who framed the article and the legislature which adopted it a very imperfect appreciation of the meaning of common English words. It is not necessary to dispute that if no other application for these words could be found one might accept this view rather than reject the words as wholly senseless. But here there is no such excuse. The words in their ordinary sense find their natural application when read as referring to the acts of the persons mentioned in the four paragraphs immediately preceding. Giving them this, their natural and obvious, application a

perfectly consistent and intelligible construction is given to all the paragraphs from 2 to 6.

The exception should not then be attributed to the first paragraph, unless some reason for doing so is to be found outside the language in which the exception is framed. I think there is no such reason. It may, of course, be suggested that the first paragraph, if taken alone (freed, that is to say, from the operation of the exception declared in the 6th paragraph) would establish a legal rule still more widely at variance with the common law. The doctrine of *le risque professionnel* mentioned which has the support of many able French commentators (and has possibly at last received the sanction of the Cour de Cassation Dal., 1908, 1, 217), regards the corresponding paragraph of the Code Napoléon as a positive enactment imposing an absolute liability for all harm caused through the instrumentality of things owned by one and worked for one's profit irrespective of proof or presumption of fault—a liability which one can only escape by establishing that the true cause of the harm was *force majeure* or the fault of the victim.

This, it may be argued, is the true effect of reading the first paragraph as freed from the exception declared in the 6th; and one must meet the question whether the words of the 1st paragraph are so intractable as to require this construction of them. No difficulty respecting this point would seem, however, to arise unless one lose sight of the office the 1st paragraph is designed to fill. It is sufficiently plain, I think, from what has already been said upon the history of the legislation, that the proper mode of approaching these articles is to regard them as an exposition of one topic in a co-ordinated system of law

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already in force—and not at all as a string of detached legal enactments. From this point of view the paragraph in question presents itself not as embodying a self-sufficient and self-operating legal rule, but as one step simply in the progress of the exposition. Thus art. 1053 C.C., explains that fault may consist in positive act or in omission and so on. Arts. 1054 and 1055 C.C., seem designated to deal with the instruments of damage in respect of which one may be answerable. Article 1054 is primarily concerned with one's responsibility for the acts of persons; but the first paragraph is most naturally read, I think, as introductory to the whole subject dealt with in the two articles; and it is seemingly utilized to state the broad general considerations which are the *raison d'être* of the positive legal rules stated in the subsequent paragraphs. One's responsibility may arise (so in effect the expositors proceed in that paragraph) not only from one's personal fault, but from the fault of those persons whom the law regards, for the purpose, as being under one's control, and out of harm caused by things in respect of which the law imposes upon one a duty to take care that they are not the instruments of harm to others. The personal relationships and the classes of things thus referred to are then specifically stated, the first in art. 1054 C.C., and the second in art. 1055 C.C. This view is concisely put by Mons. Esmein, S. V. 1897, 1, 19.

Par le membre de phrase en question, le législateur, qui, dans l'art. 1384, ne dispose en réalité que sur la responsabilité du dommage causé par le fait des personnes, a simplement indiqué, par préoccupation de symétrie, qu'une responsabilité semblable résultait aussi du fait de certaines choses; et le dispositif sur ce second point se trouve dans l'art. 1385. Le membre de phrase discuté de l'art. 1384 ne contient point la règle qu'on prétend en tirer; il n'a pas disposé sur ce point, mais simplement annoncé la disposition de l'article suivant.

And by Fromageot, "de la Faute," at p. 99:

Le premier alinéa de l'article 1384 du Code civil n'etablit pas en effet, une disposition absolue et particulière se suffisant à elle-même; il ne fait que poser un intitulé des principes qui sont précisés dans les alinéas suivants pour les personnes dont on doit répondre, dans l'article 1385 pour les choses animées et dans l'article 1386 pour les choses inanimées.

And of M. Planiol, vol. 3, at page 303:

917. *Origine et sens de cette disposition.* Il est facile de montrer pourquoi cette idée a été énconcé à cette place et sous cette forme. Dans le projet primitif, les dispositions des articles 1384, 1385 et 1386 figuraient déjà à peu près telles qu'elles existent actuellement, mais les deux articles 1384 et 1385 n'en faisaient qu'un seul, qui débutait par une phrase générale, annonçant les dispositions particulières qui en forment les autres alinéas. La formule de l'alinéa ler n'a donc d'autre but que d'énoncer le principe dont les dispositions suivantes sont les applications. Or, dans le projet de l'an VIII., il est visible que le législateur a pensé à la fois aux personnes et aux choses dont quelqu'un a la surveillance et la direction et qui peuvent être pour les tiers une source de dangers. La responsabilité est donc fondée, à raison des choses comme à raison des personnes, sur une idée de *garde*, c'est-à-dire sur une *faute personnelle* de celui qui s'est mal acquitté de sa tâche de surveillant. On ne peut faire sortir de ce texte l'idée d'une responsabilité *indépendante de toute faute.*

Cette fin de l'alinéa 1er *de l'article* 1384 *était restée inapperçue pendant près d'un siècle; mais vers* 1895 *on a cherché à en tirer parti pour élargir la disposition particulière de l'article* 1386, *qui paraissait trop étroite à certains tribunaux. J'estime que c'est à tort. Voyez cidessous nos.* 927 *et suiv.*

So we are not driven to a construction out of harmony with the declared intention of the legislature. It is proper to add that we need not concern ourselves with the rival interpretations of the Code Napoléon which during the past twenty years have been so much debated in France. The key to the legislative intention furnished us by the legislature itself is wanting to the interpreters of that instrument; and we are not required to surmise what the result might have been, had we been called upon to construe art. 1054 C.C., so to speak *in vacuo*—disregarding both the state of the law when the Code came into force and the course of judicial decision since.

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On the other hand the views respecting the effect of those articles of the Code Napoléon upon which the provisions of the Quebec Civil Code were founded which had prevailed in France down to the time of the promulgation of the latter Code have, I think, a material bearing upon the construction of those provisions.

The view of the first paragraph of art. 1384 Code Napoléon above indicated, is that which (as Mon. Josserand says in the passage quoted) (1) prevailed in France for three-quarters of a century. It was the view which the French tribunals still applied when, in 1861, the Commissioners reported their draft of the provisions upon the title of "Obligations" and, in 1866, when the Code was promulgated. That in the verbal changes made by them in adopting the provisions of the French Code the Commissioners had no suspicion that they were affecting any substantial alteration of the law upon the point in question here is made quite clear by the passage in their report (first report, p. 16) referring to those provisions.

Here is the passage:

> The articles of chapter III. "of offences and quasi-offences" correspond with the articles of the French Code, except that the wording has been changed to obviate certain objections raised to the latter; and in No. 74(79) an addition has been made to the enumeration of cases to which the article applies. These are the paragraphs relating to tutors and curators of insane persons.

Except upon the inadmissible hypothesis that the distinguished Commissioners were deliberately practising a deception upon the legislature this is not the language of trained lawyers, who, having been instructed to present to the legislature a Code embodying the law then in force, were intentionally introducing a profound modification into the rules of law upon

(1) See p. 316 *ante*.

the subject of torts both as they were found in the existing law and as they were then understood to be declared by the instrument the Commissioners were in substance professing to adopt. It is hardly to be supposed that the legislature with this report before it would be keener than the codifiers to detect the change.

Indeed, it is no exaggeration to say that the assumption involved in the view of the court below is this: that this self-delusion of the Commissioners and the consequent delusion of the legislature respecting the true construction of art. 1054 C.C., were participated in for almost a generation in every quarter of the Province of Quebec; and that the Court of King's Bench, down to the year 1908, and this court, down to this moment, have continued to give decisions in actions of tort arising in that province in ignorance or disregard of the fact, that in the deeply important point of the onus of proof the law was radically altered in 1866; that, in a word, the Commissioners who framed the law, the legislature that passed it and the courts of appeal that, for forty years, have applied it have all shared in this far-reaching misconception of its meaning and effect. That is an assumption which (with great respect) I decline to act upon without some reason more convincing than any yet advanced.

In the view expressed above an examination of the French text becomes unnecessary. Article 2615 C.C., expressly provides that, where the French and English versions differ, that construction is to be adopted which most nearly accords with the existing law upon the topic dealt with; and, assuming the language of the French version to lend some support to that view of the article, which would appear if adopted to effect

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little less than a revolution in the law on this subject as in practice administered in this court, the provision just quoted even on that assumption requires us to resort to the law of Quebec as it stood in 1866.

I now come to the question whether in this view of the law the plaintiff has shewn that the injury of which he complains was due to the fault of the appellants. The relevant facts not in dispute are these; the carbide of calcium is, for the purposes of commerce, produced by the fusion in an electric furnace of carbon and unslaked lime. The appellants use furnaces of two kinds. One in which the constitutents of the carbide are reduced to a liquid state, and the liquid carbide itself is run off through one or more openings at stated intervals; another in which the crucible itself containing the fused product is, from time to time as it becomes filled, removed, and another substituted. The first mentioned of these types of furnaces, according to the evidence of the respondent, was known at the appellants' works as *la fournaise experimentale;* the last mentioned as the "Willson" furnace. The ports through which in the first mentioned type the liquid carbide is run, are, except when open for that purpose, sealed with mortar. When the liquid is to be run off the furnace is tapped, that is to say, the plug of mortar is pierced, and the orifice cleaned out. When the run has been completed the opening is sealed again. It was the respondent's duty, with the assistance of another workman, to tap one of these furnaces and to clear the opening; and it was while engaged in this duty that he met with the injury giving rise to this litigation. The practice was that the liquid having been run off and the orifice cleaned, the mortar for plugging it again was placed on the bottom of the opening by the respondent's helpers. Then the re-

spondent proceeded to press it home, employing for that purpose a long poker having a circular iron disc at its end. On the day of the accident he had just pressed the mortar to the bottom of the orifice, when a loud explosion occurred, accompanied by a discharge through the opening of flaming liquid carbide which burned the respondent severely, destroying his sight.

Thus far, I say the facts are undisputed; and the disputes, so far as concerns the primary facts, are confined to two points. First, it is said that no proper instructions were given to Doucet. Upon this point, there is no finding by the learned trial judge; but there is a finding in favour of the appellants by the Court of Review, and, having regard to the admissions of the respondent, and the positive evidence given by the assistant superintendent of the appellants, it would, I think, be quite impossible to justify the reversal of that finding. Assuming, moreover, some lack of instruction, there is not upon the evidence, I think, the slightest ground for suggesting that the explosion can be attributed to any want of knowledge on the part of the respondent.

The other point in controversy is this: The assistant superintendent says that the respondent was "the boss of the job," that he was responsible for feeding, sealing and tapping the furnace, during his shift. The respondent denies that he was ever appointed foreman; but he constantly speaks of his associate as *"mon homme"* and his own account leaves little room for dispute that he assumed charge of the furnace and directed the operations mentioned. Here, again, there is no finding by the trial judge, and it seems clear no adequate reason for disturbing the finding of the Court of Review in the appellants' favour.

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The question to be determined is whether these facts afford a sufficient foundation for the inference that the injury suffered by the respondent was due to the fault of the appellants.

The duty of the appellants under the law of Quebec in respect of the care to be exercised for the protection of their workmen (speaking now apart from any question arising out of the construction of article 1054 C.C.) has in this court been more than once explained. The employer is not to insure the safety of his workmen. He is bound to take all reasonable steps to the end that they shall not, because of any defect or insufficiency in his plant or appliances or because of anything unnecessarily dangerous in his system or methods, be exposed to any avoidable risk or harm; and further, where the employment is hazardous (so that in spite of all practicable precautions accidents likely to cause harm are to be expected) he is bound to take the necessary steps to minimize, so far as may reasonably be possible, the evil effects of such accidents when they do occur. It is only a corollary of this to say that in the last mentioned case—where the employment is dangerous—all protective measures are required (reasonably consistent with the prosecution of the duties of the employment) which the knowledge and the practical experience of a prudent and competent employer would suggest.

Such are the measures which in such circumstances are demanded by the requirement of reasonable care on the part of the employer. That is the effect of the passage from Dal. Jur. Gen., 1870, 3, 63, adopted by the Chief Justice in *Royal Paper Mills* v. *Cameron* (1), at pages 368 and 369, which I think summarizes the

(1) 39 Can. S.C.R. 365.

law on this point as it has been enunciated and applied in the decisions of this court.

I understand the judges below to put the responsibility of the employer in respect of the safety of his employees rather higher than this. Archambault J., for example, quotes with approval a dictum to the effect, that the employer is bound to know when a machine or process is dangerous. I do not think that can be supported.

The employer is bound to have the knowledge of a competent person; but he is not to be held to know that which competent persons do not know. To hold otherwise would result in making him liable in a very large number of cases which now fall under the head of "inevitable accident."

The question then is, first, whether the discharge of carbide from which the respondent suffered was due to any failure of the duty; and, secondly: Does the evidence shew that the appellants ought at any rate to have anticipated as a possible accident the discharge of carbide from the furnace in such a way as to endanger the safety of their employees? And—if so—was the injury to the respondent due to the omission of any precaution which prudence and competent skill and experience would have dictated as likely to reduce the chances of such an accident, or to minimize the injurious effects of it, should it occur?

The learned trial judge has in general terms found that the mishap was due to the negligence of the appellants. The specific grounds upon which this finding appears to be based are, that, first, the continuous heating of the furnace, and, secondly, the use of mortar for filling the openings mentioned, constituted two unnecessary sources of danger.

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With great respect, the first of these grounds belongs, I think, to the realm of pure conjecture. There is literally no evidence to support or even suggest it. The second, also must be rejected for want of evidence to shew that the appellants should have known (or at least foreseen the possibility) that the use of mortar would be a source of danger.

The learned judge based his view apparently upon some rather doubtful evidence to the effect that after the accident the appellants discarded lime as an element in their sealing mixture. Such evidence is, I think, quite irrelevant to the question to be tried, which is whether, before the accident, in the then existing state of experience, the failure of such knowledge or foresight is to be imputed to them for a breach of duty. Conduct pursued in the light of experience derived from the accident itself can hardly be taken as a sufficient basis for a charge of want of care in not taking the same course before the accident occurred. The views which I think have generally prevailed upon this point are summarized by Mr. Justice Gray in delivering the opinion of the Supreme Court of the United States in *Columbia and P.S. Railroad Co.* v. *Hawthorne*(1), at pages 207-208, in the following passage:

The only States, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reason. *McKee* v. *Bidwell*(2), and cases cited; *St. Louis & San Francisco Railway Co.* v. *Weaver*(3).

The true rule and the reasons for it were expressed in *Morse* v. *Minneapolis & St. Louis Rly Co.*(4), above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the Supreme Court of Minnesota, after referring to earlier opinions of the same court

(1) 144 U.S.R. 202.
(2) 74 Penn. St. 218, 225.
(3) 35 Kan. 412.
(4) 30 Minn. 465, at p. 468.

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the other way, said: "But on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of the accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire and Yorkshire Railway Co.*(1).

The considerations developed in this passage, it will be observed are considerations of general application, the force of which would not appear to be affected by anything peculiar to the system of law prevailing in Quebec.

The respondent, it is true, attributes the accident to an excess of water in the mortar; but it is quite clear at the same time that this is simply a guess; Archambault J. expresses and proceeds upon the view that the contact of such an excess of water with the flaming carbide would produce acetylene gas, which is explosive. This view, again, is not based upon evidence; and with great respect, I do not think it com-

(1) 21 L.T. (N.S.) 261, at p. 263.

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petent for any court to arrive at an adjudication imputing fault and consequent liability upon the basis of scientific opinions having no foundation in the evidence upon the record, touching questions respecting the nature and results of chemical processes which, to say the least, are not immediately obvious.

Assuming, for example (a fact well enough known though not touched upon in the record), that the elements of water and of calcium carbide (when the two substances are brought together at ordinary temperatures) do separate and recombine to form, among other things, acetylene gas, can one affirm that the introduction of water into an electric furnace in full operation could bring about the decomposition of a mass of molten carbide there? Would the water not be converted into steam before it could by any possibility come into contact with the carbide? Will steam and molten carbide decompose one another? Such questions must obviously be considered in any rational investigation of the point mentioned, and the record presents literally no materials enabling one to answer them intelligently.

But there is another view which must be examined, and that is that there is sufficient ground in the circumstances of this case for affirming that the explosion in question was due to some want of care on the part of the appellants, although the specific point in which they failed in their duty is not made to appear. There are many cases in which the fact alone of an accident occurring is held to be a sufficient foundation for such an inference. Speaking broadly, in England and in the United States, this inference is held to be permissible when the injury has been caused by something wholly within the control of the defendant or of

persons for whose actions he was responsible, and the occurrence to which the injury was due was not of such a character as would ordinarily take place in the absence of negligence. Given these conditions, the inference in the absence of explanation is a plain one, but the question whether the inference is, or is not permissible, is in truth, not a question of law at all. Apart from specific rule it is merely a question of right thinking. Although, therefore, the conditions under which the maxim *"res ipsa loquiter"* is normally applied in jurisdictions where the common law prevails, are not present here (in that *vis-a-vis,* the respondent, the furnace cannot be said to have been wholly within the control of the appellants); still, if the facts in evidence in the present case could be said to justify the conclusion that assuming the absence of negligence on the part of the respondent and his helper (and I think we cannot, on the evidence attribute the accident to any such negligence), such an explosion would not occur except as the result of some negligence in respect either of the construction of the furnace, or of the methods of operation (although we might be entirely in the dark as to the specific thing wrongfully done or omitted) a *primâ facie* case of negligence would clearly be made out. To say that such conditions were present is only another way of saying there was evidence of negligence.

But these conditions are not present. The explosion stands, as a single, unexplained, isolated fact. The evidence relating both to the furnace and to the nature of the process is strikingly meagre. The construction of the furnace itself is not really described; and apart from the facts that the carbide is produced by the fusion of lime and coke by means of an electric furnace, and that the liquid carbide is run off in the man-

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ner already described, we know nothing whatever of the process. Is it then safe on such a state of the evidence to affirm as the basis of a judicial decision that this single occurrence was anything other than a pure accident? That it would not have taken place without negligence? Or that the possibility of it ought to have been foreseen? After ransacking the evidence for materials to support a reasoned conclusion on these points I find myself still in the region of surmise.

Some minor contentions remain. It is said that the description of the furnace as *"la fournaise experimentale,"* that the use of it was a mere experiment; and that the evidence of the defendants' superintendent contains what was in effect an admission that there was a known risk of such an escape of gas as might cause injury. The experiment indicated by the name *"la fournaise experimentale"* may have been, and it most likely was a trial of the comparative cost of operating the two types of furnaces. The evidence at all events does not point to anything else; and there is literally nothing to indicate that at the time of the accident the furnace was in respect of the safety of operating it in an experimental stage. At that time the "Willson" furnace appears to have been almost, if not altogether, displaced. The descriptive phrase applied to the other type had evidently survived the experiment. There is nothing whatever to shew that one type of furnace had not been as fully tested as the other; and to assume that either of them is in more general use than the other, or that furnaces in which the molten product is drawn off by tapping have not been tried and generally adopted is again to pass entirely beyond the region of legitimate deduction from the facts before us.

Then as to the admission of the superintendent. This is the passage in which it is said to be found:

A.—Well, the proper way was to fill the furnace, and to make the carbide, certain details about these furnaces are not necessary to be given to the men, they are simple, but they were given just the same; *I told him to empty or blow the furnace when it was necessary to do so at certain intervals.*

Q.—And did you ever notice that he had not done it according to the instructions received? A.—Mr. Doucet was a good workman, but it is possible that on certain occasions the work has not been done well, it is possible *it was so about the feeding of the furnace, but I cannot tell.*

Q.—What did you say to Doucet, besides? A.—I told him how to do the work right as it had to be done.

Q.—What had to be done *for the feeding of the furnace?* A.—*Well, if the gas would come out too fast, they must look out* and put something in the furnace.

Q.—Is the operation a dangerous one? A.—No, I did not say it was dangerous.

Q.—Why did you give these instructions to Doucet then? A.—Because I was in charge of the furnace.

Q.—And what did you say besides about the furnace? A.—*I told him how to feed the furnace and how to do all the operations he had to perform.*

This passage has been, I think, misunderstood. The witness is not on the point of danger at all—he is discussing the operation of feeding the furnace; and he says that when the gas escapes freely and in large volume, the workmen whose duty it is to do so, must put in a fresh supply of the materials out of which the carbide is produced. The reason for this is not explained; but one naturally supposes that a too rapid escape of gas (which probably finds its outlet through these materials and the opening by which the furnace is fed), indicates that the supply of material is low and that in consequence some waste of power is taking place. That would seem to be the simple explanation; but the passage as it stands, without elucidation, cannot certainly with justice be regarded as

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containing an admission or even a suggestion that the process should have been known to be (or was in fact) a dangerous one.

The court below has held that a proper regard for the safety of its employees would have suggested to the appellant the use of masks for the protection of their faces. But, why, if there was no reason to anticipate an accident of such a character as frequent or make useful that kind of protection? The fact that after the accident masks were supplied is relied upon; and I have already given my reasons for thinking this circumstance to be immaterial. Moreover, what ground is there for suggesting that any mask having a mesh large enough to leave the employees free to perform their necessary duty would have afforded them any protection against the spurt of liquid from which the respondent unfortunately suffered. This, again, is a question we may guess about, and again by no means intelligently answer from the materials before us.

For these reasons, I think, the Court of Review right in holding that the respondent has failed to prove his case—has failed, that is to say, to establish it by direct evidence or by proof of facts which afford sufficient ground for a reasoned inference that the injury from which he unfortunately suffers was due to the appellants' fault.

ANGLIN J.—The plaintiff lost his sight by an explosion, which occurred while he was performing duties assigned to him by his employers, the defendants, in attending an electric carbide furnace. This furnace had been recently installed and was operated upon a system materially different from that which had ob-

tained in the defendants' establishment in connection with furnaces of another class. It was attended by two sets of men—a day-shift and a night-shift. It was the duty of these men to fill the furnace with coke and lime; to draw off the liquid carbide, when ready, through openings at the base of the furnace; and then to cleanse the orifices and to close them with plugs of mortar preparatory to recharging. This work was done once every hour.

The plaintiff and his assistant, who constituted the night-shift, came on duty about 7 o'clock in the evening, and the plaintiff when injured had been at work about twenty minutes. The men of the day-shift had charged the furnace and left a quantity of mortar ready for use. After opening the orifices and allowing the liquid carbide to run off, the plaintiff cleansed them, and the explosion occurred while he was closing one of the orifices with a plug of mortar—which one, or whether the others were all open or all closed, or some open and some closed, does not appear.

Although not directly established by the evidence, there can be little doubt that contact of carbide in the furnace or in one of its orifices with water, or water vapour from the mortar used to close them, caused the explosion.

The Court of Review did not dissent from, and the Court of King's Bench expressly affirmed, the finding of the learned trial judge that the explosion cannot be ascribed to any fault or neglect of the plaintiff. This conclusion appears to be well supported by the evidence. The plaintiff had discretion neither as to the work which he was required to do nor as to the manner in which he should carry it out, and he was, when injured, discharging his duties in the manner

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in which he had been instructed to perform them. The carbide furnace had been left charged by the men of the day-shift. The plaintiff and his assistant, shortly after coming on duty, drew off the liquid carbide and, having cleansed the orifices as instructed, they quite properly proceeded to plug them with mortar prepared for that purpose by the men of the day-shift. These circumstances preclude any imputation of fault or neglect against the plaintiff.

Moreover, I would note *en passant*, that, to me, they seem to establish that, as found by the learned trial judge, and the majority of the judges in the Court of King's Bench, the things which caused the explosion, though the plaintiff was actually engaged with them, were not under his control or care, but were under the control and care of the defendants. They all belonged to them and were in use for their immediate purposes and profit. They had the direction and control of the manufacturing operations. The plaintiff was an unskilled workman—a servant acting in conformity to orders. I entertain no doubt that, upon the true construction of art. 1054 C.C., these things were in the control of the defendants.

I think it quite possible that evidence could have been adduced that it was highly and unnecessarily dangerous to plug the orifices of a carbide furnace with mortar made with water, and that this in itself constituted a defective system for which the defendants should be held responsible; that their chemist should have anticipated the occurrence of an explosion and that they could easily have taken precautions which would have saved the plaintiff from the severe injuries which he sustained. But the record does not contain such evidence, and without it I would hesitate

to rest a judgment upon these grounds. If the plaintiff must succeed upon proven, as distinguished from presumed, fault on the part of the defendants, he is charged with the burden of furnishing the proof.

In the absence of fault or neglect on the part of the plaintiff, the very fact of the explosion establishes that there must have been some defect in the system, the furnace, the means employed for cleaning out the orifices, the materials used to plug them, or the composition of these materials, because, with conditions entirely proper, such an explosion should not have occurred. What the precise defect was the evidence does not disclose. Whether it was patent or latent, discoverable or non-discoverable, and if discoverable by what degree of care or by what tests, are questions to which the evidence does not afford answers. But that the explosion was due to some defect—to this extent *res ipsa loquitur*.

Yet, unless patent, or discoverable by reasonable care and diligence, the existence of the defect would not *per se* constitute negligence of the defendants.

The master is not an insurer of the safety of his workmen, or servants, and I am unable to understand the principle upon which some of the Quebec decisions proceed, in which, apparently without invoking the provisions of art. 1054 C.C., the employer has been held liable for injuries due to latent defects. Mignault, Droit Civil, vol. 5, p. 372. In several of the cases cited by this learned author the facts in evidence appear to have justified a finding of negligence on the part of the defendants. But, if by "latent defects" we are to understand defects not discoverable by the exercise of reasonable care or skill, I am, with respect, unable to agree that for injuries due to such defects,

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apart from the provisions of art. 1054 C.C., the employer should be held responsible. Mr. Walton in an interesting article(1), points out that, in the French Cour de Cassation, the liability of the master for injuries to his servants, due to occult faults, was formerly restricted to cases in which the plaintiff could establish a definite *vice de construction* and was then based upon art. 1384 C.N.

While it seems not improbable that the plaintiff might have procured evidence to shew that the explosion was due to some defect in the defendants' system, or in their plant or its accessories, the existence of which, because discoverable by reasonable care and susceptible of remedy, should be deemed negligence on their part, he has failed to adduce this evidence and the mere occurrence of the explosion does not, I think, warrant the inference that it was caused by such negligence. Without evidence that the defendants should have anticipated danger to their workmen, I am not prepared to hold that they were guilty of fault or negligence because they omitted to warn the plaintiff of the danger to which he was exposed or to furnish him with a mask or spectacles or other means to guard against its consequences.

Upon this view of the evidence I am unable to perceive the applicability of the decision of the Judicial Committee in *McArthur* v. *Dominion Cartridge Co.* (2), cited by Carroll J. In that case there was such evidence of defects in machinery and process likely to cause a disastrous explosion, that Lord Macnaghten felt impelled to say:

The wonder really is, not that the explosion happened as and when it did, but that things went on so long without an explosion.

(1) 5 R.L., N.S. 425, 436. (2) [1905] A.C. 72.

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That these proven defects actually caused the explosion the jury were, in the peculiar circumstances, allowed to infer without direct proof.

I am, with great respect, of the opinion that the judgment in appeal cannot be supported on the ground that, apart from any presumption of fault, the evidence sufficiently establishes that the explosion which injured the plaintiff was caused by actual fault or negligence on the part of the defendants.

It is therefore necessary to deal with the contention of the plaintiff that, under art. 1054 C.C., upon the facts in evidence, there is a presumption of fault on the part of the defendants.

Arts. 1053 and 1054 of the Civil Code are as follows:

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care;

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

Tutors are responsible in like manner for their pupils;

Curators or others having the legal custody of insane persons, for the damage done by the latter;

Schoolmasters and artisans, for the damage caused by their pupils or apprentices while under their care;

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

There is no decision of this court upon the construction and effect of article 1054 C.C. In *Paquet* v. *Dufour*(1), Mr. Justice Girouard, at page 334, de-

(1) 39 Can. S.C.R. 332.

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clined to subscribe to the view that where an explosion had been caused by dynamite under the care of the defendant he should be held responsible for the resulting damages unless he should prove that it was impossible for him to have prevented the occurrence. No other member of the court took this position. Although in several cases, not unlike that now under consideration, which have come to this court on appeal from the Province of Quebec, there have been broad statements that in order to succeed the plaintiff must affirmatively prove actionable negligence on the part of the defendant, the claim put forward has invariably been founded upon an allegation of negligence which the plaintiff has failed to establish by the evidence which he adduced, and the court acting upon the view that the judgment should be *"secundum allegata et probata,"* has refused him relief. In none of these cases, so far as I have been able to discover, has the construction or effect of article 1054 C.C., been discussed, and I have found no case except *Paquet* v. *Dufour*(1), in which there has been any expression of opinion by a judge of this court upon the construction of this provision of the Code.

In several cases in the Quebec courts there are broad statements to the effect that proof of fault on the part of the defendant is essential in order to establish his liability. *Mercier* v. *Morin*(2), is an instance. In most of these cases, however, no express reference is made to article 1054 C.C. There are other decisions of the Quebec courts, such as *Dupont* v. *Quebec Steamship Co.*(3), cited by Mr. Justice Archambault, in which it has been held that the effect

(1) 39 Can. S.C.R. 332.
(2) Q.R. 1 Q.B. 86, at p. 92.
(3) Q.R. 11 S.C. 188.

of article 1054 C.C., is that, upon proof by the plaintiff that his injuries were caused by things under the care of the defendant, a presumption arises that such injuries are ascribable to the fault of the defendant, and the burden of proof is shifted, with the result that the defendant will be held responsible in damages, unless he shews that he could not (presumably by the exercise of reasonable care and skill) have prevented the occurrence. This was the opinion of the learned trial judge in the present case and of the judges who composed the majority of the Court of King's Bench, and it was not dissented from in the Court of Review.

It is manifest that it would be futile to attempt to reconcile this view of the law with the *considérant* of the judgment of the Court of King's Bench in *Canadian Pacific Railway Co.* v. *Dionne*(1), quoted by my brother Duff. But we may not reverse the judgment now in appeal merely because it is not in accord with an earlier opinion of the Court of King's Bench. We must be satisfied that the judgment in the present case is erroneous.

The earlier French authorities held the master responsible where a workman had sustained injuries of which the cause was unknown. But at a later period, possibly because they feared that the defendant's responsibility for damages caused by inanimate things in his care would otherwise under the Code Napoléon be absolute and unqualified, the French courts and authors of repute took the view that it could not have been intended that he should be subjected to such a serious burden without proof of fault or negligence. The contrary view, however, was steadfastly main-

(1) Q.R. 18 K.B. 385.

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tained by such able commentators as MM. Marcadé and Josserand. More recently the French Cour de Cassation, which apparently evaded the question as long as possible (Dalloz, 1907, 1, 177), seems to have felt itself constrained by the explicit language of art. 1384 C.N., to accede to the view supported by MM. Marcadé and Josserand, and, in a very late decision, reported in Dalloz(1), that court appears to have committed itself to the proposition that a plaintiff who proves that he has been injured by an inanimate thing, *e.g.*, machinery, in the care of the defendant, is entitled to recover damages from the latter without adducing evidence of fault on his part; the presumption thus established, says the court, may be met by proof that the injuries of the victim are due entirely to his own fault.

From a still more recent case decided in the fourth Chamber of the Court of Appeal of Paris, I take the following head-note:

> Si l'article 1384, alinéa 1er, du code civil, en disposant que l'on répond du dommage causé par le fait des choses que l'on a sous sa garde, crée une responsabilité basée sur une présomption de faute, cette présomption peut être détruite par la preuve d'un cas de force majeure ou d'un cas fortuit ou de l'inexistence de toute faute pouvant être imputée à celui qui la garde de la chose, soit à raison de l'état matériel de cette chose, soit à raison des conditions de son emploi. Recueil Phily, 1909, p. 926, No. 5039.

While the opinions of the French courts (Cassation and Appeal) are not binding upon this court, they are entitled, particularly when they deal with provisions of the French Code similar to those of the Quebec Civil Code, and of French and not of English origin, to the very greatest respect.

It was strongly pressed upon us by counsel for

(1) Dal. 1908, 1, 217.

the respondent that the sixth paragraph of article 1054 C.C., is applicable not only to the second, third, fourth and fifth paragraphs, but also to the first paragraph of the article. The judgment of the Court of King's Bench proceeds upon this view. For the appellant it is contended that the application of the sixth paragraph does not extend to the first paragraph, but is restricted to paragraphs 2 to 5 inclusive.

For convenient reference I shall set out here the sixth clause of article 1054 of the Civil Code and also the corresponding clause of the Code Napoléon.

The former reads as follows:

> The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage.

And, in the French version:

> La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pù empêcher le fait qui a causé le dommage.

The provision of the Napoleonic Code, article 1384, is as follows:

> La responsabilité ci-dessus a lieu, à moins que les père et mère, instituteurs et artisans, ne prouvent qu'ils n'ont pu empêcher le fait qui donne lieu à cette responsabilité.

The restricted application of this clause in the Napoleonic Code admits of no doubt. But the language of the provisions of the Quebec Civil Code does not at all so distinctly define its applicability. That the responsibility under the first paragraph of article 1054 C.C., in the case of damage caused by things which the defendant has under his care, if fault or negligence is to be presumed against him, may otherwise be exceedingly onerous because absolute and unqualified, affords a very strong argument in support of the view

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that the exculpatory clause should be held to apply to it, and the departure from phraseology of the Code Napoléon in substituting for its precise and unmistakable language the somewhat indefinite phrase *"la responsabilité ci-dessus,"* which is, translated, "the responsibility in the above cases," is quite consistent with and in fact rather indicative of a design to extend the application of this clause to all the cases covered by the article except those of masters and employers. Otherwise, why should not the codifiers of the Quebec Civil Code have adopted the language of the Code Napoléon merely inserting "curator and custodian of the insane" in addition to "father and mother, schoolmasters and artisans?"

Pressed by these arguments, I was for some time of the opinion that the exculpatory clause of art. 1054 C.C., should be held applicable to all cases within the first paragraph of the article except those in which the damage had been caused by the fault of the defendant himself. But upon further consideration I am convinced that this clause does not apply at all to the first paragraph. That it cannot apply to cases of damage caused by the fault of the defendant himself is obvious. That it was not meant to apply to the responsibility of masters and employers for damage caused by their servants and workmen is also clear. Yet if the clause should be held to apply to the cases covered by the first paragraphs of damage "caused by the fault of persons under his (the defendant's) control," would it not apply to the liability of masters and employers for damage caused by their servants and workmen, inasmuch as servants and workmen are persons under the control of their masters and employers? Then when it is sought to apply this clause to cases of damage caused by things under the defendant's care, the

language of the English version, viz., that he was "unable to prevent the *act* which has caused the damage," presents a very serious difficulty because it is certainly inaccurate to speak of the "act" of an inanimate thing. It is true that upon the word *"fait"* of the French version the difficulty may not be so great. But both versions of the Code are of equal authority, and in this instance the original was the English version rather than the French. (McCord's Civil Code, Preface, p. ix.) While I cannot but think the departure at this point from the language of the Napoleonic Code unfortunate, yet notwithstanding the uncertainty to which the words *"la responsabilité ci-dessus"* are calculated to give rise, I think it reasonably clear that the cases mentioned in paragraphs 2, 3, 4 and 5 of article 1054 C.C., are given as specific instances of "damage caused by persons under his (the defendant's) control," and that to these cases—"the above cases"—the sixth paragraph applies, whereas to the other specified cases of damage caused by persons under the defendant's control, viz., those mentioned in the seventh paragraph, which deals with the responsibility of masters and employers, for damage caused by their servants and workmen, as well as to any other cases within the description "damage caused by the fault of persons under his (the defendant's) control" not particularized in the article, the sixth paragraph has no application. It follows that this paragraph affords no assistance in construing the first paragraph of the article, which must now be carefully examined.

The codifiers of the Civil Code had before them the Code Napoléon. In article 1054 C.C., they followed the form of article 1384 C.N. The differences in language cannot be regarded as merely accidental. They

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were no doubt carefully considered and their significance may not be ignored. Thus we find in the first paragraph the word *"faute"* in the Quebec Civil Code in lieu of the word *"fait"* of the Code Napoléon. We find that in the case of "things" the responsibility under the Code Napoléon is for damage *"causé par le fait * * * des choses que l'on a sous sa garde,"* while under the Civil Code it is for damage *"causé * * * par les choses qu'elle a sous sa garde."* Care was taken when substituting the word *"faute"* for *"fait"* that it should not extend to the case of damage caused by things. These differences between the terms of the corresponding paragraphs of the two Codes certainly indicate that the Quebec codifiers intended that evidence of fault of the defendant or of defects in the things themselves should not be a necessary element in the plaintiff's case where damage has been caused to him by things under the care of the defendant.

But, according to all authorities, the cardinal rule for interpreting the Code is, that where the language is clear and free from ambiguity, effect must be given to it and it may not be explained away or controlled by referring to other sources. Here the terms of the first paragraph of article 1054 C.C., are simple and unequivocal. He (every person capable, etc.) is responsible for damage caused "by things which he has under his care." These words immediately follow an article in which proof of fault as the basis of liability is the dominant idea. That idea is continued in this paragraph as to the acts or omissions of the defendant himself or of persons under his control, and its application to these cases is perhaps emphasized by the use of the word *"faute"* where the Code Napoléon employs the word *"fait."* But in the case of damage caused by things under the care of the defendant the idea of

proof of fault is entirely, and I see no reason for thinking that it was not deliberately, eliminated.

No part of article 1054 C.C., is found in brackets. This indicates that the Commissioners did not intend in this article to alter or to amend what they understood to be the existing law of Lower Canada. Under that law, an injured plaintiff was required to adduce positive evidence of fault on the part of the defendant, if he would have the court hold the latter responsible. Because they regard article 1054 C.C., as merely declaratory of the former law, writers and judges have expressed the view that when the plaintiff proves that he has been injured by things under the control of the defendant he must, in addition, adduce positive evidence of fault or negligence on the part of the latter. Mignault, Droit Civil, vol. V., pages 683-4. But the language of the article is explicit, and, in view of the evidence of deliberation in its use afforded by the comparison with the Code Napoléon, I perceive no sufficient reason for reading into it a qualification which has apparently been designedly omitted. In *Trust and Loan Company of Canada* v. *Gauthier* (1), art. 1301 of the Civil Code is dealt with. This article was reported by the codifiers as an embodiment of the existing statute law of Lower Canada as judicially interpreted. DeLorimier Bibliothèque du C.C., vol. X., page 303. Their Lordships say, at page 101:

Article 1301 clearly goes further than the law which prevailed in Lower Canada before the Code was framed; but their Lordships cannot accede to the argument that the language used and deliberately adopted in the Code must be narrowed and held to have no greater effect than the previous law for which it has been substituted.

I would be better satisfied if I could find that article 1054 C.C., admitted of a construction upon

(1) [1904] A.C. 94.

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which the exculpatory provision of its sixth paragraph might be extended to the case of damage caused by things in the care of the defendant. I fully realize that without this qualification the responsibility of persons in the position of these defendants may be very onerous, because I find it difficult, owing to the presence of an exculpatory clause restricted in its application to cases within the paragraphs 2, 3, 4 and 5, to accede to the view expressed by the Paris Court of Appeal that the first paragraph should be read as subject to a very similar qualification. *Expressio unius,* etc. Yet it seems to me that to hold that the defendant is responsible for damage caused by things under his care only when it is proved by the plaintiff that he has been negligent or at fault is to give no effect to the concluding words of the first paragraph of the article, because fault imputable to the defendant must be either that of himself or of persons under his control, and damage caused by such fault is expressly declared actionable by the earlier clauses of the paragraph. Notwithstanding that judges for whose opinions I entertain the very greatest respect have taken a different view of the proper construction of the first paragraph of article 1054 C.C., so far as it relates to cases of damage caused by things under the care of the defendant, I am of opinion that the terms of this paragraph are so clear and unambiguous that it is impossible to refuse to give effect to them merely because the responsibility to which they subject defendants may be unusually onerous.

But, inasmuch as the defendants have offered no evidence to shew that the explosion was attributable to fault of the plaintiff, or to *vis major,* or that it was a case of pure accident, or that it occurred without

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fault imputable to themselves, it is not in this case necessary to determine whether or not such proof would suffice to relieve a defendant from responsibility. My conclusion is that, at all events, in the absence of such proof, a defendant must, without other evidence of fault or negligence, be held responsible for damages shewn to have been caused by things under his care.

Cases in which injury has been caused by things in the care of the defendant, but in use under statutory authority, form an exception to this general rule.

The legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong.

Canadian Pacific Railway Co. v. *Roy*(1). In such cases the defendant cannot be presumed to be at fault. Actual fault or negligence on his part must be established by evidence.

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

Appeal dismissed with costs.

Solicitors for the appellants: *McLennan, Howard & Aylmer.*

Solicitors for the respondent: *Martel & Duplessis.*

(1) [1902] A.C. 220.

1909
*Oct. 19.
*Oct. 20.

ALEXANDER F. CHAMBERLIN AND JANET HIS WIFE (SUPPLIANTS) ...... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Negligence—Injury on public work—Government railway—Fire from engine—R.S. [1906] *c.* 140, *s.* 20(*c*).

The words "on a public work" in sub-sec. (*c*) of R.S. [1906] ch. 140, sec. 20 (The Exchequer Court Act), are descriptive of locality and to make the Crown liable for injury to property under that sub-section such property must be situated on the work when injured.

APPEAL from the judgment of the Exchequer Court of Canada in favour of the Crown on a Petition of Right.

The suppliants by their petition claimed damages for loss of property, on land near the right of way of the Intercolonial Railway, by fire from sparks thrown by a passing engine. The Crown pleaded a denial of negligence and that the injury did not happen on a public work. The latter defence was not relied on at the trial, but the petition was dismissed on the ground that though sparks from an engine caused the fire, the suppliants had failed to prove that the engine was defective.

Currey K.C. and *Mott K.C.* for the appellants argued that the evidence established that the engine

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

was defective shortly before the fire and that the court below was not justified in its deduction that such defect had been repaired.

Chrysler K.C. and *McAlpine K.C.* for the respondent. The Crown can only be liable under sub-sec. (*c*) of sec. 20, "Exchequer Court Act," for "injury to person or property on a public work." Here the property destroyed was on land of the suppliants at some distance from the right of way and not "on a public work." The suppliants, therefore, do not bring their case within the statute and the judgment against them must stand. See *Larose* v. *The King*(1), *per* Taschereau J. at p. 209; *Letourneux* v. *The King*(2); *Paul* v. *The King*(3).

Currey K.C. in reply. If the cause of injury originates on a public work the Crown is liable. See *Price* v. *The King*(4).

THE CHIEF JUSTICE.—In a long series of decisions this court has held that the phrase "on a public work" in sec. 20, sub-sec. (*c*), of the "Exchequer Court Act," must be read, to borrow the language of Mr. Justice Duff in *The King* v. *Lefrancois*(5), at p. 436,

> as descriptive of the locality in which the death or injury giving rise to the claim in question occurs,

and that to succeed the suppliant must come within the strict words of the statute. Taschereau J. in *Larose* v. *The King*(1). See also *Paul* v. *The King*(3), and cases there cited.

(1) 31 Can. S.C.R. 206.
(2) 33 Can. S.C.R. 335.
(3) 38 Can. S.C.R. 126.
(4) 10 Ex. C.R. 137.
(5) 40 Can. S.C.R. 431.

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The Chief Justice.

In this case the property destroyed by fire, previous to and at the time of its destruction, was upon the land of the suppliant, some distance from the right of way of the Intercolonial Railway and was not property on a public work. As to the objection that this question was not raised in the court below I refer to *McKelvey* v. *Le Roi Mining Co.* (1) If questions of law raised here for the first time appear upon the record we cannot refuse to decide them where no evidence could have been brought to affect them had they been taken at the trial. The point was taken by the pleadings if not urged at the argument below.

GIROUARD J. agreed with the Chief Justice.

DAVIES J.—This was an action brought in the Exchequer Court on a claim for damages arising out of the destruction of the property of the suppliants claimed to have been caused by sparks from the smokestack of an Intercolonial Railway engine.

The property destroyed was previous to and at the time of its destruction upon the land of the suppliant some distance from the right of way of the railway, and was not property on a public work.

The learned judge, Mr. Justice Cassels, who delivered the judgment of the Court of Exchequer, had not heard the witnesses, who had given their testimony before the late Justice Burbidge.

The suppliants were desirous to avoid the expense of a re-hearing, and with the assent of the respondent the case was fully argued before Mr. Justice Cassels on the evidence taken before Mr. Justice Burbidge.

The learned judge found as a fair conclusion to be

(1) 32 Can. S.C.R. 664.

drawn from the evidence that the fire originated from a spark or sparks emitted from the engine, but he was unable to find that it was caused through any defect in the engine for the existence of which and the failure to remedy which the Crown could be held liable for the losses claimed.

On this appeal the jurisdiction of the Court of Exchequer over the claim in question was challenged and denied by Mr. Chrysler, his contention being that such jurisdiction was limited to claims against the Crown arising out of injuries to the person or property *on a public work,* and did not extend to injuries happening away from a public work, although caused by the operations of the Crown's officers or servants.

The cases in which the question has already come before this court for consideration were all referred to.

We are all of the opinion that the point has already been expressly determined by this court, particularly in the case of *Paul* v. *The King*(1). In that case the majority of the court held after the fullest consideration that clause (*c*) of the 16th section of the "Exchequer Court Act," which alone could be invoked as conferring jurisdiction, only did so in the case of claims

arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties.

Claims for injuries not within these words of the section and occurring, not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

With the policy of Parliament we have nothing to

(1) 38 Can. S.C.R. 126.

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do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

Under these circumstances we must, without expressing any opinion upon the conclusions of fact reached by the learned judge, dismiss this appeal with costs.

IDINGTON J. concurred in the opinion of the Chief Justice.

DUFF and ANGLIN JJ. agreed in the opinions stated by the Chief Justice and Mr. Justice Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *W. A. Mott.*
Solicitor for the respondent: *E. H. McAlpine.*

JAMES T. LAIDLAW AND GEORGE A. LAURIE (PLAINTIFFS) .... APPELLANTS;

1909
*Oct. 5, 6.
*Nov. 2.

AND

THE CROWSNEST SOUTHERN RAILWAY COMPANY (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Railways—British Columbia Railway Act—Fire on right-of-way—Combustible matter on berm—Origin of fire—Damage to adjoining property — Negligence — Evidence — Practice — New points raised on appeal.

In an action against a railway company subject to the British Columbit Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence.

Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the provincial court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.

Judgment appealed from (14 B.C. Rep. 169) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia(1), affirming the judgment of Irving J., at the trial, by which the plaintiffs' action was dismissed with costs.

The case is stated in the judgments now reported.

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

(1) 14 B.C. Rep. 169.

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SOUTHERN
RY. CO.

S. S. Taylor K.C. for the appellants.

A. H. MacNeill K.C. for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs.

DAVIES J.—I concur in the reasons stated by Mr. Justice Anglin.

IDINGTON J. (dissenting).—The findings of facts having been unanimously agreed upon below should not be lightly disturbed.

I, therefore, agree that appellants' claim, so far as rested upon the charge that the fire in question was the result of sparks from the respondents' engine or engines, should stand as disposed of by the courts below.

There remains, however, the question of respondents' liability for permitting the fire, however it may have arisen, on a part of its right of way covered with fallen timber and dry brush of a very inflammable character, to continue burning and unattended from about half-past seven A.M. to about one P.M., whilst easily extinguishable, and obviously liable to spread as it did on the rising of the slightest breeze, to the neighbouring timbered lands.

The law bearing upon this as I conceive it was not correctly presented to the courts below, nor, as far as I can see, was the evidence now relied upon directly called attention to. And, as a result of these omissions, I rather think the question now raised was by the judgments overlooked entirely. Counsel for the respondents very properly and candidly admits the legal question

involved was discussed, and, I suspect from his statement, was correctly apprehended by the learned Chief Justice. But through overlooking the evidence now pressed upon our attention the court could not come to any other conclusion than it did. In fact, in giving judgment, the majority seem to have ignored the question entirely; and Mr. Justice Clement, I submit with respect, misapprehended the pleadings in this regard, for paragraphs four and six seem sufficient.

This is not a case of a party so deliberately abandoning a claim in appeal that he or it cannot now be heard in respect to it.

At common law the liability of a possessor of land for the spreading of fire originating on his land was practically so great as to render him an insurer.

By 6 Anne, ch. 31, sec. 6, this was modified and, later, was replaced by 14 Geo. III., ch. 78, sec. 86, which provides as follows:

> No action, suit or process whatever shall be had, maintained or presented against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidently begin, nor shall any recompense be made by any such person for any damage suffered thereby; any law, usage or custom to the contrary notwithstanding.

This clearly does not abrogate the entire common law relative to liability for fire once started whether accidentally or otherwise. The owner of land is merely relieved from the inevitable consequences of such an accident. It leaves the avoidable consequences to be dealt with by applying those well-known principles of justice and reason which are represented by the maxim "*sic utere tuo ut alienum non lædas.*"

Was it reasonable or just for the respondents to have, to the knowledge of their employees (as the answers of their secretary to interrogatories shew was

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Idington J.

done), the extinguishable fire in question on their premises from

early in the morning of the 7th day of September and at other times in the forenoon of the 7th day of September?

The case of *Furlong* v. *Carroll* (1), in the judgment of Mr. Justice Patterson reviews the growth of the law.

Must the appellants be deprived of their rights because too confident of one cause of action they overlooked accidentally their other cause of action, though that other was on record and supported by evidence but not fully presented or in law correctly presented? I submit not. I think the appeal and causes of action so far as rested upon the charge that the fire originated from the respondents' engine should be dismissed with costs throughout, and such to include the general costs of the cause save what were incidental to paragraphs four and six of the statement of claim. I think a new trial of the issues arising thereon should be granted and that the costs of the last trial incidental thereto and of the new trial be in the discretion of the learned trial judge.

DUFF J. concurred with Anglin J.

ANGLIN J.—The plaintiffs' action was brought to recover damages sustained by them through the destruction by fire of a portion of a valuable timber limit. They charged that the fire in question originated on the right-of-way of the defendant railway company and was caused by sparks of fire negligently allowed to escape from an engine. They also charged that the

(1) 7 Ont. App. R. 145.

right-of-way was encumbered with combustible material facilitating the spread of the fire; and, finally, that the defendants were negligent in not preventing the spread of the fire and in allowing it to reach the plaintiffs' land.

At the trial the attention of all parties was directed to the effort made by the plaintiffs to establish that the fire was caused by sparks or fire which escaped from an engine of the defendant company. The learned trial judge held that the plaintiffs had failed to establish that this was the origin of the fire, although they probably had established that the fire was first seen upon the defendants' right-of-way. The learned judge was of opinion that unless the fire was shewn to have originated from the operation of an engine the condition of the right-of-way did not constitute actionable negligence. No other ground of action appears to have been urged at the trial. Nothing was there said in argument of the allegation now put forward that the defendants through their servants had notice of the existence upon their right-of-way of the fire which eventually spread to the plaintiffs' lands and were guilty of actionable negligence in not extinguishing it. Neither is any such cause of action alluded to in the notice of appeal to the Supreme Court of British Columbia, which affirmed the judgment in favour of the defendants.

It is quite impossible upon the evidence before us to interfere with the finding that the evidence does not establish that the origin of the fire was the escape of sparks, ashes or fire from a locomotive operated by the defendants.

The duty of the defendants to maintain a clear right-of-way is inseparably connected with the opera-

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Anglin J.

tion of their railway. There is no such duty imposed upon them as mere landowners and, without proof of knowledge or notice of the existence of a fire, not shewn to have been caused by the operation of their railway, the fact that the condition of their right of way facilitated its spread does not, in my opinion, amount to actionable negligence. Upon both these grounds, therefore, the plaintiffs' appeal is hopeless.

Nor do I think that it would be a wise or proper exercise of discretion on the part of this court to permit the plaintiffs now to bring forward a cause of action which is evidently an afterthought. Upon the condition of the record before us they would certainly not be entitled to judgment upon this allegation of negligence and could, at best, ask that the case should be sent back for a new trial upon proper terms. If this cause of action had been presented to the trial judge, or, even though not there presented, if it had been made a ground of appeal to the Supreme Court of British Columbia, the present application to the discretion of this court might have been more favourably entertained. But where the plaintiffs have allowed the trial to come to a close without setting up the cause of action on which they now rely and have not asserted it on their application to the provincial court of appeal, it is too late to ask to be permitted to put it forward in this court.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Harvey, McCarter & Macdonald.*

Solicitor for the respondents: *Albert Howard MacNeill.*

WILLIAM R. PETERS (PLAINTIFF) ... APPELLANT;

1909
*Nov. 2.
*Nov. 3.

AND

JOSEPH PERRAS AND OTHERS (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Jurisdiction—Appeal to Privy Council—Stay of proceedings.

When, as provided by sec. 58 of the "Supreme Court Act," a judgment of the court has been certified by the registrar to the proper officer of the court of original jurisdiction, and the latter has made all proper entries thereof the Supreme Court of Canada has no power to stay proceedings for the purpose of an appeal from said judgment to the Judicial Committee of the Privy Council. *Union Investment Co.* v. *Wells* (41 Can. S.C.R. 244) overruled.

MOTION, on behalf of the respondents, for stay of execution pending proceedings on an application for leave to appeal from the judgment of the Supreme Court of Canada(1) to the Judicial Committee of His Majesty's Privy Council.

The judgment allowing the appeal to the Supreme Court of Canada was rendered on 5th April, 1909; the minutes were settled and certified by the registrar of the Supreme Court of Canada on 26 June, 1909, and notice of the application for leave to appeal to the Privy Council was given in October, 1909. In the meantime the proper officer of the court of original

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

(1) 42 Can. S.C.R. 244.

1909
PETERS
v.
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jurisdiction (the Supreme Court of Alberta) had made all the proper and necessary entries thereof in the records of that court, as required by section 58 of the "Supreme Court Act," R.S.C. (1906) ch. 139, and a writ of execution had been issued therein.

N. G. Guthrie, for the motion.

C. H. Maclaren, contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—When the judgment of this court has been finally certified by the registrar to the proper officer of the court of original jurisdiction, and all the proper and necessary entries thereof have been made, the subsequent proceedings with regard to the execution are to be taken as if the judgment had been pronounced in the court below. We are, therefore, without jurisdiction to grant the present application for a stay of proceedings. See *Thompson* v. *Equity Fire Ins. Co.*(1).

Motion refused.

Solicitors for the appellant: *Short, Cross & Biggar.*
Solicitors for the respondents: *Gariepy & Landry.*

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(1) 1 Ont. W.N. 137.

ARCHIBALD YORK (PLAINTIFF).....APPELLANT;

1909
*Oct. 11.
*Oct. 20.

AND

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

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Municipal corporation—Assessment and taxes—Exemption—Charter of Edmonton—Construction of statute—"License fee"—N.W.T. Ord., 192 *of* 1900— *N.W.T. Ord.,* 1904, *c.* 19—*Con. Ord. N.W.T., c.* 89.

The provision of the charter of the Town of Edmonton (N.W.T. Ord., 1904, ch. 19), title xxxii., sec. 3, sub-sec. 4, exempting any person assessed in respect of any business from the payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the provincial government under the "Liquor License Ordinance," Con. Ord., N.W. Ter., ch. 89.

Judgment appealed from (2 Alta. L.R. 38) affirmed.

APPEAL from the judgment of the Supreme Court of Alberta(1), reversing the judgment of Stuart J., at the trial, and dismissing the plaintiff's action with costs.

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

Wallace Nesbitt K.C., for the appellant.

Chrysler K.C. and *C. A. Grant*, for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

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

(1) 2 Alta. L.R. 38.

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GIROUARD J. agreed with Anglin J.

DAVIES J.—After the argument in this case and a careful study of the "Liquor License Ordinance," ch. 89 of the Consolidated Ordinances of the North-West Territories and "The Edmonton Charter," I became satisfied that the judgment appealed from was right. I agree with the reasons of the court of appeal for that judgment, delivered by Mr. Justice Beck, namely, that on the true construction of sub-section 4 of section 3, Title XXXII. of that ordinance declaring any person assessed in respect of any business "not to be liable to pay a license fee in respect of the same business" the words "license fee" apply clearly to a license issued by the municipal corporation and have no reference to the license issued by the provincial authorities under the "Liquor License Ordinance." The City of Edmonton could not grant nor withhold the license in question in this case, and the language of the section must be held as applicable only to fees on licenses which were within their power to grant.

IDINGTON J.—The "Liquor License Ordinance" passed in 1898 having provided that hotelkeepers should be licensed by the government, and that they should each pay an annual fee for the license and that incorporated cities or towns which provided by by-law certain specified means for enforcing the law were to receive an additional fee, the respondent's council passed, in 1900, the necessary by-law and became thereby entitled to receive this additional fee.

The appellant seeks to recover fees which he paid thereunder and rests his claim thereto on the ground that he paid, as required by the city's charter, a busi-

ness tax which is not payable by those who are licensed by the city to carry on their business.

It is to be observed that it was not the city that granted or issued the licenses in question.

Again having regard to the scope of each act, I see no incompatibility between the provisions in the "Liquor License Ordinance" and this provision in the city charter, especially when the latter in express terms re-affirms the city by-laws of which the above mentioned was one.

And even if the amendment of the by-law, in February, 1908, can be said to have been an act of the city which operated in any way as a licensing by virtue of the charter, that act must be taken to have had priority over the act of the assessor in making, in April, the assessment he made. The license fee was the first paid. If both could not stand, it should be the later imposition and levy that must fall, and this latter is not attacked. I, however, think both quite legal for the reasons assigned above and in the courts below.

The appeal should be dismissed with costs.

ANGLIN J.—In my opinion this appeal cannot succeed.

Sub-section 2 of section 46 of the "Liquor License Ordinance" of the North-West Territories is in the following terms:

> Incorporated cities or towns (that have appointed an inspector or inspectors under the provisions of section 11 of this ordinance) may by by-law require each licensee to pay towards their municipal revenue such sums as they may determine not exceeding the amount of territorial duty payable on such license. * * *

The present action is brought to recover two sums of $400 each paid under protest by the plaintiff pur-

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suant to the requirements of a by-law of the defendant municipality passed under this statutory provision. The appellant claims that the provisions of the special Act or charter of the City of Edmonton are inconsistent with the exercise of this power by that municipality in the case of this plaintiff who has been subjected by the city to a business tax or assessment in respect to his hotel business. In support of this position he principally relies upon a provision of subsection 4 of section 3 of Title XXXII. of the "Charter of Edmonton" that

no person who is assessed in respect of any business * * * shall be liable to pay a license fee in respect of the same business.

The City Charter further provides, Title I., section 7:

All ordinances inconsistent with this ordinance are hereby repealed in so far as they relate to the City of Edmonton; and where any matter or thing is provided for by this ordinance the provisions of any other ordinance in relation thereto shall be deemed to be superseded so far as they relate to the said city.

The appellant further argues that in respect to the plaintiff, because of his business assessment, the municipality of Edmonton is deprived of the power conferred on towns and cities by sub-section 2 of section 46 of the "Liquor License Ordinance."

The sum of money which a licensee may, under the "Liquor License Ordinance," be required to contribute to the municipal revenue is not a license fee in the sense in which those words are used in sub-section 4 of section 3, Title XXXII. of the "Charter of Edmonton." The license fee under the "Liquor License Ordinance" is paid to the provincial government. The money paid to the municipality is not paid for a license to sell liquor.

Then again by section 2, of title XXII. of its

charter, the municipal council of Edmonton is empowered to pass by-laws

for the issue (*sic.*) of licenses and payment of license fees in respect of any business.

This provision must be held to refer to licenses which the municipality has power to issue and to fees in respect of such licenses. That it does not extend to liquor licenses, the issue of which is, by the general law of the province, reserved to the provincial executive, is made clear by the proviso appended to section 2 in these words,

provided that no such by-law shall be contrary to the general law of the Territories.

Indeed I think "the license fee" mentioned in subsection 4 of section 3 of Title XXXII. of the charter must be a "license fee" which might, but for that section, be imposable under section 2 of Title XXII. by the municipality.

I find nothing in the charter of the City of Edmonton inconsistent with the exercise in this case of the power conferred generally on cities and towns by subsection 2 of section 46 of the liquor license law.

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

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Wallbridge.*
Solicitor for the respondent: *John C. F. Bown.*

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*Oct. 20.

ALONZO AARON BROWNELL (DEFENDANT) .... APPELLANT;

AND

MILDRED VERNON BROWNELL (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Adduction of evidence—Cross-examination at trial—Vexatious and irrelevant questions—Discretionary order—Propriety of review.

The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.

Idington J. dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered.

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco,* reversing the judgment of Martin J., at the trial, with costs, and ordering a new trial.

A statement of the case appears in the judgment of Mr. Justice Anglin now reported.

Newcombe K.C., for the appellant.

J. Travers Lewis K.C., for the respondent.

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

THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. agreed in the reasons stated by Anglin J.

IDINGTON J. (dissenting).—This appeal arises in an action by a wife against a husband long and widely separated in which he amongst other things pleaded laches in bringing the action, as well as the Statute of Limitations, and in the trial of which much might turn on their respective credibility.

She was in America and he in South Africa when the events took place as to his manner of life into which inquiry was being made at the trial.

Much necessarily depended on getting from himself that part of his life history or discrediting him entirely in regard thereto.

He had been examined for discovery. He is alleged to have admitted one bigamous marriage in South Africa, and in fact to have had improper relations there with another woman, but whether under cover of marriage or not had not been developed in his examination, when the unfortunate difference took place between the learned trial judge and counsel conducting this cross-examination.

The fact of one bigamous marriage having been contracted in Cape Town in South Africa was admitted, but exactly where defendant either would not or could not tell. There might be others, as the counsel in fact tells the court, and presumably wishing to identify the marriage he asked if that one then being spoken of by witness was his marriage with Magdalena Mary Snyder. Thereupon the court interrupted and ruled he could not go into that.

Counsel asserted amongst other things that he desired to be in a position to put the examination for

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discovery in evidence and be in a position thereby to prove the fact and also effectively contradict the defendant. He was afraid to disclose to the witness just what his purpose was, and offered that discovery examination to the learned judge for perusal. That seems to have been declined. I do not see why this, which is not an unheard of method of assuring the judge of counsel's good faith and real purpose without forcing him to tell the witness and put him on his guard, was declined.

Counsel also used illustrations indicating his purpose. He also, properly as I think, for quite evident reasons protested he should not be forced in face of such a witness to disclose his full purpose.

I think he was entitled to have this question answered. It was probably the only means the respondent or her counsel had of identifying and distinguishing this marriage from another he was able by means of the discovery examination or otherwise to prove.

I do not think counsel ought to be driven in such a case and with such a witness as the record discloses this was to ask the direct question, whether or not this was the only bigamous marriage he had contracted in South Africa. Nor do I think in such a case the court should insist on the literal adoption of any precise way of putting, or words in which it might think best to put a question, and refuse to allow another which counsel might prefer.

If, as prior rulings indicate, the fact of a marriage was the proper subject for inquiry at all, I submit with respect every latitude should have been given to counsel in relation to it. Either the ground should not have been entered on at all, or the work done thoroughly.

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The ruling at this point of the cross-examination I have referred to led to counsel withdrawing. A judgment was then entered for appellant and upon appeal to the Supreme Court of British Columbia a new trial was ordered and hence this appeal.

I prefer not to deal with what appears in the course of the cross-examination leading up to this breaking off point beyond saying it indicates the witness to have been one with whom counsel needed a pretty free hand, indeed more so than he was given.

The appellate court having merely granted a new trial which bound no one's future rights in the premises, I submit with respect such an appeal to this court is to be regretted.

If, as seems quite possible, the appellant had contracted more than one bigamous marriage preceded by all which that implies, he may by untrustworthy evidence have won a judgment he is not entitled to.

I submit it would be better to dismiss the appeal with costs and let the case be fully tried out.

ANGLIN J.—The parties to this case are a wife and husband whose unfortunate matrimonial difficulties have culminated in proceedings by the wife for divorce.

In the present action the wife, as plaintiff, seeks to establish a partnership with her husband and claims from him an accounting. Denying the alleged partnership, the defendant also pleads in answer to the action laches and the Statute of Limitations.

After a refusal of a motion for nonsuit the defendant entered the witness box. In the course of cross-examination he admitted having contracted a bigamous marriage in South Africa, ten months' co-habita-

tion and the birth of a child. He also stated that he did not know in what precise place in the City of Cape Town the bigamous ceremony was performed. He was asked the name of the woman with whom the marriage had been contracted. This question the learned trial judge declined to compel him to answer, and, because this ruling was adhered to, the plaintiff's counsel withdrew from the case.

On the evidence before him the learned judge held that the plaintiff had failed to establish a partnership with the defendant and dismissed the action. Upon appeal, the Supreme Court of British Columbia set aside this judgment and ordered a new trial, on the ground that the trial judge had unduly hampered the plaintiff's counsel in his cross-examination of the defendant; and the defendant was ordered to pay the costs of the former trial and of the appeal.

The only question formulated by counsel for the plaintiff to which the trial judge refused to compel an answer by the defendant was that above stated as to the name of the bigamous wife. His refusal was based upon the irrelevancy, immateriality and vexatious character of the question.

Though counsel for the appellant at first suggested that practically the only restriction upon the right of cross-examination is the sense of professional duty of cross-examining counsel, he ultimately conceded that a trial judge has some discretion to protect a witness against questions which are purely vexatious. It is obvious that were this power denied to a judge presiding in a trial court he would have no control over the conduct of the case, and would be powerless to prevent the grossest abuse of the right of cross-examination. Trials would become interminable and irrele-

vant matter might be introduced for most improper purposes. That it is necessary that a trial judge should have this discretion is therefore manifest; that he has it in fact is well established. Taylor on Evidence (18 ed.), par. 1460; Best on Evidence (10 ed.), p. 121.

The character of this discretion, however, is such that its precise limits are not easily defined and in practice its exercise, though undoubtedly reviewable, must be left largely to the sound judgment and wisdom of the presiding judge who, from his observation of the demeanour of the witness and also of the manner of and the conduct of the case by counsel, has means and opportunities of forming a correct opinion as to the importance and real purpose of questions propounded which are not open to an appellate court.

Counsel for the appellant sought to uphold his client's right to an answer to the rejected question on the grounds that it was relevant either to the plea of laches or to that of the Statute of Limitations and also to the issue as to the defendant's credibility. The facts of the bigamous marriage, the ten months' duration of the intercourse, the birth of the child—all these were facts tending to shew a prolonged absence of the defendant in South Africa, and therefore relevant upon the pleas of laches and of the statute. But I find it difficult to conceive how the plaintiff's case on this issue could be advanced or the defence weakened by the disclosure of the name of the defendant's unfortunate victim.

Counsel ingeniously urged that the purpose of the question put was to identify the particular bigamous marriage then being dealt with, it being the intention of the cross-examiner thereafter to shew that a second

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bigamous marriage had been contracted by the defendant and thus to establish the probability, if not the certainty, of a still more prolonged absence from British Columbia, excusing the plaintiff's delay in bringing suit. It is obvious that with this object the witness might well have been asked whether in fact he had a second time committed bigamy and, if he admitted that fact, might further have been asked as to the duration of his co-habitation with the second victim. If he denied the fact of the second bigamous marriage and if counsel, desiring to lay a foundation to contradict him upon this point, then sought for that purpose to introduce the names of the persons with whom the alleged bigamous marriages had been contracted in order to fully identify the marriage as to which he sought to put himself in a position to adduce evidence in rebuttal, it may be that the relevancy and propriety of the question under consideration would be established. But as the evidence stood when the question was put it is, I think, not possible to say that the trial judge erred in treating it as irrelevant and immaterial.

No doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issues raised in the pleadings is no more admissible in cross-examination than in examination in chief.

Counsel sought to maintain the relevancy of the question to the issue of credibility on the ground that it related to matter the proof of which would tend to

degrade the witness's character and would therefore affect the judgment upon his credibility. The fact of the bigamous marriage, the duration of the intercourse, and the abandonment of the victim were all facts which might well be deemed relevant for this purpose; but again I find it impossible to conceive how the statement of her name would help in the determination of this issue.

In view of the facts that divorce proceedings were pending between the parties, that the admission sought, while apparently of no value for the purposes of this partnership action might be of service in these divorce proceedings, that from all that appeared upon the proceedings and evidence before the trial judge the identity of the woman in question was entirely irrelevant to any issue which he might have to determine, and that from what he had seen of both plaintiff and defendant in the witness box, of the conduct of the case generally by counsel and of the manner in which and the circumstances under which the particular question was put and pressed the learned trial judge had the very best opportunity of judging of its importance and real purpose, it is, I think, quite impossible for an appellate tribunal to say that his discretion was not in this case reasonably and properly exercised in excluding the question.

There was nothing in the trial judge's refusal to permit this particular question to be answered at the time when it was put which prevented counsel proceeding with the fullest cross-examination of the witness, and it might well be that that which was quite irrelevant upon the issues as developed by the evidence then before the court might at a later stage of the proceedings have become admissible. At all

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events nothing occurred which precluded counsel from proceeding with cross-examination as to any other bigamous marriage of the defendant or facts connected therewith and certainly nothing to prevent the fullest cross-examination upon matters directly relevant to the issue of partnership or no partnership. It was not argued that upon the evidence before the learned trial judge his conclusion that the plaintiff had failed to establish a partnership can be successfully attacked.

For these reasons I am respectfully of the opinion that the provincial appellate court erred in interfering with the discretion exercised by the learned trial judge, and that its order for a new trial based upon this ground cannot be upheld.

I would allow the appeal of the defendant with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Fell & Gregory.*
Solicitor for the respondent: *J. A. Aikman.*

THE AMERICAN-ABELL ENGINE AND THRESHER COMPANY (DEFENDANTS) .... APPELLANTS;

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*Oct. 14.
*Oct. 20.

AND

JOHN McMILLAN AND WILLIAM JAMES DOIG (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Title to lands — Homestead and pre-emption rights — Unpatented Dominion lands—"Transfer"—Incumbrance—Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute—60 & 61 *Vict. c.* 29, *s.* 5; *R.S.C.* (1906) *c.* 55, *s.* 142.

On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands, in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior.

Held, affirming the judgment appealed from (11 West. L.R. 185) that the instrument was in effect a "transfer" and was absolutely null and void under the provisions of the "Dominion Lands Act."

APPEAL from the judgment of the Court of Appeal for Manitoba(1), Howell C.J. dissenting, affirming the judgment of Mathers J., at the trial, by which the action was dismissed with costs as against the defendant Doig.

The defendant McMillan, in August, 1904, ordered from the plaintiffs through his co-defendant, Doig,

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

(1) 11 West. L.R. 185.

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who was then the agent of the plaintiffs, certain machinery for which he agreed to pay $2,840 in cash, or in lieu thereof to give five promissory notes for a like amount provided that the plaintiffs were willing to give credit. The form of order signed by McMillan required the agent to fill out accurately and have signed by purchaser a property statement indorsed thereon. This statement was filled out and signed by McMillan and alleged that he owned in his own name and right and unincumbered the land in question. This order was sent by Doig to the plaintiffs and, relying in part upon the statements made in the order, the plaintiffs accepted it, sent McMillan the machinery and granted him the credit, taking from him, as security, an instrument in the following form:—

"I, John McMillan, * * *, being registered as owner of an estate in fee simple in possession subject, however, to such incumbrances, liens and interests as are notified by memorandum underwritten or indorsed hereon, in the land described as follows: (description), and desiring to render the said land available for the purpose of securing to and for the benefit of American-Abell Engine and Thresher Company, Limited, * * * the sum of money hereinafter mentioned, do hereby incumber, charge and create a lien upon the said land for the benefit of the said American-Abell Engine & Thresher Company, Limited, with the sum of $2,850, to be raised and paid at the times and in the manner following, that is to say: (dates of payments set out).

"If notes should be given by me to the said company for all or any of the above payments, the said notes shall not be a satisfaction of the said incumbrance, charge and lien, but the same shall continue

until the payment in full of the said notes and any renewals thereof.

"In witness whereof I have hereunto signed my name this 6th day of August, A.D. 1904.

"JOHN MCMILLAN" (Seal).

"Signed in the presence of

"Jas. W. Currie."

The lands described were the homestead of the defendant McMillan and his rights in the land were those of a homesteader who had not received a recommendation for patent, under the "Dominion Lands Act." The sanction of the Minister of the Interior had not then been given to the transaction, and these facts were known to the defendant Doig. Subsequently McMillan secured a recommendation for patent, dated 3rd August, 1905, and the patent was issued to him, dated 23rd September, 1905.

After the issue of the recommendation for patent Doig, who had then ceased to be the plaintiffs' agent, obtained from his co-defendant a conveyance of the quarter-section of land in question in payment of indebtedness from McMillan to himself. The Secretary of the Department of the Interior, by letter dated 2nd June, 1908, waived the forfeiture of the McMillan's homestead under section 142 of the "Dominion Lands Act."

The action was brought to have it declared (*inter alia*) that the plaintiffs had a charge upon the lands in question as against the defendants. McMillan did not defend the action and judgment has been obtained against him. The plaintiffs' charge was duly registered and the defence set up by Doig was that such charge was void under section 142 of the "Dominion Lands Act," R.S.C. (1906) ch. 55, which is the

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consolidation of the statute 60 & 61 Vict. ch. 29, sec. 5, amending section 42 of chapter 54, R.S.C. (1886).

At the trial Mr. Justice Mathers held that the instrument in question was void under the provisions of section 142 of the "Dominion Lands Act," but did not decide whether or not the instrument was an "assignment" or "transfer" within the meaning of the Act. He also held that the defendant Doig was not estopped from setting up the invalidity of the instrument. An appeal to the Court of Appeal for Manitoba was dismissed, the majority of the judges holding that the instrument was an "assignment" or "transfer" and was void under the Act. Howell C.J. dissented, taking the view that the instrument was not one of those prohibited by the statute.

Chrysler K.C. for the appellants. The judgment appealed from is erroneous in holding (1) that the charge in question is an "assignment" or "transfer" of a homestead right; (2) that it is an assignment or transfer and thereby void under section 142, and (3) that the defendant, Doig, is not, by reason of his conduct, estopped from setting up, as against the plaintiffs, his conveyance from the defendant McMillan.

Section 142 of the "Dominion Lands Act"(1), is in terms identical with that in force during the whole of the transactions in question. The charge in question, being merely equitable, is not an "assignment" or "transfer" within the meaning of that section. The nearest analogy is found in cases arising out of forfeiture provisions in leases and insurance policies. The giving of an equitable mortgage is not a breach of a covenant by the lessor not to assign or sublet

(1) R.S.C. (1906) ch. 55.

without leave. *Doe d. Pitt* v. *Hogg*(1); *Gentle* v. *Faulkner*(2). Where an insurance policy prohibits a transfer of the property insured an equitable mortgage has been held not to be such a transfer. *Sands* v. *Standard Ins. Co.*(3); *Bull* v. *North British Ins. Co.* (4); *Sovereign Fire Ins. Co. of Canada* v. *Peters*(5).

A strict construction is given to such statutes as the present. In *Meek* v. *Parsons*(6), Armour C.J. held that the word "alienate" in the "Free Grant and Homestead Act of Ontario" did not include an agreement to alienate. In the United States it has been held that a mortgage of a homestead (which did not convey the legal estate) was not an alienation of the land. *Stark* v. *Morgan*(7); 9 Am. & Eng. Ann. Cases, at page 930, where the matter is fully discussed and reference made to all the American cases. A pledge of stock-in-trade bought on credit is not a "transfer." *In re Hall*(8).

The mortgage under the "Land Titles Act"(9) was on account of its form considered not to be an assignment or transfer under section 142 of the "Dominion Lands Act." Consequently Parliament passed section 96 of the "Land Titles Act," declaring that a mortgage executed by a settler should be deemed to be an assignment or transfer prohibited by section 142. The plaintiffs' claim is under a charge and not under a mortgage. It is not an instrument under which the court could foreclose the defendant's interest, but is one in which they could only order sale. The intention of section 142 is that the homesteader should not

(1) 4 D. & Ry. 226; 1 Car. & P. 160.
(2) (1900) 2 Q.B. 267.
(3) 26 Gr. 113; 27 Gr. 167.
(4) 15 Ont. App. R. 421.
(5) 12 Can. S.C.R. 33.
(6) 31 O.R. 529.
(7) 73 Kan. 453.
(8) 14 Q.B.D. 386.
(9) R.S.C. (1906) ch. 110.

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be permitted to alienate or transfer the absolute title in the property. The charge given is not an assignment or a transfer, nor was it so intended by McMillan, nor was it accepted by the company as such. It really is an undertaking to pay the price of machinery as the same becomes due; he did not assign the land but gave a document under which the court might order the sale of the land and, out of the proceeds, payment of the claim. At the time of the recommendation for patent only a small part of the plaintiffs' claim was due; the remainder of the price became due after the recommendation for patent.

The defendant, Doig, is estopped from setting up that the lien is void by reason of the fact that he was the plaintiffs' agent at the time the lien was taken, and he himself took it. The company acted on the representation in selling the machinery, and this being so, it is not open to Doig now to set up that the instrument was void. Doig is not in a position to set up that the instrument is void under the statute.

The instrument did not assign or transfer the whole or part of a homestead right. It takes away no such rights. It is not a mortgage conveying the fee. The plaintiffs under this charge could never get in the fee. All such rights are exempted from execution until patent issues, yet the statute does not prohibit the homesteader going into debt and a judgment recovered binds automatically the land as soon as the same is recommended for patent. *Harris* v. *Rankin* (1). As pointed out in this case, at page 132, the object of the Act was and is to obtain *bonâ fide* settlers on the public lands and to retain them there. This charge does not defeat that object.

(1) 4 Man. R. 115.

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We also refer to *Edwards* v. *Dick*(1); *Doe d. Bryan* v. *Bancks*(2); *Roberts* v. *Davey*(3); *Davenport* v. *The Queen*(4); *Malins* v. *Freeman*(5).

Bergman for the respondent Doig. The instrument under which the plaintiffs claim is an "assignment" or "transfer" of homestead right or of a part thereof within the meaning of section 142 of the "Dominion Lands Act," and absolutely null and void by virtue of the provisions thereof, and the defendant Doig is not estopped from thus setting up that the lien in question is void. The object of all homestead laws is to secure actual settlers and to prevent the public lands from falling into the hands of speculators, or from being homesteaded for the benefit of any person other than the entrant and his family. See *Harris* v. *Rankin*(6), *per* Killam J., at page 132; *United States* v. *Richards* (7), *per* Munger J., at page 450. That section of the Act must be construed so as to carry out this object and prevent its evasion. See Maxwell on Statutes (4 ed.), p. 171; *Philpott* v. *St. George's Hospital*(8), at page 349; *Fox* v. *Bishop of Chester*(9).

The principle on which conditions against assignment in policies of insurance and leases have been decided can have no application in the construction of the statutory provisions now in question. From the language of Killam J., in *Harris* v. *Rankin*(6), at page 128, it is clear that the learned judge considered that the creation of a mere charge upon the land came within the prohibition of the statute. See also, *per* Taylor J., at page 362, in *Manitoba Investment Association* v.

(1) 4 B. & Ald. 212.
(2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 665.
(4) 3 App. Cas. 115, at p. 128.
(5) 4 Bing. N.C. 395.
(6) 4 Man. R. 115.
(7) 149 Fed. Rep. 443.
(8) 6 H.L. Cas. 338.
(9) 2 B. & C. 635.

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Watkins(1), in respect to a mortgage, and *per* Tenterdon L.C.J., in *Wetherell* v. *Jones*(2), when speaking of a contract forbidden expressly or by implication either by a statute or at common law. The question was also decided in *Gathercole* v. *Smith,* in 1881(3), at page 7, by James L.J., and, at pages 9 and 10, by Lush L.J. This view was taken at the passing of the Dominion "Land Titles Act" (4), in which the 96th section treats a mere security or charge as an assignment or transfer prohibited by the "Dominion Lands Act." This enactment must be taken as declaratory of the law respecting all Dominion lands. See also *Bass* v. *Buker*(5), at page 923; and *Edinburgh Water Company* v. *Hay*(6), in 1854, at pages 682 to 687, *per* Cranworth L.C.

The plaintiffs themselves considered their lien within the prohibition and, consequently, applied to the Minister of the Interior for a declaration that the forfeiture of the homestead was waived and that the lien was validated. The reply from the Department, however, had not the effect of validating the lien. In fact, the whole policy of the statute would have been defeated if the lien had been validated; it would have been equivalent to a donation by the Government of the lands affected. In the cases where charges may be permitted under the Act with the sanction of the Minister, his powers are strictly limited; and, in this case the provisions of sections 145 to 148 can have no application.

Estoppel cannot work against Doig; no reliance

(1) 4 Man. R. 357.
(2) 3 B. & Ad. 221.
(3) 17 Ch. D. 1.
(4) R.S.C. (1906) ch. 110.
(5) 12 Pac. Rep. 922.
(6) 1 Macq. 682.

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was placed upon any act or representation made by him. See 16 Cyc., pp. 734-738, and the cases there cited. No equitable estoppel can arise except from actual contract: 16 Cyc. 741, and cases there cited; rules as to good faith and loyalty do not apply after an agency has been fully terminated: 31 Cyc. 1449, and cases there cited; *Nichol* v. *Martyn*(1); *Robertson* v. *Chapman*(2).

Section 142 of the "Dominion Lands Act" renders assignments and transfers of homestead rights before recommendation for patent void not only as against the Crown, but as against the homesteader and his assigns. *Harris* v. *Rankin*(3); *Cumming* v. *Cumming* (4); *Flannaghan* v. *Healey*(5); *In re Webster and Canadian Pacific Railway Co.*(6); *In re Sawyer-Massey Co. and Dennis*(7); *Park* v. *Long*(8); *Waterous Engine Works Co.* v. *Weaver*(9). We also refer to *Re Hughes*(10), at page 601, which should be read in connection with *Gentle* v. *Faulkner*(11), and to the reference made by Gwynne J. to *Sovereign Ins. Co.* v. *Peters*(12), at pages 162-163 of the report of *The Citizens' Ins. Co.* v. *Salterio*(13).

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—This appeal from the Court of Appeal for Manitoba raises the question of the proper construction to be given the 142nd section of the "Domin-

(1) 2 Esp. 732.
(2) 152 U.S.R. 673.
(3) 4 Man. R. 115.
(4) 15 Man. R. 640.
(5) 4 Terr. L.R. 391.
(6) 6 West. L.R. 384.
(7) 7 West. L.R. 272.
(8) 7 West. L.R. 309.
(9) 8 West. L.R. 432.
(10) (1893) 1 Q.B. 595.
(11) [1900] 2 Q.B. 267.
(12) 12 Can. S.C.R. 33.
(13) 23 Can. S.C.R. 155.

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ion Lands Act"(1), and specially whether the words of that section are large and broad enough to cover and prohibit the placing of a lien or charge upon his homestead by the homesteader before he has obtained the recommendation of the local agent for his patent.

The section in question reads as follows:

> Except as herein provided unless the Minister otherwise declares every assignment or transfer of homestead or pre-emption right or any part thereof and every agreement to assign or transfer any homestead or pre-emption right or any part thereof after patent obtained, made or entered into before the issue of the patent shall be null and void; and unless the Minister otherwise declares, the person so assigning or transferring or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right.

The judgment of the Court of Appeal, Chief Justice Howell dissenting, upheld that of the trial judge and held that the instrument attempting to create a lien or charge upon the homestead came within the prohibitive language of the section and was, therefore, void.

The document or instrument creating the charge or lien was given to the appellants by the defendant McMillan as security for the price of a threshing outfit sold him and professed "to incumber, charge and create a lien upon the said land," which land, at the time, was McMillan's homestead, for which he had not then obtained the recommendation of the land agent for a patent.

The contentions of Mr. Chrysler were, first, that the words of the section were not broad and ample enough to cover the case of such a lien or charge as the one in question here; and, secondly, that, if they were, the language of the section did not make the transfer absolutely void, but voidable at the option of

(1) R.S.C. (1906) ch. 55.

the Crown and only suspended it until the will or decision of the Minister was obtained.

With regard to the latter construction, I cannot for a moment accept it. The language used by Parliament seems to me clear beyond any reasonable doubt. Unless the Minister declared that a transfer by the homesteader might or could be made of his homestead within a specified time the transfer should be null and void. All transfers of homestead rights made without the sanction of the Minister before recommendation for patent were, in my opinion, by this section declared null and void, not only as against the Crown, but as against the homesteader. The section was intended as much for the protection of the homesteader and his assigns as for the Crown, and to carry out the policy of settling with *bonâ fide* settlers the unoccupied lands of the Crown. Looking to the known character and financial condition of many of those settlers it was thought desirable, for a time at least, during the early days of their settlement and occupation, to protect them, even from themselves and their own acts as well as from the speculators and others to whom they would become an easy prey. Provision is made in a subsequent part of the statute, under "Charges upon Homesteads for Advances," from sections 145 to 158, enabling persons

> desirous of assisting by advances in money intending settlers to place themselves on homestead lands,

and of securing such advances, to do so legally and properly. The provisions embrace expenditures for passages and freight, medical attendance, subsistence of the settler and his family, materials for erecting buildings on the homestead, breaking land, providing

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horses, cattle, house furniture, farm implements and seed grain, etc., etc. They cover everything which Parliament, no doubt properly advised, thought essential for a settler in aid of his establishment upon the homestead and carefully provide for the submission to the settler and to the local agent or homestead inspector appointed by the Minister of a statement of all such expenditure or advances with vouchers in support thereof, before the settler is authorized to make or give a charge or lien for the amount upon his homestead. A further general provision enabling persons to make advances to settlers and take charges or liens therefor upon the homestead is given in sub-section 3 of section 146 of the statute. But in each and all of these cases there are special conditions and provisions limiting and defining the circumstances under which and the amount for which advances may be made and charges taken upon the homestead. The sanction of the Minister must be had in advance. The amount advanced and charged in all must not exceed $600; the rate of interest is limited, the times for re-payment specified and the active supervision and approval of the Minister's agent or inspector assured.

In fact, the statute treats the intending settler as a ward of the Minister, who is to protect him from himself and prevent him from incumbering his homestead until he is, at least, entitled to obtain his patent. It is not, of course, pretended that the charge sought to be enforced in this case is one of those contemplated and provided for in the sections of the statute to which I have called attention, and I am of the opinion that the clear unambiguous words of section 142, as well as their clear and manifest object, exclude the limited

construction which Mr. Chrysler sought to place upon them.

In my judgment the only charge or lien which the settler could place upon his homestead before it was recommended for a patent was one of those specifically provided for under sections 145 to 158, of which the one in question here is not contended to be, and all other attempted charges, included in the prohibitive words of the section against transfers or assignments, are absolutely null and void, unless otherwise declared by the Minister.

I have not been able, after reading carefully the judgment of the Judicial Committee in the case of *Davenport* v. *The Queen*(1), to see its application to the construction of the clause of the statute in question here. That case is, no doubt, an authority for the general proposition that the courts have construed and will construe clauses of forfeiture in leases declaring, in terms however strong and clear, that they should be void on breach of conditions by the lessees to mean that they are voidable only at the option of the lessors, and the same rule has, no doubt, 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, as in *Doe d. Bryan* v. *Bancks*(2), and *Roberts* v. *Davey*(3). But, in the case before the Judicial Committee, their lordships simply held the construction of the statute on which they relied because the intention of the legislature to the contrary did not, in their view, so clearly appear as to exclude the usual and equitable rule of construction from applying to the leases there in question. In

(1) 3 App. Cas. 115.
(2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 665.

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the case before us there is no lease and no question of its forfeiture, while the intention of Parliament is, to my mind, plain and clearly expressed.

Then, on the question upon which Mr. Chrysler seemed chiefly to rely, I cannot doubt that what the statute intended to prevent was, as expressed, any transfer or assignment or agreement to transfer or assign as well as anything which would or could have the legal effect of transferring away from the homesteader and giving to another his rights as such or of having the same done by process of law. In other words, the language used was large enough, in the connection in which it was used, to cover indirect as well as direct transfers and so to cover a charge such as this under which a sale of the homesteader's rights could be decreed and transferred from him by a sale of the lands under the decree. The same word which is here used came under the consideration of the Court of Appeal, in England, in the case of *Gathercole* v. *Smith* (1881) (1). At page 7, James L.J. says:

Now "transfer" is one of the widest words that can be used. It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred.

At pages 9 and 10, Lush L.J. says:

The word "transferable," I agree with Lord Justice James, is a word of the widest import, and includes every means by which the property may be passed from one person to another. * * * Clearly the words "shall not be transferable at law or in equity" do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment.

(1) 17 Ch. D. 1.

Applying this language and reasoning to the present case, and I have no difficulty in doing so, the language of section 142 of the Act is sufficiently broad to cover the plaintiff's lien.

Looking at the subject-matter with which Parliament was dealing, namely, the inchoate right of a homestead settler which right might afterwards ripen into a vested right or interest in the lands, and the object it obviously had in view in limiting the power of the homesteader for a time to incumber his homestead, I have no difficulty in ascribing to the words used "transfer or assign" a meaning sufficiently wide to include such a charge as we have now before us.

Our attention was called to some language used by the learned Chief Justice of the Court of Appeal in his dissenting opinion in which he argued that the section 96 of the "Land Titles Act"(1), shewed that Parliament had felt called upon to give a meaning to the prohibitive words "transfer or assign" as used in the 142nd section of the "Dominion Lands Act," and, as he says, "it seems to me to widen their meaning."

I am not able to agree with the Chief Justice in this. The intention of Parliament, it seems to me, in passing that section 96 of the "Land Titles Act'" was to make it clear beyond any doubt that in legislating as it did in the 98th section of the Act and declaring that

a mortgage or encumbrance *under this Act* shall have effect as security, but shall not operate as a transfer of the land thereby charged,

there was no intention of interfering with the provisions of the "Dominion Lands Act" prohibiting transfers and that, notwithstanding a mortgage was de-

(1) R.S.C. (1906) ch. 110.

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clared not to be a transfer under the "Land Titles Act," it should, nevertheless, remain and be within the prohibitory words of the section 142 of the "Dominion Lands Act," and deemed and held a transfer working a forfeiture.

These sections of the "Land Titles Act rather, in my opinion, support the view I have expressed of the meaning of section 142 of the "Dominion Lands Act."

I am, therefore, of opinion that this appeal should be dismissed with costs.

IDINGTON J.—If as contended such an instrument as that in question herein can constitute a valid charge or lien it would be a good foundation for a suit to have the land sold wherein judgment might go for sale even before recommendation for patent and the conveyance thereby be completed by virtue of estoppel. Why not?

If so, then the statute is easily defeated. Any explanation shewing this impossible must disclose the frailty of the instrument by reason of its being tainted.

The mind turns back to the days when fines and recoveries were a common kind of assurance, and estopped in that relation a power in the old land.

I fear this attempted, perhaps hoped for, restoration of that good old time must fail because it merely promises to bring us an estoppel which is tainted because its work falls within the mischief against which the statute is clearly aimed.

I need not elaborate further, for my brother judges bring forward that reasoning in which, speaking generally, I agree.

The appeal must be dismissed with costs.

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DUFF J.—This appeal raises two questions concerning the construction of section 142 of the "Dominion Lands Act" (1). The opinion of the majority of the Court of Appeal for Manitoba upon both questions accords with the uniform current of decision in that province as well as in the North-West Territories; and, after a careful consideration of the dissenting judgment in the court below and the argument of Mr. Chrysler, I do not think there are sufficient grounds for rejecting the views which have hitherto prevailed.

The first question is whether, in the absence of action by the Minister of the Interior, the effect of section 142 is to invalidate for all purposes the instrument by which a homesteader professes to "encumber, charge and create a lien upon" his homestead as security for the payment of a debt. The words of the section are as follows:

Except as herein provided unless the Minister otherwise declares every assignment or transfer of homestead or pre-emption right or any part thereof and every agreement to assign or transfer any homestead or pre-emption right or any part thereof after patent obtained, made or entered into before the issue of the patent shall be null and void; and unless the Minister otherwise declares the person so assigning or transferring, or making an agreement to assign or transfer, shall forfeit his homestead and pre-emption right, and shall not be permitted to make another homestead entry: Provided that a person whose homestead or homestead and pre-emption have been recommended for patent by the local agent, and who has received from such agent a certificate to that effect, in Form R., countersigned by the Commissioner of Dominion Lands, or, in his absence, by a member of the Dominion Lands Board, may legally dispose of and convey, assign or transfer his right and title therein; and such person shall be considered to have received his certificate upon the date upon which it was so countersigned.

The question is: Does an instrument such as that now in question fall within the description

every assignment or transfer of homestead or pre-emption right or any part thereof,

(1) R.S.C. (1906) ch. 55.

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in the sense in which it is used in this section? These words are, of course, broad enough to extend to such an instrument. The scope of them is sufficiently illustrated in the following passage from the judgment of that great lawyer and master of language, James L.J., in *Gathercole* v. *Smith*(1):

> Now "transfer" is one of the widest terms that can be used. It appears to me that very word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order, by an execution creditor, or otherwise transferred.

And by this observation from the judgment of Lush L.J., in the same case:

> Clearly the words "shall not be transferable at law or in equity" do say that he shall not be at liberty to encumber it either directly by assignment or indirectly by suffering a judgment.

What we really have to determine is whether there is any good reason for restricting the *primâ facie* meaning of the words to such an extent as to exclude the instrument in question from the operation of the provision in which they occur.

The argument put forward by the appellants proceeds upon the hypothesis that the sole aim of the enactment is to secure permanency of occupation by real settlers through the prevention, on the one hand, of a succession of transfers during the performance of the settlement duties required by the Act, and, on the other, by minimizing (through the prohibition of agreements entered into by settlers before the granting of their patents for the conveyance of their lands afterwards), the possibility of the machinery of the

(1) 17 Ch. D. 1.

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Act being made an instrument for speculation in the public lands. This, there can be no doubt, was one consideration of great importance which influenced the legislature in enacting the legislation. But it was, I think, only one of the objects of the legislature. The cognate legislation to be found in sections 145 to 158 of the "Dominion Lands Act" and in the "Land Titles Act"(1), affords, I think, demonstrative evidence that the policy of Parliament was to invalidate every kind of assurance by which, save under sanction of the Minister, a homesteader should attempt to encumber his homestead by charging it as security for a debt. By the provisions of the land Act referred to, the Minister is given authority to sanction, antecedently, the creation of such a charge for securing the re-payment of advances to a limited amount for carefully specified purposes. If notwithstanding the provisions of section 142 the homesteader is to be held invested with the general power to constitute such charges upon his homestead, one does not readily see why Parliament should have deemed it necessary to confer upon him the special and carefully limited power which is the subject dealt with in the sections mentioned. Again, in section 96 of the "Dominion Land Titles Act," it is declared that

notwithstanding anything contained in this Act, any such mortgage (a mortgage by a settler affecting his homestead), shall be deemed an assignment or transfer prohibited by the "Dominion Lands Act."

The word "mortgage" here means "any charge on land created merely for securing a debt or loan," (section 2, sub-sec. 5); and the form of mortgage prescribed by the Act does not in any material respect

28½ (1) R.S.C. (1906) ch. 110.

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differ from that of the instrument in question on this appeal.

These enactments then, the first by implication, the second, by express declaration, disclose a view of the effect of section 142 by the legislature itself and a trend of legislative policy with which the narrower construction proposed by the appellant cannot be reconciled.

The other question is: Whether, in the absence of any action by the Minister, the effect of this section is to nullify absolutely and for all purposes instruments embraced within its purview or only to make such instruments voidable at the instance of the Crown.

The enactment, by its express terms, excludes from its operation those cases in which the Minister may and does by his declaration permit the instrument to go into legal effect; but the words of the section, in their more obvious and natural meaning seem to signify that, in the absence of ministerial action, all instruments avoided by the enactments are to be and remain legally inoperative, that is to say, they are to be wholly without legal effect for any purpose whatever. It is true that the word "void" is often used in the sense more correctly expressed by the word "voidable"; but the last mentioned word does not necessarily mean "valid until rescinded." It is sometimes used to mean "invalid until validated"; and this latter is, I think, the only sense in which it can be said that an instrument coming within the sweep of section 142 and unauthorized by the Minister can properly be described as "voidable."

The course of legislation upon the subject, indeed, appears to shew conclusively that it is only by thus

reading the section we can carry into effect the real intention of Parliament in enacting it. The parent enactment (which with an immaterial modification is found in section 42, ch. 54, R.S.C. (1886)) contained an unqualified declaration that any assignment or transfer of a homestead (not having been recommended for a patent) should be null and void. In 1895, by section 5 of chapter 34 of 58 & 59 Vict. (which now appears as section 143 of the consolidation of 1906), it was provided in respect of such instruments executed before the passing of that Act, that they should not be null and void, *ipso facto,* but the Minister of the Interior was given power to declare any such instrument a nullity, and it was provided that any such declaration should take effect as if enacted in the Act itself, unless the patent should have issued before the date of the declaration. In 1897 (by section 5 of chapter 29 of 60 & 61 Vict.), section 42 of the "Dominion Lands Act" (1886), was repealed and a new section (now section 142 of the consolidation above quoted) was substituted for it. The difference in form between these two enactments, the one (section 143) dealing with instruments executed prior to the passing of the Act of 1895, and the other (section 142) relating to instruments of a subsequent date, cannot, I think, properly be disregarded. The legislature has manifestly drawn a sharp distinction between the two classes of documents. Those executed before the passing of the Act of 1895 are to be deemed to have gone into effect unless avoided by the action of the Minister; the latter were never to come into legal operation except as a result of a declaration by the Minister to that effect.

The appeal should be dismissed with costs.

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ANGLIN J.—The defendant McMillan while holder of a homestead section for which he had not yet obtained a patent or "been recommended for patent by the local agent," purported to "incumber, charge and create a lien upon" his homestead in favour of the plaintiffs by instrument, dated the 6th of August, 1904, and registered at Neepawa, on the 6th of December, 1904. The certificate of recommendation for patent to McMillan was issued and countersigned on the 3rd of August, 1905, and a patent was issued in his favour on the 23rd of September, 1905. On the 19th of September, 1905, McMillan conveyed his homestead property to his co-defendant Doig by instrument of transfer registered at Neepawa on the 25th of September, 1905. Doig had actual notice of the instrument of charge or lien given by McMillan to the plaintiffs. The question for determination is the validity of this charge or lien as against him.

By section 2(5) of the Revised Statutes of Canada, ch. 110, a mortgage is defined as "any charge on land created merely for securing a debt or loan"; by section 98 of the same Act it is declared that a mortgage "shall have effect as security, but shall not operate as a transfer of the land thereby charged." And, by section 96, any mortgage made by a settler before patent or recommendation for patent is declared to be "an assignment or transfer prohibited by the 'Dominion Lands Act'"(1), which, by section 142, provides that

> unless the Minister otherwise declares, every assignment or transfer of homestead or pre-emption right or any part thereof * * * shall be null and void.

(1) R.S.C. (1906) ch. 55.

It was argued that, notwithstanding this explicit provision of the statute, the instrument upon which the plaintiffs claim was not void, but merely voidable, and that it could be avoided only by or at the instance of the Crown. But the policy of the statute appears to be entirely to prevent the settler, during the period of performance of settlement duties, alienating his homestead or any part thereof or interest therein or in his inchoate right thereto, or doing any act which might tend to or be a step towards the bringing about of any such alienation. To hold that the words "null and void," when used in such a statute, should be construed as merely "voidable" would, in my opinion, be contrary to the clear policy and intent of the legislation and would tend to defeat—certainly not to advance—its object.

The language of section 143 which declares that, notwithstanding any provision to the contrary contained in any Act relating to Dominion lands, an assignment which would be in contravention of the terms of section 142 shall, if made before the 22nd of July, 1895, be not *ipso facto* void, but only voidable if the Minister so declares it, makes the construction of section 142, in my opinion, incontrovertibly that which I have stated, when applied to cases not within section 143.

It was strongly urged that the provision enabling the Minister to declare valid an assignment which would, otherwise, be null and void, in effect makes every such instrument merely voidable. It does not follow that because the Minister may declare the instrument valid it is prior to such declaration merely voidable; the statute says that it is null and void.

There has been, in fact, no declaration by the

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Minister with regard to the validity or efficacy of the plaintiffs' charge or lien. Section 142 provides for two things; first, that the prohibited assignment shall be null and void; and secondly, that its execution shall work a forfeiture of the homestead and pre-emption right. As to each, the operation of the statute is dependent upon the Minister not otherwise declaring In the present instance the issue of the patent to McMillan subsequently to his attempted creation of a charge in favour of the plaintiffs and a letter from the Secretary of the Department of the Interior, dated the 2nd of June, 1908, which states that any forfeiture of his homestead by reason of the execution of a lien to the plaintiffs has been waived, are relied upon as implying a declaration by the Minister of the validity of the instrument under which the plaintiffs claim. It is plain that the waiver of the forfeiture of the homestead and the validating of the plaintiffs' alleged lien are things essentially different, and that the one by no means involves the other. In the statute these two matters are kept entirely distinct. In my opinion, the contention that the issue of the patent and the writing of the letter above referred to amounted to more than a waiver of the forfeiture of homestead rights incurred by McMillan is not sustainable. There is no evidence of any declaration by the Minister of the validity of the instrument under which the plaintiffs claim, nor is there anything in evidence from which it can be inferred that the Minister ever made such a declaration or intended to do so.

In view of the explicit language which I have quoted from the several sections of the "Land Titles Act"(1), I think it is quite unnecessary to deal with

(1) R.S.C. (1906) ch. 110.

the somewhat elaborate arguments addressed to us upon the question whether, apart from this legislation, the instrument executed by McMillan in favour of the plaintiffs would be a "transfer or assignment" within the meaning of section 142 of the "Dominion Lands Act."

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

Appeal dismissed with costs.

Solicitors for the appellants: *Hudson, Howell, Ormond & Marlatt.*

Solicitors for the respondents: *Rothwell, Johnson & Bergman.*

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*Nov. 4.

THE NICHOLS CHEMICAL COMPANY OF CANADA (DEFENDANTS) APPELLANTS;

AND

AMELIA LEFEBVRE (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Negligence—Findings of fact—Common fault—Apportionment of damages.

In actions to recover damages for personal injuries in the Province of Quebec, where the plaintiff has been found guilty of contributory negligence the damages should not be divided equally between the parties, but apportioned according to the degree in which they were respectively blamable for its occurrence.

Judgment appealed from (Q.R. 36 S.C. 535) affirmed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Hutchinson J., at the trial in the Superior Court, District of Saint Francis, which maintained the plaintiff's action with costs.

The plaintiff, on behalf of herself and as tutrix of her minor children, brought the action to recover $10,000 damages sustained through the death of her husband, the late Charles Newman, father of these minor children, occasioned, as alleged, by negligence for which the defendants were responsible. The trial judge found that the accident which caused the death

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

(1) Q.R. 36 S.C. 535.

of Newman was due to the common fault and negligence of Newman and of the company's foreman on the works where deceased had been employed, assessed the damages at $3,000, and awarded the moiety thereof to the plaintiff, $500 to her personally and $1,000 in her capacity of tutrix to the children. The effect of the judgment appealed from was to confirm the adjudication by the trial judge.

C. E. White, for the appellants.
Nicol, for the respondent.

THE CHIEF JUSTICE.—This is an action brought on behalf of the widow and children to recover damages resulting from the death of one Newman, who was killed by a loose rock falling on him while at work in a mine owned and operated by the appellants. The trial judge finds as a fact that the foreman of the mine was aware, at the time of the accident, of the danger caused by the presence of this rock in the roof of the stope or drift where Newman had been ordered by him to work, and that he took no steps to protect the workman; and, on appeal, the Court of Review agreed in the conclusion reached on this question of fact by the trial judge. Our attention was not drawn, at the argument here, to any evidence which would justify us in setting aside this concurrent finding of the courts below.

It is also found as a fact, both in the first court and on appeal, that Newman had been instructed to carefully observe the state of the roof each morning before commencing his work so as to ascertain if there was any loose rock there and that, on the occasion of the accident, he failed to follow this instruction and by so doing contributed to the accident.

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The Chief Justice.

The courts below, following the settled jurisprudence of the Province of Quebec (Lamothe, "Accidents du Travail," p. 68), held that as both plaintiff and defendants were shewn to have been in fault the court must apportion the damages; and we see no reason to disturb that decision. *Price* v. *Roy*(1).

It may be necessary to draw attention to the confusion which seems to exist with respect to the application of the rule now adopted in Quebec in actions of damages against employers where it is found that there is common fault (*faute commune*). The principle of the French law which, it is said, has been recently adopted in that province, is that where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault, which contributed to the accident he must share the responsibility, and, in that case, the damages are not divided equally as is the rule in the English admiralty courts (*Cayzer* v. *Carron Co.*(2), *per* Lord Blackburn, at page 881), and under the Revised Statutes of Canada (1906), ch. 113, sec. 918; but the plaintiff is awarded only a proportion varying according to the degree in which the respective parties were to blame. Planiol, vol. 2, no. 889.

The appeal is dismissed with costs.

GIROUARD J.—The rule of law with regard to *faute commune* is not new in Quebec. I submit with due respect, it is old and simply ignored for a while as I have explained in the case of *The Shawinigan Carbide Co.* v. *Doucet*(3).

(1) 29 Can. S.C.R. 494. (2) 9 App. Cas. 873.
(3) 42 Can. S.C.R. 281.

DAVIES J. agreed with the Chief Justice.

IDINGTON J. agreed that the appeal should be dismissed with costs.

DUFF and ANGLIN JJ. agreed with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Cate, Wells, White & McFadden.*

Solicitor for the respondent: *Jacob Nicol.*

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*Nov. 2-4.
*Nov. 18.

ULRIC BARTHE (DEFENDANT) .... APPELLANT;

AND

ALPHONSE HUARD (PLAINTIFF) .... RESPONDENT.

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

Evidence—Privilege—Notary—Jury trial—Practice—Charge to jury —Objections after verdict—New trial—Misdirection—Discretion.

H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed), B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim, but oral evidence was admitted proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H.,

Held, that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre*, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial.

B. in his newspaper article also accused H. of having been drunk during the election, and the judge, in charging the jury, said, "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."

Held, that this was calculated to mislead the jury and was also a reason for granting a new trial.

If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, which, pursuant to the verdict of the jury, ordered judgment to be entered in favour of the plaintiff for $800 damages with costs.

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

Alex. Taschereau K.C. and *Cannon,* for the appellant.

C. E. Dorion K.C. and *Alleyn Taschereau,* for the respondent.

GIROUARD J.—The appeal is allowed with costs in this court and in the Court of King's Bench, and a new trial is ordered, the costs of the former trial to follow the event. I concur for the reasons stated by Mr. Justice Davies.

DAVIES J.—This was an appeal from the judgment of the Court of King's Bench for Quebec (Cross J. dissenting) affirming the judgment of the Superior Court which on the findings of a jury in an action for libel directed judgment to be entered against defendant (appellant) for $800 damages and costs.

Many interesting questions were discussed at bar arising out of the facts, but in the view I take of the case, that a new trial should be granted, it is alike unnecessary and undesirable to refer to any question not bearing directly upon the granting of a new trial.

Amongst other libels charged against defendant was one of having published in his newspaper a statement that respondent Huard was a perjurer. The

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charge arose out of an affidavit made by Huard, in order to qualify himself as an alderman of Quebec,

that he possessed in the City of Quebec for his own use immovables worth $2,000 at least above his debts and that he had not acquired the said properties through fraud or collusion.

On the trial the appellant (defendant) had called into the witness-box a notary with whom he alleged the deed or conveyance to Huard, under which he pretended to qualify, had been deposited together with a certain counter letter executed by Huard to the vendor of the property limiting and qualifying his title and interest in the property conveyed and shewing as contended by appellant that Huard had really no beneficial interest in it, and that it was held by him collusively.

The notary produced the deed when called upon to do so, but declined to produce the counter letter on the ground that it was a confidential document deposited with him in his official capacity as notary, and that it was his privilege to decline to produce it.

The trial judge sustained his contention and held that the notary was justified in declining to produce the counter letter.

Subsequently when Huard was examined he said he had no objection to its production, but that he had not then the document to produce.

The result of the judge's ruling in favour of the notary's claim of privilege and Huard's statement that while he had no objection to produce it he had not the document in his possession or control was that the document was practically rejected as evidence and was not in evidence before the court or jury.

We are of the opinion that in ruling as he did the

learned judge erred and that the notary was bound when called upon under his subpœna to have produced the counter letter.

It was argued that the fact of the existence of this counter letter and also its substance was in évidence, and that the jury knew practically all that its production would prove.

I cannot accede for a moment to this argument. The jury did not and could not know, nor did nor could the trial judge know just what limitations this counter letter placed upon the deed to Huard, nor whether it afforded evidence that he did not hold the property for his own use, but did hold it collusively. What effect their production might have had upon the jury we are quite unable to say. Libel actions are peculiarly within their province to decide, and it is quite impossible for us to say that the practical rejection of such evidence did not substantially prejudice the defendant. On this ground therefore there should be a new trial.

While the judge's charge to the jury was not objected to as a whole, objection was taken to a particular part of it in which the judge told the jury that

> they should consider the case as if the charge of drunkenness had been made against themselves, their brother or their friend.

I cannot but think that this was an entirely wrong and false doctrine to lay down as to the proper functions of a jury. It was calculated to mislead their minds as to the manner and extent to which they should assess the damages or make their findings.

It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it he would have

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corrected the apparently misleading direction before the jury had retired or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.

This only goes to shew the imperative necessity of Courts of Appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to the jury will be considered or given effect to when it is shewn that objection has been taken to them at a time when their misleading character can be corrected before the jury.

The appeal should be allowed and a new trial granted with costs in this court and in court of appeal, costs of trial court to abide the event.

IDINGTON J.—This is an action for libel in which appellant complains of misdirection of the learned trial judge in rejecting evidence and charging the jury.

I think the learned judge rightly rejected publications alleged to have provoked, and thereby mitigated, the damages claimed, because the evidence had failed to establish respondent's responsibility therefor.

Until such responsibility is shewn it is idle to claim pity or excuse for such a defendant as the appellant was.

Such a defence is not, as some seem to have treated it, an answer to the action. It only goes to mitigate damages, and he claiming the damages must be shewn to have provoked or inspired something which the jury might properly consider in assessing damages.

The rejection of the evidence of the *contre-lettre* is now conceded to have been erroneous, but it is

maintained that no substantial prejudice has been thereby occasioned.

The errors of the learned trial judge's charge are sought to be excused on the same ground.

Whatever might have been said in that regard as to the part of the charge directing the jury to look upon the accusations in question as if made against themselves, their brother or their friend (grave error as with great respect I submit it was) if it had been, as likely, a slip of the tongue, and standing alone in a charge otherwise unimpeachable, it cannot be entirely overlooked when we find it accompanied by a further charge upon one of the leading features of the case which must be held quite erroneous.

The respondent had been elected and to qualify himself as a property holder swore to a qualification which in law he was not entitled to rest upon for any such purpose.

He had a friend convey some property to him for the express purpose of qualifying him and gave the friend a *contre-lettre* whereby he and not the respondent was to get the fruits of the property and become entitled to a return of the property itself.

That was a thing the respondent did not venture to repeat or to rest upon when he was re-elected.

It may have been he had not, in so swearing, committed perjury. However, that was a question for the jury, but required from the judge the legal definition thereof, and full explanation.

But beyond and above all that the jury should have been told the respondent was not in law justified in taking such an oath for such a purpose.

The parties were entitled to have it explained to the jury fully, why on the one hand it might not be

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considered perjury in law, or on the other might have been so held. And when properly so directed the issue should have been left to the jury to draw their own conclusion from the facts.

Then, if giving him the benefit of any doubt, they should find the charge not proven perhaps (and certainly so if the surrounding facts so warranted it) they should have been further directed to consider whether or not the publication imported, not perjury, but merely false swearing, and that as written it would be so understood by the readers thereof. In the event of such a finding being possible, they should have been told to try the issue so raised.

Even if this secondary meaning was not open to the jury on the surrounding facts—as to which I say nothing but merely suggest it as a possibility—the true position of the respondent claiming damages in respect of such a charge made in relation to his reprehensible conduct in taking office by means of an unjustifiable oath should have been left to the jury to deal with as they saw fit.

They might have concluded on that score that under the circumstances he was not entitled to more than nominal damages, or alternatively might, moved by the presence, in evidence, of envenomed hate, and determined to teach journalists to use properly measured words in describing an enemy, have palliated his offence against society.

They were there to appreciate in this regard the true value of the reputation of the respondent.

It is impossible to say how much a correct appreciation of the law and excluded fact might have influenced them or how much that want of appreciation thereof may have substantially prejudiced the result,

but I am driven to conclude that an accumulation of such grave errors must have produced some substantial injustice.

DUFF J. agreed with Davies J.

ANGLIN J.—The appeal in this case should in my opinion be allowed and a new trial ordered.

For what was, if untrue, a very gross libel upon the plaintiff charging perjury and drunkenness under most aggravating circumstances a jury condemned the defendant in $800 damages.

The defendant complains of the refusal of the learned trial judge to compel the production in evidence of a document which bore materially upon his plea of justification in regard to the charge of perjury. The alleged perjury consisted in taking a false oath of qualification as municipal councillor. The plaintiff had obtained a deed of a property from a friend to enable him to take the oath of qualification. He had given (probably concurrently) a *contre-lettre* to his friend, who retained possession of the property and collected the rents. The learned judge declined to compel the production of the latter document which was in the hands of a notary who was called as a witness. A claim of privilege asserted by the notary was upheld. Evidence was given of what were alleged to be the contents of the *contre-lettre*. This evidence, in my opinion, was inadmissible. The ruling that the *contre-lettre* itself was privileged from production was, I think, erroneous and in its absence it may well be that the defendant's plea of justification upon the charge of perjury was not fairly or fully presented to the jury. The case having gone to the jury upon both charges and damages having been awarded

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in a lump sum it is impossible to sever them. Neither can we say that their amount would have been the same if the *contre-lettre* itself had been before the jury.

The defendant also complains of serious misdirection by the learned trial judge. As to this, however, he is in the difficulty that no objection to the charge was taken at the trial, although formal objections in writing were filed on the morning following the verdict. As I read former article 473 C.P.Q., although the judge was only required to reduce to writing the portion of his charge to which objection had been taken (making mention of the objection) as soon as conveniently possible, it was intended that he should have the opportunity of doing so immediately (*sur-le-champ*). Moreover, this article was found under the caption "proceedings before the jury." I therefore think it clear that under it the party objecting was required to state his objections to the trial judge before verdict. Apart from the provisions of this article the manifest impropriety and inconvenience of any other course would seem to render this imperative. Although it repeals article 473, the Quebec statute, 8 Edw. VII. ch. 77, sec. 2, does not, in my opinion, alter the practice in regard to the necessity for taking objections to the charge before verdict. It follows that the appellant cannot, on the ground of misdirection, claim a new trial as of right.

But the court may, nevertheless, where the misdirection has been serious and is likely to have resulted in a miscarriage of justice, as a matter of discretion grant a new trial. The court of appeal upon technical grounds held that the charge of the learned judge was not before it. We are not therefore embarrassed by any exercise of discretion by that tri-

bunal. The charge having been procured and placed before the court by the respondent, I think it may properly, as against him, be treated as part of the record, though not taken in shorthand and filed as provided for by the statute of 1908.

The principal misdirection to which our attention has been called consists in two statements, (*a*) that as a matter of law the plaintiff, Huard, was legally qualified; and (*b*), that, in dealing with the direct charge of drunkenness and the insinuation that the defendant had visited improper places, the jury should treat the case as if these charges had been made against one of themselves, a brother, or a friend.

In effect, at all events in the circumstances of this case, the former statement amounted to a withdrawal from the jury of the defendant's plea of justification in answer to the charge of perjury. In my opinion it was quite erroneous and it is not possible to say that it did not result in a miscarriage of justice.

The other passage objected to is entirely out of harmony with the ideas which have always obtained as to the manner in which a jury should deal with cases presented for their consideration.

The charge read as a whole does not qualify or modify the effect of either of these objectionable statements.

I think, therefore, that this court should, upon these grounds, in the exercise of its discretion, as well as because of the erroneous ruling in regard to the production of the *contre-lettre*, direct a new trial.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondent: *Lavergne & Taschereau.*

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*Oct. 12.
*Dec. 13.

RICHARD B. ANGUS, THOMAS G. SHAUGNESSY AND THE COLUMBIA AND WESTERN RAILWAY COMPANY (PLAINTIFFS) .... APPELLANTS;

AND

F. AUGUST HEINZE (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Agreement for sale of lands—Construction of contract—Right of action—Partition—Administration by co-owners—Trust—Interim account—Partial discharge of trustees.

A. and S., being holders of the entire capital stock of the C. and W. Rway. Co., agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H. and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, in so far as they had not been disposed of, remained in the company. In an action by the plaintiffs against H. for partition of the lands and to have an order for an interim account by and partial discharge of A. and S. as trustees:

Held, that as, at the time of action, the title to the lands was still vested in the railway company which was not a party to the agreement, the order for partition could not be granted, and that, independently of partition or other final determination of their trust, the plaintiffs were not entitled to the relief of an interim accounting and partial discharge as trustees.

Judgment appealed from (14 B.C. Rep. 157) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Cle-

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

(1) 14 B.C. Rep. 157.

ment J., at the trial, and dismissing the plaintiffs' action with costs.

The circumstances of the case are stated in the head-note and the judgment of Mr. Justice Anglin now reported.

Armour K.C., for the appellants.
Lafleur K.C., for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

GIROUARD, DAVIES and IDINGTON JJ. agreed in the reasons stated by Anglin J.

ANGLIN J.—On the short ground that the parties to the agreement on the 11th Feb., 1898, between whom partition is sought, have neither a legal nor an equitable interest in the lands in question, but are merely interested in the performance of certain mutual covenants in respect to such lands, the entire title to which, equitable as well as legal, is outstanding in the Columbia and Western Railway Company, which is not a party to the agreement, I am of opinion that the plaintiffs are not entitled to succeed in their claim for partition.

They also claim, apparently as incidental relief, an account in respect of such of these lands as have been taken for the right-of-way of the railway, and of such as have been sold and disposed of. At bar counsel for the plaintiffs pressed that, if denied a decree for partition, the relief of an interim accounting should nevertheless be given the plaintiffs, in order that they may obtain a *pro tanto* discharge as trustees

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in respect of the lands so taken and the proceeds in their hands of the lands so disposed of. A very large proportion of the lands covered by the agreement remains vested in the railway company.

In the judgments in the provincial appellate court no allusion is made to this claim for an accounting. It was apparently treated as purely incidental to the claim for partition. No authority has been cited by counsel for the appellants either in his factum or at bar in support of the view that, independently of partition or other final determination of any trust which may subsist as to the lands in question or their proceeds, the plaintiffs are, as trustees, entitled to the relief of an interim accounting and to a partial discharge. I have been unable to find any case in which trustees have been granted such relief. It may be that, in a proper case, trustees would be entitled to some such relief in the form of a declaratory order or judgment. This they have not asked; and I should much doubt that to accord it in the circumstances of the present case would be a sound exercise of the discretion conferred on the court to pronounce declaratory judgments.

In the Province of Ontario by virtue of special legislation (63 Vict. ch. 17, sec. 18), which has no counterpart in British Columbia, "a trustee appointed by a deed, will, or other instrument in writing," would appear to be entitled to the relief of an interim accounting by proceedings in the Surrogate Court. In the absence of such legislation in British Columbia, my view is that trustees have not the right to obtain such relief.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*

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*Oct. 21.
*Dec. 13.

AINSLIE MINING AND RAILWAY COMPANY (DEFENDANTS) .... APPELLANTS;

AND

MURDOCK MCDOUGALL (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Employer and employee—Duty of employer—Proper system—Common employment.

An employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating the duty to another.

It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot in an action against him for damages, invoke the doctrine of common employment.

APPEAL from the judgment of the Supreme Court of Nova Scotia maintaining by an equal division of opinion, the verdict for the plaintiff at the trial.

The appellants own and operate a barytes mine in the County of Inverness, N.S., and Duncan R. McDougall, son of the respondent, was, with other workmen, employed to deepen the cut along the vein which was already some thirty feet below the surface. The cut was not perpendicular, but ran to the surface at an angle of about 30 degrees. To protect the workmen from stones and earth falling on them there was a scaffolding about half way down made of timbers placed across at intervals and covered with small poles lying close together, and these again covered with earth. A mass of rock having broken away near the surface it crashed through the scaffolding and fell

*PRESENT:—Girouard, Davis, Idington, Duff and Anglin JJ.

to the bottom whereby the said Duncan R. McDougall was killed. In an action by his father for damages on behalf of himself and his wife a verdict for the plaintiff for $1,000 was set aside by the Supreme Court of Nova Scotia and a new trial ordered(1). An appeal from this decision to the Supreme Court of Canada was quashed for want of jurisdiction(2). On the second trial the jury found the company guilty of negligence in not having the overhanging wall protected and a safe place for the workmen to do their work and assessed the damages at $1,200. A verdict for the plaintiff for this amount was sustained by the full court being equally divided in opinion.

Newcombe K.C. for the appellants. The company had employed proper and competent persons to oversee the work in the mine and look after the safety of the workmen. That was a performance of their full duty to the men. *Paterson* v. *Wallace & Co.*(3); McDonald on Master and Servant (2 ed.), p. 298; Beven on Negligence (3 ed.), p. 612.

The manager was the only one guilty of negligence if any one was and he was a fellow servant of the deceased. *Hall* v. *Johnson*(4).

Daniel McNeil K.C. for the respondent. The company were themselves negligent in not providing a safe and proper place for the men to work in so that the doctrine of common employment cannot be invoked. *Grant* v. *Acadia Coal Co.*(5); *Smith* v. *Baker & Sons*(6).

(1) 42 N.S. Rep. 226.
(2) 40 Can. S.C.R. 270.
(3) 1 Macq. 748.
(4) 3 H. & C. 589.
(5) 32 Can. S.C.R. 427.
(6) [1891] A.C. 325.

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The findings of the jury were warranted by the evidence and will not be disturbed on appeal. *McKelvey v. Le Roi Mining Co.*(1).

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

DAVIES J.—This was an action under the "Fatal Injuries Act" of Nova Scotia, brought by the plaintiff on behalf of himself and his wife to recover damages for the death of their son, a young man who was killed in the defendants' mine while working as one of the defendants' employees.

The jury awarded as damages $1,200 and divided it, giving to father and mother $600 each.

The death of the employee was caused by a stone or rock of several tons' weight falling out of the hanging wall of the mine upon the deceased workman, just after work had been resumed in the mine after it had remained unworked for some 18 months.

The jury found that the negligence of the defendants, which caused the death of their workman, consisted in

> not having the overhanging wall cased and protected from falling; timbering overhead in trench not sufficiently strong to hold a fall of stone liable to fall from overhanging wall;

that

> the working place was not safe (and that) if the walls had been properly examined the stone which fell would have been noticed as dangerous;

and lastly,

> that the unsafe condition of the working was discoverable by a reasonably careful inspection.

(1) 32 Can. S.C.R. 664.

I agree with the opinion of Chief Justice Townshend and Meagher J., that on these findings plaintiff was entitled to judgment.

Mr. Newcombe on this appeal invoked the doctrine of common employment as a complete answer by the defendant company; he contended that the mine which had laid unworked for some eighteen months had been properly examined before work had been resumed by the superintendent of the mine, Kenty, and the managing director, that the inspection was careful and complete, but that whether it was negligent or not the company having employed competent men were not liable and the evidence did not justify the findings.

As to the findings of the jury, I have no difficulty whatever in holding that the evidence was sufficient to sustain them.

The inclination of the hanging wall, as stated by Mr. Harrison, the managing director, was about 30 degrees. The workmen were working immediately below this overhanging wall blasting rock, and when the blasting operations were begun and no doubt caused by them, the huge stones fell out of the top part of this wall, crushing through an artificial roof or covering built across the mine or excavation and killed the unfortunate miner, McDougall. The inspection made as described by the superintendent, Kenty, was superficial and fully justified the jury's finding that it was not a reasonably careful one. Kenty says

the wall was cracked along in places, ordinary cracks as you would see in any cut, I couldn't see anything to say it was dangerous. It was grassed over to the edge of the cuts; it was impossible to see without cutting away the surface.

No cutting or prying into the surface was done and no testing of the cracks. Mr. Harrison, the managing-director, who accompanied Kenty, gave similar evi-

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Davies J.

dence of the examination which, while it may have satisfied them, was not such an examination as the circumstances called for.

I am not able to accept Mr. Newcombe's contention with respect to the duty owing to the servant by the master in respect of the dangerous condition of the mine when the mine was re-opened and the workmen were put to work on blasting. I have seen no reason to change the opinions I have expressed on this subject in *Grant* v. *Acadia Coal Co.*(1); *McKelvey* v. *Le Roi Mining Co.*(2), and *Canada Woollen Mills* v. *Traplin*(3). In substance they are that while the master is not necessarily liable for the negligence of the superintendent of his works, he is bound to see that these works are suitable for the operations he carries on at them; and he cannot by leaving their supervision to his superintendent, escape liability, for the duty is one of which he cannot divest himself.

In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to cases arising out of neglect of the masters' primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

The case of *Bartonshill Coal Co.* v. *Reid*(4) was cited in support of the general proposition that a master employing competent servants and supplying proper materials to enable them to carry on the work,

(1) 32 Can. S.C.R. 427.
(2) 32 Can. S.C.R. 664.
(3) 35 Can. S.C.R. 424.
(4) 3 Macq. 266.

was not liable for injuries caused by the negligence of one of his servants to another while they were engaged in their common work.

But in giving his careful and elaborate opinion in that case, an opinion which Lord Chancellor Chelmsford said, in the next following case of the same volume, *Bartonshill Coal Co.* v. *McGuire*(1), had his entire concurrence, Lord Cranworth was at pains to point out the broad distinction between the exemption of the master from liability arising out of the carelessness or negligence of one fellow servant causing injury to another, and the liability of the master for injuries to his servant arising out of his failure to discharge the duty the law throws upon him of providing a fit and proper place in which his workmen are engaged at work. Whether he has or has not discharged his duty in this regard, will be in all cases a question of fact. Mere proof that he had employed competent persons to do his work is not enough.

Lord Cranworth points out that the two previous decisions of the House of Lords, *Paterson* v. *Wallace & Co.*(2), and *Brydon* v. *Stewart*(3).

turned not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow workman, but on a principle established by many preceding cases, namely, that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against unnecessary risks.

The question in the former case of *Paterson* v. *Wallace & Co.*(2) he said

was not as to an injury occasioned by the unskilfulness of a fellow workman, but an injury occasioned by the fall of part of the roof;

(1) 3 Macq. 300, at p. 303. (2) 1 Macq. 748.
(3) 2 Macq. 30.

and in the other case of *Brydon* v. *Stewart*(1), the jury had found that

> the death arose from the pit not being in a safe and sufficient state;

and Lord Cranworth said, p. 288:

> Your Lordships came to the conclusion that the men had a right to leave their work if they thought fit and that their employers were bound to take all reasonable measures for the purpose of having the shaft in a proper condition so that the men might be brought up safely,

and so a verdict was directed to be entered for the pursuer.

Defective places in which to work, defective machinery with which to work, and defective systems of carrying on work, are none of them, I hold, within the exception grafted upon the rule holding an employer liable for the negligence of the men in his employ. That exception as defined by Lord Cairns in his celebrated dictum in *Wilson* v. *Merry*(2), does not cover the duties owing by the employer to the employed in these respects, but does cover all risks which the workmen assume when they enter into their master's employment against the wrongful acts or negligences of their fellow servants.

As Lord Herschell says at p. 362 of *Smith* v. *Baker & Sons*(3):

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk. *Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence* and the creation or enhancement of danger thereby engendered.

Mr. Newcombe relied upon the case of *Hall* v. *Johnson*(4) as supporting his proposition that an

(1) 2 Macq. 30.
(2) L.R. 1 H.L.Sc. 326.
(3) [1891] A.C. 325.
(4) 3 H. & C. 589.

underlooker, whose duty it was to examine the roof and prop it up if dangerous, is a fellow labourer with a workman in the mine and the latter cannot maintain an action against the owner of the mine for injury occasioned by the neglect of the underlooker to prop up the roof, if the owner has not personally interfered or had any knowledge of the dangerous state of the mine.

It cannot, I think, be questioned, that an "underlooker," with such duties as those mentioned, would be held to be a fellow workman with the ordinary workmen in the mine. In that case it appeared that the mine had been worked in the ordinary course for the previous six years, and the Court of Exchequer Chamber held that under these circumstances, the workmen

> undertook to run all the ordinary risks of the service including negligence on the part of a fellow servant,

and that the case before them was within that undertaking.

That case does not involve any question as to the primary duty of the master to provide in the first instance places in and materials with which workmen may safely work or systems under which they may so work, or whether with respect to cases where such duty is not fulfilled, and an accident happens to a workman in consequence, the master can invoke the doctrine of common employment and escape liability by shewing merely that a fellow workman's negligence was the cause of his duty being unfulfilled. My holding is that in such cases he cannot and that he is bound to shew that reasonable and proper skill and diligence were not wanting on his part or on the part of those

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to whom he delegated the performance of his duty in those regards.

In view of the disuse of the mine for a period of 18 months, I deem the position on the resumption of work, as regards the mine-owners' duties to their employees, to be the same as if they were then for the first time placing their men at work in the mine. Their duty to their workmen in this situation was to provide them with a reasonably safe place in which to work. When that duty has been delegated, any negligence of an employee to whom it has been confided must be imputed to the employer whether an individual or a body corporate.

Under these circumstances, and holdings, without discussing the other branch of the case as to whether the general manager and director of the company was or was not a fellow workman with the deceased, or was the *alter ego* of the company for whose negligence they would be liable, I think the appeal should be dismissed with costs.

IDINGTON J.—The whole point of this case as appellant's counsel put the matter without abandoning other and minor things, is whether the doctrine of common employment is applicable or not and whether the jury should have been better directed in that regard than they were.

I do not think appellant can now complain of non-direction after its counsel at the trial prudently and deliberately refrained from taking objection to the charge or submitting a proper question for adoption by the learned trial judge or otherwise insisting on the point in question being finally and definitely brought to his attention with a view to having the jury pass upon it.

Moreover, on the facts that bear on the exact point raised there is no dispute.

There is most conflicting evidence as to whether or not what the jury has found to have been negligence was so. But there is no dispute that the condition of things pronounced negligent and dangerous was seen and passed upon by three officers of the company of whom one was manager and director, and another general mine superintendent, for the express purpose of either determining or reporting to the Board of Directors (it does not appear which), so that it could decide as to re-opening the mining operations which had ceased for eighteen months.

The condition of the place in and about which the workmen had to work, the nature of that work and the risks created thereby and to be suffered must be taken I think as adopted by the company on their re-opening of the mine—as a place and things all known to it to be just what it was—and what was that? Was it not a dangerous place wherein the men were to work and was not the employment of a dangerous character?

No proper system was adopted to protect the company's workmen, in life or limb, against these dangers. No adequate protection was supplied by the company and put at the service of those it placed in charge of the work.

Nor was the obvious need either to case the wall or remove the overhanging or other material liable to fall provided for by the company.

Nor, if that might have made a difference, was there assigned to any one (competent or not) the duty of supplying the necessary protection.

This is not the case of a work opened by a competent superintendent appointed for that purpose and

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its work continuously operated and developed by him within his authority both as to the creation of its dangerous qualities and insufficient protection, but is distinct therefrom as if something new.

Whatever doubt or difficulty might exist in a case such as I have just stated, I fail to see how any can exist here if we have regard to the very cases cited by appellant without going further.

I think the appeal should be dismissed with costs.

DUFF and ANGLIN JJ. concurred in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solictor for the respondent: *Daniel McNeill.*

THE CITY OF MONTREAL (DEFENDANT) .... APPELLANT;

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*Nov. 5, 8.
*Dec. 13.

AND

THE MONTREAL LIGHT, HEAT AND POWER COMPANY (PLAINTIFFS) .... RESPONDENTS.

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

Contract—Supplying electrical energy—Delivery—Condition—Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.

A contract for the supply of electrical energy provided that the company should furnish to the city at the switch-board in its pumping station, through a connection to be there made by the city with the company's wires, an electrical pressure equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at a flat rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.

Held, that by supplying the pressure on their wires up to the point of delivery the company had fulfilled their obligation under the contract and was entitled to payment at the flat rate per horse-power per annum for the energy so furnished notwithstanding that the city had not utilized it.

Per GIROUARD and ANGLIN JJ.—The agreement was a contract for the sale of a commodity.

APPEALS from two judgments of the Court of King's Bench, appeal side, affirming the judgments of the Superior Court, District of Montreal, which maintained the plaintiffs' actions with costs.

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

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

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Atwater K.C. and *W. H. Butler,* for the appellant.

R. C. Smith K.C. and *G. H. Montgomery,* for the respondents.

THE CHIEF JUSTICE agreed with Idington J.

GIROUARD J. concurred in the reasons given by Anglin J.

IDINGTON J.—The claim of appellant that the words "actually delivered," although of doubtful import in respect to a supply of electric current, must literally be observed and maintained cannot prevail in face of the supecifications, forming part of the contract, for a flat rate and a means therein provided for measuring the force and forming one of the factors on which to rest the flat rate.

The literal meaning of "actually delivered" is inconsistent with a flat rate fixture. In light of the scope of the entire contract and surrounding circumstances to be looked at in such case of ambiguity I find the latter term must be given a meaning. To do so reduces the question to the one possible meaning the word has. Therefore that must prevail.

It is no fault of respondents, but the misfortune of the appellants which led to the intermittent cost of service and a loss of time and service, reduced in the results thereof possibly to the unexpected profit of the respondents.

I think the appeal must be dismissed with costs.

DUFF J.—The City of Montreal being about to instal a new pump at its high-level pumping-station, to be worked by an electric motor, invited tenders of proposals for supplying the necessary electric power. The specifications stated that contractors were to

supply the power required "over their own wires and poles"; that the "delivery point of the current" should be inside the "station building"; that

the power is required for the operation of a 400 h.p. induction motor which is to run a five-million-Imperial-gallon horizontal triplex power-pump; the normal operation of the pump would demand a service of 12 hours out of the 24 every day of the year;

that the pump was

to work against an estimated water-pressure of 120 to 126 lbs. per square inch due to the head of water on the upper reservoir and the load on the pump might be taken as constant within such limits;

that, whatever the characteristics of the power, the

variations in voltage from the value finally agreed upon must not be greater than 2% plus or minus.

Under the head of "terms of payment" the specifications stated

the power is to be sold on a flat rate of so much per year for horse-powers of 12 hours per day; a horse-power under this specification means 746 true Watts as indicated by an integrating or instantaneous Watt-meter of approved type.

The respondents' tender was accepted and an agreement accordingly made which provided that the specifications should be read as part of it. The controversy arises upon the construction of this clause of the agreement:

(3) The present contract has been thus made in consideration of the price or sum of twenty dollars per horse-power per annum for the quantity of said electrical current or power *actually delivered under this contract (a horse-power means* 746 *true Watts), for the supply and service of said electric current daily between the hours of ten p.m. and ten a.m. throughout the year;* and for each and every hour outside and in addition to said specified time in consideration of the sum of two dollars per hour or fraction of an hour. It being understood that said two dollars per hour for extra time is based on the supply and consumption of four hundred horse-power, and should the supply be less or more than that amount the said price for extra time shall be decreased or increased accordingly.

Payments of said price shall be made monthly on the warrant of the Water Committee on the fifteenth day of each month, and on accounts rendered by said company monthly.

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And it arises in this way. The appellants having been compelled by an injunction to discontinue the use of their pump put forward the contention that, under this clause, they are bound only to pay at the rate specified according to the quantity of current actually converted into mechanical power by their motor. The clause (in specifying a rate of $20 per annum for 12 hours per day for "each horse-power actually delivered") means, according to this contention, that the appellant should pay at this rate only for the time the current should actually be in use by them. It is not disputed, as I understand Mr. Atwater, that the quantity of power necessary to work the pump against the load mentioned in the specification would (as the parties understood), with negligible variations, be a constant quantity and that the parties had in contemplation the ascertainment of that quantity once for all in the manner in which it was, in fact, afterwards ascertained; nor is it disputed that the respondents were, under the contract, bound—and only bound—to maintain in their wire terminating at the "delivery point," so-called, during the normal hours of operation a constant pressure sufficient to enable the appellant, by closing the circuit at that point, to direct an electric current through the motor of sufficient energy to furnish that quantity of power. The sole question is: This service having once been initiated, and the actual strength of the current required having been ascertained—Was the appellant bound, under the terms of the contract, to pay, as for the whole period during which the respondents should maintain the service or only for the time during which the appellant should actually avail itself of it for working the pump?

The provisions of the specifications seem to shew —read by themselves, quite obviously and conclusively, I think—that the appellant was to pay for the service furnished by the respondents at a rate to be ascertained once for all, and not according to the measure of the use made of that service. The "delivery point" is there stated to be, not the appellant's motor, but a point within the station at which the appellant was to link up their motor with the respondents' wires. The rate of payment for each unit (one horse-power), is stated to be a "flat rate per annum" a phrase which, unless it is to be rejected as meaningless altogether, expresses the intention that the rate of payment for each unit (assuming anything to be payable at all), is to be a fixed rate for the whole year and not a rate varying with the time during which the current should actually be put to use by the appellant.

The appellant rests its case on the words "actually delivered" in the clause quoted. These words do not, once the circumstances are understood, appear to present much difficulty. The clause in question, it is to be observed, is not concerned with the obligation of the respondents under the contract, but solely with the rate at which the appellant was to pay. The rate of payment for each unit having been specified as a fixed annual rate, and the element of time having been thus eliminated, there only remained the determination of the number of units to be paid for.

That must, of course, depend upon the number of units actually absorbed in working the pump; and, as this would be a constant quantity to be ascertained once for all, the stipulation that the appellant should pay according to the number of units actually ab-

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sorbed would, in effect, be the same as a provision that it should pay for the number actually required. The phrase "actually delivered" means, I think, nothing more than this. In this view of the words, the clause harmonizes with the provisions of the specification, while, in the view advanced by the appellant, the stipulation that the rate of payment for each unit of power is to be a "flat rate" seems to be eliminated.

I agree with the court below that, in fact, the service was really initiated at the time contended for by the respondents.

ANGLIN J.—By the contract before us the plaintiffs agreed to supply to the defendant electrical current or power

to drive and operate a 400 h.p. induction motor to be used to drive a five-million-gallon horizontal triplex power-pump.

In the specifications, which are incorporated with the contract, it is provided that the power shall

be sold on a flat rate of so much per year, per horse-power, of twelve hours a day.

The contract itself contains a provision that it is

made in consideration of the price or sum of twenty dollars per horse-power per annum for the quantity of said electrical current or power actually delivered under this contract (a horse-power means 746 true Watts), for the supply and service of such electric current daily between the hours of ten p.m. and ten a.m. throughout the year; and for each and every hour outside and in addition to said specified time in consideration of the sum of $2 per hour or fraction of an hour—it being understood that said $2 per hour for extra time is based on the supply and consumption of 400 h.p., and should the supply be less or more than that amount the said price for extra time shall be increased or decreased accordingly.

We must read the contract and specifications together and construe each in the light of the other; and it is only, if at all, in the event of irreconcilable con-

flict between them that any term of the specifications may be disregarded.

The appellant contends that there is such inconsistency between the "flat rate" mentioned in the specifications and the terms of payment described in the passage quoted from the contract itself that we should disregard the former. I do not find such an inconsistency.

The one factor entering into the determination of the price to be paid, which was unascertained at the time the contract was made, was the consuming capacity or requirement of the plant which the city proposed to install. Though the motor was to be nominally of 400 h.p., its precise consumption of electric current in operation could be ascertained only when it should be actually working against the pressure of the defendant's pumping plant. It is to meet this situation that the contract provides that the rate of $20 per horse-power per annum shall apply

to the quantity of said electric current or power *actually delivered* * * * for the supply and service of said electric current between the hours of ten p.m. and ten a.m., throughout the year.

The specifications provide that a horse-power, as defined by the contract, shall

mean 746 true Watts as indicated by an integrating or instantaneous Watt-meter of approved type.

Acting under this provision the parties did, in fact, by the use of an instantaneous Watt-meter, fix at 365 h.p. the consuming capacity of the defendant's motor when operating their plant. An expert employed by the defendant made the test for this purpose and his report was accepted by the plaintiffs.

The provision for a fixed rate of $20 per annum per horse-power makes it clear that it was intended

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that this price should be payable by the city whether it in fact used the power placed at its disposal for one hour or for twelve hours, between ten p.m. and ten a.m., or on one day or three hundred and sixty-five days in the year. The further provision that the price is so fixed

> for the supply and service of said electric current daily between the hours of ten p.m. and ten a.m., throughout the year,

indicates that, however the actual consumption of current during the twelve hours between ten p.m. and ten a.m., might vary from day to day, it was meant that payment should be made at the rate of $20 per annum for a constant number of horse-power, to be ascertained presumably, having regard to the provision of the specifications, by the use of an instantaneous Watt-meter. The parties would be thus enabled to determine the consuming capacity or requirement of the defendant's plant. This would remain constant while the plant should be in operation, because the motor would be required to work against a constant water-pressure. In no other way can the provision for payment in this contract be satisfactorily worked out. If it was meant that payment should be for the actual number of Watts consumed by the defendant, it is inconceivable that the price would have been fixed at $20 per horse-power per annum, or that the contract would have provided, as it does, for the ascertainment of the contractual horse-power by instantaneous measurement, and would not have provided for the measurement by a recording meter of the number of Watts actually used by the defendant.

Reading the contract and specifications as a whole, it is, I think, clear that the words "for the quantity of said electric current or power *actually delivered*" were

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inserted merely to provide for the future determination of the then unascertained factor, viz., the consuming capacity of the pumping plant which the defendant was about to install. So read there is nothing in the terms of payment as stated in the contract at all in conflict with the "flat rate" mentioned in the specifications. On the contrary the two provisions harmonize perfectly.

Therefore I conclude that the intention of the parties as expressed in their contract was that, from the time at which the contract should become operative, the defendant should, during its term, pay to the plaintiffs $20 per annum for whatever number of horse-power of electric current should be found requisite to drive the motor to be installed in its high-level pumping-station; and that it was further intended that for this purpose the requirement or consuming capacity of the motor in horse-power should be ascertained and determined as it was in this case. The subsequent conduct of the parties, so far as it may be looked to, merely serves to confirm this view of what were the actual intentions in making this contract.

Then it is said by the appellant that "current or power" is "actually delivered" only while it is being actually used or taken by the consumer. At other times (so the appellant argues) the electric energy upon the supply wire is not "current or power"; neither is it "delivered." But, having regard to the nature of the commodity which is the subject of this contract, to the fact that the taking of the energy supplied depended entirely upon the act and volition of the defendant and to the provision of the specifications that

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> the delivery point of the current will be inside the pumping station and building,

i.e., at the point to which the plaintiffs were required to carry their wires and at which the switch connecting with the defendant's wires should be placed, I think it reasonably clear that the actual delivery which the contract contemplated was the supplying and conducting by the plaintiffs to a point within the defendant's pumping station building of electrical energy—or, perhaps, expressed more accurately, of electrical pressure—in such manner that the defendant could, by making a connection which was wholly within its own power—that is, by accepting the delivery which the plaintiffs actually tendered—obtain that which the plaintiffs had contracted to furnish. The plaintiffs shew that they did everything which was incumbent upon them towards making a complete delivery of the commodity which they undertook to supply. Treating this agreement as a contract for the sale of a commodity (which I think it is), having regard to the terms of articles 1492 and 1493 C.C., it seems clear that an actual taking of the current by the defendant was not essential to its "actual delivery" within the meaning of that phrase in the contract. The delivery contemplated by the contract was, in my opinion, complete when the plaintiffs placed at the disposal of the defendant in its station building such electrical energy or pressure as would, when taken by the defendant, supply the current or power requisite to drive its pumping plant. This the evidence discloses the plaintiffs in fact did, and the courts below have accordingly held them entitled to recover the amount of their claim.

If the agreement should be regarded not as a contract of sale, but, as suggested during the argument,

rather as an agreement whereby the plaintiffs undertook to perform work for the defendant and to bring about a state of things which would enable them to obtain certain results, it implies a condition that the defendant, on its part, will do whatever acts may be incumbent on it to enable the plaintiffs to carry out their undertaking and to earn the consideration therefor. This the defendant failed to do, and the damages to which the plaintiffs would be entitled for such breach would, in the circumstances of this case, not differ materially—if indeed they would differ at all—from the amount of the price to which they would have become entitled had the defendant done what was necessary on its part to permit of the contract being fully carried out during the period in question. But, in my opinion, the agreement is a contract for the sale of a commodity produced and to be supplied by the plaintiffs to the defendant.

The use of the terms "current or power" to describe electrical energy or pressure supplied but not taken may be technically inaccurate. Yet what the parties intended seems sufficiently clearly expressed; and, that being so, the failure to employ strictly correct words to formulate that intention will not prevent the courts from carrying it into effect.

The contract provides that it

shall continue in force for the term of five years beginning from the first supply of such electrical current.

It was contended for the appellant, though not very strenuously, that the contract was not, in fact, operative during the period for which the plaintiffs claim payment because it had merely requested the company to deliver current for experimental purposes. A perusal of the evidence, however, has satis-

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fied me that the company was in fact called upon by the city to begin to supply electrical current under the contract, and that it did in fact so supply such current while the city used it and, thereafter, continued to supply the energy or pressure necessary to produce such current, although its use was discontinued by the city, owing to the issue of an injunction restraining the operation of the city's pumping plant. With the obtaining of this injunction, the plaintiffs had nothing to do, and they cannot be held to be in any way responsible for the consequent interruption in the use by the city of the electrical energy which they held themselves at all times ready to, and did, in fact, deliver.

For the reasons which I have stated I am of opinion that the contract has been properly construed, and the obligations of the defendant correctly defined in the provincial courts.

I would dismiss the appeal with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *Ethier, Archambault, Lavalee, Damphouse, Jarry & Butler.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

IN THE MATTER OF
ORDER NO. 7473 OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA, RESPECTING FENCING AND CATTLE-GUARDS;

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*Nov. 19, 22.
*Dec. 13.

AND

THE CANADIAN NORTHERN RAILWAY COMPANY......... APPELLANTS;

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railway—Fencing—Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute—"The Railway Act," R.S.C. 1906, *c.* 37, *ss.* 30, 254.

Under the provisions of "The Railway Act" the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. Duff J. *contra.*

The "Railway Act" empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington J. *contra.*

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

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IN RE CANADIAN NORTHERN RY. CO.

APPEAL from an order of the Board of Railway Commissioners for Canada on a question as to the jurisdiction of the Board.

The Canadian Northern Railway Company, one of the companies subject to the jurisdiction of the Board of Railway Commissioners for Canada, appealed from the order whereby, among other things, it is required that all railway companies subject to the jurisdiction of the Board should, as to all railway lines completed, owned or operated by them where the lands on either side of the railway are not inclosed, settled or improved, on or before 1st January, 1911, erect and maintain on each side of the right-of-way fences with swing gates at farm crossings, and that, as to lines not yet completed or opened for traffic or in course of construction where the railway is being constructed through inclosed lands it should be the duty of the railway company at once to construct such fences or take such other steps as would prevent cattle and other animals escaping from such inclosed lands. The question to be decided was, whether or not under section 254 of the "Railway Act" or otherwise the Board of Railway Commissioners for Canada had jurisdiction to make those provisions of the order.

In giving reasons for the making of the order, the HON. J. P. MABEE, Chief Commissioner, said:

"At every sitting of the Board from Winnipeg to Victoria complaints were made against the railway companies in connection with the fencing, or rather the defective and non-fencing of their right-of-way, and that the law regarding cattle-guards was not complied with. Claims innumerable for stock killed, and refusal to make compensation were disclosed. Many cases appeared where stock had been killed upon

the track and farmers were afraid to ask for compensation for fear of being involved in endless litigation.

"It would seem, perhaps, that upon the whole the absence of fences along the right-of-way is a more fruitful source of loss to the rancher and farmer than defective cattle-guards, or their absence.

"Cases were given where those in charge of the construction of railways entered upon improved and inclosed land, threw down the fences, made no attempt to inclose the right-of-way, allowing stock to get out upon the highways, thus injuring crops, and in some instances these cattle were killed upon distant railway tracks. Whether these wrong-doers were independent contractors or servants or officers of the railways under construction did not appear, but, so far as this Board has power, it is determined that such high-handed and unreasonable conduct shall cease.

"The 'Railway Act' is clear upon the questions of fencing and cattle-guards, and the time has arrived when something must be done to compel the observance of its provisions.

"Section 254 provides as follows:

" '1. The company shall erect and maintain upon the railway:

" '(*a*) Fences of a minimum height of four feet six inches on each side of the railway;

" '(*b*) Swing gates in such fences at farm-crossings of the minimum height aforesaid, with proper hinges and fastenings, provided that sliding or hurdle gates constructed before February 1, 1904, may be maintained; and

" '(*c*) Cattle-guards on each side of the highway at every highway crossing at rail level with the highway.

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"'2. The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway.

"'3. Such fences, gates, and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

"'4. Wherever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates, and cattle-guards, unless the Board otherwise orders or directs.'

"There has been no order of the Board respecting fencing through uninclosed or unimproved lands, and the practice of the companies, so far as I can learn, has been to leave their right-of-way entirely unfenced, until the adjacent owner or owners had erected side-fences, when such owner or owners would be expected to call upon the company to erect its fences. Cases, however, were presented where the side-fences had been long since erected, but yet the railway fences had not been erected.

"We have been furnished with no information by the railway companies of the amounts paid by them for cattle killed upon their lines, or of the number of claims they have disputed, but from the large number of cases that were brought to the attention of the Board, where compensation has not been made, the better opinion perhaps is that the disputed claims vastly exceed those in which settlements have been made, if not, the companies have been paying out very large sums that would have been much better spent in protecting their rights-of-way.

"Now the statute defines clearly the kind of fence

and cattle-guard that must be provided; the fence must be at least four feet, six inches high, and it and the cattle-guards must be 'suitable and sufficient to prevent *cattle and other animals* from getting on the railway.'

"It is just as incumbent upon the companies to fence against hogs as it is against horses, yet it is not pretended that any attempt has been made to do so, and instances were given where farmers had so many hogs killed that they were compelled to abandon any attempt to raise them.

"It seems to be the practice in Manitoba, Saskatchewan, some parts of Alberta and British Columbia to remove the cattle-guards entirely in the winter time. This is done, it was said, to facilitate the operation of the snow ploughs. It was not shewn by any railway expert that this practice is necessary, but it was shewn by many Saskatchewan farmers that it was more important to them to have the cattle-guards in place during winter than any other season, as during the other seasons their cattle were mostly pasturing in the hills in charge of herders. At any rate these cattle-guards have been removed during the winter months without authority and unless a great deal more can be shewn than has yet appeared, the practice must cease. Furthermore, the railway companies must establish and maintain cattle-guards that will prevent cattle and other animals from getting upon the railways. This is the requirement of the law, and I know of no reason why it should not be complied with.

"The provisions of clause 4 have been abused, and this statutory exemption from fencing has been used by the companies to free themselves from making compensation in innumerable cases of meritorious claims.

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This condition of affairs cannot be permitted to continue; it works great hardship upon the public, and is of little or no benefit to the railway companies. The conditions in the West have greatly changed since this exemption was granted to the companies, and as they are compelled at some stage of the undertaking to erect fences, I am clearly of the opinion that no hardship will be imposed if that stage is made the initial one.

"I am aware that in various parts of the country no necessity now exists, and possibly never will, for the erection of fences. The formal order may contain a provision that railway companies, the lines of which have already been constructed, may apply to exempt certain sections of the road from the operation of the order, when, if conditions are shewn that such course will entail no hardship upon the public, the Board may so declare. The like course may be taken where railways are in course of construction, and as to such latter, when application is made to open the road for traffic, the fences, cattle-guards, highway and farm-crossings and gates shall all form part of the work necessary to be completed according to the statute and the Board's regulations, before permission is given to operate the road. I am convinced that this course will, in the end, be less expensive for the railway companies, as the erection of fences, gates, etc., can all be carried on at the time of construction at less cost than later on, to say nothing of saving liability for damage claims for stock killed and law costs in defending, even if successful.

"Many complaints were made that in the construction of the railway lines the highway crossings were left in an impassable state, causing endless incon-

venience and trouble to the public. I confess I am at a loss to understand such disregard of the rights of others, and such selfish and inconsiderate conduct upon the part of those constructing the railways, or responsible for their construction. If these works are let out to contractors, the railway companies may as well at once understand that they must make some provision in their contracts that will compel their contractors to treat the public with ordinary decency. This Board has no control over the contractors and can deal only with the railway companies. These highway crossings can be constructed at less expense when the grading is being done than later on, after the road is completed; and with respect to roads not yet completed, they will not be opened for traffic until every highway crossing opened for travel is put into the condition called for by the Board's regulations. As to these railways now in operation, all highway crossings, opened for travel, must be put into the condition called for by the regulations within one year from this date.

"A draft order embodying the foregoing may be sent to all the companies, and its settlement spoken to by them at the May meeting of the Board at Ottawa."

It did not appear that there had been any special application made to the Board in respect to any designated locality, nor that the necessity of fencing any defined portion of any particular line of railway had been inquired into and determined by the Board; and the order, by its terms, applied to the whole of the Dominion of Canada and affected all railways subject to the "Railway Act," R.S.C. 1906, ch. 37.

Chrysler K.C. for the appellants. The Board has no power to make a general order such as this, but

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must deal with each locality as an application is made in respect thereto. Section 25, Cyc. 1534, as to definition of locality. See also as to liability to fence generally, *Cortese* v. *Canadian Pacific Railway Co.* (1); *Biddeson* v. *Canadian Northern Railway Co.* (2); *Phair* v. *Canadian Northern Railway Co.* (3); *Hunt* v. *Grand Trunk Pacific Railway Co.* (4); *Canadian Pacific Railway Co.* v. *Carruthers* (5).

Ford K.C., Deputy-Attorney-General of Saskatchewan, supported the order.

THE CHIEF JUSTICE.—The provisions of the order complained of as made in excess of the jurisdiction of the Board of Railway Commissioners are fully set out in the opinion of Mr. Justice Anglin. The question to be decided on this appeal is whether, under section 254 of the "Railway Act," or otherwise, the Board has jurisdiction to make such provisions. That section (section 254, par. 1) imposes upon all railway companies under the jurisdiction of the Parliament of Canada the general obligation to erect and maintain fences, gates and cattle-guards to be constructed in accordance with certain requirements set out in detail in the section.

An exception to the general obligation contained in paragraph 1 is made in sub-section 4 of the same section 254, with respect to

any locality in which the lands on either side of the railway are not enclosed and either settled or improved.

In such a locality the company is not subject to the

(1) 7 Can. Ry. Cas. 345.
(2) 7 Can. Ry. Cas. 17.
(3) 5 Can. Ry. Cas. 334.
(4) 18 Man. R. 603.
(5) 39 Can. S.C.R. 251.

general obligation to erect and maintain fences, gates and cattle-guards unless the Board otherwise orders and directs. In the context "any locality" does not include all Canada. The word *locality* qualified by *any* conveys the idea of a portion of Canadian territory confined within a limited area. In making the order the Chief Commissioner assumes that power exists in the Railway Board to make a general order applicable to all Canada, irrespective of localities, and he says:

> The provisions of clause 4 have been abused, and this statutory exemption from fencing has been used by the companies to free themselves from making compensation in innumerable cases of meritorious claims. This condition of affairs cannot be permitted to continue; it works great hardship upon the public, and is of little or no benefit to the railway companies. The conditions in the West have greatly changed since this exemption was granted to the companies, and, as they are compelled at some stage of the undertaking to erect fences, I am clearly of the opinion that no hardship will be imposed if that stage is made the initial one.
>
> I am aware that in various parts of the country no necessity now exists, and possibly never will, for the erection of fences. The formal order may contain a provision that railway companies, the lines of which have already been constructed, may apply to exempt certain sections of the road from the operation of the order, when, if conditions are shewn that such course will entail no hardship upon the public, the Board may so declare. The like course may be taken where railways are in course of construction, and as to such latter, when application is made to open the road for traffic, the fences and cattle-guards, highway and farm-crossings and gates shall all form part of the work necessary to be complete according to the statute and the Board's regulations, before permission is given to operate the road. I am convinced that this course will, in the end, be less expensive for the railway companies, as the erection of fences, gates, etc., can all be carried on at the time of construction at less cost than later on, to say nothing of saving liability for damage claims for stock killed and law costs in defending, even if successful.

I am of opinion that the order to fence in any excepted locality must be made in the exercise of a judicial discretion on proper cause shewn, that is to say, the Commission must judicially find as a fact that

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the company with respect to a particular locality is not entitled to the benefit of the statutory exemption. The intention of Parliament clearly was to except from the general obligation to fence any locality wherein the lands through which the railway passes were "not enclosed and either settled or improved," on the presumption that, in places where such conditions existed, fences, gates and cattle-guards were unnecessary. The Chief Commissioner gives as his reason for making the order that

as they (the railway companies) are compelled at some stage of the undertaking to erect fences,

presumably because, at that stage, the adjoining lands will be settled or improved, in the meantime, the companies are not entitled to the benefit of the exception created in their favour by Parliament and this notwithstanding that the Commissioner is aware

that in various parts of the country no necessity now exists and possibly never will exist for the erection of fences.

To order the erection of fences at a time when the Commissioners admit they are not required and in places where the necessity for them will, in the opinion of the Commissioners, never arise is, in my opinion, *ultra vires* of the Commission. The Act clearly indicates that each individual case is to be considered before an order is made with respect thereto. To make a general rule obliging the companies to fence and imposing upon them the *onus* of procuring and giving evidence as to the absence of necessity for fencing in order to get the benefit of the exception created in their favour is to completely alter the policy of the Act.

As to lines not yet complete or open for traffic or in course of construction, I am of opinion that the

Commissioners have jurisdiction to oblige all railways, where they pass through enclosed lands, to fence or take such other steps as are necessary to prevent cattle or other animals from escaping from the inclosed lands through which the railway passes, whether the railways are being operated by trains or are merely in course of construction.

I agree, as to this portion of the order, with the conclusion reached by Sir Louis Davies.

GIROUARD J.—I think the appeal should be dismissed in every respect, except with regard to fences and cattle-guards on lands on either side of the railway that are not enclosed or either settled or improved, unless in "any locality" the Board has ordered otherwise. I am not called upon to express an opinion as to the exact meaning of the words "any locality"; whether it refers to a province, a district or any place in any province; it is sufficient for me to say that these words do not mean the whole Dominion. The order of the Board seems to be reasonable and even wise; but it is too general and should be given by the Parliament of Canada, who alone can change the policy expressed in article 254, par. 4, of the "Railway Act." Otherwise I agree with the Board.

The appeal is therefore allowed in part and dismissed in part, without costs.

DAVIES J.—This is an appeal challenging the jurisdiction of the Board of Railway Commissioners to make the General Order No. 7473, providing substantially that all completed railway lines owned or operated by companies should on or before the 1st January, 1911, where the lands on either side of the rail-

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way were not enclosed, settled or improved, have erected and maintained

on each side of the right of way fences of a minimum height of 4 ft. 6 inches, with swing gates at farm crossings, etc.;

and also providing with respect to lines of railway not completed or opened for traffic that where such lines are being constructed through enclosed lands it should be the duty of the company

to at once construct such fences or take such other steps that will prevent cattle and other animals escaping from such enclosed lands.

After much consideration I have reached the conclusion that such part of the order as requires all railway companies subject to the Board's jurisdiction and owning or operating completed lines running through lands "which were not enclosed, settled or improved on either side of the railway," to "erect and maintain on each side of the right of way fences of a minimum height of 4 ft. 6 in.," is in excess of the jurisdiction of the Board.

The determination of the question turns upon the proper construction of the 254th section of the "Railway Act of 1906." That section after imposing a duty upon the company to provide for the erection and maintenance generally of fences, swing gates at farm crossings, and cattle-guards at highway level crossings, contained a 4th sub-section, reading as follows:

Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs.

The language of the section is unfortunately somewhat obscure and ambiguous.

I construe it to have reference to the passage of a railway through a locality in which lands on either

side of the railway are not enclosed and *not* either settled or improved. In such cases, that is in what is popularly known as wilderness or wild or waste or forest or prairie lands unenclosed and not settled or not improved, the duty on the companies' part to fence shall not exist unless and until the Board otherwise orders or directs. It seems to me from the insertion of the words "any locality" which govern and control this sub-section, that the intention of Parliament was not to vest a general power in the Board of imposing the duty of fencing these special lands upon the companies irrespective of previous investigation or inquiry with regard to them and the necessity of fencing arising from the existing special conditions such investigation might disclose, but a special power exercisable with regard to any locality the Board might choose to investigate. Parliament no doubt wisely did not define what was intended as a locality. That too was left to the Board. Whether it was ten miles or one hundred miles or more in length was left open. So I should hold that the Board would have jurisdiction to investigate with respect to any area of such lands as the section embraced as to the conditions existing there, and after such investigation make such order as to fences, gates and cattle-guards as in its judgment was necessary and desirable.

But it must appear either expressly from the face of the order or from some record of the proceedings of the Board or be otherwise fairly to be inferred from them that the Board was exercising its powers with respect to some defined locality and was not merely making a general order covering all the localities throughout Canada through which all the railways subject to its jurisdiction ran. Such an order would

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be practically legislation in itself and not an exercise of the definite and limited powers given by Parliament. In my opinion Parliament did not intend to delegate to the Board a power to legislate, but a very broad general and, no doubt, desirable power to impose upon the railway companies duties with respect to fencing in certain designated areas of land called "localities" from which duties the statute, until the Board otherwise ordered, exempted them. Parliament obviously intended by limiting the exercise of this power to "localities" that it should not be exercised unless and until the Board having examined or enquired into the conditions had determined that these were such as called for the exercise of their powers so far as the "locality" inquired into was concerned. It is not pretended that any such necessarily precedent investigation and inquiry as would justify a general power such as the one now being considered had been made. Indeed, the contrary appears to be the fact.

With respect to that part of the order relating to lines not completed or opened for traffic or in course of construction where the railway is being constructed through inclosed lands which directs the railway company to

> at once construct such fences or take such other steps that (*sic*) will prevent cattle and other animals escaping from such enclosed lands,

I am of the opinion that the Board had jurisdiction to make the order directing immediate construction of fences or alternative steps deemed by them necessary and sufficient. The criticism upon the language of this particular order made by Anglin J. (with whose conclusion I agree) and who suggests a varia-

tion in its language is, I think, sound. If the language of the Act is adhered to and its words at the end of sub-section 3 of section 254, namely, "from getting on the railway" literally followed and substituted for those inserted in the order, namely, "escaping from such inclosed lands," I think many difficulties with respect to its enforcement in the future will be avoided.

IDINGTON J.—I fear this order exceeds the jurisdiction of the Board of Railway Commissioners.

The "Railway Act," by section 254, prescribes the duty of the railway companies in regard to fencing.

In no other part of the Act is the subject dealt with except section 242, sub-section 2, and that part relative to cattle-guards to which I will presently refer.

Sub-section 4 is as follows:

Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards *unless the Board otherwise orders or directs.*

It is by this excepting part of the clause, and by that alone, put within the power of the Board to deal with this matter of fencing through

any locality in which the lands on either side of the railway are not inclosed and either settled or improved.

To appreciate properly the nature and scope of that dealing and of the duties imposed upon the Board and jurisdiction given it by virtue of only these excepting words, for everything turns upon the range of this exception, I have searched through the Act to find if and how such excepting phrases are used elsewhere therein.

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I have also endeavoured to find in how far and in what cases and manner a general legislative power or specific power of regulation is given.

For by its nature this order must rest upon the legislative powers of the Board which are quite distinct from its judicial and administrative powers.

Their legislative power is not confined to the subject-matters indicated in section 30 of the Act, extensive as these are, but in many places is specifically given either expressly or by clear words of implication on and over a great variety of subjects.

For example, in the minor matters of practice and procedure in section 51, and of what and how plans are to be filed as is required by sections 164 and 165 and many others, all relevant to the conduct of the business of the Board, legislative power is expressly given, though from the nature of each of such subjects such powers might have been left to repose in necessary implication if any should be so left.

Then of a more important and more distinctively general legislative character we find section 264 implies by its language a general power to direct certain things relative to equipment of cars and locomotives and enabling by express words the passing of a general regulation suspending from time to time compliance with the provisions of that section.

We also find illustrations in section 269 which enables making regulations for working trains; section 284, sub-section 4, which seems to imply making general regulations for traffic accommodation; section 321, as to classification of freight traffic; section 340, as to the limiting of liability or right to contract as to same; section 357, as to publication of tariffs, and section 400, as to increased tolls in a certain class of cases.

These are some of many of a like kind covering many spheres of action and mingled as it were in some cases with many express statutory provisions on the like subject-matters.

It is this feature of the Act which impresses me.

Where Parliament felt it might have failed to cover every emergency it has expressly or by clear implication conferred the legislative power to cover the omissions experience might find needful. What is the proper inference to be drawn if it is not that where the legislative power as in the cases in hand is not clearly given, it is not intended to be exercised ?

Then we have the numerous exceptions, somewhat slightly varied in language, of the same nature as that covered by the exception under consideration.

For example, section 180, sub-section 5, uses the expression "except by leave of the Board." Section 236, "unless otherwise directed by the Board." Section 242, "unless the Board otherwise directs."

I find in these illustrations two distinct and different methods of dealing with matters relegated to the Board.

Where the matter is intended to be dealt with legislatively, Parliament has uniformly found it necessary to say so, and distinctly confers the power. Where it is intended the Board shall act in its judicial or administrative capacity then in many cases we find the

"unless the Board otherwise directs" or its equivalent. Here the expression is that of "orders or directs"

even more clearly, I think, pointing to a specific adjudication.

Then we have the "locality" referred to of which there must be many. It is surely clearly intended that

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the words "unless the Board otherwise orders or directs" at the end of the sentence should be held to relate to the antecedent part of the sentence which the word "locality" limits.

It seems to have been intended to confine the ordering or directing to each locality as the subject or place in respect of which a hearing is to be had and action is to be taken.

I do not doubt more than one such might be included in one order.

The order made is, I think, clearly of a legislative character.

It is a recasting of the scheme of the section. It throws on the railway company the onerous burthen Parliament had relieved it of and then provides for a special application and relief thereupon.

I am inclined to think it more in accordance with good, practical, common sense, if I may be permitted to say so, than the plan of the Act.

Yet it is distinctly legislative in character, and that where the phrase used is not an apt one to confer such powers, and the sentence, as a whole, does not imply action of that kind, but of a judicial and administrative character relative to a specific case as it arises.

I cannot assign legislative power to the phrase without leading to possible absurdities or at least inconsistencies when we consider its use elsewhere.

Another consideration weighs much with me, and that is this. When a *specific* Act or thing has been dealt with by the Board, and a question raised of its jurisdiction by appeal here, our decision ends the matter unless appealed to the Privy Council by those concerned.

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In the case of any excess of jurisdiction relative to some legislative power or assertion of such power where none exists and the jurisdiction is left unattacked or by us improvidently maintained, no one is so concerned as to carry the matter to the ultimate appellate court. Those indirectly so may await some specific accident case in which to raise it and carry the matter as a test then to the Privy Council with very undesirable results if the jurisdiction is not upheld, unless a more extensive meaning is given section 56, sub-section 9, than I assign to it.

Unless the legislative power is clear it better be made so, or in case of doubt be resolved (as we do in regard to our own) against jurisdiction.

The question of power as to fencing in places where construction is in process seems more clearly beyond the Board's jurisdiction than the other.

The suggestion that these orders might be rested upon section 30, sub-section (*g*), is not tenable. The fact that cattle-guards are named and fences omitted is surely enough in itself to dispose of that. Cattle-guards are referred to as well as fences in section 254. But the question of what was the best kind of cattle-guard long agitated those concerned and possibly does yet. It was necessary to give the power to the Board of deciding as to a specific form or device of cattle-guard, and insisting if need be on its adoption by the companies when something found to fill the bill and they might naturally be reluctant to change all their old devices.

No such question rose before the mind of any one in regard to fencing. That was doubtless thought to be finally disposed of and to need no more legislation.

It seems to me the appeal must be allowed.

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DUFF J. (dissenting).—The validity of the second of the impeached provisions depends upon the construction of the 4th sub-section of section 254, read, of course, with such other provisions of the Act as may throw light upon it. The effect of the whole section (254) appears to me to be this: The territory through which any given railway passes is for the purpose of the section conceived as embracing two classes of localities: 1st, those in which the lands on both sides of the railway are neither inclosed and settled nor inclosed and improved; and 2nd, localities in which some of the lands on at least one side of the railway falls within one or other of those categories; and the enactment imposes upon the railway company the duty of maintaining fences, cattle-guards and farm-crossings in the last mentioned class of localities and does not impose that duty in respect of the first mentioned. But this is not the whole of the legislative provision. The positive requirement to fence when the railway passes through a locality of the second class is only the irreducible minimum of this kind of protection for the public which is ordained by the Act. In respect of the first class of localities no such absolute duty is imposed; but the whole question of fencing, etc., in such localities is reserved to be dealt with by the Board of Railway Commissioners.

This view of the section is that upon which the Board of Railway Commissioners appears to have acted, and although (since my learned brothers agree in thinking it erroneous), I must, of course, be wrong, I cannot profess to entertain any real doubt that the Board has correctly interpreted the intention of the legislature.

The rival view of sub-section 4, put forward by Mr.

Chrysler, is that the Board is empowered to make an order or direction under sub-section 4, touching the subjects there dealt with only when satisfied judicially upon special considerations applicable to a specified locality that the measures provided for by the order are necessary. I shall briefly give my reasons for thinking this construction untenable—and the grounds upon which I think the view of the Board of Railway Commissioners should be supported will appear as I proceed.

In any suggested view of the power in question one does not readily see upon what principle the exercise of it can be described as the exercise of a judicial function. Assuming the authority to be confined to the promulgation of orders and directions applicable only to a specified railway and to a defined locality—it is still quite obvious that in determining in a given case whether such an order or direction shall or shall not be given, the Board does not act upon any rule, principle or standard prescribed for it by the statute or by any other authority; it acts only upon such principles and standards as in the exercise of its own judgment it sets up for itself. And that is by no means all. An order of the Board under this enactment assuming it to be a specific order in the sense mentioned, actually alters the law governing the specific case dealt with. The company being, prior to the order, under no duty to fence becomes—solely in consequence of the order itself—subject to an obligation to do so; and the order itself—when published in the manner prescribed—has, by virtue of section 31 the same force as if enacted in the "Railway Act." The order, in a word, does not merely give rise to a legal duty to some individual or determinate body of individuals;

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but constitutes an enactment on the violation of which the company is subjected to the same consequences as if it were found in the Act itself.

Such specific commands (as distinguished from rules or regulations governing all cases falling within a general description), although usually classed by legal writers as administrative are strictly legislative in their character. There may no doubt be cases in which it would be difficult to draw the exact line between functions that are in this sense administrative and functions that are judicial. Still the broad distinction between a function which finds its operation in determining what the law is to be for the future (whether governing one case or governing many cases) and that which is concerned with the application of some existing general rule, principle or standard to a particular case is a very plain and very familiar distinction. It is admirably illustrated in this sentence from the judgment of the Supreme Court of the United States in *Interstate Commerce Commission* v. *Cincinnati, New Orleans and Texas Pacific Rly. Co.*(1), at page 499:

It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act;

and it seems not to be at all difficult of application in the case before us.

Such being the character of the authority exerciseable is the exercise of it limited in the way contended for; that is to say, must any order under it be confined in its application to a specific railway and to a defined locality?

(1) 167 U.S.R. 479.

Looking first at the language of the sub-section itself it is at once apparent that regarding only the grammatical sense of the words employed the authority of the Board to "otherwise order or direct" is not in any way subject to any such limitation. Is there any ground for implying it? I think there is none; on the contrary there are very cogent reasons against such an implication. On the construction proposed it is obvious that before exercising its authority in any particular case the Board must first determine and define the locality in respect of which the order is to be made. Its jurisdiction *ex hypothesi* must rest upon the correctness of its own view, that the locality so defined is a locality within the meaning of the section —the notion of "locality" having no sort of relevancy except in that sense. Now the most cursory examination of the section will reveal the pitfalls besetting the path of an authority exercising a jurisdiction resting on such a condition. What is a "locality" within the meaning of this sub-section ? What are "local considerations ?"

Assume, for example, a railway passing through a string of localities, some falling under sub-section 4, while in the others sub-section 1 is applicable; and that the Board considered it desirable that the line should, through all of them, be fenced. The Board has power to enforce sub-section 1 by an order directing fencing in localities to which it applies and to make a similar order in respect of the other localities under sub-section 4. In other words, the Board has power to direct fencing throughout the whole line and has determined it is desirable to do so. According to the construction contended for it is at this point that the difficulties of the Board begin. In order to

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carry into effect its determination it must, according to that view, first ascertain and define in a series of separate orders the exact limits of the localities in respect of which it is exercising its authority under sub-section 4. Having *ex hypothesi* as enforcing sub-section 1 or as exercising the power given by sub-section 4, the authority to direct fencing throughout the whole line, and having determined to do so, the Board is disabled from exercising at once all its powers by the promulgation of a single order, but must, as a condition of its jurisdiction, first proceed to segregate the localities falling within sub-section 4—while a mistake in this process of labelling would in any particular case be fatal to the validity of the order.

It is obvious that such a construction must in practice give rise to much uncertainty in the application of the enactment and afford a field for much preliminary controversy upon the authority of the Board in particular cases; so much so, indeed, that I fear it will rob the provision of any sort of practical efficacy. I take it to be axiomatic that you must not imply a term in a statutory enactment if it is likely to defeat the purpose of the enactment as disclosed by the words actually used; and on this ground alone the implication suggested is not, I think, admissible.

It is further to be observed that the subject of the regulation of structures upon a railway in the aspect of that subject which touches the public safety is dealt with in another section of the Act (section 30 (*g*)), which confers upon the Board in respect of such structures and for the purpose of protecting the property and persons of the public the broadest powers of general regulation. The language of that provision is certainly extensive enough to embrace the subjects

of fencing and cattle-guards, and the subject of cattle-guards is expressly mentioned. No doubt the first sub-section of section 254 does, within the field of its operation, displace the authority conferred by section 30(*g*), at all events as regards the subject of fencing; but sub-section 4 must, I think, be read with the earlier provision, and reading the two provisions together the most natural construction of the words "unless the Board otherwise orders or directs" seems to be that localities to which sub-section 4 applies, or in other words, localities not subject to sub-section 1 are, in respect of the subjects mentioned, reserved to be dealt with by the Board in this exercise of the general powers given by section 30(*g*). If that be the true view there can be no doubt that the form of the Board's orders, the circumstances in which they are to be made, and the considerations by which, in making them, the Board is to be governed, are all in the largest manner left to the Board itself to determine.

As to the first provision I think that under the Act as it now stands there is, in respect of localities falling within the scope of the first sub-section, an unqualified duty to fence. The provision, it is true, is drawn in such a way as to embrace localities within sub-section 4 as well, but in the view of that sub-section already stated, the provision is not by reason of the generality of its terms open to objection.

I should, therefore, dismiss the appeal with costs.

ANGLIN J.—The Canadian Northern Railway appeals against so much of a general order pronounced by the Board of Railway Commissioners, *proprio motû,* as requires, amongst other things, that

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(*a*) All railway companies subject to the jurisdiction of the Board shall as to all railway lines completed, owned or operated by them, where the lands on either side of the railway are not inclosed, settled or improved, on or before Jan. 1st, 1911, erect and maintain on each side of the right of way, fences of a minimum height of four feet six inches with swing gates at farm crossings with minimum height aforesaid with proper hinges or fastenings.

And prescribes that

(*b*) As to lines not yet completed or opened for traffic or in course of construction * * * where the railway is being constructed through inclosed lands it shall be the duty of a railway company to at once construct such fences or take such other steps that (*sic*) will prevent cattle and other animals escaping from such inclosed lands.

The order further provides that:

6. Where it shall be made to appear to the Board that no necessity exists for the fencing or other works hereinbefore directed, the company or companies may apply to the Board for exemption from fencing, and other works, and such exemptions may be made as the Board deems proper.

Section 254 of the Dominion "Railway Act" (R.S.C. 1906, ch. 37) reads as follows:

254. The company shall erect and maintain upon the railway,—

(*a*) fences of a minimum height of four feet six inches on each side of the railway;

(*b*) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings: Provided that sliding or hurdle gates, constructed before the first day of February, one thousand nine hundred and four, may be maintained; and

(*c*) cattle-guards on each side of the highway, at every highway crossing at rail level with the railway.

* * * *

4. Whenever the railway passes through any locality in which the lands on either side of the railway are not inclosed and either settled or improved, the company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board otherwise orders or directs.

The provisions of the order of the Board as to such portions of railways as pass through lands "not inclosed, settled or improved," the appellants contend are a reversal of the policy of Parliament, as declared

by sub-section 4 of section 254 of the "Railway Act." This clause of the statute, they maintain, contemplates that as a general rule a railway company shall not be obliged to fence its right of way through lands not inclosed and not settled or improved, and that the obligation to fence the railway through such lands shall arise only when the Board of Railway Commissioners shall so order and direct in each particular locality.

I appreciate the difficulty of defining the limits of a "locality," or determining what extent of territory it may embrace. But I am satisfied that an order directing the erection of fences along the lines of all railways which pass through uninclosed lands not settled or improved in any part of Canada is not an order for the erection of such fences in "any locality" within the meaning of that phrase as used in sub-section 4 of section 254.

Mr. Ford, in supporting this part of the order, argued that the earlier part of sub-section 4 was merely meant to describe the kind of country in which a railway company is not, without an order of the Board, general or particular, required to erect and maintain fences; and that that sub-section contemplates that the Board may make a general order for the fencing of all railways wherever they pass through uninclosed lands not settled or improved. If the sub-section had read—"wherever the railway passes through lands on either side of the railway not inclosed, etc."—this interpretation might be maintained; but it obviously treats the words, "through any locality," as mere surplusage and excludes them from consideration in the construction of the clause. This seems to me contrary to the fundamental canon of con-

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struction which requires that in construing a statute effect shall if possible be given to every word.

As I read clause 4, it imports that an order requiring fencing shall be pronounced only when the Board is judicially satisfied that in the localities in regard to which such order is made fencing is necessary. To reach such a conclusion judicially presupposes investigation and inquiry as to the localities to be affected by the order, as a result of which the Board is satisfied that necessity for fencing there exists. The recital in the written opinion of the Chief Commissioner of the circumstances which led to the making of this order and the presence in the order itself of paragraph 6 above quoted, satisfy me that the part of the order now under consideration was not pronounced in the proper exercise of the judicial functions of the Board after investigation of the circumstances of all localities in Canada in which railways pass through uninclosed lands, not settled or improved, but that it is rather a declaration by the Board that, after an investigation, admittedly partial, but in its opinion sufficiently extended, it has reached the conclusion that, as to all portions of railways passing through such lands in any part of Canada, the railway companies should, *primâ facie* and generally, be required to fence, and that the burden should be cast upon them of obtaining exemption from this obligation by satisfying the Board that in particular localities no necessity exists for fencing, etc. Such an order is, in my opinion, tantamount to legislation repealing sub-section 4 and substituting for it a provision precisely the reverse in policy, operation and effect. To do this was, I think, notwithstanding the very broad terms in which the sections of the statute

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conferring and defining its jurisdiction are couched, beyond the power of the Board of Railway Commissioners.

I agree, therefore, with the contention of the appellants, that the Board had not jurisdiction to pronounce this general order requiring that every railway company throughout Canada, wherever its lines pass through uninclosed lands, not settled or improved, shall erect and maintain statutory fences, with swing gates along their right-of-way, unless it shall apply for and obtain exemption from the Board. I think the appeal of the Canadian Northern Railway Company against this portion of the order should be allowed.

This part of the order was treated by counsel for the railway company as made under sub-section 4, of section 254. No doubt it was so intended. That sub-section, however, deals with

any locality in which the lands on either side of the railway are not inclosed *and either* settled or improved.

In drafting the order the words "and either" have been, no doubt inadvertently, omitted. Without them the clause of the order under consideration is wider than the exception created by sub-section 4, of section 254, and would cover uninclosed lands though "settled or improved." In such cases any departure from the language of the statute, however unimportant it may appear, is always fraught with danger. If this paragraph of the order could be otherwise supported under sub-section 4, of section 254, it would probably be necessary to remit it to the Board for modification by inserting the words of the statute which have been omitted.

As to the other part of the order to which exception

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is taken, it will be noted that the direction is not necessarily to fence. It is to

construct such fences or *take such other steps* that will prevent cattle and other animals escaping from such inclosed lands.

By section 2, sub-section 21, "railway" is defined as including "property real or personal and works connected therewith." Having regard to this definition I see nothing in section 254 which requires the Board to abstain from ordering that fences shall be erected along the right of way before the railway is ready for operation, when, it is admitted, the duty to fence exists and may be enforced. Where the railway passes through inclosed lands, *i.e.*, where the right-of-way of the company—its real property—is carried through inclosed lands, the statute says that "the company shall erect and maintain upon the railway," *i.e.*, upon its real property,

fences * * *, suitable and sufficient to prevent cattle and other animals from getting on the railway,

i.e., on such real property.

But if, as argued by Mr. Chrysler, the obligation to fence under section 254 arises only when the railway commences operation, the Board, in my opinion, had power, under section 30, clause (*g*), to pronounce the portion of their order now under discussion. By that section it is provided that

the Board may make orders and regulations * * * (*g*) with respect to the * * * methods, devices, structures and works to be used upon the railway (which includes its real property) so as to provide means for the due protection of property.

It was argued that, because fences are dealt with by section 254, and are not specifically mentioned in clause (*g*) of section 30, it must be taken that it was not intended thereby to empower the Board to order

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the erection of fences as a method, device, structure or work for the protection of property. The order may be complied with without the erection of fences, if other adequate steps are taken. It directs that the railway company shall "construct such fences or take such other steps, etc." Moreover, section 254 either applies to the right-of-way before the rails are laid, or it does not. If it applies the order in appeal may be supported as an enforcement of its provisions (section 30 (*h*) and (*i*)); if it does not so apply, its presence in the statute affords no reason for excluding from the purview of section 30(*g*), as something elsewhere specifically provided for, the erection of fences as a means for the due protection of property pending the completion of the railway.

I think it is clear that either under sub-section 1, of section 254, or under the comprehensive language of clause (*g*), of section 30, the jurisdiction which they have here exercised is conferred upon the Board of Railway Commissioners.

It has been suggested that sub-section 1 does not apply to all localities in which the railway passes through inclosed lands, but only to those in which it passes through lands which are not only inclosed, but also settled or improved. This is said to be the effect upon sub-section 1 of the exception made by sub-section 4.

It is, I think, incontrovertible that such portions of every railway as are not within the exception in sub-section 4, are within the first sub-section. To understand the limitations upon the application of sub-section 1, it is, therefore, necessary to ascertain with precision what parts of a railway are within sub-section 4.

By sub-section 4 are excepted not all localities in which lands are "not inclosed," but only those in which there are lands not inclosed which are also not "either settled or improved," *i.e.*, localities in which there are (*a*) lands not inclosed and not settled, or (*b*) lands not inclosed and not improved. Uninclosed lands which are improved or settled, and unimproved or unsettled lands which are inclosed are not within the exception. Therefore, localities in which the lands answer to either of these latter descriptions are within sub-section 1.

If they are not, it must be because they are within the exception; and if so, the exception is in reality of all localities in which the lands are not inclosed, whether improved or unimproved, settled or unsettled; and the words, "and either settled or improved," are read out of the exception.

The only other possible construction of the exception is to read the word "not" as applicable only to "inclosed," which would be equivalent to inserting the word "are" after the word "and," so that the phrase would read—"in which the lands * * * are not inclosed and (are) either settled or improved"—a palpably wrong construction, because it would exclude from the exception the very localities in which fencing is least of all requisite, viz., those in which the lands are neither inclosed nor settled or improved.

I, therefore, think that all localities in which the lands on either side of the railway are inclosed, whether they are improved or unimproved, settled or unsettled, are within sub-section 1, because clearly not within the exception; and in addition sub-section 1 covers localities in which such lands, though not inclosed, are either settled or improved. Otherwise

either localities in which the lands answer the latter description are unprovided for—which is contrary to the view that the section, as a whole, embraces all parts of all railways—or all localities where lands are not inclosed are within the exception—a construction which, as already pointed out, involves reading out the words "and either settled or improved."

I have not overlooked the decision of Street J. in *Phair* v. *Canadian Northern Railway Co.*(1). Without expressing any opinion as to the correctness of that decision upon the language of the statute as it then was, it suffices to say that Parliament has since altered the phraseology of sub-section 4 and it is not unreasonable to suppose that by the alteration of the phraseology it intended to effect some change in the law. But whether this be so or not, sub-section 4, as it now stands, must be given that construction for which its present form seems to call.

No doubt before the railway is under actual construction, although the right-of-way has been fully acquired, the owners, through whose inclosed farms it runs, would be amply protected by and fully satisfied with an order requiring the company to maintain intact the line fences crossing their right-of-way or to take other steps sufficient to prevent cattle "escaping from such inclosed lands." Under clause (*g*) of section 30, if section 254 is not applicable, such an order might be made. But if section 254 applies—as I think it does—the only order authorized is an order requiring the erection and maintenance of statutory fences, etc., "to prevent cattle and other animals from getting on the railway." That the Board would have jurisdiction to make such an order I think sufficiently

(1) 6 Ont. W.R. 137.

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clear; its reasonableness would not be for our consideration; but it would scarcely seem necessary before construction is commenced to require the company to fence in order to prevent cattle getting upon its right-of-way, which is then for all practical purposes, still part of the farms through which it runs. Whether as a condition of exempting it from the obligation to fence its right of way before construction, the Board could order that the company should, until actual construction commences, maintain existing farm fences so as to prevent cattle escaping from inclosed lands through which its right-of-way passes may be open to some question; but, having regard to the provisions of sub-section 2, of section 30, I incline to think that such an order might be made.

The order in question, however, relates only to cases "where the railway is being constructed." It, therefore, would seem inapplicable to cases in which the work of construction has not yet commenced. Where construction is actually proceeding it is in many localities accompanied by dangers to cattle and other animals straying upon the right-of-way quite as great as those incidental to the actual operation of a railway. In such cases not only in my opinion has the Board the power to require the erection of statutory fences to prevent "cattle or other animals from getting on the railway," but it would be entirely reasonable that such an order should be made.

For these reasons I am of opinion that the portion of the order of the Board dealing with inclosed lands, "where the railway is being constructed," has not been successfully attacked, and that as to it the appeal should be dismissed.

The order should, however, be varied by substitut-

ing for the words "escaping from such inclosed lands" the words of the statute—"from getting on the railway." This alteration we cannot make; but the necessary amendment will no doubt be made by the Board itself.

Appeal allowed in part.

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*Nov. 22.
*Dec. 13.

ERNEST PITT (PLAINTIFF) .... APPELLANT;

AND

J. P. DICKSON (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action for deceit—Agreement for sale—False representations—Compromise—Notice.

P., living in Montreal, owned stock in a Cobalt mining company, and D., of Ottawa, looked after his interests therein. Being informed by D. that the mine was badly managed and the property of little value, and that other holders were selling their stock, P. signed an agreement to sell his at par. D. assigned this agreement to a third party. Later P., learning that the stock was selling at a premium and believing that he had made an improvident bargain, entered into negotiations with the holder of his agreement, and a compromise was effected by a portion of P.'s holdings being sold to the assignee at par and the remainder returned to him. It transpired afterwards that D. and the assignor were in collusion to get possession of the stock, and P. brought action against D. for damages.

Held, that the compromise having been effected when P. was in ignorance of the real state of affairs, it did not bind him as against D. from whom he could recover as damages, the difference between the par value of his remaining shares and their market value at the date of such compromise.

Judgment of the Court of Appeal (12 Ont. W.R. 824) reversed and that of the trial judge (9 Ont. W.R. 380) affirmed by a Divisional Court (11 Ont. W.R. 127) restored.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court(2), which affirmed the verdict for the plaintiff at the trial(3).

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

(1) 12 Ont. W.R. 824. (2) 11 Ont. W.R. 127.
(3) 9 Ont. W.R. 380.

The material facts are sufficiently stated in the above head-note.

Lafleur K.C. for the appellant.
Chrysler K.C. and *Larmonth* for the respondent.

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be allowed with costs.

DAVIES J.—I concur in the reasons given by Mr. Justice Duff for allowing the appeal.

IDINGTON J.—I so far agree with the reasoning and conclusions of the judgment of the learned trial judge and of Mr. Justice Riddell, that I need not add more than to indicate wherein, I respectfully submit, error exists in the views expressed in the Court of Appeal.

These judgments accept, save in one instance, the findings of fact of the learned trial judge, but assuming all that, find the respondent discharged by appellant's accepting the price agreed for and executing an assignment by him to Beament of the shares in respect of which the damages have been assessed.

If that had been done by appellant with a full understanding of all the facts finally disclosed at the trial, it might well be treated either as a release of all damages or waiver of any claim thereto or of further profit in the sale of his shares, and, held, that he could not be damnified by what he assented to.

The radical error consists in overlooking, almost if not entirely, the fact that there was no such disclosure when this assignment was executed on the 13th of November and that it was but the formal confirma-

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tion of what the assignor had already been induced by the fraudulent practices of the appellant to commit himself to.

He had been induced by fraud to sign a document enabling the respondent as his trusted agent to sell fifteen thousand shares and to accept, as if they had been sold to some third party, three thousand dollars on account thereof.

Disturbed by what he had heard after receiving this money as to the prudence of the transaction and its results and doubting what to do he wrote respondent to this effect.

The matter was, however, then represented to him by respondent on his expressing this to him, in such a way as to lead him, and as might have led a man exercising reasonable care, to believe that a sale of the whole had been made to some one in Toronto, and that one Beament was going there to see what could be done in the way of rescission as to this and other sales.

This Beament was a party to this latter bit of deception, but the appellant was ignorant of that as well as of the relations between Beament and respondent regarding the whole business.

Relying upon respondent's good faith as to the scheme for rescission of the whole sale or redemption or rescue, as it were, and wholly ignorant of respondent's fraud and duplicity and also of the duplicity of Beament, he recognized Beament and the fruits of his mission in the following telegraphic correspondence which took place between them, Beament being in Toronto and appellant in Montreal.

12.30 p.m., TORONTO, Nov. 10th, 1906.

Ernest Pitt,

Canadian Railway Accident Insurance Co., Ottawa.

Without prejudice will amend contract as follows: Seven thou-

sand five hundred shares at par, thirty-five hundred to be released now, and four thousand on payment at par within thirty days.

T. A. BEAMENT.

OTTAWA, November 10th, 1906.

T. A. Beament,
King Edward Hotel, Toronto.

Cannot accept offer. Will release three thousand, consideration cash already paid in full settlement without prejudice; offer good to-day only.

ERNEST PITT.

TORONTO, November 10th, 1906.

Ernest Pitt,
Canadian Railway Accident Insurance Co., Ottawa.

Your telegram received. Will accept offer therein contained. Leave order on trustees in my favour.

T. A. BEAMENT.

6.50 p.m., OTTAWA, November 12th, 1906.

Ernest Pitt,
78 Union Ave.

Unless order for shares received to-morrow will take proceedings. Answer.

T. A. BEAMENT.

November 12th, 1906.

T. A. Beament,
Ottawa.

George F. Henderson acting for me. See him.

ERNEST PITT.

Appellant had been induced thus by the fraud not only to agree to sell, but to compromise what up to that time he had no more than supposed possibly an imprudent or improvident sale.

In the entire absence of any knowledge of the fraud practised, how could such a compromise, which, in effect, was but a buying back of his shares, have been made in law as any answer to the series of frauds in this case?

The Court of Appeal assumes appellant not only absolutely free, but so clearly so on the 13th November that he could without risk repudiate the whole trans-

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action, including this compromise. If he fully knew what fraud had been practised, of course he was free to repudiate. I will in such a case even assume, not as undoubted law, but for argument's sake, he was bound to repudiate and refuse to deliver his goods by the delivery of the assignment.

But the appellant fell far short of possessing such vantage ground.

He was bound in honour, if no honest excuse at hand, to implement his bargain for a compromise with an unknown vendee not the respondent.

The law imposes on no man the duty to dishonour himself under pain of sacrificing his legal rights and remedies.

But, besides that, this man was bound by law to fulfil the contract he had entered into, as he was led to believe both from what he knew and had been a party to, and what he had been told by respondent had been done on the faith thereof.

It seems idle in face of all these considerations to say he was free to repudiate and refuse to carry out the compromise. He had to do that or submit to worse.

It seems equally idle to say he absolved by this compromise the respondent, who induced by his fraud the whole thing.

This is not the case of a *joint tort feasor* or of principal and agent wherein one having been deliberately or even improvidently released by the wronged party, that release enures to the benefit of the other. Beament was no party to the original fraud so far as we know.

Now, is there anything that occurred at Ottawa, when the parties met on the 13th of November, to put

appellant in a different position from what I have up to this assumed as the facts found of his being ignorant of the fraud practised?

Only two pieces of evidence came into play there and then which are relied upon to weaken this position of appellant.

One is the fact that respondent had indorsed a transfer of the written authority on which he acted to the man Beament.

I fail to see how this, executed two hours before its delivery and thus virtually concurrent with the execution of the compromise assignment can help respondent.

He is thereby re-asserting by his acts his story of Beament going to Toronto to redeem these shares. The inference to be drawn from that act alone was that he had succeeded as to part. He was empowered thereby and by the cancellation that followed to mitigate or relieve the situation. He accomplished this and the so-called compromise by the fraudulent concealment of his gross breach of trust. How can he plead fraud for acquittance of fraud?

How is the respondent who stipulated for nothing, who was in appearance no party to what was being done, further relieved thereby?

He says now, he was Beament's agent and Beament being released he is. Who said he was Beament's agent ? He never claimed in face of appellant to be anybody's agent but his.

If he had any relations with Beament he chose to conceal them and cannot now set them up to the detriment of the man who trusted him as a friend and agent and knew nothing then of such relationship with another.

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One other piece of evidence deserves notice and that is the conversation between Beament and appellant which disclosed at this meeting not the full facts, but the incorrect statement by Beament to appellant that he throughout had been the purchaser and no one in Toronto was concerned. The fact was he and respondent had been the purchasers. As the statement also included an express denial that appellant had ever been told Toronto people were concerned and an implied denial of anything leading to such belief when the appellant certainly had been (if his word accepted by the learned trial judge be true) led to believe the reverse of this, why should he accept the statement? It might well have aroused his suspicions, but, beyond that, what significance should he have attached to such a statement, coming from a man who had already failed in candour and helped, by going to Toronto to express his thoughts thence by wire, to keep up the delusion appellant laboured under.

Was he bound to assume therefrom that respondent was either the agent of Beament or his partner in the deal? Neither was explicitly stated.

Above all, was he bound thereby to ignore the fact that respondent was his agent and owed to him a primary duty and to suppose that by his dealings with or through Beament to ameliorate a threatened loss, he was releasing respondent for or in respect of any obligation he was under as trustee for himself?

I need hardly state that in my view this relationship between the parties hereto was that of principal and agent.

That is to my mind clear. We must look to the substance of what men are about and not merely to

the form in which they put their authority for the transaction by one of business for another.

It is often expedient in business in order to facilitate dealings to arm an agent with the title and give him an appearance of ownership.

Third parties are protected thereby, but the doing so does not affect the actual relations between the principal and the agent and their mutual obligations.

I have not adverted to the information, whatever it was, derived from Beament and possessed by appellant's solicitor or the reservation he was instructed by appellant to make for the simple reason that there is no evidence of either having been communicated by the solicitor to his client or to any one. He was assured, moreover, by the solicitor his assignment and cancellation left him free as regarded the respondent.

I think the appeal must be allowed with costs here and in the Court of Appeal and that the judgment of the learned trial judge be restored.

DUFF J.—The facts in this case are fully stated in judgment of the learned trial judge and it is unnecessary to re-state them.

I think the appeal should be allowed and the judgment of the learned trial judge restored.

The only question in my view of the case which it is necessary to discuss is whether, assuming that, as against Beament, the appellant had a good defence to the demand to have the stock transferred, he has by his settlement with Beament lost his right of action against the respondent. Assuming Beament to have been liable to the appellant as the respondent's principal in respect of the respondent's misrepresentations, I am quite satisfied that, having regard to the

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findings of the learned trial judge, we are not entitled to conclude that the appellant knew this at the time of the settlement with Beament. The settlement, therefore, cannot be treated as involving a composition in respect of such liability and, consequently, no question can arise touching the application of the rule governing the effect of the release of one of several joint tortfeasors. The sole question is whether the damages claimed can be said to arise out of the original misrepresentation.

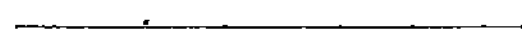
The argument is that the damages, as being the result of the appellant's own act, are not recoverable. I cannot agree with this. It was the respondent whose misconduct had placed the appellant in the situation in which he must—or at all events might reasonably think he must—engage in litigation with Beament or accept the settlement offered; and he cannot now complain that the appellant did not get the best possible settlement if he did not by his unreasonable conduct increase the damages. If Beament had abandoned his claim *in toto* the appellant would have suffered no loss; and if it had appeared that the settlement was made with full knowledge that Beament's demand must fail the appellant might be in the same position; but he was not bound to engage in doubtful litigation with Beament in order to protect the respondent. In the circumstances the loss suffered by the appellant must be regarded as the natural and normal consequence of the situation in which he had been placed by the fraud of the respondent.

For these reasons I am unable to agree with the judgment of the court below and would allow the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *MacCraken, Henderson, McDougall & Green.*

Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*



1909
*Nov. 24, 25.
*Dec. 24.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) .... APPELLANTS;

AND

FRANCIS JOHN PAGET (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—General and special Act—Inconsistency—Ontario Railway Act, 6 Edw. VII. c. 30, ss. 5 and 116—Charter of Toronto Railway Co., s. 17.

The Ontario Railway Act of 1906 (6 Edw. VII. ch. 30) is, by sec. 5, made applicable to street railway companies incorporated by the legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By sec. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by sec. 17 of the Act incorporating the Toronto Railway Co., a passenger in such case is liable to a fine only.

Held, that these two provisions are not inconsistent, and the conductor of a street railway car may lawful eject therefrom a passenger who refuses to pay his fare.

In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of a Divisional Court by which the verdict for the plaintiff at the trial was maintained.

The plaintiff sued for damages alleging that he had been wrongfully thrown from a car of the defendant company with such violence that he was laid up for several weeks and permanently injured. A verdict in his favour for $2,500 damages was maintained in

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

the Ontario courts, and the company appealed to the Supreme Court of Canada, asking for a verdict in their favour or a new trial.

The main point urged on this appeal was that there was no statutory authority for the conductor to eject a passenger for non-payment of fare, and the company was not responsible for his act in doing so without authority, because, while the "Ontario Railway Act of 1906" provides for such expulsion, the special Act incorporating the company makes provision for a fine only in such case, and such special Act overrides the provision in the general Act.

Nesbitt K.C. and *D. L. McCarthy K.C.,* for the appellants. At common law a passenger could not be put off a train for non-payment of fare. *Grand Trunk Railway Co.* v. *Beaver*(1). The "Ontario Railway Act of 1906" authorizes it, but the special Act incorporating the defendant company makes a different provision, and the latter must prevail.

Evidence of what was said by passengers on the car was improperly admitted. *Wright* v. *Doe d. Tatham*(2). See also *Gilbert* v. *The King*(3); *Garner* v. *Township of Stamford*(4); *Beard* v. *London General Omnibus Co.*(5).

Young and *T. H. Lennox,* for the respondent, cited *Loughead* v. *Collingwood Shipbuilding Co.*(6), and argued that even if the evidence of what was said by passengers on the car should not have been admitted, there was enough without it to support the verdict referring to *Tait* v. *Beggs*(7), and Rule 785 of the "Ontario Judicature Act Rules."

(1) 22 Can. S.C.R. 498.
(2) 7 A. & E. 313, at p. 359.
(3) 38 Can. S.C.R. 284.
(4) 7 Ont. L.R. 50.
(5) [1900] 2 Q.B. 530.
(6) 16 Ont. L.R. 64.
(7) [1905] 2 Ir. R. 525.

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Davies J.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

DAVIES J.—As put in the appellants' factum, the chief bone of contention between the parties is whether or not, as a matter of law, the respondent can hold the appellant corporation liable for the act of its servant, the superintendent, in putting the plaintiff off the car.

The answer to that question depends upon whether the 116th section of the "Ontario Railway Act of 1906," giving conductors and train servants of the company powers to expel without unnecessary violence passengers who refuse to pay their fares, is or is not inconsistent with section 17 of the special Act of the company which subjected passengers refusing to pay fares or leave the cars to a fine of not more than ten dollars and not to expulsion.

After a good deal of consideration I have reached the conclusion that these sections can well stand together, are not necessarily inconsistent, and may be construed as complementary one to the other.

Having reached this conclusion adverse to the appellants I cannot, in the conflicting state of the evidence, under the findings of the jury do otherwise than confirm the judgment below and dismiss the appeal with costs.

IDINGTON J.—Having due regard to the purpose and scope of the respective Acts, I fail to find any inconsistency between section 17 of the appellants' Act of incorporation and section 116 of the "Ontario Railway Act, 1906." Hence, both being in force at the time of the happenings out of which this action arose, the appellant and its properly authorized servants had

that authority denied by it in maintaining this appeal. It, therefore, fails.

I cannot attach importance to the other objections taken, and especially so in the absence of objections at the trial to lay a foundation for them in the courts appealed to.

The appeal should be dismissed with costs.

DUFF J.—There seem to be two possible views of the effect of section 5 of the "Railway Act of Ontario" where you have a provision in that Act and a provision in a prior special Act dealing with the same subject-matter in diverse ways. One possible view is that in such cases the provision in the general Act is to be wholly discarded from consideration; the other is that both provisions are to be read as applicable to the undertaking governed by the special Act so far as they can stand together, and only where there is repugnancy between the two provisions and then only to the extent of such repugnancy the general Act is to be inoperative.

I think the latter is the correct view. The question in the present case is whether section 116(1) of the "Railway Act" can in all respects stand with section 17 of the appellant's special Act, or whether that part of the first named enactment which authorizes the servants of the company to expel from its cars a passenger who refuses to pay his fare is necessarily displaced by the provision in the special Act dealing with the same subject. It may, of course, be argued that the special Act treats such a passenger as a trespasser and that the grant of the special remedy there provided negatives the existence of the remedy with which the common law would arm the company as

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against any person who, without a right to be there, should persist in remaining on its cars—in short, that resort to expulsion is prohibited. This appears, however, a strained and artificial reading of the section. The true account of the matter seems rather to be that the legislature has not in the special Act declared the passenger refusing to pay his fare and refusing to leave a trespasser for all purposes, but in such circumstances has given the company one remedy and has not given another. If this be the correct view of the section there is clearly no repugnancy and nothing to prevent the operation of both sections.

On the other points argued I agree with the judgment of Magee J., and there is no occasion to add anything to what he has said.

ANGLIN J.—The defendants appeal from the judgment of the Court of Appeal for Ontario, which dismissed their appeal from the judgment of a Divisional Court, upholding a verdict for the plaintiff for $2,500.

The action was brought to recover damages for personal injuries sustained by the plaintiff, as he alleges, either through his having been unwarrantably ejected from a street car by a divisional superintendent of the defendant company, or because of undue violence in his removal, if the removal itself was justifiable. To this claim, under a plea of "not guilty by statute," the defendants make several answers:

(*a*) They deny that the plaintiff was in fact ejected by their superintendent and say that he fell from the car in lunging forward to strike that official;

(*b*) They assert that if the plaintiff was, as he alleges, ejected merely for refusal to pay fare, the company had no power to forcibly expel a passenger for

this cause and, therefore, is not liable for the illegal act of its official, which it did not and could not authorize;

(*c*) They say that if the company has the right to eject a passenger who refuses to pay fare the superintendent was not charged with the execution of any such duty and that they are, therefore, not answerable;

(*d*) They assert that the plaintiff's conduct upon the car had been such that he had become a nuisance and that his removal was, upon this ground, justified;

(*e*) They deny that any undue or unnecessary violence was used in removing the plaintiff, and say that, if he was in fact ejected, his injuries are attributable to his own violent and improper resistance.

Upon this statement it is apparent that there were several issues of fact and law presented, and it is to be regretted that the learned trial judge did not, instead of taking a general verdict, submit to the jury a series of questions, each covering one of the issues of fact to be determined. It would have then been comparatively easy to ascertain what view of the facts was taken by the jury and upon what findings they based their verdict.

That the plaintiff was, in fact, seriously injured is not disputed and, in this court, the verdict has not been attacked as excessive.

Upon the issue whether the plaintiff fell from the car because he lost his balance while striking at the superintendent or whether he was pulled or thrown from the car by the latter there was direct conflict of testimony. This question was explicitly put to the jury in the learned judge's charge and the verdict necessarily implies a finding upon it in the plaintiff's favour which, upon the evidence, cannot be disturbed.

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It would certainly have been more satisfactory had the question whether there was or was not excessive force used in removing the plaintiff been presented to the jury as a distinct issue. They were not explicitly told that, if conditions existed which in fact and in law warranted the plaintiff's removal, a verdict against the company would be justified only if they should find that there had been improper violence on the part of the superintendent and that this was the cause of the plaintiff's injuries.

But the conflict in testimony as to what took place immediately before the plaintiff was thrown to the ground is very pointed—so much so that the learned trial judge was impelled to say,

> there has been false swearing in this case, been testimony given that is not true, and not true to the knowledge of those persons who have given it.

The plaintiff had sworn that he was pushed or pulled violently to the ground by the superintendent; the superintendent had denied that the plaintiff had been pushed or pulled at all. The learned judge told the jury that

> if what the plaintiff says is true, then this act was something that Argue (the superintendent) ought not to have done in the exercise of his duty, and it was an abuse of the plaintiff pushing him violently in that way and, in my opinion, if that is the true story, the defendants are liable in this action.

Again he said:

> Technically, Mr. Argue admitted that he was guilty of an assault upon this plaintiff; he caught him by the coat, and, unless he can justify that that would be an assault so far as the mere technical offence is concerned, because an assault is defined as an attempt to do corporal injury to another coupled with present ability, or any act or gesture from which an intention to commit a battery may be implied is an assault if the person is near enough to strike. While that is technically an assault, that is not what this action was brought for. If he had simply taken him by the coat or simply pulled

him down, it would not be an action such as this, or to the same extent at all events in damages. The serious assault that is complained of is what the plaintiff and his witness say, and that is what is denied, and so we are to deal with the case on its merits, without dealing with it merely as a matter of law as to what may be an assault or not.

And again:

Was this assault committed by the defendants in the way described by the plaintiff and his witness, or was it as described by the officers and men on the part of defendants? If the latter, there is no liability; if in the way described by the plaintiff, then you may find a verdict for the plaintiff, if you believe the evidence.

And again:

He (the plaintiff) says * * * "you (the superintendent) then got up on the car and you gave me a violent push, and it is from that violent push you gave me that my injuries have resulted.

Although these passages in the charge are unfortunately somewhat closely connected with discussion of the plaintiff's alleged misconduct, and of the question whether it amounted to a cause justifying his removal, and also with the issue as to whether he was, in fact, removed by the superintendent or whether he fell from the car because he lost his balance in an effort to strike the superintendent, looking at the charge as a whole it is not possible to say that the attention of the jury was not directed to the question whether there had been excessive violence in removing the plaintiff.

The conditions which would have justified the removal of the plaintiff (as the case was presented to the jury), might be either refusal to pay fare or misconduct of the plaintiff such that he had become a nuisance. His misconduct might be aggravated by his refusal to pay fare and the manner of such refusal.

Did the plaintiff refuse to pay his fare? The officials of the company say that he did emphatically

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refuse. He says that he merely declined to pay until the car should become less crowded, when he might more conveniently reach his pocket. The fare was payable upon his entering the car. That the superintendent was justified in treating the plaintiff as a person who had refused to pay his fare is, I think, upon the evidence incontrovertible. His declining to pay when called upon was, in my opinion, in law a refusal to pay. The learned trial judge in effect told the jury that, although the demand for payment of fare may, in the circumstances, have been rash, the plaintiff, according to his own story, did "refuse point blank to pay" his fare. It cannot be assumed that the jury found against this direction.

On the issue of misconduct the evidence is contradictory. The plaintiff says he was sober and inoffensive; the defendants' witnesses say he was intoxicated, abusive and profane. This issue was fairly presented to the jury. The difficulty is to know how they found upon it. Does their verdict mean that the plaintiff was not a nuisance, and that his removal on this ground would have been unjustifiable; or have they merely found that although he had been such a nuisance as warranted his removal, there was an undue use of force and violence in expelling him; or have they found in the plaintiff's favour upon both these questions?

If the element of non-payment of fare were eliminated it would not be very material to know upon what ground the jury proceeded, because the verdict for the plaintiff would necessarily imply that the jury had found for him, if not upon both questions, upon one or the other; and either finding would suffice to support the verdict.

But, upon a direction that refusal to pay fare would justify removal from the car and a direction or finding that such refusal had been shewn, a finding in the plaintiff's favour on the issue as to misconduct would not suffice to sustain the verdict. In that view of the case a finding that there was excessive force in removing him would be indispensable.

After careful consideration I have reached the conclusion that the verdict, in the light of the charge read as a whole, involved a finding that the superintendent used unnecessary and excessive force in expelling the plaintiff from the car and that this was the cause of his injuries. The learned judge in effect directed the jury that, as a matter of law, the defendant company had the right to expel for refusal to pay fare; his presentation of the case appears to proceed upon this view; he told them, at least impliedly, that the real issue for them to determine was whether the removal being otherwise justifiable it was or was not accompanied by undue violence.

But the defendant company maintains that it has no power to expel a passenger for mere refusal to pay fare. The Act of incorporation of the company (55 Vict. ch. 99 (Ont.)), which also ratifies their contract with the city, provides, in section 17, as follows:

> The fare of each passenger shall be due and payable on entering the car or other conveyance of the company, and any passenger refusing to pay the fare demanded by the conductor or driver, and refusing to quit the car or other conveyance when requested so to do shall be liable to a fine of not more than ten dollars besides costs. And the same shall be recoverable before any justice of the peace.

The contract itself does not contain this provision.

In 1906, the Legislature of Ontario passed a general railway Act (6 Edw. VII. ch. 30). This Act expressly defines the field of its application. By section 3, it is provided that it shall apply

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when so expressed to street railways within the legislative authority of the Legislature of Ontario * * * and shall be incorporated and construed as one Act with the special Act, subject as herein provided.

Section 5 reads as follows:

If in any special Act heretofore passed by the Legislature it is enacted that any provision of the "Railway Act of Ontario," or of the "Electric Railway Act," or of the "Street Railway Act" in force at the time of the passing of such special Act is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified in like manner; and, unless otherwise expressly provided in this Act or the special Act, this Act shall apply to every railway company incorporated under a special Act or any public Act of this province and the sections expressly made applicable shall apply to every street railway company so incorporated; but, where the provisions of the special Act and the provisions of this Act are inconsistent, the special Act shall be taken to override the provisions of this Act, so far as is necessary to give effect to such special Act.

Section 116 of the "Railway Act of 1906" is as follows:

116 (1). The fare and toll shall be due and payable by every passenger on entering the car or other conveyance, and every passenger who refuses to pay may, by the conductor of the train and the train servants of the company, be expelled from and put off the car with his baggage at any usual stopping place, or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force.

(2) This section shall apply to street railways.

Counsel for the plaintiff maintained that this provision of the general "Railway Act" applies to the Toronto Street Railway. Mr. McCarthy contended that, because section 116 of the general Act deals with a subject already dealt with in the company's special Act, and also because it is, as he said, inconsistent with section 17 of the special Act, it does not apply to his clients.

No doubt, as a general rule, where a particular matter is dealt with by a special Act, the application

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of the provisions of a general Act dealing with the same matter is excluded. Maxwell on Statutes (3 ed.), pp. 242-3. But this rule does not apply where it appears on the face of the general Act that

> the attention of the legislature has been turned to the earlier special Act, and that it intended to embrace the special cases within the general Act. Maxwell on Statutes (3 ed.), p. 250.

It is quite apparent that, when enacting the "Railway Act of 1906," the legislature had in mind the fact that a number of the railways to be affected had special Acts. It is also apparent that it was intended that, although certain subjects had been dealt with by such special Acts, the provisions of the general Act dealing with the same subjects should apply to the companies governed by such special Acts, unless and except in so far as the provisions of the general Act are inconsistent with those of the special Acts, in which case "the special Act shall be taken to override the provisions" of the general Act, but only "so far as is necessary to give effect to such special Act."

It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent" unless the two provisions cannot stand together.

> It is obvious to inquire: Where is the inconsistency if both may stand together and both operate without either interfering with the other. *Tabernacle Permanent Building Society* v. *Knight*(1), at p. 302, *per* Halsbury L.C.
>
> I think the test is whether you can read the provisions of the later Act into the earlier without any conflict between the two. (*Ibid.*, *per* Lord Herschell, at p. 306.)

As put by Fry L.J., in the same case(2):

> Section 24 provides that the Act shall apply to every arbitration under any Act passed before the commencement of this Act, "as if the

(1) [1892] A.C. 298. (2) [1891] 2 Q.B. 63, at p. 69.

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arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act." Now, what is the meaning of "inconsistent with the Act regulating the arbitration?" Section 19 creates, no doubt, an obligation to state a case when directed by the court or a judge, and, of course, in one sense, the presence of the obligation to state a case is inconsistent with the absence of such obligation. Therefore, it may be argued that, where under a previous Act there was no obligation to state a case, while under a later Act such an obligation is created, there is an inconsistency between the Acts. But that is not, in my view, the real meaning of the "inconsistency" referred to in section 24. I think there must be an inconsistency of this kind, viz., that the obligation to state a special case would be so at variance with the machinery and with the mode of procedure indicated by the previous Act, that, if that obligation were added, the machinery of the previous Act would not work.

So here the existence of the right of expulsion is in a sense inconsistent with the absence of such a right; but the existence of the right of expulsion as an additional remedy is not so at variance with the other remedy conferred by the special Act that the existence of this added right would prevent resort being had to the other remedy. To quote Lord Watson:

In my opinion the object of the legislature was to add to the remedies,

and, I may add, to supplement what might, in the case of a passenger refusing to give his name, or of his giving a false name, be found a totally inadequate remedy, by providing another which would be always available and efficacious.

Unless the existence of the right conferred by the general Act would render it impracticable to carry out the provision of the special Act there is not, in my opinion, such an inconsistency as is referred to in section 5 of the general "Railway Act of Ontario."

Having regard to the pointed and explicit provisions of sections 3 and 5 of that Act, the case in the

English courts to which I have referred—although it deals not with a special Act and a general Act, but with two general Acts, one of which is of less general application than the other—is, I think, clearly in point and an authority against the contention that section 116 of the general "Railway Act of 1906" is inconsistent with section 17 of the defendants' special Act in the sense in which the word "inconsistent" is used in section 5 of the general railway Act.

The wording of section 116 is similar to that of the corresponding section of the "Dominion Railway Act" from which it was, no doubt, taken. Its provisions as to the passenger's baggage and that he must be put off at a regular stopping place or near a dwelling house seem somewhat incongruous when the section is applied to street railways in cities and towns. But the Act applies to suburban and interurban railways as well; and, subject to the question of inconsistency, the application of this section to all street railways is concluded by its second sub-section.

It follows that at the time when the plaintiff was put off the company's car it had the right to expel him as a passenger who had refused to pay fare.

But, if it had not that right, its right to expel for misconduct amounting to a nuisance was not questioned at bar. Although no particular authority was referred to as conferring this right, its existence seems essential to the operation of a railway, and was not challenged by Mr. McCarthy. It was stated by divisional superintendent Argue, in his evidence, that the rules of a company authorize a conductor or motorman to put a passenger off if he is a nuisance. This evidence appears to have been accepted by both parties as a correct statement of the effect of the rules which

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were not themselves in evidence. It is this right which the superintendent says he, in fact, exercised. I think that in these circumstances, notwithstanding the plaintiff's contention that he was removed merely for refusal to pay fare, the defendants should not now be heard to say that he was not put off in the exercise of the power which they admittedly had to expel for misconduct. The superintendent says that he believed he had not the power to put the plaintiff off for refusal to pay fare and that he would not have put him off had he not been misconducting himself. Elsewhere he says he would not have put him off as a nuisance had he paid his fare. Upon this evidence it may well be that the superintendent regarded the plaintiff's manner of refusal to pay merely as part of or an aggravation of his misconduct; and it may be that it was so in fact. But, in the view which I take that the defendant company, under the "Railway Act of 1906," had the right to expel a passenger for mere refusal to pay fare, it is unnecessary to pursue this question further. Excessive violence, which, as I have stated, I think the jury must be taken to have found, suffices to support the verdict whether the plaintiff was put off as a nuisance or for refusal to pay fare.

Then it is said in the appellants' factum, quoting the language of Osler J.A., in *Coll* v. *Toronto Railway Co.*(1), at page 61, that a divisional superintendent is not an official who has

> authority to remove passengers or others and, therefore, his act in pushing the plaintiff off the car was not of a class of acts entrusted to his discretion to perform and so not an act done in the excessive or erroneous execution of a lawful authority.

(1) 25 Ont. App. R. 55.

The conductor has the right to expel whether for non-payment of fare or misconduct amounting to a nuisance. The divisional superintendent was his superior officer to whom the conductor referred his difficulty with the plaintiff. I agree with Magee J. that there was in these facts enough to raise a presumption that it was within the scope of the superintendent's authority to remove the plaintiff from the car and also to warrant the jury

in assuming that what he did was at the request of the conductor who had brought him and stood by.

This distinguishes the present case from *Coll* v. *The Toronto Railway Co.*(1). That the superintendent's purpose was to serve his employers, the defendants, is, upon the evidence, indisputable. The act being one which the company itself could legally do, it cannot escape responsibility therefor.

I also agree that it is extremely improbable that the result of the trial was affected by the admission of evidence of exclamations or statements of passengers made in the presence of the superintendent and during or immediately following the occurrence in which the plaintiff was injured. No objection was taken at the trial to the allusion by the learned trial judge to this evidence in his charge. It is, I think, too late to raise such an objection upon an appeal; and it is not at all clear, assuming the inadmissibility of the evidence, that any substantial wrong or miscarriage was thereby occasioned within the meaning of the Ontario Consolidated Rule, No. 785. I am by no means satisfied that the evidence complained of was not in fact admissible as part of the *res gestæ*. See Chamberlayne's Best on Evidence (1908), pp. 448-9; Taylor on Evi-

(1) 25 Ont. App. R. 55.

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dence (10 ed.), 583; Phipson on Evidence (3 ed.), pp. 47-8. But this question it is unnecessary to determine.

The defendants have come here largely on points not taken at the trial. The Divisional Court and the Court of Appeal for Ontario have, I think, correctly found them not entitled to a new trial as a matter of right. Those courts had power to direct a new trial as a matter of discretion. If they were not asked to exercise that power, or if, having been asked, they refused, this court should not, in my opinion, now exercise any discretion which it may have to interfere.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Lennox & Lennox.*

IN RE GUARANTEE OF BONDS OF THE GRAND TRUNK PACIFIC RAILWAY COMPANY.

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*Dec. 24.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Statutory contract — Construction — Bonds of railway company — Government guarantee.

The Government of Canada, in a contract with the Grand Trunk Pacific Railway Co., published as a schedule to and confirmed by 3 Edw. VII. ch. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75% of the cost of construction of the Western division of its railway. By a later contract (sch. to 4 Edw. VII. ch. 24) the Government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75% of such cost of construction.

Held, that this second contract only imposed upon the Government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75%.

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

By 3 Edw. VII. ch. 71 a contract between the Government of Canada and representatives of the Grand Trunk Pacific Railway Co. (which was incorporated in the same session) was confirmed and printed as a schedule to the Act. Section 28 of said contract is as follows:

"28. For the purpose of aiding the company in the construction of the Western Division, the Government shall guarantee payment of the principal and interest

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

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of an issue of bonds to be made by the company for a principal amount equal to seventy-five per centum of the cost of construction of the said division, as defined and ascertained in accordance with the provisions of paragraph eighteen hereof; but such principal amount shall not, in any case, exceed thirteen thousand dollars per mile of the mileage of the prairie section, nor thirty thousand dollars per mile of the mileage of the mountain section, although seventy-five per centum of such cost of construction may have exceeded the said respective sums per mile."

In the following year a further contract was entered into confirmed by 4 Edw. VII. ch. 24, and printed as a schedule thereto. By section 5 of such contract it is provided that

"Notwithstanding anything in the said contract mentioned above contained, the Government may and shall, preserving always the proportions in the said contract provided as between the prairie and mountain sections of the Western division, implement for the purposes and subject otherwise to the provisions of the said contract, its guarantee of the bonds of the company to be issued for the cost of construction of the said Western division, in such manner as may be agreed upon, so as to make the proceeds of the said bonds so to be guaranteed a sum equal to seventy-five (75) per centum of the cost of construction of the Western division ascertained as provided in the said contract, but not exceeding in respect of the prairie section, thirteen thousand dollars ($13,000) per mile."

The contracting parties not being able to agree on the manner in which the Government was to implement its guarantee of bonds under this second contract the questions were submitted to the Supreme Court of

Canada for an opinion thereon in the following manner:

"Certified copy of a report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 22nd November, 1909.

"On a memorandum dated 5th November, 1909, from the Minister of Justice, submitting—with reference to the agreement of 29th July, 1903, set forth in the schedule to the "National Transcontinental Railway Act" (3 Edw. VII. ch. 71), as the said agreement is amended or modified by the further agreement of 18th February, 1904, set forth in the schedule to the Act, 4 Edw. VII. ch. 24, intituled, 'An Act to amend the National Transcontinental Railway Act,'—that no agreement having been made between Your Excellency's Government and the Grand Trunk Pacific Railway Co. as to the manner in which Your Excellency's Government shall implement, for the purposes and subject otherwise to the provisions of the said contract, its guaranty of the bonds of the company issued or to be issued for the cost of construction of the said Western division so as to make the proceeds of the said bonds a sum equal to 'seventy-five per centum of the cost of construction of the Western division, ascertained as provided in the said contract of 29th July, 1903 (3 Edw. VII. ch. 71, schedule), but not exceeding in respect of the prairie section thirteen thousand dollars ($13,000) per mile,' and differences having arisen as to the true interpretation of the fifth clause of the said agreement of 18th February, 1904, it has been agreed between Your Excellency's Government and the company that the questions thus arising between the Government and the company may be conveniently determined by means of a reference to the Supreme

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Court of Canada in the exercise of the powers vested in Your Excellency in Council under the 'Supreme Court Act,' subject to appeal.

"The Minister having regard to the facts hereinbefore stated, therefore, recommends that the following questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of section 60 of the 'Supreme Court Act,' viz:

"(*a*) Is the Government, in the absence of an agreement between the Government and the company as to the manner of the implementing, liable, upon the true construction of the said fifth clause of the agreement of 18th February, 1904, to implement its guaranty of the bonds of the company so issued or to be issued for the cost of construction of the said Western division and guaranteed or to be guaranteed by the Government pursuant to the said agreement of 29th July, 1903, as amended by the agreement of 18th February, 1904, so as to make the proceeds of the said bonds so guaranteed or to be guaranteed 'a sum equal to seventy-five per cent. of the cost of construction of the Western division ascertained as provided in the said contract, but not exceeding in respect of the prairie section thirteen thousand dollars ($13,000) per mile?'

"(*b*) Would the obligation of the Government under the said fifth clause of the agreement of 18th February, 1904, be satisfied by the guaranteeing of additional bonds of the company to be issued for the cost of construction of the said Western division to an amount which will realize upon sale a sum of money sufficient to make the said proceeds so equivalent?

"(*c*) Would the obligation of the Government

under the said fifth clause be satisfied by the guaranteeing of the bonds of the company to be issued for the cost of construction of the said Western division, in such manner as may be agreed upon, to such an amount as will produce a sum sufficient to make the proceeds of all the bonds of the company issued or to be issued for the cost of construction of the said Western division and guaranteed or to be guaranteed by the Government, including such additional bonds as may be guaranteed for the purpose of discharging any obligation of the Government arising under the said fifth clause, a sum equivalent as aforesaid?

"(*d*) Is the Government bound upon the true construction of the said fifth clause of the agreement of 18th February, 1904, to provide and pay to the company a sum of money which, when added to the proceeds of the bonds of the company issued or to be issued for the cost of construction of the said Western division, and guaranteed by the Government pursuant to the authority of the said agreement of 29th July, 1903, as amended by the said agreement of 18th February, 1904, will aggregate a sum equal to seventy-five per centum of the cost of construction of the Western division ascertained as provided in the said agreement of 29th July, 1903, but not exceeding in respect of the prairie section thirteen thousand dollars ($13,000) per mile?

"(*e*) If so, will the Government be entitled as guarantor to call upon the company, as being primarily liable to pay for the construction of the said Western division, for reimbursement in respect of such sum of money so provided and paid, and will such sum fall within or be covered by the security provided for by paragraph 35 (*a*) of the agreement of 29th July, 1903 (3 Edw. VII. ch. 71, schedule)?

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"(*f*) Is it competent to the Government and the company to agree that the implementing for the purpose of the said fifth clause shall be by way of guarantee by the Government of additional bonds of the company, and if it be so agreed, would the obligation of the Government be satisfied by the guaranteeing of such additional bonds as may be agreed upon between the Government and the company?

"(*g*) Does the said fifth clause of the agreement of 18th February, 1904, upon its true construction, require the Grand Trunk Pacific Railway Company, for the purpose of enabling the Government to carry out the implementing of its guaranty of the bonds referred to in said clause, to undertake any further obligation by way of an additional issue of bonds otherwise; or is it intended that the Government shall without any further obligation being imposed upon the Grand Trunk Pacific Railway Company, implement its guaranty of the bonds referred to in the said clause so as to make the proceeds of the said bonds so to be guaranteed a sum equal to seventy-five per centum of the cost of construction of the Western division, ascertained as provided in the agreement of 29th July, 1903, but not exceeding in respect of the prairie section thirteen thousand dollars ($13,000) a mile?

"The Committee submit the same for approval."

"RODOLPHE BOUDREAU,"

"Clerk of the Privy Council."

Shepley K.C., for the Government of Canada.

Lafleur K.C. and *Biggar K.C.*, for the Grand Trunk Railway Co.

The court answered the questions submitted as follows:

Question (*a*). Answer No.
" (*b*). " Yes.
" (*c*). " Yes.
" (*d*). " No.
" (*e*). The answers to the previous questions make it unnecessary to give any answer to this question.
" (*f*). Answer Yes.
" (*g*). " Yes to first part; no to second.

ANGLIN J.—I would qualify the answer to the first part of question "*g*" by adding thereto these words: "If the company desires to take advantage of the provisions of the agreement of 1904 as to the implementing of the Government guarantee."

The following reasons were given for the categorical answers to said questions.

THE COURT.—It is desirable, perhaps necessary, that a few words should be added to the categorical answers given by the court to the series of questions put to it upon the true construction of the contracts made between His Majesty and the Grand Trunk Pacific Railway of 29th July, 1903, and 18th February, 1904, respectively.

The keynote to the answers to these questions is to be found in the determination whether or not the additional liability assumed by the Government under the 5th clause of the amended agreement of 1904 remained a secondary liability by way of guarantee of bonds to be issued by the G. T. Pacific Railway Company sufficient in character and amount to realize 75% of the

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cost of construction of the Western division ascertained as provided in said contract, but not exceeding in respect of the prairie section $13,000 per mile, or whether such additional liability was of a primary character and obliged the Government to make up in cash or its equivalent outside of the guaranteed bonds any deficiency that might arise between the proceeds of the bonds and the 75% of the cost of the railway.

We had no hesitation in reaching the conclusion that the extended liability the Government agreed to assume by the agreement of 1904 was a secondary liability only and not a primary one. The result of such a holding was, of course, that the only liability of the Government was to guarantee bonds of the company the proceeds of which would produce a defined amount.

But it was evident that much would depend upon the character of the bonds which the parties to the contract should eventually agree upon issuing.

The time for payment and the rate of interest they should bear would largely govern and determine the proceeds they would realize.

These and other details of the form and character of the bonds were left to mutual agreement, and such an agreement must under the terms of the contract be come to before the Government obligation became exigible.

These remarks will explain the answers to some of the questions which without them might be held to be ambiguous.

Mr. Justice Idington desires to add to the foregoing, in which all the members of the court agree, the following paragraph for himself:

Whilst agreeing in the proposition of the judgment of the court that the obligation of the Crown was that

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of guarantor, and he proceeds on such assumption, he does not understand the Crown limited absolutely to the device of bonds to make good something which is of necessity to be the subject-matter of future agreement and conceivably may be more advantageous for both parties than that, but in any case subject to the usual constitutional limitations.

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*Oct. 20.

EDMUND C. TRAVES (DEFENDANT) . . . APPELLANT;

AND

ALEXANDER FORREST AND OTHERS (PLAINTIFFS) . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mines and mining—Mining agreement—Interest in ore to be mined—After-acquired chattels—Transfer and delivery—Registration—B.C. "Bills of Sale Act," 1905—Construction of statute.

An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under the provisions of the British Columbia "Bills of Sale Act," 5 Edw. VII. ch. 8.
Judgment appealed from (14 B.C. Rep. 183) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing, in part, the judgment of Martin J., at the trial.

The circumstances of the case, so far as they are material to the issues on the present appeal, are stated in the judgment of Mr. Justice Duff, now reported.

J. Travers Lewis K.C. and *Smellie,* for the appellant.

S. S. Taylor K.C., for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Idington.

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

(1) 14 B.C. Rep. 183.

DAVIES J. agreed with Duff J.

IDINGTON J.—If we try to find and understand what the parties concerned in these apparently ambiguous writings submitted for our interpretation were about when signing same that apparent ambiguity will disappear and any need for worrying over a multitude of irrelevant points of law submitted to us will also disappear.

Smith, when he mortgaged his interest, never intended to prejudice or jeopardize respondents' interests, or rights, or reasonable expectations, nor did appellant seek to acquire more than Smith within these limits desired to give him.

Confessedly one-third of the whole property in question was an inaccurate definition of Smith's interest. Appellant's counsel claims it was, roughly speaking, one-third. I agree the share of Smith might, at the then stage in the manifold process of handling which the property had to go through, with approximate correctness be referred to as one-third; but clearly that would not have been mathematically correct, and, when we read further and look into the whole scope of the documents, we find it expressly defined as only "all the interest of the mortgagor," Smith, that was being dealt with.

When he called it one-third thus limited, or anything less than the whole, his language told any one trying to understand his meaning that he owned no more than what has been adjudged him and, through him, the appellant.

The appeal should be dismissed with costs.

DUFF J.—There are two questions. The material facts bearing on the first are these. Smith being the

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lessee of the "Payne Mine," mill and appurtenances, at Sandon, B.C., under terms entitling him to work the mine, but prohibiting sub-letting, entered into an arrangement with the respondent for working one of the levels, the terms of which (although the whole of them are not expressly stated) may be inferred with sufficient certainty from the facts in evidence. After Forrest had commenced work under this arrangement a document was signed, but on its face it is plain that it does not state the whole of the bargain. From this document, however, and the other evidence, it is quite clear that the respondent was, during the currency of the arrangement, to mine the fifth level and to have the ore reduced at the concentrator; that Smith was then to ship the ore to the smelter, and that the proceeds (which were to be payable to Smith) were to be distributed in the shares mentioned by the trial judge, Smith being beneficially entitled to five per cent. of the net returns. Forrest was to pay all expenses and to be responsible for all damage caused by his operations under the agreement.

The question is whether, under this agreement, the respondent acquired any interest legal or equitable in the ore mined under it. It seems very clear that from the time the ore should be broken down until the concentrates should be delivered to Smith for shipment to the smelter—while, that is to say, the respondent was handling it as required by the terms of the contract—the ore was to be in the possession and under the control of the respondent; so much would be necessary to enable him to perform his agreement. It is also undisputed that the effect of the agreement was to vest in the respondent the right to have the concentrates shipped to the smelter and to have a specific

share of the proceeds paid out to him. If the parties had agreed that the respondent should ship the concentrates in his own name and receive the proceeds himself, nobody could doubt that he must have been regarded in equity as having a specific interest in the concentrates themselves lying in the cars at the smelter or at the mill; or in the ore in his possession in the tramway or in the workings which he was both entitled and bound to have reduced to concentrates. Can it then make the slightest difference that the duty of shipping the concentrates is imposed upon the appellant and that the shipments were to be made in his name and the proceeds paid to him? It can make no difference because the appellant's custody of the concentrates as of the proceeds is merely that of a trustee for the purpose of carrying out the stipulation of the agreement.

It is not necessary to hold that the parties became, at law, tenants in common of the ore, and I am inclined to think they were not; but it is quite clear, I think, that, apart from the legal possession the respondent acquired under the agreement an equitable interest in the ore, which (with the performance of his obligations under the agreement) ripened into the beneficial ownership of an undivided share equivalent to seventy-eight per cent. of it. In truth, the substance of the transaction was that the respondent was to mine the fifth level for his own benefit, paying the appellant a royalty equivalent to five per cent. of the net smelter returns, together with royalties payable to the owner and to the Crown. The stipulation that these returns were to be made to Smith himself was probably inserted to satisfy the provisions of his lease, and ought not to be regarded as affecting the substan-

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tial nature of the bargain. When it is possible to do so, a court of justice ought to attribute to the ordinary transactions of business such a legal character as will effectuate, and not such as will frustrate, the real intentions of the parties to them.

The next question is whether the appellant's bill of sale is to prevail over respondent's interest. The appellant contends that it does and puts his contention on two grounds. First, that the agreement between Smith and the respondent being an unregistered bill of sale must be postponed to the appellant's registered bill of sale, and secondly, that the appellant, a purchaser for value without notice, having the legal estate, is entitled to priority over the respondent who has only an equitable interest.

As to the second ground, the defence is not pleaded and was not, I think, really set up at the trial; but at all events I agree with Clement J., that not only has the appellant not satisfied the onus upon him to prove the defence of purchase for value without notice, but that the evidence clearly shews he had constructive notice of the arrangement between Smith and the respondent.

As to the first, it seems disputable on several grounds; but it will not be necessary to refer to more than one objection which I think is conclusive.

The "Bills of Sale Act" of British Columbia was, as originally enacted in 1873, (in all respects material here), a transcript of the English "Bills of Sale Act" of 1854. The latter Act was, by a Divisional Court in *Brantom* v. *Griffits*(1), held not to apply to any assurance of goods which at the time of the execution of the assurance should not be in such a state as to be

(1) 1 C.P.D. 349.

"capable of complete transfer by delivery." This view was based upon the definition of "personal chattels" contained in the Act. Whether this view of these words—having regard to an expression of opinion to the opposite effect, not required for the decision of the case, by Lord Chelmsford in *Holroyd* v. *Marshall*(1)—is that which one would take if construing for the first time the provision in which they are contained, we need not, I think, consider. The British Columbia Act of 1873 was re-enacted in consolidations of 1888, 1897 and 1905, and the definition of "personal chattels" has throughout remained unchanged in any material particular; nor is there any change in any other provision of the Act which affects the application of this decision. The second section of the Act of 1905, which at first sight might appear to have some bearing upon the point, really has none; it is indeed a reproduction of the third section of the English Act of 1878, which was said by Lord Macnaghten in *Thomas* v. *Kelly*(2), at page 519, not to apply to assignments of "future or after-acquired chattels." There is further the opinion of Lord Macnaghten on the last mentioned case, at pages 518 and 519, that the construction adopted in *Brantom* v. *Griffits*(3) ought to be regarded as having been accepted by Parliament in passing the Act of 1878.

Such being the course of judicial opinion and the legislative action, I think we must assume that the view expressed in *Brantom* v. *Griffits*(3) has been adopted by the Legislature of British Columbia, and hold that the agreement in question relating to ore to be mined in the future, is not within the class of

(1) 10 H.L. Cas. 191, at p. 227. (2) 13 App. Cas. 506.
(3) 1 C.P.D. 349.

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assurances contemplated by the legislature in passing the "Bills of Sale Act."

ANGLIN J.—For the reasons stated by my brother Duff I am of the opinion that the document under which the respondent claims was not a bill of sale requiring registration under the British Columbia "Bills of Sale Act" in order to render it valid or to preserve its priority. I also agree that the interest acquired by the respondent under that document in the ore in question was such that he could not be deprived of it by a subsequent transfer, sale or mortgage of such ore, though by formal instrument duly registered, to a person affected with notice of his interest. That the appellant had notice of that interest, if not actual at least constructive, the evidence sufficiently establishes.

I am therefore of opinion that the defendant's appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Robert Wetmore Hanington.*

Solicitor for the respondents: *S. S. Taylor.*

HENRI LARIN (PETITIONER) ....APPELLANT; 1909

*Nov. 8, 9.
*Dec. 24.

AND

LOUIS A. LAPOINTE AND OTHERS (RESPONDENTS) ....RESPONDENTS.

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

Appeal—Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—"Montreal City Charter," ss. 42, 334, 338—*Construction of statute*—3 *Edw. VII. c.* 62, *ss.* 6 *and* 27.

An action by a ratepayer of the City of Montreal to compel the members of the finance committee of the city council to reimburse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under section 338 of the "City Charter" is not a proceeding in *quo warranto* under the provisions of articles 987 *et seq.* of the Code of Civil Procedure.

By section 334 of the charter (3 Edw. VII. ch. 62, sec. 27) the city council of Montreal must at the end of each year appropriate the revenues of the city for the services during the coming year, including a reserve of five per cent. of the total revenues, three per cent. of which is to provide for unforeseen expenses. By section 42 of the charter, as amended by 3 Edw. VII. ch. 62, sec. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted for the purpose. An item of unforeseen expenditure came before the council and was passed and sent to the finance committee, which directed the city treasurer to pay the amount, and it was paid accordingly.

Held, the Chief Justice and Girouard J. *contra*, that the reserve of the two per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.

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

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Held, also, the Chief Justice and Girouard J. dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money, where there has been no previous appropriation for the payment to be made, must receive the consideration of the finance committee and be sanctioned or rejected by that committee before being finally acted upon by the council. That any such payment made without this formality, even when made *bonâ fide* and though, in fact, sanctioned by the finance committee after it had been finally dealt with by the council, and though the city suffered no prejudice in consequence of such payment, is an illegal expenditure and involves the consequences provided in such cases by the 338th section of the "City Charter."

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, sitting in review, and restoring the judgment of Charbonneau J., at the trial in the Superior Court, District of Montreal, by which the petitioner's action was dismissed with costs.

The nature of the action and the questions at issue on this appeal are stated in the judgments now reported.

On the appeal coming on for hearing,

Atwater K.C. for the respondents moved to quash the appeal on the grounds that the Supreme Court of Canada had no jurisdiction to entertain appeals in cases, such as the present, where the proceedings taken were in the nature of *quo warranto* and involved merely the liability to a fine of $400, under the statute; that the case could not be ruled by the demand for the reimbursement of $3,800 to the city as the City of Montreal was not a party in the cause, and that there was misjoinder by the petitioner of separate causes of action in seeking this pecuniary condemnation.

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Lafleur K.C. for the appellant opposed the motion on the grounds that the proceeding taken was authorized by section 338 of the "City Charter"; that the amount now in controversy exceeded $2,000, and that, in any event, the Supreme Court of Canada had jurisdiction to review an improper exercise of jurisdiction by the Court of King's Bench if any such had taken place in that court by the decision complained of. Alternatively it was asked that the City of Montreal should be now added as a party to the cause on the present appeal.

THE COURT reserved consideration of the question as to its jurisdiction and directed that, in the meantime, the hearing on the merits of the appeal should proceed.

Lafleur K.C. and *C. Rodier* were heard for the appellant.

Atwater K.C. and *Ethier K.C.* for the respondents.

THE CHIEF JUSTICE (dissenting).—By the judgment of the Court of Review which, on this appeal, we are asked to restore, the seven defendants, that is to say, the entire finance committee of the Montreal City Council, are deprived of their offices, condemned jointly and severally to pay a sum of $3,809.40 and disqualified for re-election as aldermen for a period of two years from the date of that judgment, 17th April, 1909. (The statute says the disqualification is to run from the date of the occurrences complained of, *i.e.*, May, 1908.) The judges of the three provincial courts, nine in number, all agree that, by the irregularities

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which have resulted in such serious consequences to them, the defendants derived neither benefit, profit nor advantage; that no corrupt, fraudulent or indirect motive can be attributed to them, nor is it alleged that any injustice has been caused or wrong done, nor that any result different from what has occurred would have followed a literal compliance with the statute, even if we adopt the construction put upon it by the appellant. From this conclusion I understand that this court does not dissent. The majority here, however, are of opinion that the unanimous judgment of the provincial court of appeal must be reversed and the majority judgment of the Court of Review, which reversed the trial judge, must be restored. With great respect, however, it is impossible for me to concur.

It is important to extract from the record the substance of the charge made against the defendants and to set down with some minuteness, in the order of their occurrence, each step in the proceedings of the council and committee out of which this action arose. To do so may enable us more clearly to understand in what respect, if at all, the defendants have departed from the regulations made for their guidance in the City Charter, by-laws and rules of council, and to appreciate the legal consequences which result from the infringement of these regulations, if they have been infringed.

In substance, the plaintiff alleges that in May and July, 1908, the defendants, as members of the finance committee of the Montreal City Council, authorized an expenditure of money exceeding the amount previously voted and legally placed at the disposal of that committee and in consequence incurred the

pecuniary liability and are subject to the disqualifications enacted by section 338 of the municipal charter, which reads as follows:

> Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council and shall also be disqualified for re-election as alderman for a period of two years thereafter.

The alleged illegal expenditure was made under the following circumstances:

On the 18th of May, 1908, a letter was submitted to the Montreal City Council from the "Comité Dupleix" of Paris, inviting the mayor to represent the city at certain *fêtes* to be held in France to commemorate the tercentenary of the founding of Quebec by Champlain, and a resolution was forthwith adopted unanimously accepting the invitation and instructing the finance committee to place at the mayor's disposal the necessary funds to cover his travelling expenses. On the 20th of May a formal acceptance of the invitation was sent to the secretary of the "Comité Dupleix." On the 26th, Mr. Pelletier, city comptroller and auditor, was requested by the mayor to place $1,500 at his disposal for travelling expenses. On the 29th of May the comptroller put the mayor's letter before the finance committee and it was resolved to instruct the city treasurer to comply with the request and to advance the sum of $1,500. On May 30th, the city treasurer certified the account as true and correct, recommended that it should be paid and the payment was subsequently approved of by the finance committee in the following terms:

> The payment of the above amount is approved, but subject to the certificate of the city comptroller that there are sufficient available funds voted by council for said purpose.

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On the same day the comptroller issued his warrant for the payment of this sum of $1,500. This warrant is not in the record, but I gather from the evidence and the by-laws that the comptroller's warrant is the authority on which the city treasurer paid out the money. The latter can certify all accounts but he cannot pay them until they are approved of by the comptroller who must also countersign the treasurer's cheque. When the mayor and his secretary subsequently returned from France, the accounts for the balance of their travelling expenses were fyled with the comptroller on July 16th. On the 20th of July, the accounts were submitted to the finance committee and it was resolved

that said accounts be approved of and that the city comptroller be instructed to pay the same.

On the next day, July 21st, the accounts were certified by the treasurer and approved of by the four members of the finance committee subject, as in the first instance, to the certificate of the comptroller that there were sufficient available funds voted by council for the purpose and on the same day the comptroller issued his warrant and the treasurer's cheque followed, as in the case of the previous payment. There is some confusion as to the dates on which the comptroller signed the vouchers given by the treasurer and conditionally approved of by the finance committee; but it appears on the face of the documents that the authority to pay, which is the sole foundation of these proceedings, was in each instance given by the members of the finance committee on the same day that the comptroller's warrant issued and, assuming that there is no evidence as to which was done first, the maxim *"omnia presumuntur rite*

esse acta" applies. There is no proof that I have been able to find that the defendants Robinson and Guay were present at either meeting of the finance committee, but as this objection has not been taken here I am content to mention it; in my view of the case it is not material.

The question for consideration is: Did the members of the finance committee, in these circumstances, authorize an expenditure of money exceeding the amount legally placed at the disposal of the council or committee within the meaning of section 338 of the charter?

It appears on the face of the documents that the authority to pay was given by the finance committee when, the accounts having been referred to the city treasurer, that official approved of them and recommended their payment. In addition, that authority was clearly and expressly given subject to the certificate of the comptroller that there were sufficient available funds voted by council for the purpose. In other words, the accounts being audited, the expenditure was authorized on the condition that the certificate of the proper official was produced to establish that there were funds available and at the disposal of the city for the purpose. In terms the authority to pay is given subject to the condition prescribed in section 336 of the City Charter which reads:

> No resolution of the council or of any committee, authorizing the expenditure of any moneys shall be adopted, or have any effect, until a certificate of the comptroller is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

It was for the comptroller to say if there were funds available and at the disposal of the city out of

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which the travelling expenses could be taken. If there were no such funds, the condition upon which the comptroller was authorized by the finance committee to issue his warrant failed; and if such funds were available how can it be said that the finance committee authorized an expenditure of money exceeding the amount legally placed at the disposal of the council?

It was suggested here, and to some extent the judgment of the Court of Review proceeds on that suggestion, that the defendants came within the disqualifying section when they acquiesced, as members of the city council, in the resolution passed on the 18th of May, 1908, requesting the finance committee to provide for the mayor's travelling expenses. The argument, as I understand it, is that this resolution involving, as it did, an expenditure of a portion of the city's revenue should not have been adopted until it had been previously submitted to and sanctioned by the finance committee (rule of council 124 and section 42 of the charter) and the omission to comply with this condition precedent, although subsequently and before it became operative the resolution was submitted to and approved of by the finance committee, entailed the disqualification of the whole council under section 338. This resolution is an instruction to the finance committee to indicate the fund; but it is not an authority to the proper official to pay out of a fund not legally placed at the disposal of the council, which is the mischief prohibited by section 338. By the resolution the invitation is accepted and the finance committee is instructed to place at the disposal of the mayor an amount sufficient to cover his travelling expenses, the necessary implication being that

those expenses are to be taken out of such funds as are legally available for the purpose. I am of opinion that the omission to comply with rule 124 at most makes the resolution inoperative until the certificate is produced (section 336). Finally this, in any event, would be an objection founded upon form or upon the omission of a formality which is provided for by section 308 of the charter. I am further of opinion that section 42 of the charter is not applicable in the circumstances because the reserve fund against which the expenditure for travelling expenses was chargeable was then appropriated and at the disposal of the council for these reasons. In the month of December, each year, the council is under obligation to appropriate ("mettre de côté" is the French term) the sums at its disposal out of the revenues of the city and to provide, among other things, for a reserve of five per cent. (sec. 334, sub-sec. (*d*)). The preparation of this annual estimate of expenditure is one of the functions of the finance committee and, when adopted by council, the estimate becomes the civic budget for the ensuing year. In the budget prepared by the finance committee for 1908 and adopted by council is included the reserve of five per cent. which was set aside to the extent of three per cent. to provide for unforeseen expenses, such as the cost of representations and delegations, not an unusual item in a civic budget, as may be seen upon reference to section 596 of the "Ontario Municipal Act." Briefly in my view the revenues at the disposal of the council for 1908 were appropriated in December, 1907, by the joint action of the finance committee and of the council and the reserve fund was included in and formed part of the civic budget and was at the disposal of the council for the reception and entertain-

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ment of distinguished guests and for travelling expenses as fully and effectually as any other item in it. If in this I am not mistaken the council could by virtue of section 334(*b*) authorize the payment of the mayor's travelling expenses and charge them against that fund without further reference to the finance committee, except in so far as the rule of council 124 was applicable. When the reserve fund was included in the annual estimate prepared by the finance committee, that fund was appropriated as fully and effectually in so far as the functions devolving upon the committee under section 42 are concerned as any other item of the civic budget and were it not for rule 124, I would say that with respect to that fund the finance committee was *functus,* but assuming that they had a duty to perform they did perform it substantially, as I have already attempted to shew.

I come now to the consideration of section 338. I repeat what I have already said; there is no suggestion of personal wrong-doing and there was no diversion of funds. No result followed the action of the council or of the finance committee, except that which was desired. All checks and safeguards provided by the charter for the protection of the civic exchequer were observed; there was unanimous action on the part of the council; the certificate of the comptroller that funds were available for the purpose and the sanction and approval of the finance committee were given. Everything that the statute required on the most strict construction was complied with, although conceivably in one aspect of the case, in some respects, out of the statutory order.

I quite agree that the object of the legislature

was to check careless, unbusinesslike management of the public money; but

it is a general rule of law that a penal statute ought to be construed strictly so as not to extent its provisions to any case which is not within both the spirit and letter of the enactment. This rule applies with a greater degree of force where the Act imposes a severe punishment or affects the liberty of the subject than where it imposes merely a pecuniary penalty.

Encyclopædia of Laws of England, *vo.* "Penalty," p. 30.

In terms section 338 imposes very severe penalties on any member of the council who authorizes an expenditure in excess of the appropriations. Should we hold that to authorize the expenditure of a sum of money out of a fund amply sufficient, certified by the proper official to be at the disposal of the council for a purpose authorized by the statute comes within the spirit and the letter of the prohibition contained in this enactment? Let me here again draw attention to the form in which the authority to pay was given by the finance committee:

The payment of the above amount is approved but subject to the certificate of the city comptroller that there are sufficient available funds voted by council for said purpose.

If all the requisite formalities are complied with, even out of the regular order, before the money actually leaves the municipal exchequer, is the spirit of the Act violated? I read this section, which certainly is not free from ambiguity, to mean that when the annual appropriations have been made and placed at the disposal of the council and of the different committees, no obligation is to be contracted which would involve the credit of the city for any sum in excess of such appropriation, the legislature having in section 334 provided that in making the annual appropriations the

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council shall maintain the equilibrium between the revenues and expenses so that future ratepayers should not be charged with present expenditures and to prevent that mischief the statute makes the members who authorize the excess of expenditure personally liable therefor. But if a fund is available for a specific purpose and that in an attempt to legitimately apply it to that purpose an informality in the procedure laid down by the rules of the council and by the statutes chiefly for the guidance of the officials occurs, can it be said that the severe penalties enacted by this section are incurred? I cannot believe that such consequences were ever contemplated where no bad faith, negligence, carelessness or indirect motive is imputed and where the object of the council was carried out. If for an error in procedure, personal liability and disqualification are to be incurred, no honest man of substance would venture to assume the enormous risk involved in taking a share in the administration of the municipal government of a large city like Montreal.

The words

> any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or of any committee

in section 338, read in conjunction with section 336, must mean that what is prohibited is the expenditure by the council or by the committee of any sum in excess of the amount at the disposal of the council or committee, not that if the money is legally available for a specific purpose and that some formality is required to apply it to that purpose the omission of the formality involves the penalty. The result of such a construction, as shewn by this case, would be to make the members of the council insurers not only of the

honesty and efficiency but of the infallibility of the municipal officials. Of the fourteen judges who have heard this case, nine say that the necessary formalities have been complied with and five that the proceedings were irregular; and, as a result, seven men, admitted to be of the most trustworthy, are disqualified for a period of two years and condemned to pay a large sum. Are these gentlemen presumed to be endowed with that grace of infallibility which evidently has been denied the courts of this country?

It is the internal sense (says Plowden) that makes the law; the letter of the law is the body and the sense and reason of the law is the soul.

Applying that rule to the construction of the charter and in view of the admitted facts, I would dismiss this appeal with costs.

GIROUARD J. (dissident).—Lorsque cette cause a été présentée devant nous, j'étais sous l'impression qu'il s'agissait d'un bref de *quo warranto* purement et simplement aux termes du code de procédure civile et que par conséquent nous n'avions pas de juridiction, ni la cour d'appel non plus. Après avoir lu et relu l'article 338 de la charte de la cité de Montréal (62 Vict. ch. 58) je me suis convaincu qu'il s'agissait d'une action spéciale parfaitement indépendante du *quo warranto,* dans laquelle il y a appel non seulement à la cour d'appel, mais aussi à cette cour. Cet article se lit comme suit:

Tout membre du conseil de ville qui autorise, soit verbalement, par écrit, par son vote ou tacitement, une dépense d'argent excédant le montant préalablement voté et légalement mis à la disposition du conseil ou d'une commission, en est tenu personnellement responsable et est, par le fait même, déchu de son droit de siéger comme membre du conseil, et ne peut être réélu à la charge d'échevin pendant une période de deux ans à partir de ce moment.

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Le texte de cet article est bien différent de ceux du code de procédure, articles 987 à 991. Ces articles définissent se que c'est que le *quo warranto*. Il a pour but principal d'empêcher l'usurpation ou la détention illégale d'une charge, franchise ou prérogative publique et l'article 990 ajoute que, si la requête est fondée, le jugement ordonne que le défendeur soit dépossédé et exclus de la charge et peut en outre le condamner à une amende n'excédant pas $400, payable à la couronne. Comme l'on voit, il n'est aucunement question dans cet article d'un jugement ordonnant au défendeur de rembourser des deniers illégalement obtenus pendant l'exercice de sa charge; en fait d'argent, tout ce que le demandeur peut réclamer, c'est la condamnation à l'amende de quatre cents piastres.

L'article 338 de la charte de Montréal, cité plus haut, est bien différent. Il a pour objet principal la condamnation d'une dépense illégale d'argent; et la déqualification ou déchéance de siéger ou de se faire réélire n'est que la conséquence "par le fait même," dit l'article, de cette dépense. C'est ce que la cour d'appel a jugé et je crois qu'elle avait raison. L'application pour casser l'appel faute de juridiction doit donc être renvoyée avec dépens.

Au mérite, j'abonde dans le sens de l'honorable juge Archambault parlant pour toute la cour à l'unanimité. Qu'il y aît eu quelque irrégularité ou informalité dans la procédure suivie par le conseil de ville, cela est évident; mais ces défauts sont tolérés par la charte, à moins d'injustice réelle ou de nullité expresse (art. 308). Où est l'injustice ici? Il est impossible de la trouver. Les échevins soit du conseil de ville ou du comité des finances ont agi avec la meilleure foi du monde. Ceçi n'est pas contesté; il

n'y a pas eu de détournement de fonds ou d'excès d'appropriation. Toute l'erreur consiste en ce qu'ils ont agi non pas dans l'ordre indiqué par la charte mais à l'inverse commençant au lieu de finir par le conseil de ville. Tous les corps dirigeants ayant droit d'être consultés, de se prononcer et de décider ont approuvé la dépense en question. Le montant payable avait été préalablement voté et était légalement mis à la disposition du conseil et de la commission des finances, vu que la charte prévoit qu'une pareille dépense doit être prise à même le fonds de réserve qui avait été voté au mois de décembre précédent; 3 Edw. VII. ch. 62, art. 27; 7 Edw. VII. ch. 63, art. 12. Et puis quant à la légalité. Comment peut-on soutenir en face de l'article 308 que les informalités que l'on reproche aux échevins entraînent la nullité ? Aucun des articles cités, pas même l'article 42 tel qu'amendé par 3 Edw. VII. ch. 2, art. 6, ne décrète la nullité de la procédure qui y est indiquée. L'article 308 se lit comme suit:

> Nulle objection ne peut être admise sur une action, poursuite ou procédure concernant des matières municipales, à moins qu'une injustice réelle ne doive résulter de celles dont l'omission rend nuls, d'après les dispositions de cette charte, les procédures ou autres actes municipaux qui doivent en être accompagnés.

Il faut bien remarquer que notre mode de procéder même devant les cours de justice n'est pas toujours prescrit à peine de nullité; que cette nullité, règle générale, n'existe pas à moins qu'elle ne soit prononcée. C.P.C. art. 175.

S'il faut en croire le jugement de la cour, les échevins se trouvent à garantir la légalité des procédures du conseil et des commissions. Ils sont, pour ainsi dire, les assureurs de l'infaillibilité légale du greffier de la cité et même de ses avocats. Est-il pos-

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sible d'imaginer que le législateur aît songé à créer une semblable position. Elle est non seulement peu enviable, mais elle est même intolérable et impossible. Aujourd'hui il s'agit de quatre ou cinq mille piastres, demain il s'agira peut-être d'un demi-million ou d'un million. Comment supposer pour un instant que les échevins qui, règle générale, ne sont pas même des avocats vont mieux résoudre les difficultés légales que les juges? Nous en avons un exemple frappant dans cette cause. Neuf juges de Québec se sont prononcés et sept en faveur des échevins qui cependant perdent leur cause parce que devant cette cour ils ont une simple majorité contre eux, trois contre deux. Il est évident qu'il sera bien difficile, sinon impossible, de trouver des candidats désirables à la position d'échevin de la ville de Montréal. La position sera pire qu'aujourd'hui, car elle devra être complètement abandonneé à des gens sans valeur ni responsabilité, à des aventuriers et des brasseurs d'affaires.

Je n'ai pas l'intention d'entrer dans les détails assez nombreux de cette cause. Ceux qui désireraient les connaître n'ont qu'à parcourir le jugement très élaboré et lucide de M. le juge Archambault. Il les comprend tous. Je me contenterai de citer la conclusion à laquelle le savant juge est arrivé:

Somme toute la présente cause se réduit à peu de chose.

Tout le monde admet que le conseil avait le droit d'envoyer une délégation à Paris et d'en payer les frais à même le fonds de réserve.

Il est aussi admis que la balance disponible du fonds de réserve était plus que suffisante pour payer cette dépense.

La résolution du conseil n'a pas été précédée d'une recommendation de la commission des finances; mais quel intérêt l'intimé peut-il avoir à s'en plaindre, lorsque c'est la commission des finances qui a elle-même autorisé le paiement de la dépense?

Cette résolution n'a pas été accompagnée d'un certificat du contrôleur; mais ce certificat a été donné plus tard, et a ainsi donné effet à la résolution en la validant.

La résolution n'a pas fixé le montant de la dépense; mais les membres de la commission des finances n'ont pas excédé le montant de la partie disponible du fonds de réserve affectée à ce genre de dépense.

En résumé, le conseil avait le droit d'ordonner cette dépense. Il y avait des fonds disponibles pour la payer. Et la dépense a été payée à même ces fonds.

La procédure ordinaire et plus régulière n'a peut-être pas été suivie. Mais il n'en est résulté aucune injustice, ni aucune atteinte à l'esprit de la charte, qui veut que les fonds publics soient appliqués aux fins pour lesquelles ils sont versés dans de trésor municipal, et dans les limites établies par le conseil lui-même lorsqu'il autorise une dépense.

Je suis donc d'avis de renvoyer l'appel avec dépens.

IDINGTON J.—The City Charter of Montreal by section 338 provided as follows:

> Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

This action is taken thereupon, as the conclusions of the statement of claim in the form of a petition shew, for the twofold purpose of having it declared that respondents being aldermen of the city have forfeited their seats and for two years the right to be elected as such, and to recover moneys they had unlawfully and in breach of the foregoing section 338 authorized to be paid.

The question raised at the threshold in respect of our jurisdiction to hear the appeal is unique in its character.

We have a matter in controversy between the parties as to an amount exceeding our jurisdictional limit of two thousand dollars.

Can any one join in the same action a claim for

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over two thousand dollars ($2,000) no matter how founded, and something else over which we have no jurisdiction and thus give us jurisdiction in the latter matter, or in the converse case begin and prosecute a *quo warranto* proceeding and join to it a claim for over two thousand dollars ($2,000) and thus force an appeal here.

I incline to think not, and yet we are to give in any case, if we reverse the judgment which the court below has pronounced, the judgment and award the process or other proceedings which the court should have given or awarded.

One curious thing is the court below has no more power to hear appeal in a case of *quo warranto* than we, and yet it has heard this case in appeal and come to the decision that the case is not well founded.

Must we not first solve the question of the right of the court of appeal to interfere?

My solution is that if the case is to be held as one of *quo warranto*, then it is quite too clear for argument the court below had no jurisdiction, and its judgment ought for that reason to be reversed.

But as the question of whether the proceeding is one of *quo warranto* or not, despite the order therefor, is one of procedure, with regard to which we, according to the practice of this court, never exercise jurisdiction unless in a case, not this, wherein appears a violation of the principles of natural justice; and as the court of appeal has treated it as if not a case of *quo warranto*, I assume, for the present, that court did rightly in so treating the matter, and must, therefore, proceed to such merits as the case may have.

This section 338 quoted must be read in light of sections 42 and 336 of the charter.

Section 42 is as follows, as replaced by Edw. VII. ch. 62, art. 6, in 1903:

The functions of the finance committee shall be: The preparation of the annual estimates of expenditure; the consideration of all recommendations involving the expenditure of money, and the awarding of all contracts, subject to the ratification by the council, for works, material and supplies, unless an appropriation has been already voted.

No recommendation for such purposes shall be adopted by the council unless the same shall have been previously submitted to and sanctioned by the finance committee; provided, however, that, upon the refusal of the finance committee to sanction an appropriation asked for by any committee, the council may, by a vote of the absolute majority of all its members, order such appropriation to be voted. No member of any other permanent committee can be a member of the finance committee.

The plan outlined is clearly and expressly that in the finance committee and therein alone can lawfully be formulated any authorization involving the expenditure of money.

I will not say that the council or any one else might not discuss such matters, and in that limited sense submit the propriety of the proper authority being moved in the matter to a consideration thereof. But one thing the council must not do without the committee's consent or refusal, and that is to recommend in the sense of authorizing an expenditure of money.

They have no such power unless an appropriation has been voted. Indeed, neither council nor committee can alone do so effectively.

The appropriation, which in the words of the statute has already been voted, must have had the recommendation of the committee first or its refusal to make such a recommendation.

Either thing once done the council is free to act by a vote (if necessary of an absolute majority of all its members), but not otherwise or until then.

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The finance committee in any representative body usually comprises the ablest men of experience available therein.

In this instance the control of the city's business was thus practically, and I think intentionally, handed over to the majority of the finance committee dealing with any matter.

But they cannot be autocratic for the council by an absolute majority can overrule them.

The plan, whether stumbled on, or the fruit of much thought, is an admirable one but for one thing, and that is, that it imposes the painful duty of thinking. It is essentially the plan of controllerships.

In this latter case men understand by seeing the physical severance and act accordingly.

There is another section, that is 336, which reads as follows:

> No resolution of the council or of any committee, authorizing the expenditure of any moneys shall be adopted, or have any effect, until a certificate of the comptroller is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

The whole law necessary to a determination of this issue is contained in these three sections, but has been obscured by side issues arising from a consideration of rules of procedure, statutory, and otherwise. So far as statutory they emphasize if possible the need for the observance of these sections of the charter and so far as otherwise can have no effect.

Let us see the thing the respondents did which is complained of.

On 18th May, 1908, the council on motion of one of respondents adopted the following resolution:

Soumise et lue, une communication du comité Dupleix, Paris, invitant le maire à représenter la cité à l'occasion du tricentenaire de la fondation de Québec par Champlain. Sur motion de M. l'echevin L. A. Lapointe, appuyé par l'echevin Yates, il est resolu: Que la dite invitation soit acceptée, que son honneur le maire accompagné de son secrétaire, soit prié de représenter la ville en cette circonstance et que la commission des finances reçoive instruction de mettre à la disposition de son honneur le maire, le montant nécessaire pour couvrir ses frais de déplacement.

On the 29th May, 1908, the finance committee responded to this appeal by the following:

Submitted and read a communication from His Worship the Mayor, asking that a sum of $1,500 be placed at his disposal for travelling expenses on the occasion of his trip to Europe to represent the city at the tercentenary celebration of the foundation of Quebec.

Resolved, to instruct the city treasurer to comply with the mayor's request and to advance him the said sum of $1,500.

The respondents were parties to this.

The money was paid and the mayor and others travelled.

Something unpleasant occurred in the course of the accounting for the expenses.

We have nothing to do with that and all else which followed except that by the like illegal methods as outlined above connected with the same matter the respondents permitted and procured to be taken out of the treasury, without observing the prescribed statutory rules, sums in the aggregate which the Court of Review has found.

What appears on the face of these transactions so far as material, is that the respondents, within the words of the section first quoted, authorized an expenditure of money exceeding the amount previously voted, and thereby legally placed at the disposal of the council or committee. I cannot fritter away the force

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of the section by assuming it inoperative unless there had been a previously voted sum appropriated to the same purpose, or by adopting the statutory directions as to appropriations as a voting thereof, and thus a compliance with what is prescribed.

I repeat that section 42 constitutes the consideration of all recommendations, involving and authorizing the expenditure of money; first the duty of the committee and then of the council. Section 336 imposed also the respective duties of the committee seeing the certificate therein called for sent forward with its recommendation to the council and of the council refraining from voting till that certificate was received; for until then the recommendation was invalid.

With great respect I think the five per cent. or reserve fund specially set apart by sub-section (*d*) of section 334, as amended by 3 Edw. VII. ch. 62, was in law exactly in the same position as all the other funds of the municipality and required the provisions of section 42 to be observed in respect thereof. The statute did not place this reserve at the disposal of the council any more than other funds. Indeed, it was as to two per cent. a provision against loss merely. Although possibly, in harmony with the statute, the budget scheme might have included that in its frame, yet in no such sense as involved in the said duty laid down in section 42 can it be said to have been voted as an appropriation.

When were any of these moneys placed at the disposal of the council or any committee?

What had the finance committee ever done as required by section 42 to place any such moneys at anybody's disposal in any way to justify what was done?

Until the finance committee passed upon the matter and set aside for this purpose the necessary money forming part of this statutory reserve nothing could be legally done with it. It fell under section 42 just as other moneys were put.

To say it was available for the committee and council by proper methods is one thing. To apply or fail to apply those methods is entirely another thing.

The failure of duty upon which the foundation for the attack on respondents rests is entirely that in respect of proper legal methods they failed to observe their obligations in that regard which were as plainly written as language could make it if attentively read.

I think the appeal must be allowed and judgment go for the amounts awarded by the Court of Review. The penalties claimed cannot be awarded herein.

The section sued upon does not give any right of action in the nature of a *quo warranto* or anything leading to like results. The action is founded on the right of a rate-payer not questioned here to invoke such a statutory provision.

In light of what the court of appeal holds, however, in what I repeat is a mere matter of procedure, I do not see my way to vacating that declaratory part of the judgment.

With great deference, but for that, I would rather have held the parties to an action for money as one independent in every way of anything in the nature of *quo warranto*.

The one is not dependent on the other, though the same facts and laws may and indeed must produce in one case a judgment for money, and in the other a vacant seat.

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DUFF J.—This appeal raises first a question of procedure, which in one view of it involves the question of the jurisdiction of this court to entertain the appeal.

The action in which the appellant was plaintiff was in form of proceeding in *quo warranto,* and calling upon the respondents to shew cause why they should not be declared to be disqualified to sit as members of the municipal council of the City of Montreal, under article 338 of the City Charter, and asking also that under the provisions of that article they should be directed to repay to the city certain sums voted by them to defray the expenses of a delegation to Paris to take part in a celebration on the occasion of the tercentenary of the founding of Quebec. The Court of King's Bench has held that the action, though in form *quo warranto,* was in substance a special action under article 338. The respondents dispute this view and contend that the proceeding was in substance *quo warranto,* and that it was incompetent to the plaintiffs to include with the claims for relief appropriated to such proceeding a claim for the repayment of the moneys mentioned; they further contend that treating the action as a proceeding in *quo warranto* simply an appeal does not lie to this court. As to this contention it is sufficient to say that the view of the court of appeal is concurred in by the members of this court specially qualified to form an opinion upon a question of law of procedure in the Province of Quebec, and I see no adequate reason for disagreeing with that view.

The question of substance raised by the appeal turns upon the construction of certain articles of the Charter of Montreal, and it arises in this way: On the 1st of May, 1908, the council on receiving communica-

tion of a letter addressed to the mayor inviting him to represent the City of Montreal on the occasion mentioned, passed the following resolution:

Resolved: That said invitation be accepted, that His Worship the Mayor accompanied by his secretary be requested to represent the city on this occasion, and that the finance committee be instructed to place at the disposal of His Worship the mayor the necessary amount to cover his travelling expenses.

Subsequently the finance committee the members of which (the respondents) were the defendants in the action authorized the city treasurer at the request of the mayor to pay him to him the sum of $1,992.40 in liquidation of the expenses, the payment of which the council by this resolution professed to authorize.

The ground upon which the appellants rest their claim to have this sum refunded by the respondents, is that the resolution of the council was for various reasons inoperative to confer upon the finance committee any authority to authorize the payment of money out of the city treasury; and that the respondents having directed the disbursement mentioned without authority are compellable to restore the fund thus withdrawn under the provisions of article 338. The articles requiring consideration are 42, 334 and 338. It will be convenient to set them out in *extenso* now.

Article 42, as amended by 3 Edw. VII. ch. 2, art. 6, reads as follows:

The functions of the finance committee shall be: The preparation of the annual estimates of expenditure, the consideration of all recommendations involving the expenditure of money, and the awarding of all contracts, subject to ratification by the council, for works, materials and supplies *unless an appropriation has been* already voted.

No recommendation for such purpose shall be adopted by the council unless the same shall have been previously submitted to and sanctioned by the finance committee, provided, however, that upon the refusal of the finance committee to sanction an appropriation asked

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for by any committee, *the council may, by a vote of the absolute majority of all its members, order such an appropriation to be made.*"

Article 334. As replaced by 3 Edw. VII. ch. 62, article 27, [1903]:

In the month of December of each year, the council shall appropriate the sums at its disposal out of the revenues of the city for the needs of the various civic departments for the ensuing fiscal year.

In so doing, the council shall maintain the equilibrium between the revenues and expenses and provide for:

(*a*) The cost of the collection of the civic revenue;

(*b*) The interest upon the civic debt and sinking fund which may be established;

(*c*) The school tax;

(*d*) A reserve of five per cent.—two per cent. being to cover all possible loss in the collection of taxes and three per cent. for unforeseen expenses, such as those relating to judgments, official receptions, epidemics, inundations, fortuitous events and damages caused by irresistible force;

(*e*) Other established charges upon the civic revenue, including the deficit from any previous year;

(*f*) Repairs, maintenance, salaries and expenses for general administration.

334(*a*). Added by 63 Vict. ch. 49, art. 10, [1900]:

The reserve fund may also be employed to pay claims for damages arising from offences or quasi offences.

334(*b*). Added by 7 Edw. VII. ch. 63, article 12, [1907]:

The city may charge against the reserve fund the costs of representation and of delegations authorized by the council as well as the sums required for the settlement of claims and for the removal of snow and ice from the sidewalks.

Article 338:

Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

Added by 8 Edw. VII. ch. 85, art. 22, [1908]:

Nevertheless the said liabilities and disqualifications enacted in this article shall not exist if the council of the city has subsequently acknowledged and ratified the said expenditure of money as being valid and lawful. This provision shall have effect for the past only.

Invalidity is imputed to the resolution of the council on various grounds; but in my view of the case it is necessary to consider only one of them, which is this. —article 42 prohibits the adoption by the council of any proposal for the expenditure of money which has not been previously submitted to the finance committee, except in those cases in which an appropriation has already been voted. It is argued, and after the most careful consideration of the provisions of the statute I think the argument has not been answered, that in this case there was no appropriation within the meaning of this article of the sum disbursed or, indeed, of any sum for the purpose to which it was devoted and that the proposal was never submitted to the finance committee in the sense of article 42.

The first point for consideration is whether at the time of the passing of the resolution of the 18th of May there had been an appropriation within the meaning of article 42 of the sum in question. The point turns largely on the construction of article 334. It is argued with a good deal of force and plausibility that the city is expressly authorized by article 334(*b*) to charge expenses of this character against the reserve fund provided for by article 334, and that by the terms of the last mentioned article the reserve fund thereby directed to be provided is treated as a sum appropriated for all or any of the various purposes to which the statute authorizes the council to apply it. The statute does, no doubt, expressly authorize the city

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to charge such expenses as these against the reserve fund; but I am unable to follow the argument through to its conclusion. I do not think the reserve fund (created by the statute rather than by the council) can be treated as a sum appropriated in the sense indicated. The article 334, it is observable, requires the council in the December of each year to appropriate the sums *at its disposal* out of the revenue of the city for the needs of the various civic departments, for the ensuing fiscal year. It then goes on to direct that in thus providing for the disbursements of the revenues the city council shall make provision for certain permanent charges upon the city revenue—the cost of collection, interest upon debt and sinking fund, school tax, deficit from any previous year, "other established charges upon the revenue," maintenance, salaries and expenses for general administration. It is perfectly clear that in each one of these cases it is intended that the council should set apart sums, specific and ascertained, and that it should at the same time declare the purposes (with more or less precision as the circumstances may admit) to which these sums are to be applied.

It is perfectly clear, too, that the duty of preparing and considering the estimates upon which the appropriations are based devolves under article 42 upon the finance committee. The reserve fund stands necessarily in a different category. It is obviously intended to be what its name imports, viz.: a fund that shall be available for expenditures the municipality may be called upon to make during the course of the year, but which cannot at the time fixed for making the appropriations be ascertained with any accuracy or certainty. It is in a word a provision for contin-

gencies. Does it follow that the whole of this fund is to be treated as a sum appropriated within the meaning of article 42? So to describe it seems to me to involve some disregard of the meaning of the words as well as the substance of the operation. The direction to provide for a reserve fund seems rather to aim at imposing a limit upon the annual appropriations in relation to the amount available for expenditures—a requirement to allow a margin which shall leave a fund that can be appropriated to meet unforeseen demands which may arise during the course of the year, rather than what is commonly understood to be an "appropriation." If this be the correct view it follows that there was no appropriation for the purposes to which the sum in question was applied. It follows too, I think, that the direction to the treasury to disburse the sum in question given by the finance committee was

an expenditure of money exceeding the amount previously voted and legally placed at the disposal

of that committee, because although the reserve fund was at the disposal of the council, who could disburse it on compliance with article 42, their attempt to disburse it was inoperative for want of compliance with that article. The respondents are consequently accountable for the sum so paid out by the committee without authority.

I have not overlooked the view expressed by Archambault J. upon the construction of article 42. If I have correctly apprehended the learned judge's view it is that the article applies only to "recommendations" made by committees of the council and not to proposals initiated in the council itself. I quite agree that if that is on its true construction the meaning of

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the article there is an end of the matter so far as this point is concerned; but I can see no valid reason for thus limiting the scope of the word "recommendation." I do not know why it should not be held to embrace any proposal made by the mayor or by any other member of the council involving any expenditure of money. I think the true construction is that which council itself has adopted in Rule 124, which requires that "any resolution, motion or report" involving the disbursement of any part of the revenues of the city shall first be submitted to the finance committee.

There remains to consider the contention that the omission to submit this proposal to the finance committee should in the circumstances be regarded as a mere irregularity not affecting the validity of the transactions impugned. It is argued that in point of fact the proposal was passed upon both by the council and by the finance committee, and that in the circumstance that the council passed upon the proposal first and the committee afterwards there is involved no substantial departure from the requirements of the charter. I do not think that is a very satisfactory way of treating the express requirements of a legislative enactment such as this—designed as it is to provide machinery for securing the due administration of the funds of a municipal corporation. I do not, of course, profess to know the exact degree of importance which the legislature attached to the prohibition found in article 42. One cannot, however, lose sight of this; the legislature has entrusted not only the preparation of estimates, but the examination of all proposed expenditures to a special committee, and I am unable to say that they

may not have considered it of real importance that the municipal council in dealing as a council with the funds entrusted to its care should, before passing and as a condition of the power to pass upon any proposal involving the expenditure of money not already appropriated, submit that proposal to this committee for examination. It is not very much to the purpose to say that the council might eventually override the committee. The function of examining and advising is one function, the function of vetoing is another, and the fact that the legislature has not seen fit to endow the committee with the latter is not a ground upon which a court of law can legitimately treat the first named function as a matter of form merely. It does not, moreover, help the matter to say that the expenditure was in fact passed by the finance committee. If my view of article 42 be correct what the law requires is that the proposal, having been examined by the finance committee in the exercise of the responsibility cast upon them by article 42 shall then, and only then, be ripe for the action of the council. Obviously it is a vastly different procedure for the council first to put its imprimatur upon the proposal and then to instruct the finance committee to carry its decision into effect; and that in substance is what the respondents are called upon to uphold.

It is only bare justice to the respondents to say that no imputation involving any personal reflection upon them was seriously advanced, and in such circumstances there is a natural and justifiable regret that in the absence of *malus animus* they should suffer the penalties which will be the result of their proceedings; on the other hand it is a paramount consideration that the safeguards with which the legislature has surrounded the administration of the public funds

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should not be trifled with, and with very great respect I think one could not accede to the views advanced in behalf of the respondents without giving a start to the frittering away of the important provisions of section 42.

The appeal should be allowed with costs and judgment should be against the respondents for the restoration of the moneys disbursed with the costs of the action.

ANGLIN J.—The facts of this case and the contentions of the parties sufficiently appear in the judgments rendered in the provincial courts.

The judgment of the Court of King's Bench, reversing that of the Court of Review, and dismissing the action of the appellant, is impugned upon the grounds that the Court of King's Bench entertained the respondents' appeal without jurisdiction, and that upon the merits the judgment of the Court of Review, which had reversed that of the court of first instance, should not have been disturbed.

The action of the appellant was not, in my opinion, primarily or principally in the nature of a proceeding in *quo warranto*. He primarily and principally sought to compel the reimbursement by the respondents, the seven members of the finance committee of the municipal council, to the City of Montreal, of the sum of $3,809.40, the expenditure of which he claims they illegally authorized; and, incidently, to have them disqualified. He also sought to have them subjected to a money penalty. His action was brought to enforce against the defendants the special remedies and penalties provided by article 338 of the charter of the City of Montreal in case of such misconduct in office as he

charges against the defendants. He has added, improperly, I think, a claim that the defendants be condemned to pay a sum not exceeding $400 each to the Crown, by way of penalty.

I agree in the view that the provision which excludes the right of appeal in ordinary cases of *quo warranto* beyond the Court of Review, does not apply to this case; and that the Court of King's Bench therefore had the jurisdiction which it assumed to exercise.

Article 338 of the Montreal charter is as follows:

> 338. Every member of the council who authorizes either verbally, by writing, by his vote, or tacitly, an expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee, shall be held personally liable therefor, and shall thereby become disqualified as a member of the council, and shall also be disqualified for re-election as alderman for a period of two years thereafter.

Did the defendants authorize "an expenditure exceeding the amount previously voted and legally placed at the disposal" of the finance committee?

The expenditure in question was made out of "the reserve fund"(1). This fund is by the annual budget placed under the control of the council itself. It could only be placed at the disposal of the finance committee by a legal and sufficient act of the council. The resolution of the council upon which the finance committee acted was passed without any previous recommendation of that committee, contrary to the provisions of article 42 of the city charter, and without any certificate of the comptroller having been first obtained, in violation of the requirements of article 336. The resolution did not designate any fund out of which

(1) Art. 334(*d*).

the expenditure should be made, nor did it specify either the amount or the maximum amount to be expended. By article 334(*b*) the council is empowered to provide out of the reserve fund for the expense of representation and of delegations.

By article 42 the council is forbidden to pass any resolution for expenditure without a prior recommendation of the finance committee, unless the latter body has refused to recommend, and such refusal has been overruled by a majority of all the members of the council. Rule 124 of the council is to the same effect. Under article 336 the passage of any such resolution without production of the comptroller's certificate shewing that there are funds available therefor, is prohibited, and it is provided that a resolution so passed shall not "have any effect."

For the respondents it is asserted that the non-observance of these provisions of the charter was a mere informality or irregularity which would not prevent the resolution of council operating to legally authorize the finance committee to draw upon the reserve fund—that the committee therefore drew upon a fund "legally placed at its disposal."

I am unable to take this view. I cannot understand how a resolution of council, which is by the charter expressly declared not to have any effect, can operate to legally place the reserve fund *pro tanto* at the disposal of a committee. The comptroller's certificate required by article 336 was never obtained. Two other certificates, which the rules required should be attached to the warrants for payment were secured, but not until some time after the moneys had been actually paid over by the city treasurer. Neither of these was the certificate required by article 336.

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The absence of the preliminary recommendation of the finance committee prescribed by article 42 is excused on two grounds: (*a*) that the reserve fund was under the direct control of the council itself; and (*b*) that the finance committee subsequently assented to the expenditure.

As to the former, I think it clear that the council could not have legally authorized the expenditure by any other committee of part of the reserve fund without the preliminary recommendation of the finance committee prescribed by article 42. As to the latter, it by no means follows that the finance committee in carrying out the order of the council to make the expenditure directed, exercised in regard to it any such duty or power as that conferred on it by article 42— a power or duty which the article contemplates shall be exercised before and not after the authorization of the expenditure by the council. In directing the payment pursuant to the resolution of council the committee may well have deemed itself to be discharging a purely ministerial duty.

I am of the opinion that the members of the finance committee by their votes authorized an expenditure of money which was, for both of the above reasons, not "legally placed at their disposal."

The omission to indicate the fund out of which the expenditure should be made was, in view of article 334(*b*), probably only an irregularity. The omission to fix the sum or the maximum sum to be expended, although a more serious defect, would probably not suffice to nullify the resolution.

I do not pause to consider the allegation that there was improper expenditure by the mayor's secretary. Upon the argument I was not convinced that this was

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established, and further consideration of the evidence has not satisfied me that a finding against the defendants upon this ground would be warranted.

Having regard to the good faith of the respondents which has not been seriously questioned, and to the facts that no real injustice has been done the city; that the finance committee, if asked, would probably have recommended the expenditure; and that the comptroller could certainly have given the certificate called for by article 336, I regret to find myself obliged to reach a conclusion which must entail such grave consequences to the respondents. But it is of the utmost importance that all the safeguards which the legislature has ordained for the protection of the ratepayers of Montreal in matters of civic expenditure should be maintained intact. For this reason, no doubt, severe consequences are attached by article 338 to certain breaches of duty in this connection, regardless of whether they are or are not intentional. While regretting that, in the circumstances of this case, the respondents must suffer, being satisfied that what they have done falls within the purview of article 338, I know of no power or right in this court to exempt them from its provisions.

With the greatest respect for the Court of King's Bench, and also for those of my colleagues with whom I find myself unable to agree, I am of opinion that this appeal should be allowed and the judgment of the Court of Review restored with costs throughout to be paid by the respondents to the appellant.

Appeal allowed with costs.

Solicitor for the appellant: *Charlemagne Rodier.*
Solicitors for the respondents: *Ethier & Co.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA........ } APPELLANTS;

1909 *Dec. 16, 17.
1910 *Feb. 15.

AND

THE DEPARTMENT OF AGRICULTURE OF THE PROVINCE OF ONTARIO.................. } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Appeal—Limitation of time—Railway Commissioners—Question of jurisdiction — Leave by judge — Powers of Board — Completed railway—Order to provide station—R.S. [1906] *c.* 37, *ss.* 26, 151, 158-9, 166-7, *and* 258.

Except in the case mentioned in Rule 59 there is no limitation of the time within which a judge of the Supreme Court may grant leave to appeal under sec. 56(2) of the "Railway Act," on a question of the jurisdiction of the Board of Railway Commissioners.

The Board of Railway Commissioners has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road. Idington and Duff JJ. dissenting.

APPEAL from an order of the Board of Railway Commissioners by leave of the Board on a question of law and by leave of Mr. Justice Duff on a question of jurisdiction.

On July 22nd, 1909, the Railway Board granted an application from the Ontario Department of Agriculture for an order directing the Grand Trunk Railway

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

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Co. to provide station accommodation for traffic at a place in the County of Lincoln, where the Department owns and conducts an experimental fruit farm. The railway company on August 7th obtained leave from the Board to appeal from said order to the Supreme Court of Canada, and on October 13th the Board made an order extending the time generally for an application to the Supreme Court for leave to appeal on a question of jurisdiction, and on October 28th such time was extended to November 10th, and leave to appeal was granted by Mr. Justice Duff on November 5th.

The question of law on which the appeal was taken by leave of the Board was stated as follows in the application for such leave.

That the decision is wrong as a matter of law in holding that the railway company must provide and construct a station which requires the acquirement by the railway company of additional lands which they have no immediate power to take.

The question of jurisdiction was whether or not the Board had power under the provisions of the "Railway Act" to make such order.

By the order of Mr. Justice Duff the question of jurisdiction of the Supreme Court to hear the appeal on the ground that the leave of the judge was not asked for within sixty days from the date of the order of the Board was left open and was discussed in connection with the argument on the merits of the appeal.

Chrysler K.C. for the appellants. The Board has no power to compel a railway company, whose line is completed and already provided with stations, to erect

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a new station at any point, and especially so when it would require the company to acquire additional land when its powers of expropriation are exhausted. See *Hastings Town Council* v. *South Eastern Railway Co.*(1); *Harris* v. *London & North Western Railway Co.*(2).

Lancaster K.C. for the respondents. Leave to appeal on a question of jurisdiction cannot be granted after the expiration of sixty days from the date of the order.

On the merits see Am. & Eng. Encyc. of Law, 635-8; Maxwell on Statutes (4 ed.), p. 78; *Winnipeg Jobbers and Shippers Association* v. *Canadian Pacific Railway Co. et al.*(3).

THE CHIEF JUSTICE.—The majority are of opinion that this court is competent to hear this appeal. As to the order complained of, I am of opinion that the Board has authority to order the company to establish a station at the place indicated. Section 151 of the "Railway Act" empowers the company (sub-sec. *g*) to construct, erect and maintain all necessary stations for the accommodation and use of the traffic and business of the railway; (sub-sec. *p*), from time to time to alter, repair or discontinue any station and substitute another in its stead. When the line is located and the location is approved of by the Minister of Railways the company must prepare (section 158) a plan to shew, among other things (*c*) "the station grounds." This plan is made subject to the approval of the Board (section 159), which may require any

(1) 3 Ry. & Can. Traf. Cas. 179.
(2) 3 Ry. & Can. Traf. Cas. 331.
(3) 8 Can. Ry. Cas. 151.

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further information they may deem expedient (section 166), and this would include detailed plans of the station to be erected so as to enable the Commission to decide if they are sufficient for the accommodation and business of the railway, and the company shall not commence the work of construction until these plans have been submitted to and approved of by the Board (section 168). Section 258, par. 1, provides that every station shall be so erected and maintained as to provide suitable and sufficient accommodation and facilities for traffic, and par. 2, that the location of every station shall be approved of by the Board before the company proceeds to erect it.

From all this it appears that every station with respect to its location, plan of construction and maintenance is completely under the control and subject to the approval of the Board. Section 151, sub-sec. (*p*), empowers the company to alter, repair or discontinue a station and to substitute one station for another; but by section 167 all such changes and alterations must be approved of by the Board ("railway" includes stations, section 2, sub-sec. 21), with which lies the duty to require that all stations are so located, erected and maintained as to provide good and sufficient accommodation and facilities for traffic.

The argument pressed upon us by the appellant was that all this pre-supposes action by the company and in the absence of such action the Board is without jurisdiction. It necessarily follows, therefore, in that view that however great may be the necessity which exists in any particular locality for additional station accommodation to satisfy the requirements of the traffic that the road is intended to serve and which it may have helped to create, the Board is without

power to give relief. When under construction the Board has absolute power to fix the location of all stations so as to meet the expected requirements of the community to be served, but when the necessities of traffic are made apparent, by the operation of the railway, the Board is powerless to interfere. Such a conclusion is absolutely inconsistent with the purpose and object of the Act.

I am of opinion that the jurisdiction conferred by section 28 is wide enough to meet this case. That section, par. 1, and sub-sec. 2, gives the Board full jurisdiction of its own motion to order and require any company to do anything which such company is or may be required or authorized to do under this Act, so far as it is not inconsistent with the Act. The company could not locate or build a station, or alter, substitute or discontinue an existing station without the approval of the Board. From this it necessarily follows, in my opinion, that if nothing con be done by the company with respect to the location, erection or substitution of one station for another without the authority of the Board, the Board may order what it alone can authorize.

In addition, sub-section 3, of section 258, gives the Board absolute power to direct stations to be erected on certain provincial railways subsidized by the Dominion Government from which I infer that this power would not be conferred with respect to those railways if it does not exist as to all others. Why should the Board have with respect to this very limited number of roads, which come by exception under its jurisdiction, a power which they have not in connection with those roads which are completely and absolutely under their control from the time the line is

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located? The best explanation I can find of this ambiguous sub-section is that it is intended to meet the case of railways which are not otherwise under the Board's jurisdiction and to which sections 151, 158, 159, 166 and 167, do not apply. To say that all railways subsidized after July, 1900, are subject to the jurisdiction of the Board absolutely as to the erection and maintenance of stations and that, as to others, the Board is without jurisdiction to do more than to approve of those that in the opinion of the company are necessary does seem to be singularly unreasonable.

As to the power to expropriate, which was the chief question discussed before the Commissioners, if the power of the Board to order the erection of a station is admitted, section 178 is quite wide enough to cover this objection. As to the English cases, it must be borne in mind that the powers conferred upon the Canadian Board extend to a greater number of subjects than are brought within the jurisdiction of English and American Boards.

If it be true that the action of the company in the exercise of its powers with respect to stations may be controlled by the Board, but that no power or authority is reserved to or conferred by section 26 upon the Board by which it is enabled to compel the company to act, then I would say that the appeal should be dismissed for the reasons given by Sir Louis Davies. A station is necessarily incidental to the conveyance of goods and of passengers, and the Board has undoubtedly the power to order the company to give adequate facilities for both.

I would dismiss the appeal with costs.

GIROUARD J.—I believe the appeal is properly before this court and, moreover, that the Board had

jurisdiction to pass the order appealed from under sections 28, 258, 284 and 317, of the Dominion Railway Act.

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DAVIES J.—This appeal raises the substantial and important question whether the Board of Railway Commissioners has jurisdiction and power to order a company having a completed and running railway to provide and establish new stopping places and stations along its line of railway so as to afford adequate and suitable accommodation from time to time for increased traffic upon the road.

A preliminary question was raised as to our jurisdiction to hear the appeal on the ground that it is an appeal upon a question of law and that the necessary leave to bring it had not been obtained from the Board within the prescribed time or within any legal extension of that time. The facts were that on the 7th of August, 1909, the Board of Railway Commissioners granted the appellants leave to appeal to this court from the order of the Board complained of, and that, on the 13th of October, 1909, the appeal allowed not having been brought, an extension of time was granted by the Board after hearing the parties. This extension was in general terms merely extending the time without saying for how long, but, on the 28th of October, a further extension was granted up to the 10th of November, 1909.

On the 5th of November, Mr. Justice Duff granted leave to appeal from the order of the Board on the ground of alleged want of jurisdiction, subject to terms and conditions, one of which was that his right to make the order when he did should remain open for disposition on the hearing of the appeal.

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I have reached the conclusion that there being no limitation in the "Railway Act" upon the power of a judge of this court to grant an order allowing an appeal from an order of the Board of Railway Commissioners on the ground of want of jurisdiction, and no rule of this court limiting the exercise of such power, it remains untrammelled, so far as time is concerned, unless there is something in the rules and practice applicable to appeals from the Exchequer Court, which must be held to limit it. These rules are, under sub-section 7, of section 56, of the "Railway Act" (3 Edw. VII. ch. 58), made applicable to appeals such as this until special rules are made with respect to such appeals. I have not been able to find any limitation of time upon the power of a judge of this court to grant an appeal upon a question of jurisdiction, apart from the question whether there has been a legal extension of time by the Board of Railway Commissioners as would support an appeal from their order on a question of law. I am of opinion that the whole question being litigated is properly before us under the order of Mr. Justice Duff on the question of want of jurisdiction in the Board and that we have jurisdiction to hear this appeal.

On the merits of the appeal I have reached the conclusion that the Board of Railway Commissioners had power to make the order complained of. By subsection 31, of section 2, of the "Railway Act," "traffic" is defined to mean "the traffic of passengers, goods and rolling stock." By sub-section 1, of section 284, it is enacted that:

The company shall, according to its powers:

(*a*) Furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for

the receiving and loading of all traffic offered for carriage upon the railway;

(*b*) Furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic;

(*c*) Without delay, and with due care and diligence, receive, carry and deliver all such traffic; and

(*d*) Furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering such traffic.

The other sub-sections go on to make further provisions as to what "adequate and suitable accommodation" shall include and confer special powers on the Board to make orders respecting the same, and for the construction and carrying out of specific works or acquiring of property necessary under the circumstances.

But the controlling words upon the meaning to be given which the construction of the entire section rests are to be found in sub-section (*a*) above quoted:

> The company shall * * * furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, etc.

Here are three distinct places dealt with, first, starting places, secondly, junctions with other railways, and, thirdly, stopping places established for the purposes of receiving, loading, unloading and forwarding traffic. The question arises on the threshold of the argument: Do these places refer *only* to those which existed at the moment the railway was completed and running? By way of testing it I asked Mr. Chrysler, during the argument, whether he would contend that "the junction of the railway with other railways" was confined to junctions which existed at the time of the completion of the railway. He did not desire to commit himself on that point contenting himself with strenuously contending that "stopping places estab-

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lished for such purpose" of giving adequate and suitable accommodation for traffic purposes applied exclusively to such "stopping places" as had been sanctioned and approved of when the railway plans were submitted to and approved of by the Board, and did not confer a power upon the Board of establishing such stopping places from time to time along the railway as increasing or changing trade and railway traffic might call for. Such additional stopping places for stations he submitted were left to the control and determination of the railway company itself. I confess the language of the statute is somewhat ambiguous. To sustain his argument I think the learned counsel would have to insert after the words "established for such purpose" in the third line of the subsection the words "when the railway was completed," and to sustain my conclusion I have to insert the words "from time to time."

A fair and not an unreasonable test as to whether the section should be read with respect to such conditions only as existed when the plans of the road were approved and the road fully completed is to attempt to apply such a construction to the second of the three places dealt with, namely, at "the junction of the railway with other railways." Such junctions are constantly being made under the orders of the Board under conditions fair to both railways and the protection of the public. It would be a narrow construction indeed which would limit the "junctions" mentioned in this section, and as to which the Board could exercise its powers of ordering a stopping place to be established and a station built to those only which existed at the time the railway was completed. No such construction would, in my judgment, be sound. The law must be interpreted as always speak-

ing, and when it vests in the Board power to make the necessary orders to ensure "adequate and suitable accommodation" for the traffic on the road at the junctions of the railway with other railways it evidently means such junctions as are from time to time with the approval and sanction of the Board permitted. If the conclusion is once reached that the section refers as well to junctions existing on the completion of the road as to those subsequently established, then it would seem to follow, in the absence of clear and definite language shewing a contrary intention with regard to stations, that the same rule of construction was applicable to the language "all stopping places established for such purpose." The section would, in this construction, carry out what one would suppose, looking at the main purpose and object of the Act, must have been the intention of Parliament. As the Chief Justice suggested, during the argument, the Act was an effort to combine private ownership with public control. But Mr. Chrysler suggested that the right of expropriation on the part of the company ceased with the completion of their road and that a construction would not be put upon the section involving a right on the part of the Board to make an order establishing a station upon a particular spot by a railway incompetent for want of statutory powers of expropriation to carry it out. The special conditions made in this order for the furnishing by the company of the lands necessary for the purposes of the station ordered might not, of course, necessitate the exercise of any compulsory powers. But that accident or fact cannot, of course, determine the jurisdiction of the Board. I find, however, in the 178th section the fullest powers given the railway

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companies for the compulsory taking of lands required by them, at any point, for (*inter alia*),

the construction or taking of any works or measures ordered by the Board, etc.

I see no ground for limiting the construction of this section to such requirements as the railway company may, of its own motion, deem necessary, and excluding such as the Board may order against the company's wish. I think it fairly includes the latter. Looking, therefore, at the "Railway Act" as a remedial measure, establishing a public board of commissioners with powers to be used for the public protection in providing against abuses and preventible dangers and ensuring, amongst other things, adequate and suitable accommodation for the reception, delivery and forwarding of traffic, and construing section 284 with that knowledge, I can only conclude either that it does vest in the Board the authority claimed and exercised by it in this case of establishing a stopping-place within the meaning of those words in sub-section (*a*), or that there has been a *casus omissus* and one of the most necessary powers to ensure adequate and suitable traffic requirements overlooked. My construction of the language of the section saves me from accepting the latter conclusion.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—I regret to be driven to the conclusion that the Board has not jurisdiction to make the order in question.

Section 284 of the "Railway Act" relied upon does not, to my mind, furnish such power as claimed.

The language of the first group of sub-sections of that section evidently pre-supposes established stop-

ping-places, and proceeds accordingly to direct and render it possible for the Board further to direct the necessary details for executing its purposes.

It does not, except in sub-section 5, empower the establishment of new stopping-places.

Sub-section 5 expressly provides power for the Board to fix, under the circumstances therein specified, new stopping-places in such limited cases.

If there existed already anywhere the power to direct new stopping-places, that sub-section was quite unnecessary.

Its existence seems to exclude any reasonable ground for attributing to any part of the whole section, or elsewhere in the Act, any general power to create new stopping-places.

It is urged that orders of a like kind have been made and obeyed as of course. I cannot see any force in that. It simply means the company so directed comprehended the importance of a public demand of which the official notice was thus given.

Railway managers know these orders of the Board are not made for amusement and that it is an unwise thing, as mere business expediency, needlessly to antagonize the public.

Of course, cases arise when such expediency may be overborne by other considerations.

As to the right to hear this appeal, I think the Board has, acting within its power, very properly, so placed the matter that there is no doubt of our jurisdiction to answer the question submitted.

The second part of Mr. Biggar's application, as adopted by the Board, is but a reason or ground of objection and does not necessarily cover the essence thereof.

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I submit we should not be astute to find a means of evading answers to the submissions of the Board. The sooner any defect in jurisdiction is declared, the better so, that Parliament may act, if it find it expedient to do so.

DUFF J. (dissenting).—The question raised by this appeal is whether the Board of Railway Commissioners has authority to order a railway company having a railway in operation to establish a stopping-place where none exists.

In discussing the question it will be convenient to consider first the provisions of the Act which expressly deal with the establishment of the sites of stations and stopping-places generally. By sub-section (*g*) of section 151 which defines the general powers of the company, the company is empowered itself to

construct, erect and maintain all necessary and convenient * * * stations, depots, * * * and other structures necessary for the accommodation and use of the traffic and business of the railway;

and by sub-section (*p*) from

time to time discontinue such works or any other of them * * * and substitute others in their stead.

By section 158, sub-sec. 2, it is provided that the plan of the railway, which by that section the company is directed to make, shall shew amongst other things the names of terminal points, and "the station grounds"; and by section 159

such plan, profile, and book of reference shall be submitted to the Board which if satisfied therewith may sanction the same.

By section 258, sub-sec. 2, it is enacted, that

before the company proceeds to erect any station upon its railway the location of such station shall be approved by the Board.

These are the only provisions of the Act which deal

generally in express words with the assignment of sites for stations and stopping-places, and the result appears to be that all such sites are to be shewn upon the plan of the railway filed pursuant to section 158, and that no station other than those whose sites are exhibited upon this plan shall be subsequently established until the Board shall have approved the proposed site of it.

There is nothing in any of these provisions investing the Board with authority to compel the company against its will to establish any station or stopping-place at any site other than the sites shewn upon this plan or afterwards selected by the company with the approval of the Board under section 158(2). These I have said are the provisions which deal with the sites of stations and stopping-places generally. There is one other provision providing for a special case; and that is sub-section 5 of section 284. That sub-section is as follows:—

Where a company's railway crosses or joins or approaches, in the opinion of the Board, sufficiently near to any other railway, upon which passengers or mails are transported, whether the last-mentioned railway is within the legislative authority of the Parliament of Canada or not, the Board may order the company so to regulate the running of its trains carrying passengers or mails, *and the places and times of stopping them, as to afford reasonable opportunity for the transfer of passengers and mails between its railway and such other railway, and may order the company to furnish reasonable facilities and accommodation for such purpose.*

These being all the provisions of the Act dealing expressly with the establishment of such sites, it is at once observable that while no general power is expressly conferred upon the Board to establish a site against the will of the company, there is such a power conferred in the specific case provided for in the enactment last quoted. If these were all the

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provisions of the Act having a bearing upon the question the result would I think be very clear. We should then have before us simply one of those cases in which a power is conferred to be exercised in a specific case, and there is no provision conferring a more general power. As a general rule when authority is given by statute to some person or body to do something in a specified case and no power is expressly given to do that thing generally it may be taken that any such general power has been withheld; for the simple reason that if the general power existed the grant of the special power would be superfluous.

The provisions to which I have referred are not, however, those upon which the respondent mainly relies in support of its contention. It invokes chiefly section 284, sub-secs. (*a*), (*b*), (*c*), (*d*), 2, 3, and 6, and section 317. Sub-sections (*a*), (*b*), (*c*), (*d*) of section 284, are as follows:—

284. The company shall, according to its powers,—

(*a*) furnish, at the place of starting, and at the junction of the railway with other railways, and *at all stopping-places established for such purpose*, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;

(*b*) furnish *adequate and suitable accommodation* for the carrying, *unloading and delivering of all such traffic;*

(*c*) without delay, and with due care and diligence, receive, carry and *deliver all such traffic; and*

(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering *such traffic.*

Sub-section 6 of the same section provides that for the purposes of the section the Board may order "that specific works be constructed or carried out," and by sub-section 3 it is enacted that "if in any case such accommodation" (*i.e.,* the accommodation mentioned in sub-sections (*a*), (*b*), (*c*), (*d*)), "is not in the

opinion of the Board furnished by the company the Board may order the company to furnish the same."

I am not able to find in any of these provisions any grant of authority to make such an order as that under appeal. The subject matters dealt with in these provisions are the facilities and accommodation to be furnished by the railway in the reception, loading, carrying and delivering of traffic. The application of these provisions necessarily presupposes in each case traffic in the course of transit or offered for carriage or at the end of transit between a terminus *a quo* and a terminus *ad quem*. These provisions of the Act invest the Board with the supervision of the accommodation and facilities furnished by the company for the handling of such traffic; that is to say the reception and loading of traffic at places established for that purpose, the transport of it to places established for the delivery of it, and the delivery of it when it reaches its destination. Sub-section (*a*) which deals with reception and loading is confined in its application expressly to the place of starting, to the junction of the railway with other railways and to establish stopping-places. I do not think sub-sections (*b*), (*c*) and (*d*) have as regards stopping-places any wider application. Sub-section 2 applies only to junctions with private sidings or private branch railways; and sub-sec. 4 is in its operation expressly confined "to the places aforesaid" which would seem to include only the places mentioned in sub-section (*a*) and sub-section 2. In a word, with the single exception of sub-section 5 already dealt with, no part of section 284 appears to be directed to the establishment of stopping-places, but only to the facilities and accommodation to be afforded at such stopping-places, at the

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termini of the railway, and at its junction either with other railways generally or with private sidings or private railways.

It remains to deal with section 317, and a like remark applies to that section. The subject of it is the provision of proper facilities for the receiving, forwarding and delivering of traffic, but it presupposes, I think, traffic offered for carriage from one point at which the railway is bound to receive traffic to another point at which the railway is bound to deliver it or in transit between such points or at its destination ready for unloading or delivery. In these two sections (284 and 317), moreover, the legislature had in contemplation these subjects of accommodation and facilities. The subject of the establishment of stopping-places is specifically dealt with, as I have already pointed out, in other sections of the Act. It would, I think, involve some departure from sound principles of construction to treat the general language used in these two sections (assuming it to be broad enough to embrace the subject of the establishment of stopping-places) as applicable to a subject which has been specifically dealt with elsewhere, and which the legislature had not immediately in view in framing these provisions.

One further point requires notice.

It was strongly pressed upon us by Mr. Lancaster in his able argument that the scheme of regulation provided for by the Railway Act is the embodiment of a policy to apply public regulation to railways privately owned and that no such scheme could be beneficial or effective which did not involve the grant to the regulating authority of the power to dictate the establishment from time to time of stopping-places

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for the reception and discharge of traffic. I think there is some danger in giving effect to considerations of this kind. A court of justice has no means of ascertaining the views of policy upon which legislation is based except through the interpretation of the language which the legislature had used, and indeed we are not concerned with the ultimate motives which have induced the legislature to pass the enactment to be construed, but only with the meaning of the legislative provisions themselves by which the legislature has seen fit to give legal effect to its views. "Intention of the legislature," said Lord Watson, in *Salomon* v. *Salomon* (1), at page 38,

> is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

The appeal should in my opinion be allowed. There should be no costs.

Since the above was written a new point not raised in the argument has been suggested based upon section 28, sub-sec. 1, and section 26, sub-sec. 2 of the Act. It is said that the effect of these two sections is that whatever the Board may authorize a company to do under the Act, that the Board may require a company to do. It is then argued that since, under sub-section 2 of section 258 and under section 167, the Board is authorized to approve the establishment of new stations, by the combined operation of these different provisions the Board acquires authority to direct the company *in invitum* to establish a new stopping-place and sta-

(1) [1897] A.C. 22.

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tion. I am disposed to think that this construction of section 26, sub-section 2 is altogether too broad. The authority conferred upon the Board to require the company to do something it may authorize would seem to be intended to be exercised as ancillary only to the power to authorize. However that may be it seems to me there are two further answers to the argument:—First, such general enactments as section 26, sub-section 2 when found in statutes containing a great variety of provisions relating to diverse subjects cannot be applied mechanically in every case in which the words read literally might appear to justify such application. They must be read with the other parts of the Act; and subject to the implied condition that they are only applicable where neither by express words nor by necessary implication arising out of the subject matter or the context a contrary intention is made to appear. Where the provisions relating to a specific subject matter in themselves shew that the legislature did not intend the power to authorize to include the power to require —then according to well-established rules of construction the specific provision must prevail over the general. The foregoing discussion of the provisions relating to stations and facilities sufficiently indicates the grounds of my view that this subject of the establishment of stations has been dealt with in such a way as to exclude the application of any such rule as that said to be found in section 26, sub-sec. 2.

Again, giving to the words of section 26, sub-sec. 2, the wider signification, they could only be held to empower the Board to require something to be done (merely on the ground that the Board has power to approve such a thing) in circumstances in which approval by the Board is authorized. Sub-section

1 of sec. 28 does not help us in the least. That is only a section dealing with procedure; the substantial conditions of the jurisdiction of the Board to empower or authorize any given thing cannot be affected by it. Now sub-section 2 of section 258 involves not merely an application by the railway company which is a mere matter of procedure, but behind and giving rise to it a determination by the company to erect a station on its railway. The initiative of the company in that substantial sense is the essence of the whole provision. That condition is wanting here. So the condition of the operation of sec. 167 is that some alteration shall be required by the company to be made; that is the substantial condition on which the Board's jurisdiction rests. The application of section 28, subsecs. 1 and 2, to these provisions in the sense proposed seems to me for these reasons not to be permissible.

ANGLIN J.—I am of opinion that the sixty-day limitation imposed by section 69 of the "Supreme Court Act" does not apply to appeals from the Board of Railway Commissioners under section 56 of the "Railway Act." Sections 36 *et seq.* of the "Supreme Court Act" confer rights of appeal from provincial courts. To these appeals section 69 applies. A right of appeal from the Board of Railway Commissioners is, in certain cases, conferred by the "Railway Act," which imposes the condition that in cases where the appeal is upon a question of jurisdiction the leave of a judge of this court shall first be had, and, in cases where the appeal is on a question of law, the leave of the Board shall be obtained. I see no reason for holding that section 69 of the "Supreme Court Act" applies to these appeals so as to add another con-

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dition. Sub-section 7, of section 56, of the "Railway Act"—which makes applicable to appeals from the Board of Railway Commissioners the rules and practice applicable to appeals from the Exchequer Court—tends to confirm this view.

If section 82 of the "Exchequer Court Act" applies, the Board probably had jurisdiction to make the order pronounced by it, extending the time for appealing. If section 69 of the "Supreme Court Act" were applicable, in so far as this appeal involves a question of law, the Board would probably have the like power under section 71 of the "Supreme Court Act." But I find nothing to warrant the view that an appeal will not lie under sub-section 2, of section 56, of the "Railway Act," unless the leave of a judge of this court be obtained and the appeal brought within sixty days from the date of the judgment appealed from. The preliminary objection, therefore, in my opinion, fails.

By sub-section 2, of section 258, of the "Railway Act," it is provided that

before the company proceeds to erect any station upon its railway, the location of such station shall be approved of by the Board.

There is nothing to confine the application of this sub-section to railways projected or in course of construction; nothing to exclude from it railways already in operation.

By section 167, it is provided that

if any deviation, change or alteration is required by the company to be made in the railway or any portion thereof as already constructed, * * * a plan, etc., shall be submitted for the approval of the Board.

And, upon approval and deposit of such plan, etc., the company is authorized to make such deviation, change or alteration.

By section 2(21), "railway" is declared to include "stations." The establishment of a new station or stopping-place is a change or alteration in the railway.

It is reasonably plain from these provisions that the Board has jurisdiction to *authorize* the construction by the company of stations at new or additional stopping-places upon its lines already constructed and that, without such authorization, the company cannot lawfully establish a new station.

These provisions, however, seem to contemplate authorization on the application of the railway company.

But, by section 28(1), the Board is empowered to determine "of its own motion," any matter or thing which it may determine upon application, and it is, when so acting, given "the same powers as upon any application."

It may, therefore, of its own motion authorize the construction by the company of stations at new or additional stopping-places.

Then, by section 26(2), it is provided that

the Board may order and require any company or person to do forthwith, and within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required or authorized to do under this Act.

Being empowered to *authorize* the company to erect stations at new or additional points and being clothed by the sub-section last quoted with authority *to order and require* the company to do that which it may be *authorized* to do, it would seem to follow that the Board has jurisdiction to *order and require* the erection of a station at a new and additional stopping-place upon a railway already constructed.

These provisions suffice, in my opinion, to sup-

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port the order in appeal. Reference may also be made to sections 158(2*c*) and 159.

Sections 177 and 178 confer powers of expropriation quite sufficient to enable the company to carry out any order of the Board such as that in appeal.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *E. A. Lancaster.*

THE TOWN OF BERLIN............APPELLANTS;

AND

THE BERLIN AND WATERLOO STREET RAILWAY COMPANY } RESPONDENTS.

1909 *Nov. 18.

1910 *Feb. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Street railway—Franchise—Assumption by municipality—Principle of valuation—Operation in two municipalities—Compulsory taking—R.S.O. [1897] *c.* 208.

By sec. 41 of the "Ontario Street Railway Act" (R.S.O. [1897] ch. 208), no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration.

Held, reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise.

Held, also, that in view of the provisions in the "Street Railway Act" authorizing the municipality to assume owership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the Town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo.

On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six months more had elapsed. During the extended time an

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

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Act was passed by the legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the court.

Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.

The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. over and above the actual value of the property.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of Mr. Justice Britton, who affirmed the award of arbitrators appointed to determine the value of the Berlin and Waterloo Street Railway, the ownership of which had been assumed by the Town of Berlin on termination of the company's franchise.

Under the provisions of the "Ontario Street Railway Act" the Town of Berlin assumed ownership of the Berlin & Waterloo Street Railway when its twenty-year franchise expired. The arbitrators appointed to determine the value of the railway stated in their award that

"We find, award, adjudge and determine the value of the railway of the Berlin and Waterloo Street Railway Company, Limited, and of all the real and personal property in connection with the working thereof to be the sum of seventy-five thousand two hundred dollars ($75,200.00), which sum is the actual present value of the railway and of the real and personal property in connection with the working thereof, not taking into account or in any way dealing with the bonded

(1) 19 Ont. L.R. 57.

debt of the company, which is a charge upon the property of the company and which bonded debt was stated to us to be thirty thousand dollars.

"We further find, award and determine that the said railway and the said real and personal property so valued by us consist of and include the railway and all the real and personal property specified or mentioned in the schedule marked "A" hereto annexed, and that the above mentioned sum so found by us is the value of the said railway and property free and clear and fully and completely discharged of and from all mortgages, debentures, bonds, debts, liens, incumbrances, claims and demands whatsoever, either at law or in equity of every nature and kind whatsoever.

"In arriving at the above value we have valued the railway as being a railway in use and capable of being used and operated as a street railway and have not allowed anything for the value of any privilege or franchise whatsoever, either in the Town of Berlin or in the Town of Waterloo.

"It was argued before us on behalf of the Street Railway Company that the mode and principle of valuation should be to ascertain the amount of the present net earning power of the railway and to capitalize this amount so as to reach the correct value of the railway and the real and personal property in connection therewith. We have not been able to assent to that contention and have not reached our valuation as above in any way on that basis, but have considered only the actual present value.

"It was argued on behalf of the Berlin and Waterloo Street Railway Company that if our valuation was upon actual present value, we should add to the amount found by us as such present value, ten per

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cent. of that value as for compulsory taking. We have not been able to accede to this contention and have not added anything on that account."

This award was affirmed on appeal therefrom by Mr. Justice Britton, but on further appeal it was sent back to the arbitrators by the Court of Appeal, which held the true principle of determining the value of the company's property to be by capitalizating its net permanent revenue and taking that as the value. The municipality then appealed to the Supreme Court of Canada.

The franchise of the company expired in September, 1906, and by agreement between the company and the municipality the time for the latter to assume ownership was extended to November 1st, but possession was not given up until May, 1907. In April, 1907, the legislature of Ontario passed an Act reciting all the circumstances, confirming the agreement for extension and authorizing the town council to take possession on paying the amount of the award subject to variation thereof on appeal.

Shepley K.C. and *Drayton K.C.* for the appellants. The franchise cannot be regarded in determining the value of the railway. See *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board*(1); *Toronto Street Railway Co.* v. *City of Toronto*(2); *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh*(3).

Bicknell K.C. and *McPherson K.C.* for the respondents, cited *London County Council* v. *London Street Tramways Co.*(4); *Toronto Railway Co.* v. *City of*

(1) [1893] A.C. 444.
(2) [1893] A.C. 511.
(3) [1894] A.C. 456.
(4) [1894] 2 Q.B. 189.

Toronto(1); *Commissioners of Inland Revenue* v. *Glasgow and South-Western Railway Co.*(2).

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THE CHIEF JUSTICE.—I would allow this appeal for the reasons given by the Chief Justice of Ontario, to which I can find very little that is useful to add.

It is impossible for me to distinguish this case from *The Toronto Street Railway Co.* v. *The City of Toronto* (3). The statute and by-laws under which the company respondent operated its railway in the Towns of Berlin and Waterloo practically constitute an agreement which is in terms identical with that made between Easton and the City of Toronto. In that case the precise point on which the Court of Appeal proceeds was negatived as appears by the reasons for appeal, paragraph 14 of which reads as follows:

> In any case whether the franchise, as such, is property to be valued under the 18th resolution or not, the proper method of arriving at the value of the "railway" was and is to capitalize its earning power, and, as the learned arbitrators have admittedly not proceeded upon that basis, the matter should be referred back with proper directions upon the subject.

The respondent obtained its franchise and privileges in and upon the streets of Berlin and Waterloo subject to the right of the appellant to assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value to be determined by arbitration. This is, therefore, not a case of compulsory taking to fix the amount of compensation to which the respondents are entitled not only for their railway, but for the undertaking, which would include the charter, in-

(1) 22 O.R. 374. (2) 12 App. Cas. 315.
(3) 20 Ont. App. R. 125; [1893] A.C. 511.

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corporation and charter rights. This is an arbitration under an agreement to ascertain, at the expiry of the twenty years period for which the municipal franchise was granted, and when the right to use the streets had lapsed, the value not of the undertaking, but of the properties enumerated in the agreement as a railway and all real and personal property in connection with the working thereof, or, in other words, this is an arbitration to fix the value of that part of the undertaking in which the respondents had, at that time, an interest, the property of the line without any privileges of user.

I would allow the appeal with costs.

DAVIES and IDINGTON JJ. concurred in the opinion stated by Anglin J.

DUFF J.—I agree with the conclusion of the Chief Justice of Ontario and with the reasons upon which it is based. I would allow the appeal.

ANGLIN J.—With great respect for the opinion of the learned judges who constituted the majority of the Ontario Court of Appeal, I am of opinion that this appeal should be allowed.

All questions as to the right of the Town of Berlin to give the statutory notice, under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, and to acquire the railway of the Berlin and Waterloo Street Railway Company, as to the sufficiency of such notice and as to the validity and efficacy of the arbitration had and award made are concluded in favour of the municipality by the statute 7 Edw. VII. ch. 58, subject

only to any variation on appeal in the amount allowed by the arbitrators.

The Town of Berlin is in possession of the railway and the company does not now dispute the right of the municipality to retain and operate it. The sole question presented for determination upon this appeal is whether, on a proper construction of sections 41 and 42 of the Revised Statutes of Ontario (1897), ch. 208,

the value of the railway and of all real and personal property connected with the working thereof

is limited to its value as

a railway in use and capable of being used and operated as a street railway—

which the arbitrators have allowed—or should be deemed to include, as part of the property to be valued and paid for, the privilege or franchise of operating the railway or any part thereof as a privilege or franchise in perpetuity, or for a further term of definite or indefinite duration; whether the amount to be paid by the municipality is only the present value of the tangible or corporeal property of the company taken as a whole and available for immediate use, or includes, in addition, compensation for the loss or deprivation of a profitable franchise or privilege terminated by the act of the municipality.

Mr. Justice Britton, affirming the finding of the arbitrators, held that the former is the correct view of the extent of the company's right to compensation. The Chief Justice of Ontario, dissenting in the Court of Appeal, took the same view. The majority of the judges in that court, however, reversing the judgment of Mr. Justice Britton, held that the company is entitled to be paid a sum equal to a capitalization of its

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income, everything abnormal in such income being eliminated.

I shall first deal with the question as if the present case were admittedly governed by section 41 (R.S.O. 1897, ch. 208), alone, *i.e.*, as if the entire railway had consisted of a line or lines within the corporate limits of the Town of Berlin and all proper steps had been taken and an award and payment of the amount thereby fixed had been duly made in time to permit of the assumption of the railway by the municipality immediately upon the expiry of the twenty years' term mentioned in section 41.

That the Berlin and Waterloo Street Railway Company had a privilege of which their enjoyment was limited to a term of twenty years,

at the expiry of which the privilege or franchise of the railway company ceased,

is, I think, incontrovertible upon the authority of *Toronto Street Railway Co.* v. *The City of Toronto* (1).

It is obvious that an amount based upon capitalization of revenue or profits earned by the company during some period preceding the expiry of the twenty years' term would include an allowance or compensation for loss of franchise, because such earnings or profits are attributable not merely to the capital invested in the physical constituents or corporeal property of the company, but also to the exercise of the privilege of operation. Without a railway system the franchise would not be profit-earning; without a privilege to operate the railway system would not be revenue-producing. What proportion of the earnings or profits should be treated as the legitimate return

(1) [1893] A.C. 511, at p. 515.

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from the capital invested in corporeal property—rails, ties, rolling stock, etc.—and what proportion should be ascribed to the exercise of the franchise, it would be extremely difficult, if not impossible, to determine. Unless, therefore, the terms

the railway and all real and personal property in connection with the working thereof

include the franchise or privilege to operate, notwithstanding its terminable character, the value of the former cannot be ascertained by a capitalization of the revenue or profits of the company during any period short or long.

The construction of the statute as to the subject-matter of the valuation to be made cannot, I venture to think, be dependent, as suggested by Garrow J.A., upon whether the company's undertaking has been carried on at a loss or whether it has been productive of profit. Neither are we concerned whether, upon what may otherwise be found to be the proper interpretation of the statutory contract, the municipality will

gain at the end of the twenty years at the expense of the company.

As pointed out by Lord Adam, in the passage from his judgment in the *Edinburgh Tramways Case,* in 1894(1), at page 698, quoted by Moss C.J.O., when the company accepted its franchise from the municipality under the statute 48 Vict. ch. 16, secs. 18 and 19, it took it, not as a right which would belong to it in perpetuity, but as a privilege, the enjoyment of which by it should be terminable; it took it subject to the contingency of the municipality exercising the power to terminate its

(1) 21 Ct. Sess. Cas., 4 ser., 688.

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rights; it took, therefore, with the full knowledge that except in so far as the statute may have otherwise provided, all its profits from its undertaking and investment must be made out of its earnings during the period for which the statute permitted that the privilege of operating should be committed to it, and, that, upon the extinction of its rights in the franchise, its right to compensation would be merely that which its statutory contract with the municipality confers. As tersely put by Garrow J.A.,

> Each has, had, or is entitled to have, simply what was bargained for.

Whether the privilege of operation held by the company ceased to exist, or whether it continued in existence but was by the statute transferred to the municipality is an academic rather than a practical or material question. If transferred to the municipality, it was so by the operation of the statute. It ceased to belong to or to be exercisable by the company; it was no longer available to it for its benefit or profit. It was, after the statutory notice and upon the expiry of the twenty years, in no sense property of the company. Of the privilege to operate the company had been rather a lessee or a licensee than an owner. Its rights therein were temporary. Upon their termination the municipality became again seized in possession of its reversionary interest. To quote the language of Lord Shand, in the *Edinburgh Tramways Case*(1), at p. 487:

> It is true that the local authority by the purchase acquires a more extensive right—a right of a permanent nature. This might follow, as it appears to me, because of the direct right of property, or other direct interest, which the local authority has in the streets, and be-

(1) [1894] A.C. 456.

cause, having once acquired the undertaking, the local authority is under no obligation thereafter to sell it, as the promoters were. The permanent right thus acquired is not, however, conferred by the promoters, or acquired from them, but is conferred by the special provision of the statute.

Moreover, the company originally acquired its franchise for nothing—probably because of the temporary and terminable character of the rights which it received. If it was then intended that it should obtain a right to be compensated on the taking over of the railway upon the same footing as if it had been granted a franchise in perpetuity, it may well be that the municipality would have secured from the company a substantial consideration for the grant of such a franchise. There do not, therefore, appear to be any peculiarly equitable considerations which should affect in favour of the company the construction of the statutory contract between it and the municipality. The question is simply: For what has the legislature required that the municipality should pay on assuming the ownership of the railway?

That of which the statute says that the municipality shall pay the value is

the railway and all real and personal property in connection with the working thereof,

which it is authorized to assume. The company's privilege of operating being no longer available to it or exercisable by it, I am unable to see how it can be regarded as still subsisting as something for which the company is to be paid as part of its railway and property assumed by the municipality. The company's right of property in the railway, upon the expiry of the twenty years of enjoyment of the privilege of operation, appears to be what Lord Watson, in

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the *Edinburgh Tramways Case*(1), at page 469, describes as property which does not carry with it the privilege of future user, but is such

> that others than the owner selling may either possess or be in a position to acquire such privilege.

All interest of the company in the franchise having ceased to exist, it cannot be part of the "railway" or of the "property" which the municipality acquires from it.

As pointed out by Mr. Justice Britton, in sections 42 and 45 the assumption of the railway by the municipality is referred to as a purchase. In a purchase that for which payment is made is what the vendor is able to sell—what the purchaser acquires from him. The franchise or right to operate the lines after they have been taken over, both within its own corporate limits and in those of the adjacent municipality, the town acquires, not from the company, but from the legislature under the statute. I cannot understand a purchase from the company of a right or privilege which "was not theirs to sell." *Edinburgh Tramways Case*(1), *per* Lord Watson, at page 473.

The word "railway" is defined in the interpretation section of chapter 208 as including a "tramway." In no provision of the statute, other than sections 41 and 42, is it employed in a sense which could comprise the franchise or privilege of operation. In every instance it is used as descriptive merely of the physical structure owned by the company, which, according to Lord Watson, is its "primary and natural meaning" (1), at p. 471. In section 41 it is used not as the equivalent of the undertaking of the company, which would

(1) [1894] A.C. 456.

include all its property, but as descriptive of one part of that undertaking, for the value of which, with that of other parts—"all real and personal property"—payment is to be made. Having regard to the words "in connection with the working thereof," which immediately follow them, the words "all real and personal property" seem descriptive of "physical objects." *Kingston Light, Heat and Power Co.* v. *Corporation of Kingston*(1).

In view of these considerations the statutory description of the subject-matter to be valued, of which the ownership is to be assumed by the municipality, appears to be apt to define precisely what has been valued by the arbitrators in the present case, but inapt to cover, in addition, a franchise or privilege of operation.

The tenor of the authorities to which I have referred, although they deal with statutory and contractual provisions not identical with those now under consideration, is consistent only with this view.

If, therefore, the railway of the Berlin and Waterloo Street Railway Company had been wholly within the corporate limits of the Town of Berlin and all necessary proceedings had been regularly and promptly taken under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, in my opinion the arbitrators would have been justified in excluding from their valuation any allowance in respect to the franchise or privilege to operate.

But much stress was laid by counsel for the respondents upon the fact that the railway in question lies not in a single municipality, but in at least two

(1) 20 Times L.R. 448.

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municipalities. It was pointed out that as a result of the taking over of this railway the Town of Berlin has acquired not merely a right to operate a street railway upon its own streets and within its own corporate limits, but also a right to operate such a railway in the Town of Waterloo, with "all the powers and authority theretofore enjoyed by the company." (Section 42.) This right, it is said, the Town of Berlin could not otherwise have acquired, and for this privilege or franchise counsel for the company argue that it is entitled to receive compensation.

Section 42 of the statute (R.S.O. [1897] ch. 208), which provides for the case of a company

whose line or lines is or are situated in two or more municipalities,

gives to one of such municipalities (ascertained by the statute),

the right to exercise the power of purchase herein conferred.

This right of purchase is that created by the next preceding section, and is the same right with the same incidents as is conferred on a municipality in regard to a railway which does not extend beyond its territorial limits. In such a case it is for

the railway and all real and personal property in connection with the working thereof

that the company is to be paid. What these terms, in my opinion, mean, as used in section 41, I have endeavoured to state. Under section 42 *quoad* the company the railway is to be dealt with under the provisions of section 41; *quoad* the other municipalities interested, provision is made by sections 43 and 44 for the protection of their rights and the making of such terms in regard to the operation of the railway by

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the municipality assuming ownership as will ensure to such other municipalities due compensation for the value of the franchise or privilege to be exercised within their limits. Whatever the rights of the company may have been within any of the municipalities into which its lines extend those rights were all acquired subject to the provisions of the statute, including those of section 41, which are made applicable by section 42. They were taken with the knowledge and upon the contractual basis that their enjoyment by the company might be terminated by the exercise by one of the municipalities of the powers conferred by sections 41 and 42. The policy of the Act appears to be that the company shall be entitled to compensation for the same subject-matter whether the railway taken over operates in a single municipality or in several municipalities. In neither case, in my opinion, is it entitled to be paid for a franchise or privilege of operation, the term of its right to the enjoyment of which has expired. In each case whatever rights in the nature of a franchise or privilege to operate the purchasing municipality becomes entitled to exercise are conferred upon it not by the company, but by the statute. It is not the policy of the statute in the one case that the municipality should be obliged to buy back the right to use its own streets, nor in the other that it should have to pay the company for that part of the franchise which the statute confers upon it, but permits it to exercise only for the benefit of and as quasi-trustee for the other municipalities interested. In other words, in both cases alike the company is to be paid only for that which it really held as its own property and which the assuming municipality in fact acquires from it.

It was very strongly argued by Mr. Bicknell that

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because the Town of Berlin failed to exercise its right of assuming the railway immediately upon the expiration of the twenty years' period, a franchise for a further period of five years became vested in the company under sub-section 2, of section 41.

By an agreement of the parties providing for the appointment of arbitrators, etc., the time for assuming the ownership of the railway was extended from the 8th of September, 1906, to the 1st of November, 1906. The railway was not in fact taken over until May, 1907, when the company relinquished possession on receiving the sum awarded by the arbitrators.

On the 20th of April, 1907, the legislature of Ontario, in an Act which recites the circumstances in which the railway came into existence, the steps taken by the municipality towards acquiring it, the agreement for the appointment of arbitrators and the award made on the 29th of December, 1906, expressly authorized the town, upon payment of the amount of the said award, to take over and enter into possession of the railway, etc., and ratified and confirmed the agreement and award,

subject, however, to such variation in the amount of the award as may be made on appeal.

Because this Act does not in express terms provide that the municipality may assume possession of the railway on the same footing as if it had in fact paid for and had assumed possession of it immediately upon the expiration of the twenty years' period, the respondents maintain that they are entitled to an award on the basis of their being compulsorily deprived of a franchise which they allege they had become entitled to enjoy for a further term of five years.

Such, they argue, is, upon its proper construction, the effect of the statute of 1907.

While this Act is by no means clear or free from ambiguity, read as a whole, and having regard to the recital of the proceedings, the affirmance of the award and the express limitation, on the question of amount, of the right to vary it upon appeal, it is, I think, clear that the legislature intended not to confer upon the town a new right of expropriation in respect of an extended franchise, but merely to further extend for a reasonable period (no date being stated), the time for taking over the railway upon the expiry of the twenty years' franchise, as the parties themselves had already extended it by the very agreement which the statute confirms. Having before it this agreement, which provides for the holding of an arbitration under section 41 of the Revised Statutes of Ontario, 1897, ch. 208, and for its completion after the expiry of the twenty years' term, and an award which on its face was a valuation of

> the railway and of all real and personal property used in connection therewith

as of the date to which the expiry of the twenty years' period had been extended under the agreement of the parties, which incorporated the provisions of the "Ontario Arbitration Act"—an award which explicitly proceeds upon the basis that the franchise and privilege of operation of the company had been determined and that no allowance should be made in respect thereof, and expressly so states—the legislature ratified and confirmed both the agreement and the award and authorized the town upon payment to the company of the sum awarded to take over and enter into possession of the railway, subject only to such varia-

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tion of the amount of the award as may be made upon appeal.

It is to me inconceivable that we should have had a statute in any such form if the legislature had intended to confer upon the municipality a new right of expropriation in respect of an extended franchise, such as the company now contends had become vested in it. The company had by its own agreement already waived payment for and assumption of the railway on the very day on which the twenty years' term expired and had thereby waived its right, if the agreement were carried out, to claim any extension of franchise under the statute. Circumstances having arisen which rendered legislation necessary—the failure of the arbitrators to make an award before the 1st of November, the date fixed by the agreement for taking over the road, and the existence of a bonded debt on the railway for which provision had to be made—the legislature, ratifying all that had been done, merely further extended the time for the actual payment of the amount of the award and the taking over of the road.

Having reached the conclusion that, apart entirely from the provisions of the Act of 1907, the arbitrators properly construed section 41 of the Revised Statutes of Ontario, 1897, ch. 208, in excluding from their valuation everything in respect of franchise or privilege to operate, it is unnecessary to consider whether that statute of 1907 does not, by confining the right of appeal from the award to the *amount* awarded, entirely preclude the view that it is open to the present respondents to maintain upon appeal that the arbitrators should have included in their valuation such additional subject-matters as the right or franchise to operate, which they had explicitly excluded from their award. I express no opinion upon this question.

As to the claim made that the arbitrators should have allowed ten per cent. above the actual value of the property acquired from the company as compensation for its being compulsorily taken, it suffices to say that the statute defines the rights of the company and does not provide for such an allowance.

For these reasons I would allow this appeal with costs in this court and in the Ontario Court of Appeal, and would restore the judgment of Mr. Justice Britton.

Appeal allowed with costs.

Solicitors for the appellants: *Scellen & Weir.*

Solicitors for the respondents: *McPherson & Co.*

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*Feb. 15.

THE ALEXANDER BROWN MILLING AND ELEVATOR COMPANY (DEFENDANTS) .... APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lessor and lessee—Covenant to renew—Severance of term—Consent of lessor—Enforcement of covenant — Expropriation — Persons interested.

The covenant for renewal of a lease for a term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion.

The assignment of part of the leasehold premises included an assignment of the right to renewal of the lease for such part and the lessor executed a consent thereto.

Held, that he did not thereby agree that his covenant for renewal would be exercised in respect to a part only of the demised premises.

In the case mentioned the lessee who has severed his term cannot, when the land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease.

Judgment of the Court of Appeal (18 Ont. L.R. 85) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment at the trial in favour of the defendant company.

The City of Toronto leased certain water lots to the Toronto Grape Sugar Co. for a term of twenty-one

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

(1) 18 Ont. L.R. 85.

years, from July 1st, 1881, and covenanted that should the lessees at the expiration of the term, desire a renewal and give notice thereof to the lessors, the latter would renew for a like term or pay for improvements. This lease afterwards became vested in one Gooderham, who, in 1889, with the assent of the city in writing, sold a part of the leasehold premises to the Canadian Pacific Railway Co., and the remainder was assigned with the like assent to the appellants in 1902, who shortly after gave notice to the city that they desired a further lease of the lots less the portion taken by the railway company and remained in possession for some time after the lease expired without notice that their request would be denied.

In June, 1902, the railway company gave notice to the appellants of their intention to expropriate another strip of the leased lands and took the necessary steps to accomplish their purpose. The action in this case was to settle the question of the appellants' right to compensation for the loss of a renewal of the lease for the portion of the land so taken.

The trial judge held that they were entitled to the renewal and, consequently, to the compensation claimed. His judgment was reversed by the Court of Appeal and the defendants then appealed to the Supreme Court of Canada.

Shepley K.C. and *A. A. Miller* for the appellants. The appellants were clearly entitled to a renewal unless barred by the severance. But a severance of the term does not prevent a reversioner from enforcing covenants in the lease: *Piggott* v. *Middlesex County Council*(1); *Winter's Case*(2); and the same principle applies here.

(1) [1909] 1 Ch. 134. (2) Dyer, 308*b*.

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Armour K.C. and *MacMurchy K.C.* for the respondent. To entitle the appellants to compensation they must have something which they could convey. *In re Morgan and London & North Western Railway Co.* (1); *The Queen* v. *Poulter*(2); here they had nothing as the right to renewal cannot be severed: *Finch* v. *Underwood*(3); *Cook* v. *Jones*(4); *Barge* v. *Schick* (5). Even if it could they have no absolute right to renewal, as the city may elect to pay for improvements.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—This appeal raises the question of what rights an assignee under an assignment by the lessee of a part of the demised premises comprised in a renewal lease acquired under and by virtue of the right of renewal, can have to further renewal, in the absence of any express provision in his favour therefor or anything from which an implication may be drawn conferring any such right upon such an assignee of a part.

The City of Toronto demised to the Toronto Grape Sugar Company certain lands for a term of twenty-one years from the 1st July, 1881.

The lease contained, besides the usual covenants to be found in such a lease, the following:

(1) [1896] 2 Q.B. 469.
(2) 20 Q.B.D. 132.
(3) 2 Ch. D. 310.
(4) 96 Ky. 283.
(5) 57 Minn. 155.

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The said lessors covenant with the said lessees for quiet enjoyment, and also that if at the expiration of the term hereby granted or of any future term of twenty-one years the said lessees, their successors or assigns shall be desirous of taking a new lease of the premises hereby granted for a further term of twenty-one years, having conformed to all the terms and conditions herein mentioned and set forth, and having given to the council of the said corporation thirty days' notice in writing of such desire, the said lessors will, at the costs and charges of the said lessees, their successors or assigns as aforesaid, grant such new lease for the further term of twenty-one years from the determination of the present or existing lease at such a rental per foot per annum as the said premises shall then be worth, irrespective of any improvements made by the said lessees, their successors or assigns, such value to be determined as hereinafter provided for determining the value of the lessees' improvements. Provided, that if the said lessors do not see fit to renew this or any future lease the said lessees, their successors or assigns, shall receive from the said lessors such reasonable sum as the buildings and permanent improvements made and erected by the said lessees shall then be worth, such value to be determined by three arbitrators nominated in writing for that purpose as follows:—

and then sets forth the method of constituting an authority to determine such questions as contemplated herein and the principles upon which such constituted authority should proceed and the means for enforcing its determination.

The assignees of this lease assigned, first, a part of the land so demised and the demise with right of renewal as to the part so assigned to one party and later assigned the rest of the land so demised, and the demise thereof with right of renewal to another party under whom the appellants claim.

Did the appellants acquire thereby any legal or equitable right to a renewal of the lease, confined to and in respect of this part alone of the lands in the original lease?

They only acquired such rights as the above quoted covenant for renewal gave him.

It seems impossible to so read such a covenant, which by its express words refers only to the whole, as

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to make it applicable only to a part thereof. How can we (when we go beyond these words and try to find some implication therein or in the rest of the contract making it or them relative to a part only), apply distributively all the conditions and incidents to be dealt with in relation to the whole, as if in any way relevant to a diversity of notices to be given, by divers persons, and of rents to be reserved, to say nothing of covenants to be entered into, and last, but not least, the right of distress? The simple method and principles to determine the conditional rights relative to the whole and the alternatives of refusal and payments for buildings thereon seem unfitted and inapplicable to the complex case of parts and possibly numerous parts.

I can find no shadow of warrant for claiming a right of renewal to the assignee of a part.

That should end the appellants' claims as far as I am concerned, but for what they urge is to be drawn from the terms of the consents which were given by the respondents to these assignments.

There was the usual proviso in the lease for its forfeiture on the event of assignment or sub-letting without the leave of the landlord.

The consent to the first is as follows:

The corporation of the City of Toronto in accordance with an order of the Committee on Property of the said corporation made on the 13th day of April, A.D. 1893, being Minute No. 149 and pursuant to By-law No. 2445, hereby consents to the annexed lease and agreement dated the 5th day of February, A.D. 1889, but such consent shall not be considered or construed to be a waiver of the covenant in the original lease of the within described leasehold premises from the said corporation to the Toronto Grape Sugar Company not to assign and shall not extend or be construed to extend beyond the permission to execute the annexed indenture, nor shall it be taken to sanction the removal of any improvements of any kind now or that may hereafter be placed upon the said premises.

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The second is somewhat more lengthy, but in my view no more effective for the appellants' purpose than this.

Besides, the first instrument which this one relates to lends itself by its express language as to a renewal much more readily than does that of the second one to aid the argument submitted on this appeal.

It is said that as these instruments profess to assign the right of renewal therefore we must hold these consents thereto respectively as of a contractual nature extending the original obligation of the respondent and distributing its benefits.

Such, though not the language of the forcible argument addressed to us, must be taken in light of what I have said to be what it means or nothing.

We must always have regard to the business the parties had in hand. Obviously all that ever was intended was to avert a possible forfeiture.

Seeing the far-reaching results of holding otherwise, and the radical changes in the original contract to be thereby implied, I cannot find any such implication as reasonably within the contemplation of the parties to this consent.

Moreover, the possibility existed of the severance being got over by later assignments uniting the right to renewal in one person as a lessee who might claim the benefits of the right to claim a renewal of the term as a whole.

Indeed, having regard to the general powers of a municipal corporation, though no point was made of that, I suspect a by-law giving express authority to so modify the contract would likely be necessary.

In the view I have taken altogether apart from this last suggestion, I do not think it necessary to follow

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the matter in the many subsidiary conditions under and in relation to which the right is set up.

There is no foundation in law therefor, however hard or possibly unjust in light of what an ordinary business man might reasonably have expected.

Nor can I find any solid basis for the argument sought to be drawn from the alleged compulsory nature of the transfer to the Canadian Pacific Railway Company.

The appeal must be dismissed with costs.

DUFF J.—I agree that the appeal should be dismissed with costs. I concur in the reasons given by my brother Idington.

ANGLIN J.—The material facts are fully stated in the judgment of Mr. Justice Riddell.

I agree in his view that the rights of the parties are to be determined as of the 21st September, 1903, as provided by statute 51 Vict. ch. 59, sec. 145, and now by R.S.C. [1906] ch. 37, sec. 192(2).

This, the learned judge says, was "admitted, and indeed the common case before me." The subsequent transactions between the city and the railway company, and between the city and the defendants, have no bearing upon the question presented for adjudication, which is whether the defendants had or had not, on the 21st September, 1903, an interest in the lands expropriated by the railway company for which they are entitled to compensation. If the defendants then had a right to a renewal of the lease, which had expired on the 30th June, 1902, and were in a position to claim that this right should be enforced against their lessors in an action for specific performance,

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they had, in my opinion, an interest in respect of which they are entitled to compensation from the expropriating railway company.

On the authority of *Ward* v. *City of Toronto* (1)—which, I may be permitted to say with respect, was, in my opinion, well decided upon the ground stated by Moss J.A. (2), and by Meredith C.J. (1), at p. 733, concurred in by Osler J.A. (2)—I am of the opinion that, had there been no prior severance of the term, the defendants would have been, on the 21st September, 1903, absolutely entitled to a renewal of their lease from the City of Toronto. They had given notice of their desire for renewal more than thirty days before the expiry of their lease. They had, in the meantime, remained in possession of the leasehold premises, and had not received any notice from the municipal corporation that it had elected against renewal, and would pay for improvements. This election the city would, I think, have been bound to make and to notify to its lessees before the expiry of their lease, or, at all events, within a reasonable time thereafter. If, as seems not improbable, the defendants remained in possession under the provisions of their expired lease (2), at p. 228, *per* Maclennan J., two gales of rent had accrued due since its expiry. It seems to me impossible that, had there been no severance, the city, on the 21st September, 1903, could still have retained its right to elect against its covenant to renew. Unless the city had exercised its right of election against its covenant within the time allowed under the terms

(1) 29 O.R. 729.

(2) 26 Ont. App. R. 225, at p. 231.

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of the lease that covenant would have become absolute and the right of the defendants to renewal might have been specifically enforced.

The only refusal of the city was a refusal to renew as demanded by the Canadian Pacific Railway Company in respect of another part of the leasehold premises acquired by it some years before. With the consequences of the severance of the term then effected I shall presently deal. But, if there had been no such severance, or if, notwithstanding such severance, the original lessees had, in respect of the portion of the lands not alienated, a several right of renewal which passed to the defendants as assignees, it is impossible to treat the refusal to grant a renewal to the Canadian Pacific Railway Company as in any sense a refusal to grant a renewal to the defendants.

I am, therefore, with respect, of the opinion that the judgment in appeal cannot be supported on the ground on which I understand it to have been put by Mr. Justice Garrow.

But the judgment must, I think, be supported because of the severance of their term by the original lessees in 1889. They then agreed to sell part of their leasehold premises to the Canadian Pacific Railway Company, and this agreement was carried out by an assignment of lease in January, 1902.

By the agreement of 1889 the vendors agreed to sell all their right, title and interest in the lands to be conveyed "including all right of renewal of the lease in respect of such lands." For the defendants it is contended that when the city consented to the execution of this agreement—as it did by writing under seal indorsed on the document—it thereby assented to an apportionment of the covenant for renewal. It was not argued

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that a covenant for renewal is apportionable by a lessee without the consent of his lessor; and, although it has been held that the assignee of part of leasehold premises may, without joining his co-assignees, recover damages from a mesne landlord for breach of a covenant to apply for and do his utmost to procure a renewal of the head lease(1), it by no means follows that a covenant on the part of the lessor to renew would confer upon an assignee of part of the leasehold premises a like right as against the lessor—still less a right to maintain an action for specific performance of the covenant.

At a later date (February, 1902) the original lessees sold and assigned the residue of their leasehold rights to the defendants, including

all right of renewal or payment for buildings or improvements in place of renewal.

To the execution of this assignment the lessors also assented, and it is contended that they thus recognized the covenant for renewal as still subsisting, and also again agreed to its apportionment.

The primary purpose of procuring the consent of the lessors to each of the assignments made by the original lessees was to avoid committing a breach of the lessees' covenant not to assign or sublet without leave. But I have no doubt that, assuming that the effect of the severance would otherwise have been to entirely relieve the lessors from their covenant to renew, they effectively waived their right to take that position, because some right of renewal was unquestionably recognized by them as still subsisting, when, in February, 1902, they assented to the assign-

(1) *Simpson* v. *Clayton*, 4 Bing. N.C. 758.

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ment to Brown, which expressly purported to give to him rights under the covenant for renewal in the lease.

It does not, however, follow that there was an assent by the city to an apportionment of its covenant such that, as a result of each assignment, the assignee became entitled by way of renewal to a separate lease of the part of the leasehold premises thereby transferred.

The transfer to each of the assignees was merely of the lessees' right of renewal in respect of the part of the lands conveyed. That right was not for renewal as to these lands separately, but only as part of the entire leasehold premises. The landlords' covenant was merely to give one renewal of the lease of the whole. Had the original lessees remained the owners of the entire leasehold premises no one would suggest that they could ask for separate renewal leases of the two parcels into which they divided the property.

Under the covenant to renew the tenant can only ask for such a lease as the landlord covenanted to grant.

Finch v. *Underwood*(1), *per* Mellish L.J., at p. 316. It is difficult to understand how he can by any act of his vest any other right in his assignees. The lessors' burden might be much increased by the granting of such separate leases; their rights and remedies would be materially diminished.

It is quite consistent with the terms of the consents actually given that the only right of renewal on the part of the assignees to which the lessors assented was, in the first case, a right to be exercised by the lessees and their assignee jointly, and in the second, a right to be exercised jointly by the two assignees, to

(1) 2 Ch. D. 310.

take a single new lease of the entire premises at a single rental for the whole of which both should in each case become liable. There is nothing in the documents to warrant a construction which would carry the obligation of the lessors or the rights of the lessees or their assigns further. It would require the substitution of a new and a different covenant on the part of the lessors to support the contention of the defendants, and the burden is upon them to establish that such a covenant was in fact entered into. This they have, in my opinion, not done.

Although notice demanding a renewal was given by the defendants in respect of the part of the leasehold premises assigned to them and a similar notice by the Canadian Pacific Railway Company in respect of the part held by it, there was no notice given on behalf of both or either of the assignees demanding a single renewal of lease of the entire premises. In the view I have taken of the proper construction and effect of the document in evidence, no notice was given to the lessors which complied with the condition attached to the covenant for renewal. This covenant, therefore, never became operative and for this reason neither of the lessees' assignees became entitled to renewal.

Mr. Shepley urged that because the Ontario and Quebec Railway Company was in a position to expropriate the interest of the original lessees in the leasehold lands which they agreed to sell to the company in 1889, the transfer of that interest to the company should be regarded as made under compulsion of law. The railway company could not have expropriated the lessees' interest alone. Their only right by this method was to acquire the fee. They certainly could

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not have obtained in expropriation proceedings any such agreement as they actually secured from the lessees. I, therefore, think it impossible that the transaction between the lessees and the railway company should be treated as the equivalent of a compulsory acquisition by the latter of these leasehold lands.

But if, notwithstanding these objections, the severance effected in 1889 may be treated as involuntary, I cannot see how that fact would justify the imposition upon the lessors of a covenant for renewal other than and different from that which they had made. This case is, I think, distinguishable from *Piggott* v. *Middlesex County Council*(1), relied on by Mr. Shepley. It was there held that an involuntary severance of a reversion did not destroy the condition of re-entry. The saving of a condition such as that of re-entry differs materially from the imposition of a new and different obligation such as the renewal in parcels of a lease which the lessor had agreed to renew only in entirety.

For these reasons I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Donald & Miller.*

Solicitor for the respondents: *Angus MacMurchy.*

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(1) [1909] 1 Ch. 134.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA AND THE CANADIAN PACIFIC RAILWAY COMPANY .... APPELLANTS;

1909
*Nov. 29, 30.
1910
*Feb. 15.

AND

THE CITY OF TORONTO .... RESPONDENT.

(TORONTO VIADUCT CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Jurisdiction of Board of Railway Commissioners—Deviation of tracks—Separation of grades—"Highway"—Dedication—User—Public way or means of communication—Access to harbour—Navigable waters—Construction of statute—"Special Act"—R.S.C. 1906, *c.* 37, *ss.* 2(11) (28), 3, 237, 238, 241; 56 *V. c.* 48(*D.*).

Prior to 1888, the Grand Trunk Railway Company operated a portion of its railway upon the "Esplanade," in the City of Toronto, and, in that year, the Canadian Pacific Railway Company obtained permission from the Dominion Government to fill in a part of Toronto Harbour lying south of the "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade," and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892, an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of overhead traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (56 Vict. ch. 48), providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right

*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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of the Canadian Pacific Railway Company to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line Agreement," and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there.

Held, Girouard and Duff, JJ. dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the "Railway Act"; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of "The Railway Act" and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the Canadian Pacific Railway Company, having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour.

APPEAL from an order of the Board of Railway Commissioners for Canada by leave of the Board on a question of law and on a question of jurisdiction by leave of Mr. Justice Duff.

The material facts on which the order of the Board was based are sufficiently set out in the above head-note. The order, omitting the portion respecting damages and costs was as follows:—

"In the matter of the application of the City of Toronto, hereinafter called the "city," for an order directing the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company, hereinafter called the "railway companies," to carry York

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Street and certain other streets in the said city under the tracks of the said railway companies.

"Upon hearing the evidence, and counsel for the city, the railway companies, the Toronto Board of Trade and a number of land-owners in the said city—

"It is ordered and directed:—

"1. That the railway companies, within two years from the date of this order, construct a four-track viaduct from a point west of John Street to a point at or near Berkeley Street, with three tracks on either side of such viaduct east of Church Street, at the present grade of the Esplanade, with all necessary cross-overs and as shewn on a plan filed by the Grand Trunk Railway Company on April 27th, 1909, except where changes as hereinafter set forth are necessary, and except that Bay and Yonge Streets shall each have a total width of eighty feet between abutments under the viaduct, and that from the point of junction of the Canadian Pacific Railway Company and the Grand Trunk elevated tracks at or near Berkeley Street to Scott Street, the centre line of the viaduct shall be located on the southerly boundary of the Esplanade, except at the curve in the tracks in the vicinity of West Market Street.

"2. That the Canadian Pacific Railway Company elevate two tracks from the point at or near Berkeley Street where the said tracks will connect with the tracks on the viaduct referred to in paragraph 1, to Queen Street, providing a clear headway of fourteen feet over the following streets, Parliament, Trinity and Cherry, and a clear headway of ten feet over Vine and Front Streets; and that the railway companies construct a bridge to carry the highway at Eastern Avenue over the railway tracks with a clear headway

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of twenty-two feet six inches over the base of the rail; the openings at Front and Vine Streets to be each thirty feet between abutments and at Parliament, Trinity and Cherry Streets to be each a width of sixty-six feet between abutments.

"3. That the Grand Trunk Railway Company, within two years from the date of this order, elevate two tracks from the point at or near Berkeley Street where the said tracks will connect with the tracks on the said viaduct, to Logan Avenue, providing a clear headway of fourteen feet over the following streets, Parliament, Cherry, Eastern Avenue and Queen Street, and ten feet over Trinity Street.

"4. That the railway companies, within two years from the date of this order, construct bridges to carry the highways at John Street and Spadina Avenue over the tracks on the said viaduct or the extension of the said tracks westerly, with a clear headway over the base of the rail of twenty-two feet six inches.

"5. That the Canadian Pacific Railway Company be permitted to construct and maintain two tracks at grade, one on either side of its elevated tracks, that on the north side commencing at or near Queen Street and crossing the intervening streets between Queen and Parliament Streets, and that on the south side commencing at or near the Don Esplanade, crossing intervening streets and passing under the Grand Trunk Railway Company's elevated tracks referred to in paragraph 3, between Parliament and Berkeley Streets, with a clear headway of seventeen feet and an opening of the width of seventeen feet, measured at right angles to the track.

"6. That the Grand Trunk Railway Company be permitted to construct and maintain a track, at grade,

at or near Berkeley Street, under the tracks of the Canadian Pacific Railway Company, referred to in paragraph 2, with a clear headway over the base of the rail of seventeen feet. The width of the opening under the said tracks to be seventeen feet, measured at right angles to the track.

"7. That concurrently with the completion of the works ordered in paragraphs 1, 2 and 3, and as soon as the railway companies can operate their trains thereon, the railway companies shall alter and arrange their yards and sidings so that no tracks on ground level shall cross Bay Street, Yonge Street or Church Street, in the said city.

"8. That after the completion of the work ordered in paragraphs 1, 2 and 3, and as soon as the railway companies can run their trains thereon, no locomotive or car be moved on tracks at ground level between Church Street and Parliament Street during the months of May, June, July, August and September, except between the hours of 10 p.m. and 6 a.m.; Provided, however, that cars containing fruit or other perishable merchandise may be moved across streets within the said limits at any time when a flagman on foot precedes the train (engine, car or cars) to warn persons on such streets that a train is approaching.

"9. That the city shall, within one year from the date of this order lay out, complete and dedicate a new street south of the viaduct, from the easterly limit of Church Street produced to the westerly limit of Berkeley Street produced, which shall have a width of at least forty-seven and one-half feet, and acquire the lands necessary therefor, and pass all necessary by-laws for that purpose; and shall grade the said street; the share of the cost of such work as between

the railway companies to be reserved for further consideration, along with the questions covered by paragraph 14 hereof.

"10. That the said street shall be paved by the city, pursuant to its powers under the Municipal Act, the Canadian Pacific Railway Company to pay one-half the cost of paving."

Armour K.C. and *MacMurchy K.C.* for the Canadian Pacific Railway Co.

Blackstock K.C. for the Grand Trunk Railway Co.

Dewart K.C. and *Chisholm K.C.* for the City of Toronto.

GIROUARD J. (dissenting).—We have been treated to an interesting though rather long history of certain lands and water lots in front of the city of Toronto, for many years known as the Esplanade, going as far back as old Muddy York in 1818. As I understand the case, I do not think it is at all necessary, for the purposes of this appeal, to go so far back. It cannot be denied that from 1855 and after, the Grand Trunk Railway Company had been authorized to use, and did in fact use, certain parts of the Esplanade for the purposes of their railway, and that likewise in 1888 the Canadian Pacific Railway Co., in right of the Quebec and Ontario Railway Co., held water-lots to the south of the Esplanade which they filled in, and where they put their tracks, yards and sheds and have used them ever since, subject to certain subsequent alterations. The location and operation of these railways were made not only with the consent of the corporation of the City of Toronto, but also with the ex-

press approbation of the competent legislatures. If the present Railway Commission had not been created with most extensive, and even legislative powers, I would feel inclined to apply the rule held by the Privy Council in the case of the *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (1), but I believe that now that decision cannot have any application.

Here the applicant is not the Attorney-General claiming a *jus publicum* over certain railways, but the Railway Commission first *ex proprio motû*, and later on, on the special application of the City of Toronto, has taken cognizance of the situation and has ordered certain works to be done for the "protection, safety and convenience of the public," crossing over certain railways. Extraordinary powers, far exceeding any existing in the Railway Acts of any other country, are given to the Railway Board, and it might be possible that the Board had jurisdiction to issue the order given to build a viaduct and other works specified in the Order No. 7,200, dated 9th June, 1909, unless prohibited by some statute from so doing.

The reasons advanced by the Commissioners for giving this order may be unreasonable, and the work to be done even absurd; this court has nothing to do with any such possibilities, and unless it can be shewn that the Board has no jurisdiction or acted contrary to the Railway Act, this court cannot interfere, for the Board can do almost anything in relation to railways, except when prohibited by Parliament. As we held in a recent case, *In re Canadian Northern*

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

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Railway Co.(1), the Board cannot change the "Railway Act" of the Parliament of Canada; and I have arrived at the conclusion that, in this instance, they have violated that Act, because the subject matter of the order given by them has already been provided for by the parties and the legislatures interested, not exactly in the same manner and by the same kind of works, that is a viaduct, but by other works which had been found satisfactory to all intents and purposes and must stand until otherwise ordered by Parliament.

There is no doubt that the two railway companies all along, from the very first day they obtained possession of their lands in front of the City of Toronto for the purposes of their railways, knew that the cross streets abutting on the Esplanade might one day be prolonged to the water's edge, so as to afford public access to the front lots and to the bay or lake, in a convenient and safe manner, due regard being given to the growth of a progressive commercial city. All the plans and documents produced shew the possible prolongation of these cross streets. The two railway companies soon realized the situation and finally came to an arrangement with the City of Toronto to secure this end. On the 26th July, 1892, they came to an agreement called the Esplanade or Tripartite Agreement, which was confirmed by the Ontario Legislature, 55 Vict. ch. 90, and also by the Parliament of Canada, 56 Vict. ch. 48. Expensive works were executed, for instance overhead traffic bridges with approaches for vehicles and foot passengers, the closing of certain streets, the deviation of others, the acquisition, aban-

(1) 42 Can. S.C.R. 443.

donment and exchange of lands, the raising and removal of tracks, including the erection of a vast Union Station, etc. The construction of these heavy works involved the expenditure of large sums of money amounting to several millions, the Union Station alone having cost the railways $1,370,000, and was approved of by the Parliament of Canada by Vict. ch. 48. It must be observed with reference to the opinion of the learned chairman of the Board that this agreement entirely excluded forever the proposition of a viaduct. I find in his opinion a fair recapitulation of these works, comprehensive enough to give some idea of their magnitude. He says:—

On July 26th, 1892, the city, the Grand Trunk Railway Company and the Canadian Pacific Railway Company, the latter representing also the Toronto, Grey and Bruce Railway Company, the Ontario and Quebec Railway Company and all its other leased lines, entered into what is called the "Esplanade Tri-partite Agreement" in which appear most elaborate provisions relating to the rights of the railway companies upon the Esplanade and for the construction of the Union Station. I deal with only a few of its provisions: Par. 4 provided for the erection of private overhead bridges. (5) The city agreed to prevent the public crossing the tracks on the Esplanade between Yonge and York Streets, except at Bay Street, and the Grand Trunk Railway Co. waived its contention that it was not liable to contribute to the cost of making or protecting level crossings at Church, Yonge and Bay Streets. (7) Provided for the construction of the York Street bridge and declared it to be a public highway. (9) Provided for deviating York Street, closing a portion of it and the Esplanade. (10) The Grand Trunk agreed to construct the John Street bridge. (11) Provision was made for closing Esplanade from York Street to Brock Street and portions of Simcoe, Peter, and John Streets. (15) The railway companies agreed to pay $15,000.00 to the city for conveyance of the portions of streets agreed to be closed. (17) The city consented to the Grand Trunk Railway Co. obtaining a patent from the Crown of the prolongation of Peter Street and the companies consented to the city obtaining a patent of the prolongation of Simcoe and York Streets, all to the Old Windmill Line.

It is alleged that the Dominion statute, 56 Vict. ch. 48, merely recognized the capacity of the parties

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to enter into such an agreement. The Dominion statute could not give capacity to the City of Toronto. This was done by the Ontario statute. The Dominion statute was necessary to make the scheme agreed to permanent and final until otherwise provided for by Parliament.

Section 1 enacts that

> all works done or to be done in order to give effect to the agreement hereinafter mentioned, as well as those affected by it, are hereby declared to be works for the general advantage of Canada.

They cannot, therefore, be considered as private works of railway companies. They are to all intents and purposes federal works remaining under the exclusive jurisdiction of the Dominion Parliament, under section 92, par. 10, of the British North America Act.

Some authorities have been quoted by the Railway Board to the effect that although an agreement between the parties be ratified by an Act of the Legislature, it still remains a private contract. See *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Railway Co.*(1), at page 468. But this Ontario case is not a parallel one, for it was a mere ratification of an agreement without any such clause as is found in section 1 of 56 Vict. ch. 48, and therefore has no application.

Some reference has also been made by counsel to a decision of the Ontario High Court, confirmed by the Court of Appeal, with respect to the Yonge Street bridge. This decision may affect some other branches of the case, which I do not intend to deal with, but has no bearing upon the point under consideration. It is not even mentioned in their judgments(2). It is

(1) 25 Ont. App. R. 462.

(2) *Yonge Street Bridge Case,* 6 Ont. W.R. 852; 10 Ont. W.R. 483.

only fair to add that the Railway Board does not refer to this decision.

The Railway Commission now proposes to destroy all those works and provide a new scheme still more elaborated and "enormously expensive," observes the chairman, even before ascertaining the financial aspect of the enterprise, for the purpose of giving protection, safety and convenience to the public; involving also the erection of a new Union Station. Can they do so, or is it necessary to apply to the Parliament of Canada? That is the whole question. Section 3 of the Railway Act says in express terms that:

> Where the provisions of this Act or of any special Act passed by the Parliament of Canada, relate to the same subject matter, the provisions of the special Act shall, in so far as is necessary to give effect to such special Act, be taken to override the provisions of this Act.

Then section 2, par. 28, says:

> "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway.

The Railway Board considers "that the fair meaning of the words *with special reference to such railway* is with respect to the *construction or operation* of the railway"; but this is not what the statute says. The interpretation given by the Board has reference only to one part of sub-section 28, and says nothing of the enactment "with special reference to such railway." I cannot understand, moreover, how there can be any doubt that 56 Vict. ch. 48 is an Act having special reference to the railways on the Esplanade. But even if we were to take the interpretation given by the Board, it seems to me that all the works executed under the Tripartite Agreement are works dealing with the construction and operation of the railway.

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I finally submit that the Railway Board has no jurisdiction over the subject matter, which has been fully dealt with and settled by that Special Act of the Parliament of Canada, and that the Dominion Parliament can alone deal with it again. The Railway Board seem to be conscious of the difficulty they are labouring under, for the chairman remarks in his opinion that "both the agreement and the clauses of the General Act deal with public protection, safety and convenience," and therefore with the same subject matter.

It is finally contended that on the 19th of May, 1909, and before the order in council in question in this case was settled, the above legislation was swept away by section 8 of 8 & 9 Edw. VII. ch. 32. The decision upon the point in dispute was pronounced long before it was passed, although the formal order was not settled until after. I cannot see how this amendment to the Railway Act can have that effect. I do not see how it can have any application, as that amendment is not a mere matter of procedure, but a matter of jurisdiction affecting vested rights. It would be iniquitous to apply such a statute to a case like the present one without an express enactment to that effect. *Williams* v. *Irvine*(1). See also decisions quoted in Am. & Eng. Encycl. of Law, *vo.* "Statutes," page 693, *notes* (2 ed.).

I would, therefore, allow the appeal of the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada, with costs against the City of Toronto.

DAVIES, J.—This is an appeal upon questions of jurisdiction and law from an order of the Board of

(1) 22 Can. S.C.R. 108.

Railway Commissioners directing the elevation of certain railway tracks of the Grand Trunk Railway and the Canadian Pacific Railway, in the City of Toronto.

The proceedings began by an application on the part of the two railway companies for the Board's approval of plans for a new Union Station at Toronto, which involved necessarily what the elevation of the station should be as well as those of the railway tracks that entered it.

The Board during the hearing of the application and thinking the occasion opportune to consider the elevation of these tracks for the protection, safety and convenience of the public directed the city to make the necessary application and the city did so.

The jurisdiction of the Board to make the order it did is challenged upon two grounds; one that there was no highway within the meaning of the 238th section of the Railway Act, upon or along or across which the Canadian Pacific Railway was constructed which was admittedly necessary to give jurisdiction; the other that the matter in dispute and disposed of by the order related to the same subject matter as that dealt with by a special Act of Parliament, and by section 3 of the Railway Act, R.S.C. 1906, in such case

the provisions of the special Act shall in so far as it is necessary to give effect to such special Act, be taken to override the provisions of this Act.

As stated by the Chief Commissioner in his opinion when granting the order in question:

The one broad question for determination is whether this separation of grade shall be accomplished by the city streets being carried over the lines of railway tracks or whether the latter should be carried over the streets.

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The special Act invoked as ousting the jurisdiction of the Board was one passed in 1893, declaring (1) all works to be done or in pursuance of the agreement therein mentioned to be works for the general advantage of Canada; (2) an agreement dated 26th May, 1892, made between the Grand Trunk Railway Company, the Canadian Pacific Railway Company and the City of Toronto "to be in force and binding upon the parties thereto"; and (3) that each of the parties might do what was necessary to carry out its undertaking under that agreement.

The Act did not profess to embody the agreement or to make it part of the statute. Its first provision was necessary as the Union Station provided for was for the use and benefit of two Dominion railways, and as there might be doubts whether the railways or the city had the power to bind themselves in the several respects they did the agreement was declared to be binding upon the parties to it each of whom was authorized to carry out its undertaking as specified in the agreement.

Substantially the agreement provided for the erection of a new Union Station in the City of Toronto for the necessary opening, deviation and closing of certain specified streets, consequent upon its erection, for the construction of York Street bridge, and for the prevention of the public crossing over the tracks of the railways on the Esplanade between Yonge and York Streets. Incidentally no doubt these provisions had in view and did not ignore the public safety, but their object and purpose was to enable the Union Station to be erected and provide for access to it by the railway tracks and the public.

By no reasonable construction of language can this

Act be called a special Act dealing with the "safety, protection and convenience of the public" as those words are used in the amended section 238 of the Railway Act.

The agreement sanctioned by Parliament was a private agreement made between the railways and the city in which no doubt some public interests were considered, but which mainly concerned the interests of the respective parties. Like many other agreements it may have to be interfered with or perhaps overridden either in whole or in part by the Board while exercising their important functions and duties, and as in the case before us where they find it necessary to order anything to be done for the public safety or protection to the prejudice or damage of a corporation or company they take care to consider that fact in awarding the proportion of cost which such interested party must bear in the works ordered.

I have not any doubt that this Act is not such a one as could oust the jurisdiction of the Commissioners under section 238 of the Railway Act.

The main contention, however, of the Canadian Pacific Railway Co. was that there was no "highway" upon, along or across which its line of track was constructed which alone could give the Board jurisdiction.

On this question we had prolonged arguments in which the historical aspects of the case as well as the legal ones were thoroughly examined.

I do not think it necessary to go back further than the date when and the authority under which the "Don Branch" was constructed.

That branch railway adjoins on the south the Esplanade along the southern portion of which the tracks of the Grand Trunk Railway are laid.

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By common consent that Esplanade is a highway and all the streets leading to it from the city are highways, and at the time the Don branch was authorized to be constructed the waters of the harbour washed against the southern side of the Esplanade.

No one disputes the right of the public to reach the waters of the lake or harbour along these streets and across this Esplanade, and no question of jurisdiction could be raised by the Grand Trunk Railway Co. if the proposed work related to its road alone.

The judgment of the Judicial Committee in the case of *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*(1), was invoked in support of the proposition that the construction of the Don branch of the Ontario and Quebec Railway, by the Canadian Pacific Railway Co. as the lessee of that railway effectually and legally obstructed and put an end to any rights of passage previously and at the time existing across the lands or waters on and over which such branch was built.

For my part I am quite unable to see how the decision in that case applies to the one we have now before us. In the British Columbia case above cited the Judicial Committee held that the special Act authorizing the construction of the Canadian Pacific Railway authorized the taking by the railway company of all Crown lands provincial as well as Dominion necessary for the undertaking; that a proper construction of sections 91 and 92 of the British North America Act authorized the Dominion Parliament to dispose of provincial Crown lands for the purposes of this Interprovincial railway; that the Dominion Government had issued a Crown grant to the Canadian Paci-

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

fic Railway Co. under section 18(*a*) of their incorporating Act including all the foreshore in question at the street ends; that apart from this the foreshore in question being found as a fact to be a part of the harbour of Vancouver was clearly subject to Dominion legislation; that section 18 of the Canadian Pacific Railway Act gave the necessary authority to the company to take the foreshore there in dispute for the purposes of the railway; that the company had properly exercised the powers so given to them and appropriated the foreshore; and that such appropriation of necessity included the right to obstruct any rights of passage previously existing across that foreshore.

In the case before us there is no exercise of any power or right arising under the Canadian Pacific Railway Act, nor is there any analogous or similar Dominion legislation to that authorizing the construction of this "Don branch." No grant has been made to the Ontario and Quebec Railway Co. or to the Canadian Pacific Railway Co., its lessee, of any part of the lands; the sole right or authority which the company has or had to construct its line in the place it has constructed it along and adjoining the south side of the Esplanade and in front of the streets leading from the city to the harbour is to be found in (1) the order in council of the 25th January, 1887; (2) 51 Vict. ch. 53, confirming the said order in council; (3) the order in council 23rd March, 1893, for a grant to the Canadian Pacific Railway Company of an easement "for railway purposes over the extensions of the streets from Berkeley to Bay streets"; and (4) the grant to the company following and in pursuance of that order in council.

The question is: Did these orders in council, this

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statute and this grant give or convey to the Ontario and Quebec Railway Co. or to its lessee, the Canadian Pacific Railway Co., anything more than a bare easement or right to construct its branch line on the location specified and defined in the orders in council and the grant and subject to the limitations expressed in those documents and without prejudice to the public rights of communication with the waters of the harbour?

The contention of the appellants is that they got a title to the exclusive occupation of the spaces which formed the prolongations of the several streets and had a good title thereto in fee simple or if not that at least an exclusive license of occupation under which they had spent large sums of money and which could neither be derogated from nor revoked by the Crown.

I am quite unable to accept this contention. The first order in council of January, 1887, did nothing more and professed to do nothing more than sanction the building of a branch line of the Ontario and Quebec Railway, called the "Don branch," under six miles in length, pursuant to the provisions of the 18th subsection of sec. 7 of the Consolidated Railway Act, 1879; and approve of the maps and plans submitted shewing the location of the line, and fixing the time for construction as the 30th November, 1887.

In May following, 1888, the statute 51 Vict. ch. 53, was passed which amongst other enactments declared that the Ontario and Quebec Railway Company

> might at any time *within three years* from the passing of the Act construct and complete the branch of its line referred to in the said order in council of 25th January, 1887.

This Act gave no new nor further power or authority for the construction of the branch than that

given by the order in council. It merely extended the time within which the work had to be completed.

Sub-section 7 of the General Railway Act of 1879, under which the governor in council alone had power to sanction the building of the branch line, prescribes the conditions which must exist before the sanction sought for is given, and amongst them is the deposit in the County Registry office of the maps and plans indicating the location of the line, which plans the governor in council must approve of before the company could exercise its powers of expropriation.

Turning to plan No. 7, which was filed in the Registry office and submitted to and approved of by the governor in council in the above order which plan is signed by the president of the Canadian Pacific Railway Co., by the Deputy-Minister of Railways and Canals and certified by the Registrar as having been deposited in the Registry Office it appears that the several streets from Berkeley Street to York Street, twelve or thirteen in number, are clearly and distinctly shewn as prolongations of the streets opening on and upon Esplanade Street out into the harbour as far as the Windmill Line.

The proposed line, sanction for the building of which was thus sought, necessarily crossed each of these streets or prolongations of streets which at that time of course were south of the Esplanade covered with water. All that appeared in the map or plan therefore which the governor in council was asked to approve was certain streets, sanction for the crossing of which was sought and obtained.

It would be a singular construction to place upon such a sanction that it operated to shut up and close the street, and enabled the railway company after

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expropriating the lands of the private owners and building its roadbed, absolutely to shut out the public from access to the harbour from the city and *vice versâ.*

In my judgment this order in council and statutory extension of time with the implied confirmation contended for gave the company no power whatever to enter and construct their railway on these Crown lands which formed part of the harbour and were designated as streets on the plan.

It merely gave the sanction required by the then general Railway Act to the construction of the branch and so enabled the company to take steps to purchase or expropriate the lands necessary for the purpose or so far as they were Crown lands to obtain a right to cross them on such terms as the Crown chose to impose, or a deed or conveyance of the lands if the Crown chose to give it.

Without however taking any such steps as far as these intervening spaces called streets on the plan were concerned, and without any other authority than the order in council and the statute referred to, the company entered and built their road and operated it till 1893, when the discovery of their utter want of title was made.

Now what are the facts proved with respect to these intervening spaces in the harbour called streets as they abutted on the Esplanade at the time before and when the Don branch was built. Evidence was given and not contradicted that so far as eight or nine of them were concerned the city had constructed wooden slips, as they were called, at their junction with the Esplanade, which slips had been used by the public for years with horses and carts or wagons as ways or communications

with the harbour for the purpose of getting lake water and selling the same to the citizens of Toronto. The watermen drove their horses and carts across the Esplanade and down these slips, procured the water they required and crossed back again. The public in other ways used these slips or wooden ways built upon stone and secured by piles driven in the bed of the lake for the ordinary purposes of leaving the city to go upon the lake or getting to the city from the lake.

There is not a scintilla of evidence that such right of way or passage was ever called in question by anyone.

The introduction into the city of water by means of pipes of course put an end to the necessity for continuing this manner of using these ways to obtain water, so that when the Canadian Pacific Railway Co. built in 1888 the Don branch abutting upon the Esplanade and running across these prolongations of streets while the foundations and remains of the slips were there and were covered up by the railway filling the special user of them as a means of procuring water had ceased.

So far as the crossing at the foot of Yonge Street is concerned the question whether it had been prolonged beyond the Esplanade and constituted a public way or crossing was tried some years ago before the High Court of Ontario at great length with the result that the Court found in favour of the public right and the finding of Mr. Justice Anglin, the trial judge, supported by elaborate and convincing reasoning was on appeal confirmed by the unanimous judgment of the Court of Appeal.

The leading opinion of that court delivered by Chief Justice Moss leaves no doubt upon my mind that the evidence in that case fully justified the findings.

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There is no doubt that no such ample evidence was or could be procured with respect to the user of the ways or communications from the other streets to the harbour. Such a public and continuous user as was shewn always to have existed at Yonge Street after the Esplanade was constructed, did not, of course, exist at the ends of the other streets, but as I have stated evidence of some user though perhaps slight was given.

Pausing for a moment at this point in the chronological statement of the facts let us see what was the legal situation in the year 1888 when the Don branch was built.

The public right of access to and from the streets to and from the waters of the harbour had not been denied or prevented.

The Canadian Pacific Railway Co. simply filled up the harbour, level with the Esplanade, opposite to the ends of the streets and filled in with planks between the rails of their railway, thus giving the public the same right of access as they previously had and practically and *de facto* if not *de jure* extending the highways or streets and Esplanade to the extent of the width of their embankment on the prolongation.

That condition continued until the year 1893 without any attempt being made to exclude the public from the user of the Don branch as a street or highway in so far as it was prolonged into the harbour opposite to the streets leading to and on the Esplanade from the city.

Discovery had then been made that the branch had been constructed across the Crown property in these prolongations of streets without authority. Application was made, by the Canadian Pacific Railway

officials, to obtain that authority and the order in council of March, 1893, was, on report from the Minister of Railways, granted.

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This order in council sets out the existence of the application by the Canadian Pacific Railway Co. to have been for a

grant of the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor on and over eleven parcels of land, etc.

Then follow the descriptions of these parcels severally as the prolongations of the respective streets leading to and across the Esplanade.

The order in council recites the representations of the company on which they sought to have the order granted to have been that these lands were "held by the Government in the interests of Canada" and

under the impression that the order in council of 25th January, 1887, and the Don Act, 51 Vict. ch. 53, gave the company the right to do so, it some time ago constructed tracks over the said lands and had been using them for railway purposes but, having been advised that this right was not complete unless the approval given by the order in council be followed by a formal grant, it now prayed *that its right to use the said tracks* be confirmed by such a grant.

The order in council further recited that

the company further points out that the giving of this easement will not interfere with the Crown granting to the City of Toronto or to any other party *a full title to the said parcels of land subject only to the use for railway purposes* above mentioned.

The order in council therefore recommended

that there be granted to the Canadian Pacific Railway Co., its successors and assigns in perpetuity, the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor on and over the said eleven parcels of land, etc.

The grant followed in the same terms as the order in council recommended and was dated 10th June, 1903.

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Next in order came the Crown grant from the Dominion Government to the City of Toronto of these eleven parcels of land being the eleven street prolongations from the Esplanade southward to Lake Street, which was reserved for a highway. This grant was dated 28th November, 1894, and was given to the corporation

> in trust that the corporation, its successors and assigns should use each of the said parcels as and for a public highway either in the shape of a water-slip as portion of Toronto Harbour or as a street, or as partly one and partly as the other as to the corporation should seem meet, subject always to the terms and conditions in respect of the same embodied in the agreement dated 15th March, 1888, between the corporation, the Canadian Pacific Railway Co. and certain riparian owners known as "The Windmill Line Agreement."

This "Windmill Line Agreement" to the terms and conditions of which this grant was thus made subject does not, for the purposes we are discussing, in my judgment, affect the result.

The legal result which followed these several orders in council and grants was to vest the title of the soil in all these prolongations of the streets beyond the Esplanade and between it and Lake Street, in the corporation of the City of Toronto in trust to use them as public highways as expressed in the grant with a right to the Canadian Pacific Railway Company to use for railway purposes two or more railway tracks and the roadbeds therefor across the parts of these prolongations of streets immediately adjoining on the south the Esplanade.

It gave the company this easement and nothing more. Subject to that easement the land became the city's in trust for public streets or slips or both as the corporation should decide.

The legal result was that the Canadian Pacific

Railway tracks and roadbed which up to this time had been a *de facto* street or highway, subject to the railway easement, became on and afterwards one *de jure*, just as the adjoining tracks and road bed of the Grand Trunk Railway on the Esplanade were parts of a public highway subject to a similar easement.

The public right of access to the waters of the harbour had been, so far as the Crown could do so, secured and placed beyond doubt and the Crown's title in these extensions of the streets transferred to the city in trust for the public as highways or streets or slips. Under the statutory powers given the Crown with respect to the beds or soil of public harbours there can be no doubt as to the validity of this grant to the city or as to its effect as vesting the fee in the soil in the city corporation.

Suppose that at any time the city had determined to execute this trust and fill up any one of these street extensions or prolongations with earth from the Canadian Pacific Railway roadbed to Lake Street and had sent down their horses drawing carts filled with clay for the purpose, is it conceivable that the Canadian Pacific Railway Co. could have prevented them crossing their roadbed from the Esplanade in order to carry out the purpose of the corporation in so fulfilling its public trust?

The only right the Canadian Pacific Railway Co. had was one to an easement for railway use and subject to that, in my opinion, the right of the city to have its carts cross the railway from the embankment to fill and construct the street prolongations was incontestable.

Suppose again the city had completed its purpose and carried out its trust with regard to any one or

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more of these street prolongations south of the Canadian Pacific Railway tracks to the extent of say one hundred yards or more of the distance towards Lake Street would not there be alike a *de jure* and a *de facto* crossing there, a road, a street, a way which the public could use of right which the Canadian Pacific Railway Co. beyond their right of user of their own tracks for railway purposes could not interfere with?

Now for a moment let us look at the Railway Act and the nature or kind of highway which must exist to give the Board of Railway Commissioners jurisdiction under the 238th section.

The word "highway" is used in the section and is defined in sub-section 11 of sec. 2 of the Railway Act as including "any public road, street, lane or other public way or communication." If the public right of access between the city and the harbour by way of the streets and the Esplanade is not a public "road, street or lane" it is in my judgment a "public way or communication." These latter words, I would humbly submit, are peculiarly apt to describe the public right of access I am speaking of and which the Board of Commissioners on ample evidence found to exist.

If I am wrong in that even then I hold that the various orders in council and grants following them, vesting in the company and the city the several rights and titles in these street extensions I have before referred to coupled with the *de facto* filling in of these streets for the full breadth of the Don branch roadbed extended the streets, at any rate to the extent of that filling in, as far as the waters of the harbour and thus gave jurisdiction to the Board. There was originally a *de jure* "way or communication" which ripened on the filling in into a *de facto* public road or

street the legal title to which was vested in the city in trust for the public as a street but subject to the railway easement.

With regard to the minor but important questions as to the legal exercise by the Board of their jurisdictional powers, I am satisfied to rest my judgment upon the reasoning of Anglin J., with which I concur. The appeal therefore should, in my opinion, be dismissed with costs.

IDINGTON J.—The question raised is whether or not the Board of Railway Commissioners had jurisdiction to make the order complained of.

The order rests on section 238 of the Railway Act as it stood as amended by 8 & 9 Edw. VII. ch. 32, section 5, of which the first sub-section, and that most material herein, is as follows:—

> Where a railway is already constructed upon, along or across any highway, the Board may, upon its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

The material facts are in a narrow compass. The City of Toronto fronts upon the navigable water of

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Lake Ontario. There is a street of the city now known as Front Street running parallel with the lake shore.

Between that and the lake there was formed at an early date a parallel street known as Esplanade Street, one hundred feet wide.

The relation of the construction of this to the work of constructing the Grand Trunk Railway and the relation of the city corporation and the Grand Trunk Railway Company, which involved several agreements between them in regard to said works, though all gone into very fully at the trial and in argument before us, need not now, so far as I see, concern us.

Indeed their consideration has to my mind tended to obscure the real issues now to be disposed of. Some comprehensive knowledge of their results have, however, to be borne in mind and especially so the construction of the Esplanade and its character as a street whereon all men may go as of right.

The Grand Trunk Railway Company did not appear in this appeal and, so far as it is directly concerned, may be considered out of the question.

The admitted facts are that this Esplanade was so constructed that the south side thereof formed after its construction the north boundary of the lake and that the Grand Trunk Railway was built upon and along the southerly fifty-two feet of the Esplanade in the late fifties.

The Canadian Pacific Railway Co. as lessees of another railway company known as the Ontario and Quebec Railway Company which had constructed its road from the east and entered Toronto on the north side thereof some two miles from the lake desired an entrance to the lake front and applied to the Governor in Council then having the powers given by the Con-

solidated Railway Act, 1879, for sanction to the building of a branch line called the "Don Branch" under six miles in length.

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The application as appears from the face of the order made thereupon was under the provisions of the 18th sub-section of section 7 of said Act.

That sanction was given in the following words:—

The Minister considering it desirable that the company should be permitted to build this branch, recommends that due sanction be given therefor, and that the maps and plans submitted, shewing the location of the line from a point on the main line of the Ontario and Quebec Railway, on lot 12, in the 3rd concession from the bay, in the township of York, to a point on the Esplanade in the City of Toronto, near York Street, be approved, and further, that the time for the construction of the said branch be fixed as on or before the 30th of November, 1887.

It is most important to understand exactly the nature of this concession for upon the correct interpretation thereof turns the rights of the parties who have appeared before us.

This sub-section 18 indicates its purposes and prohibits work until as provided a company applying under it shall have given the notices specified and prior thereto shall

have deposited in the Registry Office of any city, county, or part of a county, in which the line or any part thereof is to be constructed, the maps and plans indicating the location of the line, and until the company shall have submitted the same to, and such maps and plans shall have been approved by the Governor in Council, after the expiration of the notice.

A sub-section (*b*) of this sub-section, gives for the purposes thereof to every

such company the powers given them with respect to their main line, by the Act incorporating the company.

The power of expropriation in such Acts was exercised by the company in respect of the lands of pri-

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vate owners but nothing was done to acquire title to the lands of the Crown crossed by this projected railway.

The Ontario and Quebec Railway Co. before proceeding to build obtained from Parliament an Act extending time and confirming said order in council but, beyond the extension of time, this Act (which also dealt with other matters) added nothing to the order and neither by express terms nor impliedly, when we have regard to its purview and the frame of some of its reservations, in any way affected the rights of the Crown.

The appellants or its lessor proceeded to build this branch line without acquiring from the Crown the lands necessary for its construction and in doing so crossed some eleven parcels of land covered by the waters of the harbour and belonging to the Crown; without a shadow of title to do so, save possibly that implied in the general right to cross highways. But were these even highways to be crossed?

Some years later in 1893, the solicitor of the Canadian Pacific Railway Company, having discovered the oversight, made an application to the Minister of the Interior for a grant to that

> company, its successors and assigns in perpetuity, of the right to construct, maintain and use for railway purposes two or more railway tracks and appurtenances, and the roadbeds therefor, on and over eleven parcels of land in the City of Toronto, in the Province of Ontario, containing in the aggregate fifty-six hundredths of an acre, more or less, and being bounded respectively

—as therein appears.

This was conceded by an order in council of 23rd February, 1893, which shews it was assented to by the Ministers of Marine and Fisheries and of Public Works as well as by the Minister of the Interior. As

to whether that was or not a proper compliance with section 19 of ch. 39, of the Revised Statutes of Canada, I pass no opinion.

That section amongst other things provided,

And any portion of the shore or bed of any public harbour vested in Her Majesty, as represented by the Government of Canada, not required for public purposes, may, on the joint recommendation of the Ministers of Public Works and of Marine and Fisheries, be sold or leased under the authority aforesaid.

It seems these eleven parcels formed part of the bed of Toronto Harbour on Lake Ontario and lay next along the southerly side of the above mentioned Esplanade.

In the order in council there appears this express statement:—

That the company further points out that the giving of this easement will not interfere with the Crown granting to the City of Toronto or to any other party a full title to the said parcels of land, subject only to the use for railway purposes above mentioned; a use which the Government and the city officials, and all other parties interested, have for several years understood that the company had or was to have.

On the 10th June, 1893, a patent was issued to the Canadian Pacific Railway Company for said parcels of land in consideration of a dollar, granting

its successors and assigns (so far as we have power to grant the same) the right to construct, maintain, and use for railway purposes two or more railway tracks and appurtenances and the roadbeds therefor, as part of the Ontario and Quebec railway on and over eleven parcels of land situate in the City of Toronto.

It is to be observed that this transaction can hardly be called a sale; that the necessary concurrence of Ministers named in the statute was, if had, rather informally so; that in its terms a doubt is carried on the face of the instrument as to its legality; that the grant is not to the company building or owning but to its

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lessees; and that it ends by an express declaration that if no right to grant existed, it is accepted with such risks by the company.

The respondent, apparently wishing to escape from what was implied in this transaction, sought in argument herein to discard this order in council and this grant, and claimed boldly that the original order in council permitting the branch line to be constructed had the effect of granting to the company named therein the fee in these lands of the Crown crossed by the construction of the branch.

No such contention can be properly maintained. The Crown lands are just as sacred as any other lands and are not disposed of in that way or impliedly disposed of at all.

It never was the intention of the Minister of Railways and Canals or within the scope of any such order to grant lands of any kind, but only to grant the power and capacity to take and hold the necessary lands when the title thereto had been got from the Crown or others concerned as owners.

And when we find that these very lands can only be disposed of in the way specified in the statute already referred to the contention seems futile.

Support was, faintly I must say, sought in the case of *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(1), or something therein. The Crown had made a grant there. Hence as well for that reason as the nature of the whole case and all it originated in or rested upon it had no resemblance to this case.

Then again the very maps or plans filed in the Registry Office, and thereby submitted to found the application for the original order in council had

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

plainly set forth thereon these lands as parts respectively of Yonge Street and a large number of other streets of the city, as if they extended a considerable distance to the south of the lands in question. I think these plans were intended to represent the continuation of such of these streets as such from the south side of the Esplanade, though necessarily obscured on the plan by the shading of the lines representing the intended location of the tracks of the projected branch line crossing same.

What appeared in this application was no more than the crossing of any other street or public highway.

Instead of an apparent grant of land springing from the order resting on such a plan there is apparently involved the mere concession of a right to cross as over a supposed highway or highways so far as these lands were concerned. We are not informed whether anything else was placed before the Ministers to displace such clear inferences of fact and intention.

What is claimed to have resulted in law is the grant of the fee simple in said lands; in other words, is the right to put a fence thereon across a mile of the front of Toronto preventing men from going on and over these numerous tracts of space where undoubtedly before they had a clear right to go and had so gone for years. Such is the right claimed or nothing.

When we consider that a legislative concession of such a character as that must be clear before the public rights can be so invaded or such supposed to have been an intent of these so legislating, and we do not find it clearly so expressed the claim fails. At least all the surrounding circumstances attendant upon the execution or constitution of such a document under which the creation of such an alleged grant with such

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consequences as claimed is involved ought to be demonstrative of such intention before we can fairly attribute such a purpose to those responsible therefor —instead of being as I submit they are of the reverse character.

If the Governor in Council is to be supposed aware, despite the appearances of the plan, that these street extensions were covered by the waters of the lake then he and his council might as well be supposed aware also of the schemes of the city recognized by the prior grant, fifty years before, of the Crown to the city of the lands on either side thereof which clearly contemplated a possible filling up of these spaces and the constructing of streets to serve the uses of such grant and those made thereunder.

The scheme involved in that early grant to the city might look either to the reclamation of that part of the lake from the waters thereof and the construction of suitable buildings thereupon; or to the construction of wharves and such like over the water.

But having regard to the width of the spaces left ungranted the former would seem the more probable.

In either case it evidently was a reservation of ways of access to the lands or wharves, and consistent in either case with a means of passage by the public by land or water to that beyond, whatever it might be or might become; either lake, or land, or water, on either side.

All this makes clear, to my mind, that the power of the railway company to prohibit the passage across its tracks as implied in the theory of a grant in fee of the roadbed, never was in the mind of any human being.

I have not overlooked the provisions of sub-section

3 of section 7 of the Railway Act of 1879, prohibiting and enabling, nor can I overlook the constitutional limitations, conditions and methods by which such enabling consents might have been got. They were not got and must not be presumed to have been got by virtue of something else than such express consent to fulfil a present definite purpose as the statute implies; a different thing entirely from the wavering thing given for an entirely different purpose by the order in council relied on, and which might become determinate in two years or changed as need be.

The city on the 28th of November, 1894, obtained a grant, for what such grant was worth, from the Crown of these parcels of land forming extensions of streets including the lands up to the south side of the Esplanade being several of those crossings now in question.

Wharves and industrial establishments have been erected south of this railway branch, and the several means of access thereto furnished over many of these lands so granted, have daily been used for years by thousands as of right. So long as the water covered them they were highways of a kind, and the merely filling in, under and by virtue of or without such authority as here found, did not end the right of travel over them.

Nothing has ever transpired to prevent the use of such means of access. It obviously was the purpose of every one that they should be so used. Works of accommodation—not very expensive, it is true—have been added and kept in repair by the city for no other purpose than to promote this use as of right.

It seems idle to put forward the reservation of individual proprietors in arranging with the railway company for, and in respect of the making of their grants

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of right of way, as in any way limiting this paramount right of travel.

What the Board had to consider was not alone the technical definition of a highway given by the Ontario Legislature or its predecessor, but the use as of right of a means of communication set forth as follows:—

"highway" includes any public road, street, lane, or other public way or communication.

This right every one of the public had, by means first of the streets joining the Esplanade on the north, thence across that a public highway, and thence into the lake itself a highway.

An additional strip of some feet in width was granted the railway company in 1904, which in express language so reserves the right that its very terms forbid any question of this right of crossing, and is in itself a recognition thereof. Its acceptance with such condition by the appellant implied an acknowledgment of respondent's claims herein.

Besides all these things it is to be observed that the Board's findings of fact as such are conclusive, and in this case the findings of Mr. Justice Anglin are expressly accepted by the Board without distinction of law from fact.

Does that under section 54 of the Railway Act imply an acceptance of the *primâ facie* case, and if so with what results so far as we are concerned?

I have, for the foregoing manifold reasons, no doubt of this being a crossing such as referred to in the above section 238 of the Railway Act, and the consequent jurisdiction over it by the Board.

Is there anything else to consider? It is said the power is excepted by virtue of what flows from an agreement known as the tripartite agreement entered

into between the city, the Canadian Pacific Railway Co., and Grand Trunk Railway Co., on the 26th July, 1892, long before the Board was constituted with its extensive powers.

The appellant, the Canadian Pacific Railway Company, submits, that inasmuch as the said agreement provided for the elimination in the future from the results of the local operation of the railway many elements of danger then and still existent, including the same as those sought to be relieved against by the order of the Board, and as the scheme of the said agreement had for its chief purpose such elimination of danger, it must, when ratified, as it was by Act of Parliament, be taken that a special Act, relative to the same subject matter as that dealt with by the Board, existed within the meaning of sec. 3 of the Railway Act, and being so related to the same subject matter of street crossings overrides the provisions of the Railway Act in this regard.

If the validity of the argument will not stand on such assumption, of identity, of elements of danger, and the chief purpose of the agreement, giving added strength (not, in fact, therein), then all weaker positions must inevitably fall.

I desire the utmost supposition of the case to be the test.

As the Chief Commissioner points out a private agreement ratified by Act of Parliament remained but a private contract.

It furnished and furnishes no security to the general public. It supplied no method but the will of the contracting parties for carrying out such provisions as it contained.

It does not seem when we have regard to the nature

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of public rights, wrongs and remedies, as at all legislation that deals with them.

All it does is to validate corporate Acts and covenants, which might, but for it, have been of no binding effect, as between the parties. It is the private right alone that is dealt with. No one could be indicted for breach of anything therein provided as if in the way of imposing the discharge of a public duty.

A few words might have changed all this, but they are not in this private Act.

It is not necessary to go further than to point out that Parliament, eleven years later, constituted a Board for the express purpose of securing to the public their enjoyment not only of all such safeguards as legislative ingenuity had been able to devise, but helpless to execute, for the protection, safety and convenience of the public; because public opinion and the private contract system and legislative sanctions had all broken down, and an executive power was needed to effectuate the purpose of so many endeavours of the kind in question.

Three years later section 238 seems to have been transformed from an inefficient sort of thing to what evidently was meant to be a most drastic sort of legislation intended, as the terms of the 3rd sub-section thereof indicates, if need be, to override such objections as now set up.

I have no doubt, in the absence of the most express legislation, by clear language or implication in a special Act dealing with the very thing, that sec. 238, even as it stood in its early form, was intended to have been acted upon by the Board notwithstanding any such arrangements of a contractual nature as relied on now to take the case out of the Act.

If the tripartite agreement had, in its every provision, not been a mere private contract, but an Act of Parliament, I doubt if it would, in the language of section 3, have overridden the plain provision of section 238, so far as operative at all, as originally enacted.

As it now stands it is radically different from all that the provisions of the tripartite agreement expresses or implies. I therefore cannot see any grounds for finding such provisions to be "like" and relative "to the same subject matter."

Some forcible remarks, well addressed elsewhere, no doubt, on the injustice of thus in effect sweeping aside the realization of that which was expected from this agreement, were put before us.

However rich the field furnished by the history of the relations of these corporations with each other may be in food for thought on the part of the ethical philosopher in quest thereof, in an inquiry as to the uses and development of a corporate conscience, our present sphere of duty in the premises does not lead us to enter therein.

The next question is: Has the jurisdiction thus founded been exercised in such a way as to fall within the powers conferred by the section?

The most formidable objection made is that the section contemplated the elevation of the whole railway or the whole highway within the meaning given those respective words in the interpretation clauses of the Act, and not merely a part of either.

It has I confess caused me far more difficulty than any other in this case to arrive at a satisfactory solution of the construction of this section.

The solution of what should be done has, if the

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Board has the power, been properly made. It ameliorates what indeed seems a strong measure. I do not think, if we can help it, a construction (however much it may suit appellant's present purposes) that would on the one hand needlessly invade the rights of property or on the other render the statute nugatory, should be adopted.

Moreover the order seems to me to provide for what in a correct sense is substantially the elevation of the railway.

A complete railway is to be elevated. A subsidiary part of its serving tracks, which may be used for mere siding accommodations is permitted under regulations as other

measures taken as under the circumstances appear to the Board best adapted to remove or diminish the dangers of obstruction in the opinion of the Board arising or likely to arise in respect of *such portion of the crossing, if any, or any other crossing directly or indirectly affected.*

These words seem to indicate the contemplation of just such a case as that found here, and to detract from the force of the argument that the whole railway is to be elevated.

Indeed it comes to the question of whether two of the several means specified or indicated disjunctively as they are in the section can be coupled or not in the same order. For example can the employment of watchmen not be directed in the case of a diversion of track or highway, which in its diverted path might yet need some such additional safeguard?

If it had been a case of doubt to be only solved by increasing the burthen upon the railway companies I should have been more loath in face of doubt of that kind to pronounce in favour of jurisdiction. But when the probable consequence is the alternative of

an order to elevate every track on the whole of these roads, no matter whether merely used for siding accommodation or otherwise, in order to comply with the alleged literal meaning of the words used I pause to see if it is possible to find another meaning in the section which may be more consistent with the rule of construction in section 15 of the Interpretation Act, which directs every Act to be deemed remedial and accordingly to

> receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Section 48 of the Railway Act also seems comprehensive enough to be, and may be, applicable.

It seems to follow from these several considerations that the jurisdiction of the Board has in this regard not been exceeded.

The other objections as to York Street bridge, and the closing of the streets indicated, I do not think have much weight. They are covered by the necessities of exercising the jurisdiction and the express provision for the diverting of highways, if we apply the section above partly quoted. I also am inclined, though doubting, to think section 31, sub-sec. (*b*) of the Interpretation Act may also be relied upon.

The Yonge Street order of the Privy Council does not seem at all to interfere, seeing the Board has the power to rescind the order.

This order, if effective, is a substitutionary rescission of it.

No point was made of the appellant, as lessee, not being liable or at all events without its lessor being joined.

I think this appeal must be dismissed with costs.

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DUFF J. (dissenting).—This in an appeal from an order of the Board of Railway Commissioners raising the question of the jurisdiction of the Board to entertain an application by the municipality of Toronto respecting the lines of the Grand Trunk Railway and Canadian Pacific Railway running along and adjacent to the Esplanade, a street running east and west in that city, and for an order directing the construction of a viaduct and the placing of the railway tracks upon it.

The order was made in professed exercise of the powers of the Board under sections 237 and 238 of the Railway Act. Admittedly a condition of the jurisdiction of the Board is that both these railways had been constructed *"upon, along, or across"* one or more highways. The Chief Commissioner, in upholding the jurisdiction of the Board, appears to have proceeded upon two grounds:—First, that both these railways were constructed "along" a highway, the Esplanade; secondly, that they are both constructed upon or across a number of streets running admittedly to the northerly limit of the Esplanade, and, according to the contention of the respondent and the decision of the Chief Commissioner, proceeding further and crossing both railways.

As it has never been disputed that the line of the Ontario and Quebec Railway in question lies to the south of the Esplanade, the highway referred to by the Chief Commissioner, we must take it, I think, that the Chief Commissioner has acted upon the view that this line, running as it does *alongside* the Esplanade in the locality in question, is for that reason a railway constructed "along" a highway within the meaning of section 238.

I do not think this construction can be supported. When one looks at the history of these sections, it seems clear that this is not the sense in which prior to the Act of 1903 the word "along" was used in the legislation out of which sections 235 to 243 developed. The first sentence of section 15 of the Consolidated Railway Act of 1879, is as follows:—

The railway shall not be carried along an existing highway, but merely across the same in the line of the railway, unless leave has been obtained from the proper municipality or local authority therefor.

"Along" in this sentence seems to be used to express longitudinal direction in contradistinction to "across," and to mark the case in which the railway is to be constructed upon the highway in a direction corresponding generally to that of the highway rather than in the general direction of the railway line itself; and the other parts of the section hardly permit any other view of the meaning of the word. The same phraseology is used in the same sense in section 183 of the Consolidated Act of 1888. The Act of 1903, with which, in substance, the present Act in this particular corresponds, provided that whether the railway was to be carried "across or along or upon" a highway the leave of the Railway Commissioners must first be obtained. The addition of the word "upon" can hardly be held to alter the meaning of the other words. I am not much concerned to dispute that upon this construction there is some superfluity. A distinguished judge once said that Parliament is seldom parsimonious of language, and the following passage from Lord Selborne in *Hough* v. *Windus*(1), seems appropriate here:—

(1) 12 Q.B.D. 224, at p. 229.

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I cannot admit that there is any such presumption against fullness or even superfluity of expression, in statutes or other written instruments, as to amount to a rule of interpretation controlling what might otherwise be their proper construction. No doubt, when the words admit of it, that interpretation which makes them more officious with respect to the clear and ascertained policy of the statute, or purpose of the instrument, is (in general) to be preferred to that which makes them less so.

* * * * * * * * *

And I adhere to an opinion expressed by myself in the House of Lords more than ten years ago in *Giles* v. *Melsom*(1), which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that "nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous."

At the time that part of the line the Ontario and Quebec Railway, which is now in question (a part, that is to say, of the Don branch of that railway) was authorized, the Esplanade—upon the southerly part of which the line of the Grand Trunk Railway was constructed—was, as I have said, a highway running east and west. A number of streets running north and south admittedly came to the northerly limit of the Esplanade. South of the Esplanade between Berkeley Street to the east and York Street, which was the westerly limit of the branch in question, and extending as far southward as a line known as the old windmill line, the bed of the harbour had been granted or leased to individuals—with the exception of a series of strips enclosed by lines formed by the production south of the boundaries of the streets already mentioned running north and south to or across the Esplanade. The intervening spaces between these strips were at the southerly front of the Esplanade occupied by wharves and other structures. That the strips of harbour bed mentioned were

(1) L.R. 6 H.L. 33.

at that time still vested in the Crown in the right of the Dominion, nobody disputes. That Toronto harbour or bay was then a navigable water subject to the public right of navigation, or that these strips or street prolongations, as I shall call them, were part of the harbour in this sense, that the bed and the waters of the harbour there were subject to the public right of navigation, can hardly be called in question. Not only is there no evidence except of the most equivocal kind suggesting any intention on the part of the Crown to devote these strips to highway as distinguished from harbour purposes, but nobody suggests that there was any statutory authority by which the Crown could merely by a declaration of intention convert a part of the harbour of Toronto into something that was not a part of that harbour. The effect of the Revised Statutes of Canada (1886), ch. 39, section 11, I will discuss when I come to the grant of 1894, upon which the respondents rely.

I do not understand the learned trial judge in the *Yonge Street Bridge Case* (1) (upon which the learned Chief Commissioner relies) to dispute that the prolongation of Yonge Street was at the time the authority was obtained for the building of the Don branch a public navigable water part of the harbour of Toronto. Nor do I understand from the judgment of the Chief Justice of the Court of Appeal that he disagrees with that view. With respect to some of the other prolongations there is another point to consider. There is some evidence to the effect that at some time prior to the construction of the Don branch there were at the southern face of the Esplanade on these prolongations, structures called "slips," consisting of an apron of

(1) 6 Ont. W.R. 852; 10 Ont. W.R. 483.

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wood resting at the upper end on the Esplanade, and at the lower end, upon a crib. It is said that these slips were used as landing places for limited purposes, but more generally as conveniences for filling water-carts with water which was peddled about the streets of Toronto. There is nothing to shew by what authority these slips were put there. There is nothing to shew the date when they disappeared. The fair inference from all the evidence is, I think, that they had all completely disappeared in 1887 with the exception of the remains of one at Bay Street. The evidence (at all events) is altogether too vague and too meagre to support any finding that in any of these prolongations what was formerly the bed of the harbour was not still the bed of the harbour in 1887. There is no finding by the Board or the Chief Commissioner inconsistent with this view.

When then the Don branch was constructed by placing solid structures adjoining the Esplanade across these street prolongations was it constructed "upon, along or across" a highway within the meaning of section 238 of the Railway Act? The view most strongly pressed upon us was that the word "highway" by the interpretation clause is defined as including "any public road, street, lane, or other public way, or communication"; and it is argued that the word as it appears in sections 237 and 238 must be read as convertible with (as a mere symbol standing for) the whole of this definition.

With great respect I think so to apply the definition is to misapprehend the office of this interpretation clause. *Meux* v. *Jacobs*(1), *per* Lord Selborne; *Dechène* v. *City of Montreal*(2), at p. 645; *The Queen*

(1) L.R. 7 H.L. 481, at p. 493. (2) [1894] A.C. 640.

v. *The Justices of Cambridgeshire*(1). In the Act of 1879, under which the Don branch was authorized as well as in all the consolidations of the Railway Act down to that of 1906, the meanings assigned by the interpretation clauses to the words there defined are assigned subject to the usual condition that there shall be nothing in the subject or context repugnant to such a construction. It is quite clear that the highways referred to in section 238 are highways of the same class as those referred to in section 237 and that, again, those dealt with in the latter section are the same things as are dealt with in section 235. The whole group of sections beginning with section 235 and ending with section 243, and headed "Highway Crossings," is designed to deal with highways of the same class obviously. If one examine these provisions (the most cursory examination is sufficient), there are the strongest indications, I think, that in them the legislature was not dealing with navigable waters or the beds of navigable waters; and this becomes perfectly plain when we look at the group of sections beginning with section 230 and ending with section 234, headed "Navigable Waters," and compare that with the group in which sections 237 and 238 occur.

The enactments in the second group are exactly appropriate to highways on land; those in the first group exactly appropriate to the subject with which they profess to deal. The difference between the two groups of sections is perhaps even more marked if we look at the Act of 1879, and at the Consolidated Act of 1888. In section 15, which is the provision of 1879 dealing with highway crossings, the authority to which

(3) 7 A. & E. 480, at p. 491.

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the railway company must resort, where leave is required, is the "proper municipal authority," an authority which as such (except in rare cases) could have nothing whatever to do with navigable waters. Again the group of sections in that Act dealing with navigable waters, sections 66 to 68, refer the railway company as we should have expected to the Railway Committee of the Privy Council, where authority is required to put its works on the bed of any such water. Nobody can doubt that when the company proposed to construct its works in these prolongations the authority to which application must be made (after the consent of the Governor in Council under section 7, sub-sec. 3 had been obtained), was not the municipal authority, but the authority named in section 68 (the Railway Committee), and that section 15 could not possibly apply to such a situation.

These prolongations were not then in themselves highways within the meaning of section 238, and in crossing them the railway company was not by reason of that circumstance alone constructing a railway "upon or across" a series of highways. But the argument is put in another way. It is said that there was a public right of access to the waters of the bay from the Esplanade and *vice versâ,* which was interfered with, and that the parts of the harbour occupied by the railway, being subject to this right, were "highways" (using that word in the sense of "public way or communition") distinct both from the Esplanade and the harbour itself. With every respect, I am unable to follow this argument. There was a public right of passage, up and down, let us say, Yonge Street, to the Esplanade, and then across the Esplanade (whether Yonge Street crossed the Esplanade seems to me to

be immaterial) and to and from its southern boundary. There was a public right to use for navigation and all purposes reasonably incidental thereto that part of the harbour which came up to the Esplanade opposite to or at the end of Yonge Street. The public had a right to be on the highway for highway purposes, and they had a right to go from the highway south for any purpose reasonably connected with navigation. They had a right to go from the harbour on to the highway. But these rights were rights which arose solely from the circumstance that the southern line of the Esplanade here merely marked the contiguity of a land highway and a public harbour. If the Esplanade had ceased to be a public highway, and had become private property, the public right to cross it to get to the harbour would have ceased to exist, not because the rights of the public appertaining to the harbour had in any way been impaired, but because the land highway had ceased to go down to the harbour. And so, if the public rights of navigation should, in respect of the prolongation of Yonge Street, be extinguished, and that prolongation become private property, the right of the public to get to the harbour from the southern face of the Esplanade through this prolongation would cease to exist, not because any public right in respect of the highway had been affected, but because that particular locality had ceased to be part of the harbour. Let us suppose, for example, that the Don branch should have crossed the Yonge Street prolongations some distance south of the Esplanade, would anybody have suggested that the crossing there was a highway crossing within sections 237 or 238?

It seems to me, therefore, to be clearly impossible to maintain that at the time they were made, these

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crossings were highway-crossings. They were, for the purpose of applying the statute, crossings of navigable waters. It seems to me to be equally clear (assuming the railway to have been lawfully constructed across these street prolongations), that the public rights of navigation there and the rights ancillary thereto were extinguished by the construction of these crossings. They were extinguished because as such it became upon the construction of the railway physically impossible any longer to exercise them. Once the spaces became filled up, it became obviously impossible that the public should use them in the way they were used before, and in the only way which the public had a right to use them before. *Corporation of Yarmouth* v. *Simmons*(1), at pages 524 and 526.

When it is argued that the public right to get to the waters of the harbour was not extinguished, but was reserved by implication, I suppose what is really meant is that for the rights formerly lawfully exercisable by the public in the place occupied by the railway, there was substituted some other right. That substituted right is said to be a right of passage across the tracks of the railway and, therefore, the part of the railway subject to that right is said to be a land highway—a highway within the meaning of sections 237 and 238. Whether such land highways over the tracks of the Canadian Pacific Railway were ever substituted for the rights extinguished by the construction of the railway is perhaps the principal question raised on this branch of the argument. The contention that such highways came into existence is based upon several grounds: First, it is said that public right of passage across the railway—it is not put precisely

(1) 10 Ch.D. 518.

in this way, but in effect, I think, I am putting the contention fairly—was one of the terms implied, at all events, if not expressed, in the consent under which these parts of the harbour were occupied by the railway. Then it is said that under the authority of a certain agreement dated 1892, called the Tripartite Agreement, ratified by Parliament and by the Legislature of Ontario, certain highways were constructed across the railway. The first, I think, is the main ground upon which the decision in the *Yonge Street Bridge Case*(1) proceeded, both at the trial and in the Court of Appeal, which decision, as I have said, is accepted and acted upon by the Chief Commissioner, and if I do not mistake the views of the majority of this court, I think it is the principal ground upon which they also proceed.

The first point to consider is whether the company in occupying the parts of the harbour in question with its works, was acting legally in accordance with the terms of the authority conferred by the Railway Act of 1879, which admittedly governed it. The principal provisions applicable are section 7, sub-sec. 3, and section 68. As to section 68, it has never been suggested that the approval of the Railway Committee was not obtained, and we may assume that the course of the company in that respect was regular. It is argued, however, that the consent required by section 7, sub-sec. 3, by reason both of the fact that the lands occupied were Crown lands, and that they constituted part of the bed or beach of a lake, was not procured until some time after the railway was constructed, and was then procured upon such terms as to constitute the public right of passage contended for. Before discussing the

(1) 6 Ont. W.R. 852; 10 Ont. W.R. 483.

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documents, which are said to shew the necessary consent under section 7, sub-sec. 3, it will be convenient to look a little at the terms of that section. It is to be observed that the enactment prescribes no particular form of words or of instrument in which the consent is to be embodied, and the force of this circumstance is emphasized by the provisions of sub-section 4, which expressly provides that in certain cases the license and consent are to be under the hand and seal of the Governor. Any instrument, and any form of words sufficient to evidence the consent of the Governor in Council, in fact, would, I think, be sufficient under sub-section 3. The documents relied upon are an order in council of the 25th of January, 1887, and an Act of the Dominion Parliament of 22nd of May, 1888. By the order in council sanction is given for the building of the Don branch, and the maps and plans shewing the location of the line are approved. By the Act the company is authorized at any time within three years from the passing of the Act to construct and complete the branch referred to in the order in council, which is set forth in the schedule to the Act. It is not disputed that the branch was constructed in accordance with the maps and plans that were before the governor in council and, one must presume, before Parliament. We must assume as I have already said, that the approval of the Railway Committee under section 68 was obtained. I am not able to convince myself that in these circumstances the consent of the governor in council under section 7, sub-sec. 3, has not been sufficiently established. It is idle, it seems to me, to suggest (at all events, the onus is upon those who do suggest it), that this order in council was passed and this statute was enacted in ignorance of the fact that the Don branch was being constructed along the water

front of Toronto south of and adjoining the Esplanade; and, in part, in spaces which were parts of the harbour. The map produced shews, as plainly as anything could shew to any one having the slightest knowledge of the locality, that such was the case. I am not able to follow the suggestion that this statute and order in council amounted to nothing more than a consent to a street crossing. It must be observed that the function of the Governor in Council under section 18 was confined in its operation to branch lines. The approval of the location and the maps and plans of the main line was not required under the Act of 1879, or the Act of 1888. Even under the Railway Act as it stands to-day, it is only the approval of the general location that is required. In the case of branch lines (which could not exceed six miles in length), the whole responsibility was thrown upon the governor in council. In such circumstances the suggestion referred to is not one to which, I think, much weight should be attached.

But the order in council contains much more than an approval of plans; it expressly sanctions the building of the line according to the plans, that is to say, in the places actually afterwards occupied by the railway, and the statute confirms that sanction.

I am not concerned at present to consider the precise interest in these lands which passed to the railway company on the construction of their works under the authority thus conferred. For the present the question is, was the railway lawfully there? If a sufficient consent was obtained within the meaning of subsection 3, then the railway was lawfully there. If such a consent was not obtained it was not lawfully there, and the railway company were trespassers as against the Crown and (assuming the public to have been

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actually prejudiced thereby in the exercise of the right of navigation, or any right ancillary thereto), the works in the localities under discussion were a public nuisance. I do not think the respondent pressed its point quite so far as to say that the company was acting wholly without authority in constructing its works in these places, but I am not able myself to find any middle ground; either there was a consent within the statute or there was not. Without such consent there was an absence of statutory authority for the occupation of any Crown lands or of any part of Toronto Harbour.

If my view be correct that the consent required is sufficiently evidenced by the order in council and the statute, then I must say I cannot find, at this point, anything to shew the creation or reservation of any public right of passage across these parcels of land. It cannot surely be said (in every case in which railway works should be placed on the bed or shore of a navigable water under the authority of sub-sec. 3), that for the public right of navigation thereby interfered with, there would be substituted, *ipso jure,* a public right of passage over such works. I do not, for the moment, consider the question whether the Governor in Council would have power to reserve such a right as one of the terms of consent. It is sufficient for the present to say that there is no evidence whatever down to the time I am speaking of, to shew that any such term was imposed. It is convenient to observe at this point, however, that the consent under the sub-section mentioned and the statutory authority flowing from the consent is to occupy the area to which it relates for railway purposes. *Primâ facie,* at all events, that appears to me to involve the exclusion of any such gene-

ral right of passage as was here contended for. *Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.*(1), at page 212.

I do not suppose that the sufficiency of the statute or order in council for the purpose suggested would have been impeached at this date, had it not been for some transactions between the railway company and the Dominion Government, six years later, in 1893. In that year an application was made by the Canadian Pacific Railway Company under the provisions of section 19, ch. 39 of the Revised Statutes of Canada, 1886, for a formal grant of the parts of the prolongations now in question; and under the authority of that statute a grant was made to the Canadian Pacific Railway of

the right to construct, maintain, and use for railway purposes two or more railway tracks and appurtenances ,and the roadbeds therefor, as part of the Ontario and Quebec railway and over eleven parcels of land situated in the city of Toronto, in the Province of Ontario, in our Dominion of Canada, containing in the aggregate fifty-six one-hundredths of an acre, more or less, and, being bounded respectively as follows, that is to say.

Assuming there had been no previous consent under the Railway Act, that, of course, was in itself a sufficient consent. But it is said that this consent was given upon terms involving the reservation of a public right of passage across the railway. This contention is based upon the terms of the company's application in part, and in part upon the order in council under which the grant was made. I do not think, myself, that the terms of the company's application (except to the extent to which they are incorporated expressly or impliedly in the order in council or the grant), are relevant upon the question whether in point of fact

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

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such a term was imposed by the Governor in Council. They are not referred to in the grant; the parts of the order in council which refer to them and which respondent relies upon as evidencing the constitution of such rights of passage are as follows:—

The Minister further states that the company represents that these lands are held by the Government in the interests of Canada, and under the impression that the order of His Excellency the Governor-General in council, dated 25th January, 1887, and the Dominion Act, 51 Vict. ch. 53, gave the company the right to do so, it some time ago constructed tracks over the said lands, and has been using them for railway purposes; but having been advised that this right is not complete unless the approval embodied in the said order in council be followed by a formal grant, it now prays that its right to use the said tracks be confirmed by such a grant.

That the company further points out that the giving of this easement will not interfere with the Crown granting to the city of Toronto or to any other party a full title to the said parcels of land, subject only to the use for railway purposes above mentioned; a use which the Government and the city officials, and all other parties interested, have for several years understood that the company had or was to have.

These paragraphs do not appear to me to impose any terms upon the railway company. They record an admission by the company which, taken at the highest against it, may be said to embody an understanding upon which the grant issued—that the grant should not prevent the vesting of a "full title" to the parcels in question in the municipality of Toronto subject to the use of them for railway purposes. I do not profess to understand the meaning of the words "full title," but whatever they may mean there is surely nothing here which, upon any fair construction of the words, can be held to impose the condition that the right of the railway to use these parcels for railway purposes should be subject to the right of the public to use them as a highway. The vesting of a title to the parcels subject to

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the railway company's interest in them is a vastly different thing from that. If it be asked, what other purpose could such a grant to the municipality serve, the answer is, that for the moment I am dealing with the question whether public rights of passage were created by this transaction through the imposition of terms by the Governor in Council; what the parties may have had in view for the future is another thing.

Here the respondents at the threshold of their contention are confronted with an important question touching the extent of the powers of the governor in council concerning the creation of highways over a railway line with or without the consent of the company or of the municipality or of both. If, as Mr. Armour contended, the works had already been sufficiently sanctioned, and the Governor in Council were then *functus officio,* in respect of terms, and if no term establishing public rights of way had been imposed, then we have upon this contention to consider the bald question, whether the railway and the Governor in Council in such circumstances had any legal authority to create highways over these parcels. I think they could not do so. The Consolidated Railway Act of 1888 was in force at the time of this transaction. That Act contains special provisions which, in my opinion, were intended to be exhaustive with respect to the creation of public rights of way over a railway. I think that such rights of way could not be created except by the authority of the Railway Committee acting (at the time in question) under the powers conferred by section 11 or section 14 of the Railway Act: *Canadian Pacific Railway Co.* v. *Guthrie*(1); *Town of High River* v. *Canadian Pacific Railway Co.*(2). The

(1) 31 Can. S.C.R. 155. (2) 6 Can. Ry. Cas. 344.

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Railway Committee of the Privy Council did not derive its powers in any way from the Governor in Council as a whole; it was a statutory body with a purely statutory mandate, and the statutory duties assigned to it were clearly not exerciseable in the first instance by the larger body; and it is not suggested that in this transaction there was any action of the Railway Committee. Assuming on the other hand the Governor in Council with respect to terms were not *functus officio,* I do not think the section of the Act authorizing that body to impose terms where Crown land or the bed of a navigable water was to be occupied can fairly be held to authorize the doing of something, such as the creation of a highway, where there were special provisions of the Act providing machinery through which alone that thing could, in general, be done. It is not, in a word, to be taken as vesting in the Governor in Council in the cases to which it applied a general dispensing power in respect of the provisions of the Railway Act. Doubtless the company might be compelled to submit to an undertaking not to oppose an application to the Railway Committee or to pay the cost of the construction of the crossing if a highway should be ordered by that body or even to make an application to the Railway Committee for such an order. But none of these things was done here. Nor is the position strengthened at all, in my opinion, by the subsequent grant to the municipality of these parcels in 1894. It is perfectly true that the grant is expressed to be made to the grantee in trust to use the subjects of it for the purposes of highways; but it is also made subject to the terms of the Windmill Line Agreement, and by the provisions of that agreement the prolongation of the streets could not, without the consent of the

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riparian owners, be filled up for a period of ten years nor until the space described as Lake Street in that agreement should have been filled in and converted into a highway under the terms of it; nor at all after the expiration of fifteen years. The suggestion that this grant in itself amounted to a dedication of those parts of the harbour corresponding to the prolongations of the streets is one with which I wholly disagree; section 19, ch. 39, under which it purports to be made, authorizes the Governor in Council to sell or lease parts of the beds of harbours, but nothing in that enactment professes to authorize the construction of any work, in the subjects of grants made under it, which would be an interference with the public right of navigation. Hundreds of grants have been made since Confederation under this statute, and many before Confederation under similar statutes in all parts of Canada; but it has never been supposed that such grants *per se* conferred any authority to interfere with the public right of navigation; where any structure having such effect is to be erected —except under the authority of some such statute as the Railway Act—resort is to be had to the machinery provided by the Act relating to Works in Navigable Waters, which, at the time in question, was ch. 92, R.S.C. (1886), an Act in *pari materiâ* with section 19, ch. 39, and, for the purposes of construction, to be read with that enactment. Moreover the enactment (sec. 19, ch. 39) provides that no grant under the authority of it should be held to justify any interference with riparian rights; the municipality was therefore both by the statute and the grant thrown back upon the Windmill Line Agreement for its authority to fill up these prolongations. The grant was

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made doubtless with a view to enable the city in accordance with the provisions of that agreement, and in compliance with the Dominion statute relating to Works in Navigable Waters to convert these strips of harbour into streets when the proper time should arrive. When that should occur it was doubtless contemplated by all parties that crossings over the parcels in question should be provided; but that they should be provided through the machinery furnished by the Railway Act for that purpose.

It is argued also that in some way the railway company is estopped (by reason of its application, and of the terms of the grant to the company and of the grant to the municipality just referred to) from disputing the existence of these highways. I do not think that can be supported. The statutory grant received by the railway company is not a record; *The Queen* v. *Hughes*(1); and (since the Crown could, under the common law, convey by matter of record only) could not of itself have the effect of a common law conveyance in working an estoppel as against the grantee. *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Soc.* (2). It is possible—although I think it very doubtful—that the circumstances afford a ground for an equitable estoppel against the railway company respecting the extent of its interest in the parcels comprised in its grant. But I can find nothing in them to support any estoppel on the subject of public rights of passage. There is, however, a complete answer to this contention, if I am right in the view that highways could only be established over these parcels by means of the machinery provided by the

(1) L.R. 1 P.C. 81.

(2) 10 Ch.D. 15.

Railway Act. It is quite too clear for argument that no act of the company, however effective to create an estoppel in other cases, could take effect by way of estoppel in establishing a highway where none existed, and when the statutory prerequisites for the creation of one had not been complied with; the company could not, in a word, by resorting to the expedient of creating an estoppel, add to its own statutory powers. *Great North-West Central Railway Co.* v. *Charlebois*(1).

I come now to the consideration of the agreement of 1892, and the statutes confirming it. There are two statutes, one (provincial), 55 Vict. ch. 90, giving the municipality authority to execute the agreement; and one (Dominion), 56 Vict. ch. 90, declaring the works to be for the general advantage of Canada, enacting (sec. 2) that the agreement shall be "in force and binding on the parties thereto," and (sec. 3), empowering the parties to do all things necessary to carry its provisions into effect. There are two rival views of the nature of this latter statute. The respondent argues that it is merely a statute authorizing an agreement *inter partes* which, notwithstanding the statutory authorization, still remains a private agreement. The appellants contend that it is a special Act within the meaning of the Railway Act creating a scheme with a view to providing accommodation for the two railways, and establishing means for the protection and for the convenience of the public in relation to those parts of the railways of the appellants, which are specially dealt with in the order appealed from, and that according to the terms of section 3 of the Railway Act the provisions of this special

(1) [1899] A.C. 114.

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statute must displace sections 237 and 238 of that Act. I do not think that, on its construction of it, there is anything in the text of the agreement itself that materially supports the contentions of the respondent, but it is argued that the plan annexed to it shews crossings to be protected at Bay Street, Yonge Street and Church Street, and that section 5 of the agreement (taken with this plan) constitutes a binding admission that there were such crossings there at the time the agreement was entered into. Section 5 is as follows:—

The city hereby agrees to extinguish, at its own expense, all the present rights (if any) of the public and of property owners to cross the railway track on the Esplanade, between Yonge Street and the point where York Street, as deviated, connects with Esplanade Street, except at Bay Street, and in consideration thereof each of the companies agrees to give up, without compensation, any right of crossing the said railway tracks between Yonge and York Streets, except at Bay Street, and for such consideration the Grand Trunk further agrees to waive its contention that it is not liable to contribute to the cost of making or protecting level crossings at Church Street, Yonge Street and Bay Street, and the Grand Trunk and the Canadian Pacific, without prejudice to their rights in any other transaction, agree to pay each one-half of the cost and maintenance of such by gates and watchmen at the latter crossing, such protection to be subject to the approval of the Railway Committee of the Privy Council of Canada, or to be made in such a way as it may direct.

Looking at the plan one sees that the so-called crossings at Yonge Street and Church Street are obviously contemplated crossings, having no existence in fact at the date of the agreement. As to Bay Street, I do not understand it to be disputed that south of the Esplanade that street was not filled in. The parties doubtless did anticipate that the Windmill Line Agreement of 1888 would be carried out, and that the street prolongations south of the Esplanade would eventually be filled in under the terms of that agreement, and the stipulations contained in article 5 of the

agreement were, no doubt, entered into in that view. The article, therefore, cannot fairly be read as containing any admission touching the existing state of affairs. Furthermore the railway companies never received the consideration mentioned, and it is doubtful whether the undertakings on the part of the companies have ever yet become operative. But there is an answer based upon broader grounds than these. If the agreement is to be treated merely as a private agreement, then any implied admissions can only be taken as admissions *inter partes* and cannot be effective to found jurisdiction any more than an agreement between the parties that the Board should have jurisdiction. The article itself provides that the undertaking of the Canadian Pacific Railway shall be without prejudice to its rights in any other transaction; and it would seem to be a violation of principle to use such an admission so guarded in a private agreement as an instrument for furthering a proceeding intended to destroy the situation which it was the object of the agreement to set up and maintain.

It may be argued that as by the third section of the ratifying Act, 56 Vict. ch. 48, each of the parties to the agreement is empowered to do whatever may on its part be necessary to carry out and give effect to its undertakings as embodied in the agreement, that the railway companies were authorized by this Act to permit the municipality to lay out highways across their respective railways at the place mentioned, and that in so far, at all events, as this was acted on such highways were validly constituted. This argument, I think, overlooks article 21 of the agreement, which provides that the Railway Act and the Municipal Act, so far as applicable to anything in the agreement, shall,

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except where otherwise provided, form part of the agreement as if expressly set out in it. Assuming article 5 then to be rightly read as containing an undertaking on behalf of the companies to agree to the constitution of highways across their tracks (which was merely a private undertaking), it is quite clear that the formalities of the Railway Act and of the Municipal Act were not intended to be dispensed with. The authority given by section 3 of the Act is an authority to act in accordance with the provisions of the agreement. That clearly imports, I think, except where inconsistent with the terms of the agreement, those parts of the Railway Act and of the Municipal Act which relate to the subjects dealt with. I have not been able to satisfy myself that there is any evidence from which one can properly conclude that any public way was, in fact, laid out either at Yonge Street or at Church Street. With regard to Bay Street the evidence is hardly more satisfactory. It was not suggested that in respect to any one of these streets the sanction of the Railway Committee or of the Board of Railway Commissioners had been obtained to laying it out across the railways.

There is, of course, York Street bridge, the construction of which the agreement did authorize; but assuming the municipality to have established highway crossings at Bay Street and York Street, I do not think that would afford a sufficient ground for supporting the order in question. Having regard to the reasons given by the Chief Commissioner in support of the jurisdiction of the Board, I think it is perfectly idle to suggest that the Railway Board in directing the putting up of the structure in question did so primarily with the design of protecting the crossings at

these two streets alone. The Board has not exercised its powers with any such view; it has acted upon the assumption that it has power to deal with a series of crossings extending from Parliament Street to Spadina Avenue.

I think, however, that the view of the agreement of 1892 and the ratifying statutes expressed by my brother Girouard is the sounder view.

"Special Act" is defined by section 2, sub-sec. 28, of the Railway Act. I am not able to agree with the view of the learned Chief Commissioner that the effect of that definition is to limit the application of the term to statutes relating to the construction or the operation of a railway. That view seems to me to ignore the words, "which is enacted with special reference to such railway." The Act ratifying the tripartite agreement is clearly a statute enacted with reference to the Grand Trunk and Ontario and Quebec Railways, and I think section 3 of the Railway Act applies to it, and consequently that the provisions of the special Act, in so far as it is necessary to give effect to them, must be taken to override the general provisions of the Railway Act. I postpone for the moment the Act of 1909 relied upon by Mr. Dewart. I was impressed at the argument with the view that the Act in question does nothing more than ratify an agreement between private parties which, notwithstanding the Act, would be enforceable only as between the parties to it themselves, and that such a statute could not be said to be within the contemplation of Parliament when passing section 3 of the Railway Act. On further consideration I have come to the conclusion that this view of the Act of 1893 is founded upon some misconception of the character of the legislation,

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and of the agreement thereby ratified. One of the parties to the agreement was the municipality of Toronto. That municipality was invested with authority over the public streets in the municipality; and in all the negotiations, agreements and legislation respecting the Esplanade and the situation of the railway companies there, the municipality had acted and had been treated as representing the inhabitants not only as regards public safety in the localities through which the railways passed, but as regards the convenience of industrial and other establishments with respect to shipping facilities. The agreement of 1892 provided for the recasting of the existing railway arrangements. There was to be a new Union Station. There was to be a change in the site of the station and yards of the Canadian Pacific Railway. There were to be facilities by which the Grand Trunk Railway was to have access to the waters of the harbour through the prolongation of two of the streets west of York Street. The site provided for the Canadian Pacific Railway was situated west of the western terminus of the Don branch, between the Union Station to the north and the harbour to the south. Traffic across the railways of all kinds was provided for by two bridges, one at York Street and one at John Street. The cost of maintaining level crossings at Bay Street, at Yonge Street, and at Church Street was provided for. The agreement, as framed, involved as its central and governing features, provisions for direct access, from the railway yards to the railway lines on the same level, direct access to the harbour by the railway companies from their yards and overhead bridges or protected level crossings for the purpose of carrying the highway traffic across the railways from the north to south and *vice versâ.* I have already pointed out

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that the application of the Railway Act to the works in contemplation is provided for by article 21 of the agreement, where it is said that, except as otherwise provided in the agreement, the Railway Act shall form part of it so far as applicable to anything therein contained. What is the effect of this article? Surely when Parliament declared that this article should be valid, and that these works might be carried out according to the provisions of the agreement there was necessarily involved in this that, except as otherwise provided in the agreement, the Railway Act and all the sanctions of the Railway Act should, so far as applicable, govern everything to be done under the agreement and the operation of the works when completed. On the other hand, in so far as the agreement did otherwise provide, the statutory authority was an authority to carry out the scheme and operate the works when finished according to the terms of such special provisions. Reading article 21 and section 3 together then, we must, I think, look to this agreement for the provisions of the law governing those subjects with respect to which the agreement makes specific provision.

What then has this agreement to say with regard to the subject matters dealt with in the order appealed from? In express terms it provides for the maintenance of level crossings at Church, Yonge and Bay Streets. In express terms it provides for highway bridges at York and John Streets. If I am right in my view as to the character of the Act, there cannot be any question that the jurisdiction of the Railway Committee was excluded to this extent, that they were to have no power to make an order inconsistent with these provisions. Since, moreover, as I have

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pointed out, the purpose of the scheme obviously was in part to maintain the railway yards and the railway tracks on the same level, it is very clear that the order made is incompatible with it.

One is asked, however: Is it to be supposed that the legislature intended these provisions to fix for all time the situation of the railways on the water front? The answer, I think, is that the two railways concerned, and the municipality as representing the interests mentioned, having reached an arrangement satisfactory to themselves the Legislature was quite content to give effect to that arrangement in the expectation that for many years, at all events, it would not be necessary to disturb it. Nor do I think there is much force in the observation that only one or other of the parties to it could, while it remained executory, compel the others to carry out the undertakings embodied in it. We need not suppose the legislature to have been very tenderly concerned with respect to the interests of the railway companies. And as for the undertakings of these companies the cardinal fact is that the other party was the municipality which, in the very special sense I have mentioned, was treated as the guardian of the interests of the inhabitants in respect of the matters dealt with.

With respect to the level crossings indeed, and the protection to be afforded there, that subject was committed by paragraph 5 to the Railway Committee of the Privy Council, and in most of the provisions of the agreement in respect of the carrying out of which disputes might reasonably be anticipated some method for the speedy and authoritative settlement of them was provided for. In case of dispute, for example, in regard to the York Street bridge, the arbi-

ters were to be the Railway Committee. In respect of bridges, crossings, and approaches over the Grand Trunk Railway Co.'s tracks on the Esplanade disputes were to be submitted to the Chancery Division of the High Court of Justice, with a right of appeal to either party; and plans and specifications for the bridge at John Street were to be prepared by the city engineer of the City of Toronto, an engineer to be named by the Grand Trunk Railway Company, and, in the event of disagreement, by an umpire to be named by the Chief Justice of Ontario.

The contention of the respondent seems to me to lead to this conclusion—that these provisions which the legislature had declared to be binding upon the parties and which the legislature had authorized the parties to carry into effect might, next day, be completely nullified by the action of the Railway Committee of the Privy Council acting under sections 187 and 188 of the then existing Railway Act. With great respect, I cannot accept that view.

It is said, however, that the application of sections 237 and 238 to the works in question is made clear by an Act of 1909 amending section 241, sub-sec. 2 of the Railway Act. The Act is 8 & 9 Edw. VII. ch. 32, section 8, and is in the following words:—

241. Every structure by which any railway is carried over or under any highway, or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under, or through such structure.

2. Notwithstanding anything in this Act, or in any other Act, the provisions of sections 236 to 241, both inclusive, of this Act shall apply to all corporations, persons, companies and railways, other that Government railways, within the legislative authority of the Parliament of Canada.

It will have been observed that my view with respect to the character and effect of the agreement of

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1892 and the ratifying statutes does not necessarily depend upon the application of section 3 of the Railway Act, but may be rested upon the circumstance that the agreement in itself plainly declared the intention that the provisions of the Railway Act should be applicable only to the extent to which it was not otherwise provided in the agreement, that is to say, that the provisions of the Railway Act were not to be applied in such a way as to alter fundamentally the character of the settlement embodied in the agreement. I do not think that the Act of 1909 displaces these provisions of the agreement relating to the application of the Railway Act. It is one thing to say that the sections mentioned shall apply to the Grand Trunk Railway, and to the Ontario and Quebec Railway generally; it is another thing to say that the Act of 1909 shall be held to abrogate the terms of this statutory settlement—a settlement entered into and sanctioned by the two legislatures with a view of providing for the special needs of a particular locality as touching not only the railways concerned but touching also the interests of the public as regards safety and as regards the accommodation of shippers on the railways and as regards the convenience of access to and from the harbour and passage across the railways. To some of the subject matters falling within the scope of the scheme, the Railway Act would, in the absence of such special legislation, have applied. To many others the Railway Act could have no possible application. It appears to me to be contrary to principle to hold that subsequent legislation dealing generally with highway crossings over railways should (without any special manifestation on the part of the legislature that it should so operate) be applied to the

specific crossings provided for by this legislative scheme in such a way as to abrogate the provisions relating to them, and furthermore to make it impossible to carry the scheme into effect as a whole, and in many respects to render fruitless the costly outlays made on the faith of the legislative sanction given to it. *Esquimault Water Works Co.* v. *City of Victoria*(1). I do not suggest that the provisions of the Railway Act referred to in the Act of 1909 are not to have any application whatever to the locality in question. It is not necessary to go further than this—that the provisions of the legislative arrangement of 1892, so far as they extend to the subjects dealt with in those sections, are to be regarded as paramount. The two following passages appear to me to be apposite. The first is from the judgment of Mr. Justice Willes in *Thorpe* v. *Adams*(2), at page 138:—

The good sense of the law as laid down by my lord is quite obvious, because if a bill had been brought into Parliament to repeal a local Act, it would never have been allowed to pass into law without notice to the parties whose interests were affected by it, and opportunity being given to them to be heard in opposition to it, if necessary; whereas a general provision in a public Act is discussed with reference to general policy, and without any reference to private rights, with which there is no intention on the part of the legislature to interfere.

And the second from Lord Hobhouse, delivering the judgment of the Judicial Committee in *Barker* v. *Edger*(3), at page 754:—

The general maxim is *generalia specialibus non derogant.* When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enact-

(1) (1907) A.C. 499, at p. 509. (2) L.R. 6 C.P. 125.
(3) [1898] A.C. 748.

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ment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim. The legislature found an area of land comparatively small in extent to be the subject of intricate disputes in which both Europeans and natives took part. Some of those questions fell within the scope of the Native Land Court and others did not. It was for the benefit of all parties that a single tribunal should adjudicate on the whole group of questions. Therefore, as Williams J. has stated, a new authority was given to the Native Land Court as regards both land and matters of account. It would require a very clear expression of the mind of the legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the court has ever since been assiduously addressing itself.

The appeal should be allowed with costs.

ANGLIN J.—For the reasons given by me at length in the *Yonge Street Bridge Case*(1), and approved of by the Court of Appeal for Ontario(2), I am of opinion that this appeal, in so far as it rests upon an allegation that the appellant company's tracks along the water front of the City of Toronto do not cross any highway, cannot be maintained. That Yonge Street exists as a highway crossed by these tracks was demonstrated in that case; that some ten other highways are likewise crossed by such tracks was shewn before the Railway Board in this case.

The evidence of actual user, prior to the construction of the Don branch, of the portions of such highways actually crossed by it was, it is true, "somewhat scanty, but it is perhaps as good as could reasonably be expected with respect to a time so far back." *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*(3), at page 209.

(1) 6 Ont. W.R. 852.
(2) 10 Ont. W.R. 483.
(3) (1906) A.C. 204.

But the appellants, as grantees from the Crown of limited railway rights in the nature of quasi-easements, are estopped as against the respondents, privies of the Crown, and its grantees of the lands in question for highway purposes subject to such railway rights, from denying the existence of these highways. This part of the respondent's case is overwhelmingly established.

That over these other streets, as over Yonge Street, in respect to which I need not reiterate my views, the appellants had merely rights for the purposes of their railway in the nature of quasi-easements, similar to those which they enjoy at other highway crossings, is clearly shewn in the judgment of Mr. Justice Idington.

That these streets existed as highways within the definition of that term in section 2 (*k*) of the Railway Act, and that as such they were crossed by the appellants' railway when the order now in appeal was pronounced, in my opinion does not admit of doubt. Moreover, the Railway Board very properly assumed that it was clothed with jurisdiction to determine this question. *Williams* v. *Adams*(1).

The Board had authority to abrogate the Yonge Street bridge order of the former Railway Committee of the Privy Council (R.S.C. [1906] ch. 37, section 32 (2)). The order in appeal, inasmuch as it is inconsistent with the Yonge Street bridge order, is tantamount to an express rescission of the earlier order. The fact that the Yonge Street bridge order, made by the late Railway Committee, has not been in terms rescinded, therefore affords no objection to the jurisdiction of the Board to make the order now in appeal.

The provisions of the order in respect to the clos-

(1) 2 B. & S. 312.

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ing and removal of the York Street bridge may be supported as the rescission of an order of the Railway Committee, and also as a substantive order of the Board for the diversion of a highway.

The provisions directing the elimination of some tracks now in use, the elevation of "through" tracks, while allowing some sidings to be maintained on the level subject to restrictions as to their use, and the cutting off of direct access from the east to the appellants' freight yards involve considerations of two kinds—of policy and of jurisdiction. With considerations of the former class we are not concerned; the discretion of the Board is absolute, and its judgment final. I find nothing in any of these provisions which transcends the jurisdiction of the Board under section 238 of the Railway Act, as re-enacted by 8 & 9 Edw. VII. ch. 32, section 5, to

make such an order as to the protection, safety and convenience of the public as it deems expedient * * * and (to order) that such other works be executed * * * or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, etc.

I am also of the opinion that there is no "special Act," within the meaning of that term, as used in section 3, of the Railway Act, applicable, which should be taken to override the provisions of section 238. The subject matter of that section—public safety and convenience—is not only not the same as any of those dealt with in the so-called special Acts relied on, it is also paramount to them in its importance. Moreover, I am not at all satisfied that a statute which validates and confirms a private agreement between corporations renders stipulations in that agreement equivalent to provisions of a "special Act" so that they

would, by virtue of section 3 of the Railway Act, override statutory provisions obviously intended to be of universal application such as are contained in section 238. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Ry. Co.*(1).

But any possible doubt arising out of the so-called "special Acts" affecting the appellant company, would appear to be concluded by section 241(2) of the Railway Act, as re-enacted by 8 & 9 Edw. VII. ch. 32, section 8. Although the decision of the Board was announced in December, 1908, the order in appeal was not settled until, and it bears date, the 7th June, 1909; this Act was assented to on the 19th May, 1909. It provides that:—

> Notwithstanding anything in this Act, or in any other Act, the provisions of sections 236 to 241, both inclusive, of this Act shall apply to all corporations, persons, companies and railways, other than government railways, within the legislative authority of the Parliament of Canada.

Although the Grand Trunk Railway Company has not appealed from the order of the Board, the Canadian Pacific Railway Company claims the benefit of any objections to its validity which would have been open to the former company. The Grand Trunk tracks are admittedly constructed along and upon a public highway. It is, therefore, within the very terms of section 238. The company is required by the order to elevate some of these tracks. This is a permanent diversion of the railway. Diversion may, I take it, be perpendicular as well as horizontal. The order may also be viewed as requiring that "the railway be carried over * * * the highway." In either aspect it is within the purview of section 238.

(1) 25 Ont. App. R. 462, at p. 468.

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That the order involves the erection of a structure which will in effect obstruct and destroy part of a highway seems to be an objection which should not be open either to the Grand Trunk Railway Company or to these appellants. For highway purposes, excepting the right of crossing the tracks, the part of the Esplanade upon which it is proposed that the viaduct shall be constructed has now no real value. It is for all practical purposes a railway right of way. Vehicles cannot be driven along it and they cross it only at street crossings. For the traffic of carriages and pedestrians easterly and westerly abundant provision is made by the remaining 48 feet of the Esplanade lying north of the Grand Trunk tracks and used as a public street. The crossing rights are provided for by the openings or passages to be made through the viaduct embankment as the order of the Board directs.

Neither in the fact that the order requires the elevation of the tracks of the Grand Trunk Railway Company, the laying of which on the Esplanade was authorized by pre-confederation legislation, nor in the fact that it involves the erection of a permanent embankment upon what is undoubtedly part of a highway subject to railway rights, do I find anything which exceeds the jurisdiction of the Board. By section 6 of the Railway Act the Grand Trunk Railway Company is explicitly declared to be subject to the provisions of the Dominion Railway Act, and provisions of its ante-confederation special Acts inconsistent with the provisions of the Railway Act are excluded and abrogated.

Provision is not made for the carriage of all the crossing highways through openings or passages in

the proposed embankment. Whether the railway companies are entitled to raise this objection is, at least, questionable. The highways not so provided for are in effect diverted so that the traffic upon them will cross the railways at other openings or passages to be provided for parallel and adjacent streets. There is express jurisdiction for the diversion of highways, and, given the jurisdictional fact of a highway crossing or crossed by a railway, the Board is the sole and final judge of when and how this power shall be exercised.

Finally counsel for the appellants object that while they are obliged to elevate their tracks along the water front, they are also required at other points, viz., at Eastern Avenue, and at Spadina Avenue, to carry their tracks under the highways, overhead bridges being directed for the accommodation of vehicular and passenger traffic. With the policy of the order in these particulars we are not concerned. The statute expressly authorizes the Board to order that at any particular crossing the railway shall be carried over or under the highway, and the highway over or under the railway. I see no reason why, if deemed advisable, the Board may not make one provision for one crossing and another provision for another crossing; no reason why it may not embody in one order provisions which it could certainly make in several orders.

To express an opinion upon the merits of the proposed viaduct as a solution of the difficulty caused by the location of railways along the water front of the City of Toronto would be impertinent to the questions before this court. Whatever view should be entertained as to the advisability of the erection of such a structure, the jurisdiction of the Board of Railway

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Commissioners to order it, in my opinion, is unquestionable.

The appeal fails upon every point and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the Grand Trunk Railway Co., appellants: *W. H. Biggar.*

Solicitor for the Canadian Pacific Railway Co., appellants: *A. MacMurchy.*

Solicitor for the respondent: *W. C. Chisholm.*

THE WHYTE PACKING COMPANY (DEFENDANTS) .... APPELLANTS;

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*Feb. 21, 25.
*March 4.

AND

JAMES PRINGLE (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—Public interest—Important questions of law—Exemption from taxation—School rates—R.S.O. [1906] *c.* 139, *s.* 48.

By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal (20 Ont. L.R. 246). On motion for special leave to appeal from the latter judgment.

Held, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co.* v. *Marsh* (35 Can. S.C.R. 197), for granting such leave.

MOTION for special leave to appeal from a judgment of the Court of Appeal for Ontario(1), affirming the order of Mr. Justice MacMahon that a writ of mandamus issue to compel the City of Stratford to assess the appellant company for school rates.

The City of Stratford by a by-law of the city council exempted the appellant company from taxation for

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

(1) 20 Ont. L.R. 246 *sub nom. Pringle* v. *City of Stratford.*

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municipal purposes during a specified term of years. The plaintiff, Pringle, acting on behalf of all the ratepayers of the city, applied for a writ of mandamus to compel the council to assess the company for school rates and an order for the writ to issue was made by Mr. Justice MacMahon and confirmed by the Court of Appeal.

Two questions were raised in the case, and both decided against the company. First, whether or not the remedy by mandamus was open to the plaintiff. Secondly, whether or not the exemption from taxation covered school rates.

Chrysler K.C. for the motion.

J. Travers Lewis K.C. *contra.*

THE CHIEF JUSTICE.—This is an application for leave to appeal from the Court of Appeal for Ontario in two actions consolidated. In both, the relief claimed was for a mandamus ordering the corporation of Stratford to assess the present appellants for certain school taxes. The mandamus was granted by the trial judge, and affirmed by the Court of Appeal.

The motion is based upon an affidavit alleging that the amount indirectly involved is over $1,000.

It would seem clear, and the application apparently is based upon the fact, that no appeal lies in the present case as of right, in view of the decisions of this court, more particularly, *Attorney-General for Ontario* v. *Scully*(1). In that case, which was similar to this in that the judgment complained of dismissed an appeal from the judgment of the Chief Jus-

(1) 33 Can. S.C.R. 16.

tice of the King's Bench, who dismissed an application for a writ of mandamus, the court said:

> There must be special reasons to support an application of this nature.

In the later case of the *Lake Erie & Detroit River Railway Co.* v. *Marsh* (2), the court, after deliberation, determined that leave to appeal under this very sub-section should only be granted where the case involved matters of public interest or some important question of law.

In the present case, however important the judgment of the Court of Appeal may be to the parties to the action, it only affects the construction to be placed upon a particular by-law of the respondent municipality, and an agreement entered into between it and the appellant, and the matter is, therefore, not one at all within the rule laid down in the case above referred to.

The application must be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *McPherson & Davidson.*
Solicitors for the respondent: *Makins & Gregory.*

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(2) 35 Can. S.C.R. 197.

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*Feb. 25.

THE JOHN GOODISON THRESHER COMPANY (PLAINTIFFS) .... APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF McNAB (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—Time limit—Extension—R.S.C. [1906] *c.* 139, *s.* 48(*e*).

After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court which sustained the verdict at the trial in favour of the plaintiffs.

The action was brought to recover compensation for injury to an engine of the plaintiff company, which went through a bridge in the defendant municipality owing, it was alleged, to negligence of the defendants in failing to keep such bridge in a proper state of repair. The plaintiffs succeeded at the trial, and in a Divisional Court, but their action was dismissed by the Court of Appeal, which, on application

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

of the plaintiffs, granted an order extending the time for appealing to the Supreme Court of Canada. As the damages recovered at the trial were only $807, there was no appeal to the latter court as of right, and the plaintiffs moved for special leave.

J. E. Jones for the motion.

Douglas K.C. *contra* was not called upon.

THE CHIEF JUSTICE.—In this case the judgment of the Court of Appeal for Ontario was pronounced on the 13th May, 1909. On the 31st December of the same year, the Court of Appeal made an order on the application of the present appellants, by which they purported to extend the time for appealing to the Supreme Court until the close of the present sittings, in order that an application might be made to the Supreme Court for leave to appeal. The appellants now apply, on notice, for such leave, under section 48(*e*), although the amount involved is less than $1,000.

Before considering the latter question, however, we have to determine whether we have power to grant leave at all in view of section 69 of the Supreme Court Act, which provides that every appeal shall be brought within 60 days from the signing, or entering, or pronouncing of the judgment appealed from. Although the 60 days have elapsed, the appellants contend that we have power to grant leave under section 71, which provides as follows:—

> Notwithstanding anything herein contained the court proposed to be appealed from or any judge thereof may, under special circumstances, allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf.

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GOODISON THRESHER CO. v. CORPORATION OF McNAB.

The Chief Justice.

The jurisprudence of this court is entirely against our having any power to grant leave to appeal after the 60 days have expired.

In *Walmsley* v. *Griffith*(1), and *News Printing Co. of Toronto* v. *McCrae*(2), this court held that neither the Supreme Court nor any judge thereof has jurisdiction under this section to extend the time within which an appeal must be brought.

In *Barrett* v. *Syndicat Lyonnais du Klondyke*(3), it was held that even where the court below, as in this case, had extended the time for bringing the appeal, nevertheless the Supreme Court had no power to grant leave to appeal *per saltum.*

In *Canadian Mutual Loan and Investment Co.* v. *Lee*(4), the court said:

> More than 60 days have elapsed since the judgment, * * and under a constant jurisprudence our power to grant special leave is gone, and the time cannot be extended for such a purpose either under sec. 42 (now section 71), which applies exclusively to appeals as of right, or under rule 70 (now rule 108), which has always been construed as not applying to delays fixed by statute.

We hold, therefore, that the court has no jurisdiction to grant the leave asked for, and the application must be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Cowan & Towers.*

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

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(1) 13 Can. S.C.R. 434.
(2) 26 Can. S.C.R. 695.
(3) 33 Can. S.C.R. 667.
(4) 34 Can. S.C.R. 224.

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APPEAL — *Jurisdiction — Rivers and streams—Right of floating logs—Servitude—Faculty or license—Possessory action—Injunction—Matter in controversy —Practice—Costs.*] In the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal. The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice. PRICE BROTHERS & CO. *v.* TANGUAY **133**

2——*Jurisdiction—Commitment of judgment debtor—Final judgment—Manitoba King's Bench rules* 748, 755—*"Matter or judicial proceeding" — Supreme Court Act, s.* 2(*e*).] An order of committal against a judgment debtor, under the Manitoba King's Bench rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of sub-sec. tion (*e*) of section 2 of the Supreme Court Act but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis* (3 Can. S.C.R. 258) referred to. SVENSSON *v.* BATEMAN **146**

3——*Jurisdiction—Matter in controversy —Municipal franchise—Demolition of waterworks—Title to land — Future rights.*] The action, instituted in the Province of Quebec, was for a declaration of the plaintiff's exclusive right under a municipal franchise to construct and operate waterworks within an area defined in a municipal by-law, for an injunction against the defendants constructing or operating a rival system of waterworks within that area, an order for the removal of water-pipes laid by them within that area, and for $86 damages. On an appeal from a judgment maintaining the plaintiff's action.—*Held*,

APPEAL—*Continued.*

Girouard and Idington JJ. dissenting, that, as it did not appear from the record that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec nor that any title to lands or future rights were affected, an appeal would not lie to the Supreme Court of Canada. La Cie. d'Aqueduc de la Jeune-Lorette v. Verrett. **156**

4——*Appeal per saltum—Jurisdiction.*] On application for leave to appeal *per saltum* from a judgment (14 Ont. L.R. 606) refusing to quash a by-law, the objection to the by-law was that it assumed to affect an Indian Reservation over which neither the corporation nor the Legislature of Ontario had authority. The appellant had been too late to appeal to a Divisional Court, leave for an extension of time was refused, and there was no right of appeal to the Court of Appeal. The motion was refused; *Ottawa Electric Co.* v. *Brennan* (31 Can. S.C.R. 311) followed. Armour v. Township of Onondaga **218**

5——*Appeal — Jurisdiction — Dismissing appeal.*] On motion to quash an appeal from a judgment of the Court of Appeal (14 Ont. L.R. 578) affirming the judgment of the Divisional Court (13 Ont. L.R. 189), which sustained an order setting aside a judgment entered by default for non-appearance, the question involved was whether or not the defendant (plaintiff in an issue directed), was entitled to have the judgment set aside. The appeal was, on this motion, dismissed with costs. Green v. George **219**

6——*Jurisdiction — Amount in controversy—Addition of interest to amount of verdict—Stay of execution.*] The action was for damages for personal injuries sustained through the negligence of the company in the operation of their tramway. The jury found for the plaintiff and assessed damages at $1,000, for which amount judgment was entered, some time subsequently. This judgment was affirmed by the judgment appealed from (17 Ont. L.R. 530). The security offered on the proposed appeal to the Supreme Court of Canada was approved (17 Ont. L.R. 370), on the view that

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interest ($43.50) from date of judgment on the verdict at 5 per cent. per annum, allowed by sec. 116 of the Judicature Act, R.S.O. 1897, ch. 51, should be added to the amount of the judgment and that, consequently, an appeal would lie. The appeal was quashed, the Supreme Court of Canada holding that the amount in controversy was that at which damages had been assessed by the jury and as interest had not been included in nor made part of such judgment it could not be added in order to bring the amount involved beyond the limit fixed by the Supreme Court Act in respect to appeals from the Province of Ontario.—An application for stay of execution was refused. Toronto Railway Co. v. Milligan. **238**

Note.—On a subsequent application to the Court of Appeal for Ontario, special leave to appeal was refused (18 Ont. L.R. 109).

7——*Jurisdiction—Alberta Liquor License Act—Cancellation of license — Persona designata—Curia nominatim — "Originating summons"—Court of superior jurisdiction.*] On an application for the cancellation of a liquor license issued under the Liquor License Act of the Province of Alberta, a judge of the Supreme Court of Alberta, in chambers, granted an originating summons ordering all parties concerned to attend before him, in chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada. —*Held*, that the case came within the principle decided in the *Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse* (16 Can. S.C.R. 606), and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal. St. Hilaire v. Lambert... **264**

8——*Limitation of time—Railway Commissioners—Question of jurisdiction — Leave by judge.*] Except in the case mentioned in rule 59 there is no limitation of the time within which a judge of the Supreme Court may grant leave to appeal under sec. 56(2) of the Railway Act, on a question of the jurisdiction of

APPEAL—*Continued.*

the Board of Railway Commissioners. Grand Trunk Ry. Co. *v.* Dept. of Agriculture of Ontario **557**

And *see* Board of Railway Commissioners 2.

9——*Special leave—Public interest — Important questions of law—Exemption from taxation — School rates — R.S.* [1906] *c.* 139, *s.* 48.] By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal (20 Ont. L.R. 246). On motion for special leave to appeal from the latter judgment.—*Held*, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co.* v. *Marsh* (35 Can. S.C.R. 197), for granting such leave. Whyte Packing Co. *v.* Pringle. **691**

10——*Special leave—Time limit—Extension — R.S.O.* [1906] *c.* 139, *s.* 48(*e*).] After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the sixty days will not enable it to do so. John Goodison Thresher Co. *v.* Township of McNab **694**

11——*Appeal—Findings of fact—Division of partnership profits—Collateral business affairs—Trust.* **240**

See Partnership 1.

12——*Jurisdiction — Appeal to Privy Council—Stay of proceedings* **361**

See Practice 8.

13——*Practice—New points raised on appeal.* **355**

See Practice 7.

APPEAL—*Continued.*

14——*Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—"Montreal City Charter" — Construction of statute.* **521**

See Municipal Corporation 3.

ARBITRATION AND AWARD — *Statutory arbitrators—Jurisdiction—Awards "from time to time"—Res judicata.*] The statutes authorizing the appointment of arbitrators to settle accounts between the Dominion and the Provinces of Ontario and Quebec and between the two provinces provided for submission of questions by agreement among the governments interested; for the making of awards from time to time; and that, subject to appeal, the award of the arbitrators in writing should be binding on the parties to the submission.—The provinces submitted to the arbitrators for determination the amount of the principal of the Common School Fund to ascertain which they should consider not only the sum held by the Government of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2 the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause were shewn for non-collection should be deemed moneys received by Ontario, and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 the Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Quebec to have Ontario declared liable for the purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Quebec for inclusion therein of the amounts found due from Ontario for remissions and non-collections and held that they had exceeded their jurisdiction in determining such liability. On appeal from this determination embodied in the final award:—*Held*, Fitzpatrick C.J. and Duff J. expressing no opinion, that the arbitrators had no jurisdiction to determine the liability of Ontario for moneys remitted or not collected. *Attorney-General for Ontario* v. *Attorney-General for Quebec* ([1903]

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A.C. 39) followed.—*Held*, also, Fitzpatrick C.J. and Duff J. dissenting, that awards Nos. 2 and 4 in so far as they determined this liability were absolutely null, and, therefore, not binding on Ontario. PROVINCE OF QUEBEC *v.* PROVINCE OF ONTARIO **161**
(Leave to appeal to Privy Council granted, 1st. Dec., 1909.)

2——*Street railway—Assumption by municipality—Principle of valuation — Operation in two municipalities—Compulsory taking* **581**

See TRAMWAY 4.

ASSESSMENT AND TAXES—*Municipal corporation—Exemption — Charter of Edmonton—Construction of statute — "License fee."* **363**

See LIQUOR LAWS 1.

2——*Appeal—Special leave — Public interest—Important questions of law — Exemption from taxation — School rates.* **691**

See APPEAL 9.

ASSIGNMENT—*Lease—Covenant not to assign — Assignment to co-partner — Right to renewal—Notice* **254**

See LANDLORD AND TENANT.

2——*Lessor and lessee—Covenant to renew — Severance of term — Consent of lessor—Enforcement of covenant—Expropriation—Persons interested* **600**

See LEASE.

ATTACHMENT—*Jurisdiction — Service out of jurisdiction — Manitoba King's Bench Rules* 201, 202—*Questions of practice.*] The court refused to interfere with the judgment appealed from (18 Man. R. 56) affirming the judgment of Mathers J. (18 Man. R. 59), on questions of procedure. *Williams* v. *Leonard* (26 Can. S.C.R. 406) and *Green* v. *George* (42 Can. S.C.R. 219) referred to. EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF **226**

AWARD.

See ARBITRATION AND AWARD.

BAILMENT—*Negligence — Evidence — Damages—Storage of meat.*] The decision of the case depended upon evidence as to the condition of frozen meat placed in cold storage by the plaintiffs (appellants) in the defendants' warehouse for safekeeping. The evidence established that the meat was in good and sound condition when delivered at the defendants' warehouse; the warehouse was properly constructed for the purpose of cold storage, the plant of first-class modern type and sufficient power; it was operated with proper care and by men of sufficient knowledge to conduct the business in an ordinary satisfactory manner, and the actual cause of the spoiling of the meat, for which damages were claimed, was not disclosed. The judgment dismissing the plaintiffs' action was affirmed by the judgment appealed from (17 Man. R. 539). The appeal was dismissed with costs. CHARREST ET AL. *v.* MANITOBA COLD STORAGE CO.. **253**

BANKING—*Customer's cheque — Evidence of presentation—Refusal to pay—Action for damages.*] The action claimed damages for wrongful refusal to cash the plaintiff's cheque on his account at the office of the bank where the cheque was presented for payment, there being, at the time, sufficient funds to meet the cheque, which was duly drawn and indorsed. The defence was non-presentment. It appeared that a clerk from another bank, which held that cheque, presented it at the office of the defendant, but at the wrong wicket, and was directed to present it at another wicket to the clerk there who had charge of the ledger containing the drawer's account. There was no evidence that this was done, but the bank which held the cheque sent out a telegram stating that the drawer had no account. The trial judge withdrew the case from the jury for want of sufficient evidence, and his order was affirmed by the judgment appealed from (13 B.C. Rep. 345). The appeal was dismissed with costs. REAR *v.* THE IMPERIAL BANK OF CANADA........ **222**

BILLS AND NOTES — *Practice — Impeachment of testimony—Evidence—Notice of imputations—Promissory note—Fraud — Suspicious circumstances — Transfer of negotiable instrument.*] The court below held that the burden of proving affirmatively that he was the

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holder in due course of a note in question in the case rested upon the plaintiff, that he had not satisfied the onus, that his neglect to make inquiries, though not inconsistent with good faith, constituted some evidence of bad faith, and affirmed the judgment of the trial court dismissing the action (1 Alta. L.R. 1, 201). On the appeal, the majority of the judges of the Supreme Court of Canada held that, under the circumstances of the case, the courts below were not justified in refusing to accept the uncontradicted testimony of a witness (examined abroad under commission), as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon to sustain or point to the imputation of bad faith and no opportunity afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based. *Browne* v. *Dunn* (6 R. 67) was applied; *Union Investment Co.* v. *Wells* (39 Can. S.C.R. 625) was followed; and the judgment appealed from was reversed. Peters *v.* Perras .. 244

BILLS OF SALE — *Mines and mining — Mining agreement — Interest in ore to be mined—After-acquired chattels — Transfer and delivery—Registration — B.C. Bills of Sale Act,* 1905—*Construction of statute.* 514

See Mines 1.

BOARD OF RAILWAY COMMISSIONERS — *Railway—Fencing — Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute —The Railway Act, R.S.C.* 1906, *c.* 37, *ss.* 30, 254.] Under the provisions of the Railway Act the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. Duff J. *contra.*—The Railway Act empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington J. *contra.* In re Canadian Northern Ry. Co. 443

2——*Appeal—Limitation of time—Railway Commissioners—Question of jurisdiction—Leave by judge—Powers of Board—Completed railway — Order to provide station—R.S.* [1906] *c.* 37, *ss.* 26, 151, 158-9, 166-7, *and* 258.] Except in the case mentioned in rule 59 there is no limitation of the time within which a judge of the Supreme Court may grant leave to appeal under sec. 56 (2) of the Railway Act, on a question of the jurisdiction of the Board of Railway Commissioners of Canada.—That Board has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road. Idington and Duff JJ. dissenting. Grand Trunk Ry. Co. *v.* Department of Agriculture of Ontario 557

3—— *Railways—Jurisdiction of Board of Railway Commissioners—Deviation of tracks — Separation of grades — "Highway"—Dedication—User—Public way or means of communication—Access to harbour—Navigable waters—Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2 (11), (28), 3, 237, 238, 241, 56 *V. c.* 48 (*D.*).] Prior to 1888 the Grand Trunk Railway Company operated a portion of its railway upon the "Esplanade" in the City of Toronto, and, in that year, the Canadian Pacific Railway Company obtained permission from the Dominion Government to fill in part of Toronto harbour lying south of the "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade" and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892 an agreement was entered into between the city and

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the two railway companies respecting the removal of the sites of terminal stations, the erection of over-head traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (56 Vict. ch. 48) providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right of the Canadian Pacific Railway Company to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line" agreement, and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there.—*Held*, Girouard and Duff JJ. dissenting, that the Board has jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of the "Railway Act" and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the Canadian Pacific Railway Company, having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour. GRAND TRUNK RY. CO. *v.* CITY OF TORONTO 613

BONDS —*Statutory contract—Construction—Bonds of railway company—Government guarantee* 505

See CONTRACT 6.

BROKER—*Sale of land—Principal and agent—Commission for procuring purchaser—Sale to person introduced by broker.*] The judgment appealed from (13 B.C. Rep. 389), which was affirmed, held that the appellant (plaintiff) was not entitled to commission for the introduction of a purchaser of land which was sold to the person so introduced, as he had been engaged only to sell the land at a price higher than that for which the sale was subsequently made and he had failed to prove an agreement of pay commission on the lower price. BRIDGMAN *v.* HEPBURN................... 228

BUILDERS AND CONTRACTORS—*Negligence—Carelessness of workmen—Liability of employer—Dangerous appliances—Electric wires—Volunteer—New trial.*] The appellant's husband was killed by electric shock from a live wire of a company supplying electricity. As he passed along a public street he witnessed an accident to an employee of respondents, at a building they were constructing, through a derrick in use by them coming in contact with the live wire; while attempting to extricate the man at the derrick, he received the shock which caused his death. The action was against the contractors, respondents, and the electric company, and the negligence attributed to the contractors was placing and operating the derrick in dangerous proximity with the live wire. The jury exonerated the deceased from blame, found the company at fault for not protecting the wire, and also that the contractors were not blamable for the accident. The case was referred to the Court of Review which affirmed the verdict against the company, but on appeal the Court of King's Bench reversed this judgment and dismissed the action (Q.R. 15 K.B. 11). A further appeal to the Supreme Court of Canada was discontinued (Cout. Cas. 408) and the case was carried to the Privy Council where the judgment of the Court of King's Bench was affirmed ([1907] A.C. 454). The Court of Review dismissed the action against the contractors, and this judgment was affirmed by the judgment appealed

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from (Q.R. 17 K.B. 471). The Supreme Court of Canada allowed the appeal with costs and ordered a new trial. DUMPHY *v.* MARTINEAU ET AL. **224**

BY-LAW—*Constitutional law—Legislative jurisdiction—"Early closing by-law—Municipal affairs—Property and civil rights—Local and private matters—Regulation of trade and commerce*..... **211**

See CONSTITUTIONAL LAW 2.

2——*Appeal per saltum — Jurisdiction.* **218**

See APPEAL 4.

CASES—*Ahearn & Soper* v. *New York Trust Co.* (Q.R. 18 K.B. 82) affirmed **267**

See PRIVILEGES AND HYPOTHECS.

2——*Anderson* v. *Foster* (16 Ont. L.R. 565 reversing 15 Ont. L.R. 362) affirmed **251**

See SPECIFIC PERFORMANCE.

3——*Angus* v. *Heinze* (14 B.C. Rep. 157) affirmed **416**

See TRUSTS 1.

4——*Armour* v. *Tp. of Onondaga* (14 Ont. L.R. 606). Leave to appeal refused **218**

See APPEAL 4.

5——*Attorney-General of Ontario* v. *Attorney-General of Quebec* ([1903] A.C. 39) followed **161**

See ARBITRATION AND AWARD 1.

6——*Beauvais* v. *City of Montreal* (Q.R. 17 K.B. 420) reversed. **211**

See CONSTITUTIONAL LAW 2.

7——*Berlin Ry. Co.* v. *Town of Berlin* (19 Ont. L.R. 57) reversed **581**

See TRAMWAY 4.

8——*Bridgman* v. *Hepburn* (13 B.C. Rep. 389) affirmed. **228**

See BROKER.

CASES—*Continued.*

9——*Browne* v. *Dunn* (6 R. 67) applied **244**

See PRACTICE 6.

10——*Canadian Pacific Ry. Co.* v. *Alexander Brown Milling Co.* (18 Ont. L.R. 85) affirmed **600**

See LEASE.

11——*Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse* (16 Can. S.C.R. 606) followed **264**

See APPEAL 7.

12——*Charrest* v. *Manitoba Cold Storage Co.* (17 Man. R. 539) affirmed.. **253**

See BAILMENT.

13——*Danjou* v. *Marquis* (3 Can. S.C.R. 258) referred to **146**

See APPEAL 2.

14——*De Lasalle* v. *Guilford* ([1901] 2 K.B. 215) followed **230**

See SALE OF LAND 2.

15——*Dominion of Canada* v. *Province of Ontario* (10 Ex. C.R. 445) reversed **1**

See CONSTITUTIONAL LAW 1.

16——*Doucet* v. *Shawinigan Carbide Co.* (Q.R. 18 K.B. 271, reversing 35 S.C. 285) affirmed **281**

See NEGLIGENCE 3.

17——*Dumphy* v. *Martineau* (Q.R. 17 K.B. 471)—New trial ordered..... **224**

See NEGLIGENCE 2.

18——*Dumphy* v. *Montreal Light, Heat & Power Co.* (Q.R. 15 K.B. 11; Cout. Cas. 408; [1907] A.C. 454) noted....... **224**

See NEGLIGENCE 2.

19——*Fitzgerald* v. *Barbour* (17 Ont. L.R. 254) affirmed **254**

See LANDLORD AND TENANT.

CASES—*Continued.*

20——*Forrest* v. *Traves* (14 B.C. Rep. 183) affirmed **514**

See Mines 1.

21——*Furness Withy & Co.* v. *Great Northern Ry. of Canada* (Q.R. 32 S.C. 121) varied **234**

See Contract 2.

22——*Gordon* v. *Horne* (14 B.C. Rep. 138) reversed. **240**

See Partnership 1.

23——*Green* v. *George* (13 Ont. L.R. 189; 14 Ont. L.R. 578) affirmed.......... **219**

See Appeal 5.

24——*Green* v. *George* (42 S.C.R. 219) referred to **227**

See Attachment.

25——*Grenier* v. *Connolly* (Q.R. 34 S.C. 405) affirmed **242**

See Ships and Shipping.

26——*Hood* v. *Bank of Ottawa* (Q.R. 33 S.C. 506) reversed **231**

See Contract 1.

27——*Laidlaw* v. *Crowsnest Southern Railway Co.* (14 B.C. Rep. 169) affirmed **355**

See Railways 2.

28——*Lake Erie and Detroit River Ry. Co.* v. *Marsh* (35 Can. S.C.R. 197) applied **693**

See Appeal 9.

28*a*——*Lapointe* v. *Larin* (Q.R. 19 K.B. 146) reversed. **521**

See Municipal Corporation 3.

29——*Lefebvre* v. *Nichols Chemical Co. of Canada* (Q.R. 36 S.C. 535) affirmed. **402**

See Negligence 5.

30——*Lott* v. *Sydney & Glace Bay Ry. Co.* (41 N.S. Rep. 153) affirmed **320**

See Negligence 1.

31——*Martel* v. *Connolly* (Q.R. 34 S.C. 405) affirmed **242**

See Ships and Shipping.

32——*Mey* v. *Simpson* (17 Man. R. 597) affirmed **230**

See Sale 2.

33——*Milligan* v. *Toronto Ry. Co.* (17 Ont. L.R. 370) reversed; appeal from judgment of Court of Appeal (17 Ont. L.R. 530) quashed **238**

See Appeal 6.

34——*Moritz* v. *Canada Wood Specialty Co.* (17 Ont. L.R. 53) affirmed...... **237**

See Contract 3.

35——*McClellan* v. *Powassan Lumber Co.* (15 Ont. L.R. 67; 17 Ont. L.R. 32) affirmed **249**

See Easement.

36——*McMillan* v. *American-Abell Engine and Thresher Co.* (11 West. L.R. 185) affirmed. **377**

See Title to Land 2.

37——*Ottawa Electric Co.* v. *Brennan* (31 Can. S.C.R. 311) followed...... **218**

See Appeal 4.

38——*Pense* v. *Northern Life Assurance Co.* (15 Ont. L.R. 131; reversing 14 Ont. L.R. 613) affirmed................ **246**

See Insurance, Life.

39——*Peters* v. *Perras* (1 Alta. L.R. 1, 201) reversed. **244**

See Bills and Notes 1.

40——*Pitt* v. *Dickson* (12 Ont. W.R. 842) reversed. **478**

See Deceit 1.

41——*Pitt* v. *Dickson* (9 Ont. W.R. 380; 11 Ont. W.R. 127) restored **478**

See Deceit 1.

42——*Price* v. *Power* (Q.R. 36 S.C. 13) affirmed **144**

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43——*Pringle* v. *City of Stratford* (20 Ont. L.R. 246)—Leave to appeal refused 691

See Appeal 9.

44——*Rear* v. *Imperial Bank of Canada* (13 B.C. Rep. 345) affirmed 222

See Banking.

45——*Robinson* v. *Can. Pac. Ry. Co.* ([1892] A.C. 481) referred to 205

See Damages 1.

46——*Russia, Emperor of,* v. *Proskouriakoff* (18 Man. R. 56) affirmed 226

See Attachment.

47——*Union Investment Co.* v. *Wells* (39 Can. S.C.R. 625) followed 244

See Bills and Notes 1.

48——*Union Investment Co.* v. *Wells* (41 Can. S.C.R. 244) overruled 361

See Practice 8.

49——*Varley* v. *Coppard* (L.R. 7 C.P. 505) followed 254

See Landlord and Tenant.

50——*Williams* v. *Leonard* (26 Can. S.C.R. 406) referred to 226

See Attachment.

51——*York* v. *City of Edmonton* (2 Alta. L.R. 38) affirmed 363

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CODE, CIVIL—*Art.* 379 (*Movables*). 267

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2——*Art.* 1054—(*Quasi-delits*) 281

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3——*Art.* 1056 (*Damages*) 205

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4——*Art.* 2000 (*Privileges and Hypothecs*) 267

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CODE OF CIVIL PROCEDURE—*Arts.* 205, 503 (*New trials*) 205

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2——*Arts.* 987 *et seq.* (*Quo warranto*) 521

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COLLOCATION —*Privileges and hypothecs—Tramway—Operation on highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Construction of statute,* 3 *Edw. VII. c.* 91 (*Que.*)—*Priority of claim—Collocation and distribution—Arts.* 379, 200 *C.C.*—*Art.* 752 *Mun. Code.* 267

See Privileges and Hypothecs.

COMMISSION —*Sale of land—Principal and agent—Commission for procuring purchaser—Sale to person introduced by broker* 228

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COMMITMENT—*Appeal—Jurisdiction—Commitment of judgment debtor—Final judgment—Manitoba King's Bench rules* 748, 755—*"Matter or judicial proceeding"—Supreme Court Act, s.* 2(*e*) 146

See Appeal 2.

COMMON EMPLOYMENT — *Negligence—Employer and employee—Duty of employer—Proper system* 420

See Negligence 6.

COMMON SCHOOL FUND — *Arbitration and award—Statutory arbitrators—Jurisdiction—Awards "from time to time"—Res judicata.* 161

See Arbitration and Award 1.

COMPANY— *Action for deceit—Agreement for sale—False representations — Compromise—Notice.* **478**

See DECEIT 1.

CONDITION—*Contract—Supplying electrical energy—Delivery—Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.* **431**

See CONTRACT 5.

CONSTITUTIONAL LAW—*Indian lands —Extinguishment of Indian title—Payment by Dominion—Liability of Province —Exchequer Court Act, s. 32—Dispute between Dominion and Province.*] Wnere a dispute between the Dominion and a Province of Canada, or between two Provinces comes before the Exchequer Court as provided by sec. 32 of R.S.C. [1906] ch. 140, it should be decided on a rule or principle of law and not merely on what the judge of the court considers fair and just between the parties.—In 1873 a treaty was entered into between the Government of Canada and the Salteaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Co. By said treaty the Salteaux agreed to surrender to the government all their right, title and interest in and to said lands and the government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands and pay each Indian $5 per year and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario and, in 1903, the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The Province disputed liability and, by counter-claim, asked for an account of the revenues received by the Dominion while administering the lands in the Province under a provisional agreement pending the adjustment of the boundary.—*Held*, reversing the judgment of the Exchequer Court (10 Ex. C.R. 445) Girouard and Davies JJ. dissenting, that the Province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the Province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate. PROVINCE OF ONTARIO *v.* DOMINION OF CANADA **1**

2—— *Legislative jurisdiction —"Early closing by-law"—Municipal affairs—Property and civil rights—Local or private matters—Regulation of trade and commerce—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 2; *s.* 92, *s.-ss.* 8, 13, 16—57 *V. c.* 50 (*Que.*).] Provincial legislation authorizing a municipality to regulate the closing of shops of a particular character within its limits is a subject which falls within the classes of matters enumerated as being within the exclusive jurisdiction of provincial legislatures under sub-section 13 or sub-section 16 of section 92 of the British North America Act, 1867, and is not an interference with the exclusive legislative jurisdiction of the Parliament of Canada conferred by the second sub-section of section 91 of that Act.—Unless a by-law, enacted in good faith under the authority of the Quebec statutes, 57 Vict. c. 50, and 4 Edw. VII. c. 39, appears to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council it should not be set aside.—Judgment appealed from (Q.R. 17 K.B. 420) reversed. CITY OF MONTREAL *v.* BEAUVAIS **211**

(Leave to appeal to Privy Council refused, 1st December, 1909.)

3——*Appeal per saltum—Jurisdiction* **218**

See APPEAL 4.

CONTEMPT —*Judgment debtor—Examination—Refusal to answer—Commitment—Appeal* **146**

See APPEAL 2.

CONTRACT —*Delegation of payment — Revocation of authority.*] B. & M., a firm of government contractors, sublet their contract to respondent. The respondent questioned the manner in which payments for the works were to be made to him, on progressive estimates, and this formed the subject of correspondence between B. & M. and the bank, that firm having already given the Ottawa branch of the bank a power of attorney to draw these moneys from the government. The respondent wished to be furnished with an undertaking by the bank to pay to him in Montreal the moneys it received under the power of attorney, and the bank's manager, at Ottawa, wrote a letter to B. & M. stating that "as each payment is made to the bank by the government it will, with your consent, be forwarded to W. H. & Son in payment of their work." This arrangement having been assented to by B. & M., the bank wrote to the respondent in regard to drawing the moneys in Montreal, referred to the correspondence with B. & M. and enclosed a copy of their letter assenting to the arrangement above mentioned. The moneys received by the bank from the government were credited to B. & M. and, upon their instructions, certain of the payments were forwarded to the respondent, none being so forwarded except those so authorized. Subsequently, B. & M. notified the bank to make no more payments to the respondent and, on their order, some payments were made to another person. In August, 1901, B. & M. became insolvent, the government cancelled their contract and the last payment received from the government by the bank was placed to their credit. On refusal by the bank to recognize the respondent's demands for payments made from time to time, he brought action against the bank for $3,300 alleged to be due to him out of $3,500 in possession of the bank, and for an account of all moneys received by the bank from the government. The defence was, in substance, that the only agreement the bank made was with B. & M., that this contract was entered into in Ontario and was governed by the law of that province under which there existed no privity of contract between it and the respondent. The respondent's action was maintained at the trial and affirmed by the Court of Review (Q.R. 33 S.C. 506).—The judgment appealed

CONTRACT—*Continued.*

from was reversed. Bank of Ottawa *v.* Hood. **231**

2—— *Construction of contract—Traffic agreement—Furnishing cargoes—Freight rates—Failure to find full cargoes—Vis major—Damages.*] The alleged breach of contract was that the railway company failed to obtain freight at Montreal rates and to provide freight for 60,000 cubic feet of unfilled space in vessels sailing from the port of Quebec. The defence was that the railway company had never been put in default to settle and determine the freight rates obtainable in Montreal; that they were prevented fulfilling the contract by a fortuitous event; that they were not responsible for the empty space as they had not been put in default to fill same, and that the plaintiffs had joined causes of action not susceptible of being united. The Superior Court allowed items as to differences in freight rates only, but the judgment appealed from (Q.R. 32 S.C. 121) allowed the full claim. The Supreme Court of Canada varied the judgment appealed from by reducing to amount assessed for difference in Quebec and Montreal freight rates to the extent of 40 per cent. of the cargo of the ship, in accordance with correspondence relating thereto. Great Northern Ry. Co. of Canada *v.* Furness, Withy & Co. **234**

3——*Breach of contract—Place of performance — Foreign judgment—Action.*] The appellants (defendants) agreed to supply to the respondent, in London, Eng., a quantity of dowels or rungs for chairs, and, failing to do so, respondent obtained a judgment against them in England. He then brought action against them in Ontario, claiming on his judgment and also for damages for breach of contract. The plaintiff succeeded in all the courts below (17 Ont. L.R. 53) mainly on the ground that the goods to be supplied were of a special kind that could not be procured elsewhere. The appellants contended that there were plenty similar goods on the market and also that the plaintiff had not proved special damages. The Supreme Court of Canada dismissed the appeal with costs. Canada Wood Specialty Co. *v.* Moritz **237**

CONTRACT—*Continued.*

4——*Lease—Covenant not to assign — Assignment to co-partner—Right to renewal—Notice.*] Where partners are lessees of a term for years and have covenanted not to assign or sub-let without the consent in writing of the lessor an assignment by one of his interest in the lease to his co-partner without such consent is a breach of such covenant. *Varley* v. *Coppard* (L.R. 7 C.P. 505) followed.—The lease provided that, having performed all their covenants and agreements contained in the lease the lessees on giving six months' notice in writing to the lessor before the expiration of the term that they required it, would be entitled to a renewal.—*Held*, that a breach (after the said notice was given) of their covenant in the lease not to assign without leave caused a forfeiture of the right to renewal.—Judgment appealed from (17 Ont. L.R. 254) affirmed. LOVELESS *v.* FITZGERALD. . **254**

5——*Supplying electrical energy — Delivery—Condition—Payment at flat rate —Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.*] A contract for the supply of electrical energy provided that the company should furnish to the city at the switch-board in its pumping station, through a connection to be there made by the city with the company's wires, an electrical pressure equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at a flat rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.—*Held*, that by supplying the pressure on their wires up to the point of delivery the company had fulfilled their obligation under the contract and were entitled to payment at the flat rate per horse-power per annum for the energy so furnished notwithstanding that the city had not utilized it.—*Per* Girouard and Anglin JJ.—The agreement was a contract for the sale of a commodity. CITY OF MONTREAL *v.* MONTREAL LIGHT, HEAT AND POWER CO. **431**

6——*Statutory contract—Construction—Bonds of railway company—Government guarantee.*] The Government of Canada, in a contract with the Grand Trunk Pacific Railway Co., published as a schedule to and confirmed by 3 Edw. VII. ch. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75 per cent. of the cost of construction of the Western division of its railway. By a later contract (sch. to 4 Edw. VII. ch. 24) the government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75 per cent. of such cost of construction.—*Held*, that this second contract only imposed upon the government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75 per cent. IN RE GRAND TRUNK PACIFIC RY. CO. . . . **505**

(Leave to appeal to Privy Council granted 18th March, 1910.)

7——*Railways—Jurisdiction of Board of Railway Commissioners — Private contract — Ratification by statute—Special Act—R.S.* [1906] *s.* 2(28).] An Act of Parliament (58 Vict. ch. 28) ratifying an agreement between two railway companies and the City of Toronto for the construction of railway works in the city is not a "special Act" within the meaning of section 2, paragraph 28 of the Railway Act though it provides that the works to be constructed shall be works for the general advantage of Canada. GRAND TRUNK RY. CO. *v.* CITY OF TORONTO **613**

8——*Sale of land—Misrepresentation — Deceit—Warranty* **230**

See SALE OF LAND 2.

9——*Sale of land—Contract for sale—Time of essence—Delay of vendor—Description—Statute of Frauds — Specific performance.* **251**

See SPECIFIC PERFORMANCE.

10—— *Privileges and hypothecs—Tramway—Operation on highway—Title to land—Immobilization by destination — Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Construction of statute, 3 Edw. VII. c.* 91 *(Que.)—Priority of*

CONTRACT—*Continued.*

claim—Collocation and distribution — Arts. 397, 2000 *C.C.—Art.* 752 *Mun. Code.* **267**

See PRIVILEGES AND HYPOTHECS.

11——*Agreement for sale of lands—Construction of contract—Right of action—Partition—Administration by co-owners —Trust—Interim account—Partial discharge of trustees.* **416**

See TRUSTS 1.

12——*Action for deceit—Agreement for sale—False representations—Compromise —Notice.* **478**

See DECEIT 1.

13——*Street railway—Assumption by municipality—Principle of valuation — Operation in two municipalities—Compulsory taking* **581**

See TRAMWAY 4.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE 5.

COSTS—*Non-observance of rules — Refusal of costs.*] The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice. PRICE BROS. *v.* TANGUAY **133**

COURT —*Appeal—Jurisdiction—Alberta Liquor License Act—Cancellation of license—Persona designata—Curia nominatim—"Originating summons"—Court of superior jurisdiction.*] On an application for the cancellation of a liquor license issued under the Liquor License Act of the Province of Alberta, a judge of the Supreme Court of Alberta, in chambers, granted an originating summons ordering all parties concerned to attend before him, in chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada.—*Held,* that the case came within the principle decided in the *Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse* (16 Can.

COURT—*Continued.*

S.C.R. 606), and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal. ST. HILAIRE *v.* LAMBERT. **264**

CROWN—*Negligence—Injury on public work—Government railway—Fire from engine—R.S.C.* 1906, *c.* 140, *s.* 20(*c*). **350**

See PUBLIC WORK.

CROWN LANDS—*Extinguishment of title to Indian lands—Payment by Dominion —Liability of Province.* **1**

See CONSTITUTIONAL LAW 1.

2——*Arbitration and award—Statutory arbitrators—Jurisdiction—Awards "from time to time"—Res judicata.* **161**

See ARBITRATION AND AWARD 1.

3———*Title to lands—Homestead and pre-emption rights — Unpatented Dominion lands—"Transfer"—Incumbrance —Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute—Dominion Lands Act*. . . **377**

See TITLE TO LAND 2.

DAMAGES — *Negligence—Operation of railway—Solatium doloris — Verdict — New trial.*] The court refused to order a new trial or reduction of damages, under the provisions of articles 502, 503 C.P.Q., where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies J. dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.—*Quære.*—In an action under article 1056 C.C. can a jury award damages *in solatium doloris? Robinson* v. *The Canadian Pacific Railway Co.* ([1892] A.C. 481) referred to. CANADIAN PACIFIC RY. CO. *v.* LACHANCE. **205**

2——*Construction of contract — Traffic agreement—Furnishing cargoes— Freight rates—Failure to find full cargoes—Vis major.*] The alleged breach of contract

DAMAGES—*Continued.*

was that the railway company failed to obtain freight rates at Montreal rates and to provide freight for 60,000 cubic feet of unfilled space in vessels sailing from the port of Quebec. The defence was that the railway company had never been put in default to settle and determine the freight rates obtainable in Montreal; that they were prevented fulfilling the contract by a fortuitous event; that they were not responsible for the empty space as they had not been put in default to fill same, and that the plaintiffs had joined causes of action not susceptible of being united. The Superior Court allowed items as to differences in freight rates only, but the judgment appealed from (Q.R. 32 S.C. 121), allowed the full claim. The Supreme Court of Canada varied the judgment appealed from by reducing to amount assessed for difference in Quebec and Montreal freight rates to the extent of 40 per cent. of the cargo of the ship, in accordance with correspondence relating thereto. GREAT NORTHERN RY. CO. OF CANADA *v.* FURNESS, WITHY & CO. **234**

3——*Negligence—Findings of fact—Common fault—Apportionment of damages.*] In actions to recover damages for personal injuries in the Province of Quebec, where the plaintiff has been found guilty of contributory negligence the damages should not be divided equally between the parties, but apportioned according to the degree in which they were respectively blamable for its occurrence.—Judgment appealed from (Q.R. 36 S.C. 535) affirmed. NICHOLS CHEMICAL CO. OF CANADA *v.* LEFEBVRE **402**

DECEIT—*Action for deceit—Agreement for sale—False representations—Compromise—Notice.*] P., living in Montreal, owned stock in a Cobalt mining company, and D., of Ottawa, looked after his interests therein. Being informed by D. that the mine was badly managed and the property of little value, and that other holders were selling their stock, P. signed an agreement to sell his at par. D. assigned this agreement to a third party. Later P., learning that the stock was selling at a premium and believing that he had made an improvident bargain, entered into negotiations with the holder of his agreement, and a compromise was effected by a portion of P.'s holdings being sold to the assignee at par and the remainder returned to him. It transpired afterwards that D. and the assignor were in collusion to get possession of the stock, and P. brought action against D. for damages.—*Held*, that the compromise having been effected when P. was in ignorance of the real state of affairs, it did not bind him as against D. from whom he could recover as damages the difference between the par value of his remaining shares and their market value at the date of such compromise.—Judgment of the Court of Appeal (12 Ont. W.R. 824) reversed and that of the trial judge (9 Ont. W.R. 380) affirmed by a Divisional Court (11 Ont. W.R. 127) restored. PITT *v.* DICKSON **478**

(Leave to appeal to Privy Council refused, 22nd Feb., 1910.)

2——*Sale of land—Misrepresentation — Contract—Warranty* **230**

See SALE OF LAND 2.

DEDICATION—*Railways — Jurisdiction of Board of Railway Commissioners — Highway—User—"Public way or means of communication"—Access to harbour —Deviation of tracks—Navigable waters —Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2(11), 3, 237, 238, 241.... **613**

See RAILWAYS 5.

DEED—*Sale of land—Contract for sale —Time of essence—Delay of vendor — Description—Statute of Frauds—Specific performance* **251**

See SPECIFIC PERFORMANCE.

DELIVERY —*Contract—Supplying electrical energy—Condition—Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service* **431**

See CONTRACT 5.

2—— *Mines and mining — Mining agreement — Interest in order to be mined —After-acquired chattels—Transfer and delivery—Registration—B.S. Bills of Sale Act,* 1905—*Construction of statute.* **514**

See MINES 1.

DISCRETION— *Evidence—Privilege — Notary—Jury trial—Practice—Charge to jury—Objections after verdict — New trial—Misdirection* **406**

See PRACTICE 10.

DOMINION ARBITRATORS.

See ARBITRATION AND AWARD.

EASEMENT — *Private way—Unity of ownership—Subsequent severance — Revival of easement—Reservation.*] In 1891 two parcels of land, on one of which was a grist-mill and the other a saw-mill, theretofore owned by different persons, became vested in one owner who, in 1894, conveyed away to defendants' (respondents') predecessors in title both parcels except certain lots including that on which stood the grist-mill which was afterwards conveyed to the plaintiff (appellant). A road from the highway over a part of the saw-mill property had been used for access to the grist-mill from the time it was built, but was obstructed by the defendants in 1906, and plaintiff sought an injunction to restrain them from continuing such obstruction and damages. The judgment at the trial, in plaintiff's favour, was reversed by the Divisional Court (15 Ont. L.R. 67), which held that the easement was extinguished by the unity of ownership in 1891, and that, as the subsequent conveyances contained no reservation, express or implied, of the right to use the road, the plaintiff could not recover. This judgment was affirmed by the Court of Appeal (17 Ont. L.R. 32).—The appeal was dismissed for the reasons given in the court appealed from. MCCLELLAN *v.* POWASSAN LUMBER CO. **249**

(Leave to appeal to the Privy Council was granted, 29th June, 1909.)

AND *see* SERVITUDE.

EDMONTON CHARTER—*Municipal corporation—Assessment and taxes — Exemption—Construction of statute — "License fee."* **363**

See LIQUOR LAWS 1.

ELECTION LAW — *Election petition — Preliminary objections—Cross-petition—Sufficiency of charge of corrupt acts—Particulars.*] By a preliminary objection to an election petition (see Q.R. 36 S.C. 13) it was claimed that the petitioner was not a person entitled to vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day.—*Held*, that the second objection was not merely explanatory of the first but the two were separate and independent; that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not *ipso facto;* and that the first objection should not have been dismissed, the respondent to the petition being entitled to give evidence as to the status of the petitioner.—The respondent, by cross-petition, alleged that the defeated candidate personally and by agents "committed acts and the offence of undue influence." —*Held*, that it would have been desirable to state the facts relied on to establish the charge of undue influence, but as these facts could be obtained by a demand for particulars a preliminary objection was properly dismissed. QUEBEC WEST ELECTION CASE **140**

ELECTRICITY —*Contract — Supplying electrical energy—Delivery — Condition — Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.*] A contract for the supply of electrical energy provided that the company should furnish to the city at the switch-board in its pumping station, through a connection to be there made by the city with the company's wires, an electrical pressure equivalent to a certain number of horse-power units during specified hours daily, and the city agreed to pay for the same at a flat rate of "$20 per horse-power per annum for the quantity of said electrical current or power *actually delivered*" under the contract.—*Held*, that by supplying the pressure on their wires up to the point of delivery the company had fulfilled their obligation under the contract and were entitled to payment at the flat rate per horse-power per annum for the energy so furnished notwithstanding that the city had not utilized it.—*Per* Girouard and Anglin JJ.—The agreement was a contract for the sale of a commodity. CITY OF MONTREAL *v.* MONTREAL LIGHT, HEAT AND POWER CO.. **431**

ELECTRICITY—*Continued.*

2——*Negligence—Buildings and contractors—Carelessness of workmen—Liability of employer—Dangerous appliances — Electric wires—Volunteer—New trial* **224**

See NEGLIGENCE 2.

EMPLOYER AND EMPLOYEE —*Negligence—Duty of employer—Proper system —Common employment.*] An employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating the duty to another.—It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot in an action against him for damages, invoke the doctrine of common employment. AINSLIE MINING AND RY. CO. *v.* MCDOUGALL **420**

2——*Negligence—Builders and contractors—Carelessness of workmen—Liability of employer—Dangerous appliances — Electric wires—Volunteer — New trial.* **224**

See NEGLIGENCE 2.

3——*Ships and shipping—Perils of the sea —Unseaworthy ship—Evidence—Warranty—Inspection of a shipping— Certificate of seaworthiness—Construction of statute —R.S.C.* 1906, *c.* 113, *s.* 342—*Drowning of sailors—Negligence of master—Liability of owner.* **242**

See SHIPS AND SHIPPING.

4—— *Negligence—Dangerous works — Defective appliances — Evidence — Art.* 1054 *C.C.—Res ipsa loquitur*...... **281**

See NEGLIGENCE 3.

EVIDENCE —*Practice—Impeachment of testimony—Evidence—Notice of imputations—Promissory note — Fraud—Suspicious circumstances—Transfer of negotiable instrument.*] The court below held that the burden of proving affirmatively that he was holder in due course of a note in question in the case rested upon the plaintiff, that he had not satisfied the onus, that his neglect to make inquiries, though not consistent with good faith, constituted some evidence of bad faith, and affirmed the judgment of the trial court dismissing the action (1 Alta. L.R. 1, 201). On the appeal, the majority of the judges of the Supreme Court of Canada held that, under the circumstances of the case, the courts below were not justified in refusing to accept the uncontradicted testimony of a witness (examined abroad under commission), as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon to sustain or point to the imputation of bad faith and no opportunity afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based. *Browne* v. *Dunn* (6 R. 67) was applied; *Union Investment Co.* v. *Wells* (39 Can. S.C.R. 625) was followed; and the judgment appealed from was reversed. PETERS *v.* PERRAS **244**

2——*Railways — British Columbia Railway Act — Fire on right-of-way—Combustible matter on berm — Origin of fire—Damage to adjoining property — Negligence — Evidence—Practice — New points raised on appeal.*] In an action against a railway company subject to the British Columbia Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence.—Judgment appealed from (14 B.C. Rep. 169) affirmed, Idington J. dissenting. LAIDLAW *v.* CROWSNEST SOUTHERN RY. CO. **355**

AND *see* RAILWAYS 2.

3——*Practice—Adduction of evidence — Cross-examination at trial— Vexatious and irrelevant questions—Discretionary order—Propriety of review.*] The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a ques-

EVIDENCE—*Continued.*

tion being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.—Idington J. dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered. BROWNELL *v.* BROWNELL **368**

4—— *Negligence—Dangerous works — Defective appliances—Onus of proof — Presumption—Art.* 1054 *C.C.—"Res ipsa loquitur."*] In an action to recover damages for injuries sustained by him in consequence of an accident in the company's calcium carbide works, the plaintiff's evidence shewed that a furnace operated upon a new system had been recently installed, that he was employed with other workmen to charge the furnace, draw off the liquid carbide when it was ready through openings in the base of the furnace, clean the orifices and re-plug them with moist mortar preparatory to re-charging. While the plaintiff was in the performance of his work in re-plugging one of these orifices an explosion occurred which caused the injuries complained of. There was no evidence of contributory negligence.—*Held*, Duff and Anglin JJ. dissenting, that, apart from any presumption arising under article 1054 C.C., the fact of the explosion occurring under such circumstances sufficiently established actionable negligence on the part of the company.—*Per* Fitzpatrick C.J. and Anglin J. (Girouard and Duff JJ *contra*, and Idington J. expressing no opinion upon the question), that, under article 1054 of the Civil Code of Lower Canada, masters and employers, as well as other persons, are responsible for damages caused by things under their control or care where they fail to establish that the cause of the injury was attributable to the fault of the person injured, to *vis major* or to pure accident, or that it occurred without fault imputable to themselves.—Judgment appealed from (Q.R. 18 K.B. 271) reversing the decision of the Court of Review (Q.R. 35 S.C. 285), affirmed, Duff J. dissenting. SHAWINIGAN CARBIDE CO. *v.* DOUCET **281**

5——*Ships and shipping—Perils of the sea—Unseaworthy ship—Warranty — Inspection of shipping—Certificate of seaworthiness — Construction of statute — R.S.C.* 1906, *c.* 113, *s.* 342—*Drowning of sailors—Negligence of master—Liability of owner*. **242**

See SHIPS AND SHIPPING.

6——*Sale of land—Contract for sale — Time of essence—Delay of vendor — Description—Statute of Frauds—Specific performance*. **251**

See SPECIFIC PERFORMANCE.

7——*Bailment—Negligence—Damages — Storage of meat*. **253**

See BAILMENT.

8—— *Privilege—Notary—Jury trial — Practice—Charge to jury — Objections after verdict—New trial—Misdirection—Discretion* **406**

See PRACTICE 10.

EXCHEQUER COURT—*Disputes between Dominion and Provinces—Adjudication—Practice.*] Where a dispute between the Dominion and a Province of Canada, or between two Provinces comes before the Exchequer Court as provided by sec. 32 of R.S.C. [1906] ch. 140, it should be decided on a rule or principle of law and not merely on what the judge of the court considers fair and just between the parties. PROVINCE OF ONTARIO *v.* DOMINION OF CANADA. **1**

AND *see* CONSTITUTIONAL LAW 1.

EXECUTION —*Appeal—Jurisdiction — Commitment of judgment debtor—Final judgment—Manitoba King's Bench rules* 748, 755—*"Matter or judicial proceeding"—Supreme Court Act, s.* 2(*e*)... **146**

See APPEAL 2.

2—— *Appeal—Jurisdiction—Amount in controversy — Addition of interest — Amount of verdict—Stay of execution.* **238**

See APPEAL 6.

EXPROPRIATION—*Lessor and lessee — Covenant to renew—Severance of term—Consent of lessor—Enforcement of covenant—Expropriation—Persons interested* **600**

See LEASE.

EXPROPRIATION—*Continued.*

2—— *Street railway — Assumption by municipality—Principle of valuation — Operation in two municipalities—Compulsory taking* **581**

See TRAMWAY 4.

FRAUD—*Practice—Impeachment of testimony—Evidence—Notice of imputations —Promissory note—Fraud — Suspicious circumstances—Transfer of negotiable instrument.*] The court below held that the burden of proving affirmatively that he was holder in due course of a note in question in the case rested upon the plaintiff, that he had not satisfied the onus, that his neglect to make inquiries, though not inconsistent with good faith, constituted some evidence of bad faith, and affirmed the judgment of the trial court dismissing the action (1 Alta. L.R. 1, 201). On the appeal, the majority of the judges of the Supreme Court of Canada held that, under the circumstances of the case, the courts below were not justified in refusing to accept the uncontradicted testimony of a witness (examined abroad under commission), as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon to sustain or point to the imputation of bad faith and no opportunity afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based. *Browne* v. *Dunn* (6 R. 67) was applied; *Union Investment Co* v. *Wells* (39 Can. S.C.R. 625) was followed; and the judgment appealed from was reversed. PETERS *v.* PERRAS 244

2—— *Action for deceit—Agreement for sale—False representations—Compromise —Notice*.......................... **478**

See DECEIT 1.

FUTURE RIGHTS—*Appeal—Jurisdiction —Matter in controversy—Municipal franchise—Demolition of waterworks—Title to land—Future rights.* **156**

See APPEAL 3.

GUARANTEE—*Railway bonds—Government guarantee—Statutory contract.* **505**

See CONTRACT 6.

HARBOURS —*Jurisdiction of Board of Railway Commissioners—"Public way or means of communication" — Access to harbour* **613**

See HIGHWAYS 1.

HIGHWAYS— *Railways — Jurisdiction of Board of Railway Commissioners — Deviation of tracks—Dedication—User— "Public way or means of communication" —Access to harbour — Navigable waters —Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2(11) (28), 3, 237, 238, 241; 56 *V. c.* 48(*D.*).] Prior to 1888 the Grand Trunk Railway Company operated a portion of its railway upon the "Esplanade" in the City of Toronto, and, in that year, the Canadian Pacific Railway Company obtained permission from the Dominion Government to fill in part of Toronto harbour lying south of the "Esplanade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade" and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892 an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of over-head traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (56 Vict. ch. 48), providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right of the Canadian Pacific Railway Company to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line" agreement, and excepting therefrom strips of land 66 feet in width between the southerly ends of

HIGHWAYS—*Continued.*

the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there. —*Held*, Girouard and Duff JJ. dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of the "Railway Act" and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the Canadian Pacific Railway Company, having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour. GRAND TRUNK RY. CO. *v.* CITY OF TORONTO **613**

2——*Privileges and hypothecs—Tramway —Operation of highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as a "going concern" —Unpaid vendor—Lien on price of cars —Pledge—Contract—Construction of statute,* 3 *Edw. VII. c.* 91 (*Que.*)*—Priority of claim—Collocation and distribution — Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code* **267**

See PRIVILEGES AND HYPOTHECS.

HOMESTEADS—*Title to lands—Homestead and pre-emption rights — Unpatented Dominion lands—"Transfer"—Incumbrance—Charge to secure debts — Sanction of minister—Absolute nullity—Construction of statute—Dominion Lands Act*............................ **377**

See TITLE TO LAND 2.

INDIANS —*Constitutional law—Indian lands—Extinguishment of Indian title—Payment by Dominion—Liability of Province—Exchequer Court Act, s.* 32*—Dispute between Dominion and Province.*] In 1873 a treaty was entered into between the Government of Canada and the Sal-

INDIANS—*Continued.*

teaux tribe of Ojibeway Indians inhabiting land acquired by the former from the Hudson Bay Company. By said treaty the Salteaux agreed to surrender to the government all their right, title and interest in and to said lands and the government agreed to provide reserves, maintain schools and prohibit the sale of liquor therein and allow the Indians to hunt and fish, to make a present of $12 for each man, woman and child in the bands and pay each Indian $5 per year and salaries and clothing to each chief and sub-chief; also to furnish farming implements and stock to those cultivating land. At the time the treaty was made the boundary between Ontario and Manitoba had not been defined. When it was finally determined, in 1884, it was found that 30,500 square miles of the territory affected by it was in Ontario and, in 1903, the Dominion Government brought before the Exchequer Court a claim to be re-imbursed for a proportionate part of the outlay incurred in extinguishing the Indian title. The Province disputed liability and, by counterclaim, asked for an account of the revenues received by the Dominion while administering the lands in the Province under a provisional agreement pending the adjustment of the boundary.—*Held*, reversing the judgment of the Exchequer Court (10 Ex. C.R. 445) Girouard and Davies JJ. dissenting, that the Province was not liable; that the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians and with a view to the maintenance of peace, order and good government in the territory affected; and that no rule or principle of law made the Province responsible for expenses incurred in carrying out an agreement with the Indians to which it was not a party and for which it gave no mandate. PROVINCE OF ONTARIO *v.* DOMINION OF CANADA....... **1**

AND *see* CONSTITUTIONAL LAW 1.

2—— *Appeal per saltum—Jurisdiction.*] On application for leave to appeal *per saltum* from a judgment (14 Ont. L.R. 606), refusing to quash a by-law, the objection to the by-law was that it assumed to affect an Indian Reservation over which neither the corporation nor the Legislature of Ontario had auth-

INDIANS—*Continued.*

ority. The appellant had been too late to appeal to a Divisional Court, leave for an extension of time was refused, and there was no right to appeal to the Court of Appeal. The motion was refused; *Ottawa Electric Co.* v. *Brennan* (31 Can. S.C.R. 311), followed. ARMOUR *v.* TOWNSHIP OF ONONDAGA **218**

INFANT—*Operation of tramway — Injury to child of tender age—Recklessness of motorman* **220**

See NEGLIGENCE 1.

INJUNCTION—*Appeal — Jurisdiction—Rivers and streams—Floating logs—Servitude—Faculty or license—Possessory action—Injunction—Matter in controversy—Practice—Costs* **133**

See APPEAL 1.

INSURANCE, LIFE — *Construction of policy—Payment of premium—Time for payment—Forfeiture.*] By the judgment appealed from (15 Ont. L.R. 131) the judgment at the trial (14 Ont. L.R. 613) was reversed, on the ground that, on the proper construction of the terms of the policies, every year's premium was payable on a fixed date annually, and that payments had not been made in conformity therewith, and there had been a forfeiture of benefits under the policies. The Supreme Court of Canada dismissed the appeal, Girouard, Maclennan and Duff JJ. adopting the opinion of Meredith J. in the Court of Appeal for Ontario; Davies J. being of opinion that the reasons assigned by the Court of Appeal were right, and Idington J. seeing no reason to disturb them. PENSE *v.* NORTHERN LIFE ASSURANCE CO. . . **246**

INTEREST — *Appeal—Jurisdiction — Amount in controversy—Addition of interest—Amount of verdict—Stay of execution* **238**

See APPEAL 6.

JUDGMENT — *Appeal — Jurisdiction — Commitment of judgment debtor—Final judgment—Manitoba King's Bench rules* 748, 755—*"Matter or judicial proceeding" —Supreme Court Act,* s. 2(*e*). **146**

See APPEAL 2.

JUDGMENT—*Continued.*

2——*Default judgment—Order setting aside—Appeal* **219**

See APPEAL 5.

3—— *Breach of contract—Place of performance—Foreign judgment — Action* **237**

See CONTRACT 3.

JUDICIAL PROCEEDING — *Judgment debtor—Examination—Refusal to answer —Commitment* **146**

See APPEAL 2.

JURISDICTION—*Arbitration and award —Statutory arbitrators—Awards "from time to time"—Res judicata.*] The statutes authorizing the appointment of arbitrators to settle accounts between the Dominion and the Provinces of Ontario and Quebec and between the two provinces, provided for submission of questions by agreement among the governments interested; for the making of awards from time to time; and that, subject to appeal, the award of the arbitrators in writing should be binding on the parties to the submission.—The provinces submitted to the arbitrators for determination the amount of the principal of the Common School Fund to ascertain which they should consider not only the sum held by the Government of Canada but also "the amount for which Ontario is liable." In 1896 by award No. 2 the arbitrators determined that moneys remitted to purchasers of school lands unless made in fair and prudent administration, and uncollected purchase money of patented lands, unless good cause were shewn for non-collection, should be deemed moneys received by Ontario, and in 1899 the amount of liability under these heads was fixed by award No. 4. In 1902 the Privy Council held that the arbitrators had no jurisdiction to entertain a claim by Quebec to have Ontario declared liable for the purchase money of school lands yet unpatented allowed to remain uncollected for many years. In making their final award in 1907, the arbitrators refused an application by Quebec for inclusion therein of the amounts found due from Ontario for remissions and non-collections and held that they had exceeded their jurisdiction

JURISDICTION—*Continued.*

in determining such liability. On appeal from this determination embodied in the final award:—*Held*, Fitzpatrick C.J. and Duff J. expressing no opinion, that the arbitrators had no jurisdiction to determine the liability of Ontario for moneys remitted or not collected. *Attorney-General for Ontario* v. *Attorney-General for Quebec* ((1903) A.C. 39) followed.—*Held*, also, Fitzpatrick C.J. and Duff J. dissenting, that awards Nos. 2 and 4 in so far as they determined this liability were absolutely null, and, therefore, not binding on Ontario. PROVINCE OF QUEBEC *v.* PROVINCE OF ONTARIO **161**

(Leave to appeal to Privy Council granted, 1st December, 1909.)

2——*Appeal to Privy Council—Stay of proceedings.*] When, as provided by sec. 58 of the Supreme Court Act, a judgment of the court has been certified by the registrar to the proper officer of the court of original jurisdiction, and the latter has made all proper entries thereof the Supreme Court of Canada has no power to stay proceedings for the purpose of an appeal from said judgment to the Judicial Committee of the Privy Council. *Union Investment Co.* v. *Wells* (41 Can. S.C.R. 244) overruled. PETERS *v.* PERRAS **361**

3——*Constitutional law—Legislative jurisdiction—"Early closing by-law"—Municipal affairs—Property and civil rights—Local and private matters—Regulation of trade and commerce* **211**

See CONSTITUTIONAL LAW 2.

4—— *Appeal per saltum—Jurisdiction over Indian reserves* **218**

See APPEAL 4.

5—— *Railways—Fencing — Uninclosed lands—Jurisdiction of Board of Railway Commissioners—Construction of statute —The Railway Act, R.S.C.* 1906, *c.* 37, *ss.* 30, 254 .... **443**

See RAILWAYS 3.

6——*Appeal—Limitation of time—Jurisdiction of Board of Railway Commissioners—Leave by judge — Powers of Board—Completed railway — Order to provide station* **557**

See BOARD OF RAILWAY COMMISSIONERS 2.

7——*Deviation of railway tracks—Highway—Dedication—User—"Public way or means of communication"—Access to harbour—Navigable waters* **613**

See HIGHWAY 1.

JURY—*Charge to jury—Objections after verdict—New trial — Misdirection—Discretion.*] B. in his newspaper article accused H. of having been drunk during an election, and the judge, in charging the jury, said, "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."—*Held*, that this was calculated to mislead the jury and was a reason for granting a new trial.—If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion. BARTHE *v.* HUARD **406**

AND *see* PRACTICE 10.

LANDLORD AND TENANT—*Lease—Covenant not to assign—Assignment to copartner—Right to renewal—Notice.*] Where partners are lessees of a term for years and have covenanted not to assign or sub-let without the consent in writing of the lessor an assignment by one of his interest in the lease to his copartner without such consent is a breach of such covenant. *Varley* v. *Coppard* (L.R. 7 C.P. 505) followed.—The lease provided that, having performed all their covenants and agreements contained in the lease, the lessees, on giving six months' notice in writing to the lessor before the expiration of the term that they required it, would be entitled to a renewal. *Held*, that a breach (after the said notice was given) of their covenant in the lease not to assign without leave caused a forfeiture of the right to renewal.—Judgment appealed from (17 Ont. L.R. 254) affirmed. LOVELESS *v.* FITZGERALD.. **254**

LEASE—*Lessor and lessee—Covenant to renew—Severance of term—Consent of lessor—Enforcement of covenant—Expropriation—Persons interested.*] The covenant for renewal of a lease for a term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion.—The assignment of part of the leasehold premises included an assignment of the right to renewal of the lease for such part and the lessor executed a consent thereto.—*Held*, that he did not thereby consent that his covenant for renewal would be exercised in respect to a part only of the demised premises.—In the case mentioned the lessee who has severed his term cannot, when the land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease.—Judgment of the Court of Appeal (18 Ont. L.R. 85) affirmed. ALEXANDER BROWN MILLING CO. *v.* CANADIAN PACIFIC RY. CO. **600**

AND *see* LANDLORD AND TENANT.

LIBEL—*Evidence—Privilege—Notary—Jury trial—Practice—Charge to jury—Objections after verdict—New trial—Misdirection—Discretion* **406**

See PRACTICE 10.

LIEN—*Privileges and hypothecs—Tramway—Operation of highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute, 3 Edw. VII. c. 91 (Que.)—Priority of claim—Collocation and distribution—Arts. 379, 2000 C.C.—Art. 752 Mun. Code* **267**

See PRIVILEGES AND HYPOTHECS.

2——*Title to lands—Homestead and pre-emption rights—Unpatented Dominion lands—"Transfer"—Incumbrance—Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute—Dominion Lands Act* **377**

See TITLE TO LAND 2.

LIMITATIONS OF ACTIONS.

See PRESCRIPTION.

LIQUOR LAWS—*Municipal corporation—Assessment and taxes—Exemption—Charter of Edmonton—Construction of statute "License fee"—N.W.T. Ord., 192 of 1900—N.W.T. Ord., 1904 (c. 19—Con. Ord. N.W.T., c. 89.*] The provision of the charter of the Town of Edmonton (N.W.T. Ord., 1904, ch. 19), title xxxii., sec. 3, sub-sec. 4, exempting any person assessed in respect of any business from the payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the provincial government under the Liquor License Ordinance, Con. Ord., N.W.T., ch. 89.—Judgment appealed from (2 Alta. L.R. 38) affirmed. YORK *v.* CITY OF EDMONTON **363**

2——*Appeal—Jurisdiction—Alberta Liquor License Act—Cancellation of license—Persona designata—Curia nominatim—"Originating summons"—Court of superior jurisdiction* **264**

See APPEAL 7.

MINES—*Mining agreement—Interest in ore to be mined—After-acquired chattels—Transfer and delivery—Registration—B.C. Bills of Sale Act, 1905—Construction of statute.*] An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under the provisions of the British Columbia Bills of Sale Act, 5 Edw. VII. ch. 8.—Judgment appealed from (14 B.C. Rep. 183) affirmed. TRAVES *v.* FORREST **514**

2——*Negligence—Employer and employee—Duty of employer—Proper system—Common employment* **420**

See NEGLIGENCE 6.

MORTGAGE—*Title to lands—Homestead and pre-emption rights—Unpatented Dominion lands—"Transfer"—Incumbrance—Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute—Dominion Lands Act* **377**

See TITLE TO LAND 2.

AND *see* PRIVILEGES AND HYPOTHECS.

MOVABLES—*Privileges and Hypothecs—Tramway—Operation of highway—Title*

MOVABLES—*Continued.*

to land—Immobilization by destination—Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute, 3 Edw. VII. c. 91 *(Que.)—Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code.* **267**

See PRIVILEGES AND HYPOTHECS.

MUNICIPAL CORPORATION — *Constitutional law—Legislative jurisdiction—"Early closing by-law"—Municipal affairs—Property and civil rights—Local or private matters—Regulation of trade and commerce—B.N.A. Act,* 1867, *s.* 91, *s.-s.* 2; *s.* 92, *s.-ss.* 8, 13, 16—57 *V. c.* 50 *(Que.).*] Provincial legislation authorizing a municipality to regulate the closing of shops of a particular character within its limits, is a subject which falls within the classes of matters enumerated as being within the exclusive jurisdiction of provincial legislatures under sub-section 13 or sub-section 16 of section 92 of the British North America Act, 1867, and is not an interference with the exclusive legislative jurisdiction of the Parliament of Canada conferred by the second sub-section of section 91 of that Act.—Unless a by-law, enacted in good faith under the authority of the Quebec statutes, 57 Vict. ch. 50, and 4 Edw. VII ch. 39, appears to be so unreasonable, unfair or oppressive as to be a plain abuse of the powers conferred upon the municipal council it should not be set aside.—Judgment appealed from (Q.R. 17 K.B. 420) reversed. CITY OF MONTREAL *v.* BEAUVAIS **211**

(Leave to appeal to Privy Council refused, 1st December, 1909.)

2——*Assessment and taxes—Exemption—Charter of Edmonton—Construction of statute—"License fee"—N.W.T. Ord.,* 192 *of* 1900—*N.W.T. Ord.,* 1904, *c.* 19—*Con. Ord. N.W.T., c.* 89.] The provision of the charter of the Town of Edmonton (N.W.T. Ord., 1904, ch. 19), title xxxii., sec. 3, sub-sec. 4, exempting any person assessed in respect of any business from the payment of "a license fee in respect of the same business" does not apply to fees exigible upon licenses issued by the provincial government under the Liquor License Ordinance, Con. Ord., N.W.T., ch.

MUNICIPAL CORPORATION—*Con.*

89.—Judgment appealed from (2 Alta. L.R. 38) affirmed. YORK *v.* CITY OF EDMONTON. **363**

3——*Appeal—Quo warranto—Action by ratepayer — Payment of money — Statutory procedure—Matter of form — "Montreal City Charter," ss.* 42, 334, 338 *—Construction of statute—*3 *Edw. VII. c.* 62, *ss.* 6 *and* 27.] An action by a ratepayer of the City of Montreal to compel the members of the finance committee of the city council to reimburse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under section 338 of the "City Charter" is not a proceeding in *quo warranto* under the provisions of articles 987 *et seq.* of the Code of Civil Procedure.—By section 334 of the charter (3 Edw. VII. ch. 62, sec. 27) the city council of Montreal must at the end of each year appropriate the revenues of the city for the services during the coming year, including a reserve of five per cent. of the total revenues, three per cent. of which is to provide for unforeseen expenses. By section 42 of the charter, as amended by 3 Edw. VII. ch. 62, sec. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted for the purpose. An item of unforeseen expenditure came before the council and was passed and sent to the finance committee, which directed the city treasurer to pay the amount, and it was paid accordingly.—*Held,* the Chief Justice and Girouard J. *contra,* that the reserve of three per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.—*Held,* also, the Chief Justice and Girouard J. dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money, where there has been no previous appropriation for the payment to be made, must receive the consideration of the finance committee and be sanctioned or rejected by that committee before being finally acted upon by the council. That any such payment made without this formality, even when made *bonâ fide* and though, in fact, sanctioned by the finance committee after it had been finally dealt with by the council, and though the city suffered no prejudice in conse-

MUNICIPAL CORPORATION—*Con.*

quence of such payment, is an illegal expenditure and involves the consequences provided in such cases by the 338th section of the "City Charter." LARIN *v.* LAPOINTE **521**

(Leave to appeal to Privy Council granted, 16th February, 1910.)

4—— *Appeal—Jurisdiction—Matter in controversy—Municipal franchise—Demolition of waterworks—Title to land — Future rights.* **156**

See APPEAL 3.

5——*By-law affecting Indian reserves—Jurisdiction* **218**

See APPEAL 4.

6—— *Street railway—Assumption by municipality—Principle of valuation — Operation in two municipalities—Compulsory taking* **581**

See TRAMWAY 4.

7——*Exemption from taxation—School rates—Appeal—Extension of time*.. **691**

See PRACTICE 12.

NEGLIGENCE—*Operation of tramway—Injury to infant—Reckless running of car.*] Upon seeing a child (aged one year and eleven months approaching the tracks, the company's motorman sounded the whistle of the car he was driving; the child stopped for a moment and looked towards the car; the motorman then applied full speed without waiting to see whether the child retreated or making any effort to remove it from the dangerous position; the child moved quickly towards the tracks and received the injuries for which damages were claimed. The court below held (41 N.S. Rep. 153) that the conduct of the motorman was recklessness for which the company was liable, that failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time-table and preventing delay to passengers and that the failure of the company to provide its car with a fender was evidence of negligence. The appeal was dismissed

NEGLIGENCE—*Continued.*

with costs. SYDNEY AND GLACE BAY RAILWAY CO. *v.* LOTT **220**

2——*Builders and contractors—Carelessness of workmen—Liability of employer—Dangerous appliances—Electric wires — Volunteer—New trial.*] The appellant's husband was killed by electric shock from a live wire of a company supplying electricity. As he passed along a public street he witnessed an accident to an employee of respondents, at a building they were constructing, through a derrick in use by them coming in contact with the live wire; while attempting to extricate the man at the derrick, he received the shock which caused his death. The action was against the contractors, respondents, and the electric company, and the negligence attributed to the contractors was placing and operating the derrick in dangerous proximity with the live wire. The jury exonerated the deceased from blame, found the company at fault for not protecting the wire, and also that the contractors were not blamable for the accident. The case was referred to the Court of Review which gave judgment against the company, but on appeal to the Court of King's Bench such judgment was reversed and the action dismissed (Q.R. 15 K.B. 11). A further appeal to the Supreme Court of Canada was discontinued (Cout. Cas. 408) and the case carried to the Privy Council where the judgment of the King's Bench was affirmed ([1907] A.C. 454). The Court of Review dismissed the action against the contractors and this judgment was affirmed by the judgment appealed from (Q.R. 17 K.B. 471). The Supreme Court of Canada allowed the appeal with costs and ordered a new trial. DUMPHY *v.* MARTINEAU ET AL.. **224**

3—— *Dangerous works—Defective appliances—Evidence—Onus of proof—Presumption—Art.* 1054 *C.C.—"Res ipsa loquitur."*] In an action to recover damages for injuries sustained by him in consequence of an accident in the company's calcium carbide works, the plaintiff's evidence shewed that a furnace operated upon a new system had been recently installed, that he was employed with other workmen to charge the furnace, draw off the liquid carbide when it was ready through openings in the base

NEGLIGENCE—*Continued.*

of the furnace, clean the orifices and re-plug them with moist mortar preparatory to re-charging. While the plaintiff was in the performance of his work in re-plugging one of these orifices an explosion occurred which caused the injuries complained of. There was no evidence of contributory negligence.—*Held*, Duff and Anglin JJ. dissenting, that, apart from any presumption arising under article 1054 C.C., the fact of the explosion occurring under such circumstances sufficiently established actionable negligence on the part of the company.—*Per* Fitzpatrick C.J. and Anglin J. (Girouard and Duff JJ. *contra*, and Idington J. expressing no opinion upon the question), that, under article 1054 of the Civil Code of Lower Canada, masters and employers, as well as other persons, are responsible for damages caused by things under their control or care where they fail to establish that the cause of the injury was attributable to the fault of the person injured, to *vis major* or to pure accident, or that it occurred without fault imputable to themselves.—Judgment appealed from (Q.R. 18 K.B. 271) reversing the decision of the Court of Review (Q.R. 35 S.C. 285), affirmed, Duff J. dissenting. SHAWINIGAN CARBIDE CO. *v.* DOUCET. **281**

4——*Railways—British Columbia Railway Act—Fire on right-of-way—Combustible matter on berm—Origin of fire—Damage to adjoining property—Evidence—Practice—New points raised on appeal.*] In an action against a railway company subject to the British Columbia Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence.—Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the provincial court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.—Judgment appealed from (14 B.C. Rep. 169) affirmed, Idington J. dissenting. LAIDLAW *v.* CROWSNEST SOUTHERN RY. CO... **355**

NEGLIGENCE—*Continued.*

5——*Findings of fact—Common fault — Apportionment of damages.*] In actions to recover damages for personal injuries in the Province of Quebec, where the plaintiff has been found guilty of contributory negligence the damages should not be divided equally between the parties, but apportioned according to the degree in which they were respectively blamable for its occurrence.—Judgment appealed from (Q.R. 36 S.C. 535) affirmed. NICHOLS CHEMICAL CO. OF CANADA *v.* LEFEBVRE. **402**

6——*Employer and employee—Duty of employer—Proper system—Common employment.*] An employer is under an obligation to provide safe and proper places in which his employees can do their work and cannot relieve himself of such obligation by delegating the duty to another.—It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot in an action against him for damages, invoke the doctrine of common employment. AINSLIE MINING AND RY. CO. *v.* MCDOUGALL.... **420**

7——*Operation of railway—Damages—Solatium doloris—Verdict—New trial.* **205**

See DAMAGES 1.

8——*Ships and shipping—Perils of the sea—Unseaworthy ship—Evidence—Warranty—Inspection of shipping—Certificate of seaworthiness—Construction of statute—R.S.C. 1906, c. 113, s. 342—Drowning of sailors — Negligence of master—Liability of owner.* **242**

See SHIPS AND SHIPPING.

9——*Bailment—Evidence — Damages—Storage of meat.* **253**

See BAILMENT.

10——*Crown—Injury on public work — Government railway—Fire from engine —R.S.C. 1906, c. 140, s. 20(c)* **350**

See PUBLIC WORK.

NEW TRIAL—*Operation of railway—Damages — Solatium doloris — Verdict.*] The court refused to order a new trial or reduction of damages, under the pro-

NEW TRIAL—*Continued.*

visions of articles 502, 503, C.P.Q., where it did not appear that, under the circumstances, the amount of damages awarded by the verdict was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. Davies J. dissented in respect of that part of the verdict awarding damages in favour of one of the sons who was almost 21 years of age and earning wages at the time deceased was killed.—*Quære.* In an action under article 1056 C.C. can a jury award damages *in solatium doloris*? *Robinson* v. *The Canadian Pacific Railway Co.* ([1892] A.C. 481) referred to. CANADIAN PACIFIC RY. CO. *v.* LACHANCE **205**

2——*Negligence—Builders and contractors—Carelessness of workmen—Liability of employer—Dangerous appliances—Electric wires—Volunteer—New trial.* **224**

See NEGLIGENCE 2.

3——*Evidence—Cross-examination—Discretionary order* **368**

See PRACTICE 9.

4——*Evidence — Privilege — Notary — Jury trial—Practice—Charge to jury — Objections after verdict—Misdirection—Discretion* **406**

See PRACTICE 10.

NOTARY—*Evidence — Privilege—Jury trial—Practice—Charge to jury—Objections after verdict—New trial—Misdirection—Discretion.*] H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed), B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim, but oral evidence was admitted

NOTARY—*Continued.*

proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H.—*Held*, that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre*, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial. BARTHE *v.* HUARD **406**

AND *see* PRACTICE 10.

NOTICE— *Lease—Covenant not to assign—Assignment to co-partner—Right to renewal* **254**

See LANDLORD AND TENANT.

2—— *Action for deceit—Agreement for sale—False representations — Compromise* **478**

See DECEIT 1.

PARTITION— *Agreement for sale of lands—Construction of contract—Right of action—Administration by co-owners—Trust—Interim account — Partial discharge of trustees.*] A. and S., being holders of the entire capital stock of the C. and W. Railway Company, agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H. and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, in so far as they had not been disposed of, remained in the company. In an action by the plaintiffs against H. for partition of the lands and to have an order for an interim account by and partial discharge of A. and S. as trustees.—*Held*, that as, at the time of action, the title to the lands was still vested in the railway company which was not a party to the agreement, the order for partition could not be granted, and that, independently of partition or other final determination of their trust, the plaintiffs were not entitled to the relief of an interim accounting and partial discharge as trustees.—Judgment appealed from (14 B.C. Rep. 157) affirmed. ANGUS *v.* HEINZE. **416**

PARTNERSHIP—*Division of profits — Collateral business affairs—Trust—Account—Findings of fact.*] The action was for dissolution of partnership, an account and division of profits from sale of lands. The plaintiff, Gordon, and two of the defendants (the Hollands), were partners as real-estate brokers and, aside from the agency business, entered into investments on their own account in the purchase of three lots of land, making a payment on account of the price. When instalments of the balance became due they took Horne into the transaction, it being agreed that he was to pay 85 per cent. of the price and the others to contribute 15 per cent., and that the profits should be divided between them. Horne took over the agreements for the purchase and the lots were eventually conveyed to him. Under a verbal agreement, if a sale could be effected before the second instalment became due and netted 15 per cent. profit, the old partnership was to share in the profits equally with Horne. This sale was not made, but four months after the instalment fell due Horne sold a half interest. At the trial Morrison J. held that no partnership had been proved. His judgment was reversed by the judgment appealed from (14 B.C. Rep. 138) Hunter C.J. and Clement J. holding that Horne was a trustee for the partnership consisting of the plaintiff, himself and his co-defendants. Irving J. thought Horne could not be held to account until he had been re-imbursed what he put into the transaction. The Supreme Court of Canada, Girouard and Idington JJ. dissenting, considered that the question was one of fact depending upon the proper view of conflicting testimony and that the decision of the trial judge should not have been disturbed. Horne et al. *v.* Gordon **240**

(Leave to appeal to Privy Council granted, 1st December, 1909.)

2——*Lease—Covenant not to assign — Assignment to co-partner—Right to renewal—Notice* **254**

See Landlord and Tenant.

PAYMENT — *Contract—Delegation of payment—Revocation of authority*. **231**

See Contract 1.

PLEADING.

See Practice and Procedure.

PLEDGE — *Privileges and hypothecs—Tramway—Operation of highway—Title to land—Immobilization by destination—Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Contract—Construction of statute, 3 Edw. VII. c. 91 (Que.)—Priority of claim—Collocation and distribution —Arts. 379, 2000 C.C.—Art. 752 Mun. Code*. **267**

See Privileges and Hypothecs.

POWER OF ATTORNEY— *Contract — Delegation of payment—Revocation of authority*. **231**

See Contract 1.

PRACTICE AND PROCEDURE---*Objection to jurisdiction—Neglect to observe rules —Costs withheld.*] An appeal was quashed without costs as objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice. Price Bros. *v.* Tanguay **133**

2——*Election law—Election petition — Preliminary objections—Cross-petition—Sufficiency of charge of corrupt acts — Particulars.*] By a preliminary objection to an election petition (see Q.R. 36 S.C. 13) it was claimed that the petitioner was not a person entitled to vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day.—*Held*, that the second objection was not merely explanatory of the first but the two were separate and independent; that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not *ipso facto;* and that the first objection should not have been dismissed the respondent to the petition being entitled to give evidence as to the status of the petitioner.—The respondent, by cross-petition, alleged that the defeated candidate personally and by agents "committed acts and the offence of undue influence."—*Held*, that it would have been desirable to state the facts relied on to establish the charge of undue influence but as these facts could be obtained

PRACTICE AND PROCEDURE—*Con.*

by a demand for particulars a preliminary objection was properly dismissed. QUEBEC WEST ELECTION CASE...... **140**

3—— *Appeal — Jurisdiction — Commitment of judgment debtor—Final judgment—Manitoba King's Bench rules* 748, 755—*"Matter or judicial proceeding" — Supreme Court Act, s.* 2(*e*).] An order of committal against a judgment debtor, under the Manitoba King's Bench rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of subsection (*e*) of section 2 of the Supreme Court Act but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis* (3 Can. S.C.R. 258) referred to. SVENSSON *v.* BATEMAN. **146**

4——*Appeal—Jurisdiction — Dismissing appeal.*] On motion to quash an appeal from a judgment (14 Ont. L.R. 578) affirming the judgment of the Divisional Court (13 Ont. L.R. 189), which sustained an order setting aside a judgment entered by default for non-appearance, the question involved was whether or not the defendant (plaintiff in an issue directed), was entitled to have the judgment set aside. The appeal was, on this motion, dismissed with costs. GREEN *v.* GEORGE. **219**

5——*Jurisdiction—Service out of jurisdiction—Attachment—Manitoba King's Bench rules* 201, 202—*Non-resident foreigner—Detention of goods pending suit—Substantial service — Consolidating appeals to Supreme Court of Canada — Questions of practice.*] The court refused to interfere with the judgment appealed from (18 Man. R. 56) affirming the judgment of Mathers J. (18 Man. R. 59) on questions of procedure. *Williams* v. *Leonard* (26 Can. S.C.R. 406), and *Green* v. *George* (42 Can. S.C.R. 219) referred to. EMPEROR OF RUSSIA *v.* PROSKOURIAKOFF **226**

6—— *Practice—Impeachment of testimony—Evidence — Notice of imputations—Promissory note—Fraud—Suspicious circumstances—Transfer of negotiable instrument.*] The court below held

PRACTICE AND PROCEDURE—*Con.*

that the burden of proving affirmatively that he was holder in due course of a note in question in the case rested upon the plaintiff, that he had not satisfied the onus, that his neglect to make inquiries, though not inconsistent with good faith, constituted some evidence of bad faith; and affirmed the judgment of the trial court dismissing the action (1 Alta. L.R. 1, 201). On the appeal, the majority of the judges of the Supreme Court of Canada held that, under the circumstances of the case, the courts below were not justified in refusing to accept the uncontradicted testimony of a witness (examined abroad under commission), as to particular facts, of which notice had not been given in the pleadings or otherwise, relating to circumstances relied upon to sustain or point to the imputation of bad faith and no opportunity afforded to the witness of explaining or qualifying the facts or conduct on which the attack upon his veracity or honesty was based. *Browne* v. *Dunn* (6 R. 67) was applied; *Union Investment Co.* v. *Wells* (39 Can. S.C.R. 625) was followed; and the judgment appealed from was reversed. PETERS *v.* PERRAS. **244**

7——*New points raised on appeal — Cause of action.*] Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the provincial court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada. LAIDLAW *v.* CROWSNEST SOUTHERN RAILWAY CO. **355**

AND *see* RAILWAYS 2.

8—— *Jurisdiction — Appeal to Privy Council—Stay of proceedings.*] When, as provided by sec. 58 of the Supreme Court Act, a judgment of the court has been certified by the registrar to the proper officer of the court of original jurisdiction, and the latter has made all proper entries thereof the Supreme Court of Canada has no power to stay proceedings for the purpose of an appeal from said judgment to the Judicial Committee of the Privy Council. *Union Investment Co.* v. *Wells* (14 Can. S.C.R. 244) overruled. PETERS *v.* PERRAS. **361**

PRACTICE AND PROCEDURE—*Con.*

9——*Adduction of evidence—Cross-examination at trial—Vexatious and irrelevant questions—Discretionary order — Propriety of review.*] The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not, at the time it was put to the witness, have relevancy to the issues.—Idington J. dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered. BROWNELL *v.* BROWNELL... **368**

10—— *Evidence—Privilege—Notary — Jury trial—Practice—Charge to jury — Objections after verdict—New trial — Misdirection—Discretion.*] H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed), B. in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim, but oral evidence was admitted proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H.—*Held*, that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre,* as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial. —B. in his newspaper article also accused H. of having been drunk during the election, and the judge, in charging the jury, said, "You should consider the case as if the charge of drunkenness had been made against yourself, your brother or your friend."—*Held,* that this was calculated to mislead the jury and was also a reason for granting a new trial. —If objection to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellate court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion. BARTHE *v.* HUARD. **406**

11——*Appeal—Special leave—Public interest—Important questions of law — Exemption from taxation—School rates —R.S.* [1906] *c.* 139, *s.* 48.] By a municipal by-law an industrial company was given exemption from taxation for a term of years. P., a ratepayer of the municipality, applied for a writ of mandamus to compel the council to assess the company for school rates, which, he claimed, were not included in the exemption. The decision to grant the writ was affirmed by the Court of Appeal (20 Ont. L.R. 246). On motion for special leave to appeal from the latter judgment.—*Held*, that the case was not one of public interest, and did not raise important questions of law. It did not, therefore, fall within the principles laid down in *Lake Erie & Detroit River Railway Co.* v. *Marsh* (35 Can. S.C.R. 197), for granting such leave. WHYTE PACKING CO. *v.* PRINGLE **691**

12——*Appeal—Special leave—Time limit —Extension—R.S.O.* [1906] *c.* 139, *s.* 48 (*e*).] After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so. JOHN GOODISON THRESHER CO. *v.* TOWNSHIP OF MCNAB **694**

13——*Appeal per saltum—Jurisdiction.* **218**

See APPEAL 4.

14—— *Appeal—Jurisdiction — Amount in controversy—Addition of interest — Amount of verdict—Stay of execution.* **238**

See APPEAL 6.

PRACTICE AND PROCEDURE—*Con.*

15——*Appeal—Findings of fact—Division of partnership profits — Collateral business affairs—Trust.* **240**

See PARTNERSHIP 1.

16—— *Appeal—Jurisdiction — Alberta Liquor License Act—Cancellation of license—Persona designata—Curia nominatim—"Originating summons"—Court of superior jurisdiction.* **264**

See APPEAL 7.

17——*Appeal—Limitation of time—Jurisdiction of Board of Railway Commissioners—Leave by judge — Powers of Board—Completed railway — Order to provide station* **557**

See BOARD OF RAILWAY COMMISSIONERS 2.

AND *see* NEW TRIAL.

PRESCRIPTION—*Action in wrong jurisdiction—Transfer to court of competent jurisdiction—Expiration of time — Pleading prescription after transfer of action.* **242**

See SHIPS AND SHIPPING.

PRINCIPAL AND AGENT—*Sale of land —Commission for procuring purchaser— Sale to person introduced by broker.* **228**

See BROKER.

PRIORITY—*Privileges and hypothecs— Tramway—Operation on highway—Title to land—Immobilization by destination —Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Construction of statute, 3 Edw. VII. c. 91 (Que.) — Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code.* **267**

See PRIVILEGES AND HYPOTHECS.

PRIVILEGES AND HYPOTHECS—*Tramway—Operation on highway — Title to land—Immobilization by destination — Sale of tramway by sheriff as "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute* 3 *Edw. VII. ch.* 91 *(Que.)— Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code.*] A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture-bonds hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture-holders and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern.—*Held* that whether, at the time of such sale, the cars in question were movable or immovable in character the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution.—*Per* Girouard J., Duff J. *contra.* After the cars in question had been delivered to the tramway company and used by it in the operation of their tramway, they became immovable by destination.—In the result, the judgment appealed from (Q.R. 18 K.B. 82) was affirmed. AHEARN & SOPER *v.* NEW YORK TRUST CO...... **267**

PRIVY COUNCIL — *Jurisdiction — Appeal to Privy Council—Stay of proceedings.* **361**

See PRACTICE 8.

PROMISSORY NOTE.

See BILLS AND NOTES.

PROVINCIAL ACCOUNTS —*Arbitration and award—Statutory arbitrators—Jurisdiction—Awards "from time to time" —Res judicata.* **161**

See ARBITRATION AND AWARD 1.

PUBLIC WORK—*Crown—Negligence — Injury on public work—Government railway—Fire from engine—R.S.C.* [1906] *c.*

PUBLIC WORK—*Continued.*

140, *s.* 20(*c*).] The words "on a public work" in sub-sec. (*c*) of R.S.C. [1906] ch. 140, sec. 20 (The Exchequer Court Act), are descriptive of locality and to make the Crown liable for injury to property under that sub-section such property must be situated on the work when injured. CHAMBERLAIN *v.* THE KING. **350**

QUO WARRANTO —*Appeal—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure — Matter of form—"Montreal City Charter"—Construction of statute*....... **521**

See MUNICIPAL CORPORATION 3.

RAILWAYS —*Crown — Negligence — Injury on public work—Government railway—Fire from engine—R.S.* [1906] *c.* 140, *s.* 20(*c*).] The words "on a public work" in sub-sec. (*c*) of R.S. [1906] ch. 140, s. 20 (The Exchequer Court Act), are descriptive of locality and to make the Crown liable for injury to property under that sub-section such property must be situated on the work when injured. CHAMBERLAIN *v.* THE KING. **350**

2——*British Columbia Railway Act — Fire on right-of-way—Combustible matter on berm—Origin of fire—Damage to adjoining property—Negligence — Evidence —Practice—New points raised on appeal.*] In an action against a railway company subject to the British Columbia Railway Act, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right-of-way, not caused by the operation of the railway, the fact that the condition of the right-of-way facilitated the spread of the fire to adjoining property which was destroyed by it does not amount to actionable negligence.—Where a matter relied upon to support the action was not urged at the trial nor asserted on an appeal to the provincial court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.—Judgment appealed from (14 B.C. Rep. 169) affirmed, Idington J. dissenting. LAIDLAW *v.* CROWSNEST SOUTHERN RY. CO..... **355**

3——*Fencing—Uninclosed lands — Jurisdiction of Board of Railway Commissioners—Construction of statute — The Railway Act, R.S.C.* 1906, *c.* 37, *ss.* 30, 254.] Under the provisions of the Railway Act the Board of Railway Commissioners for Canada does not possess authority to make a general order requiring all railways subject to its jurisdiction to erect and maintain fences on the sides of their railway lines where they pass through lands which are not inclosed and either settled or improved; it can do so only after the special circumstances in respect of some defined locality have been investigated and the necessity of such fencing in that locality determined according to the exigencies of the case. Duff J. *contra.*—The Railway Act empowers the Board to order that, upon lines of railway not yet completed or open for traffic or in course of construction, where they pass through inclosed lands, the railway companies should construct and maintain such fences or take such other steps as may be necessary to prevent cattle and other animals from getting upon the right-of-way. Idington J. *contra.* IN RE CANADIAN NORTHERN RY. CO. **443**

4——*Appeal—Powers of Board of Railway Commissioners—Completed railway —Order to provide station—R.S.* [1906] *c.* 37, *ss.* 26, 151, 158-9, 166-7, *and* 258.] The Board of Railway Commissioners has power to order a railway company whose line is completed and in operation to provide a new station at any place where it is required to afford proper accommodation for the traffic on the road. GRAND TRUNK RY. CO. *v.* DEPT. OF AGRICULTURE OF ONTARIO **557**

AND *see* BOARD OF RAILWAY COMMISSIONERS 2.

5——*Jurisdiction of Board of Railway Commissioners — Deviation of tracks — Separation of Grades — "Highway" — Dedication—User—"Public way or means of communication"—Access to harbour—Navigable waters—Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2(11), (28), 3, 237, 238, 241, 58 *V. c.* 48(*D.*).] Prior to 1888 the Grand Trunk Railway Company operated a portion of its railway upon the "Esplanade" in the City of Toronto and, in that year, the Canadian Pacific Railway Company obtained permission from the Dominion Government to fill in part of Toronto harbour lying south of the "Es-

RAILWAYS—*Continued.*

planade" and to lay and operate tracks thereon, which it did. Several city streets abutted on the north side of the "Esplanade" and the general public passed along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892 an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of overhead traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act (58 Vict. ch. 48) providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right of the Canadian Pacific Railway Company to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line" agreement, and excepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there.—*Held*, Girouard and Duff JJ. dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agreement made in 1892 was not a "special Act" within the meaning of the "Railway Act" and did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the Canadian Pacific Railway Company, having acquired only a limited right or easement in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour. GRAND TRUNK RY. CO. *v.* CITY OF TORONTO **613**

6——*Negligence—Operation of railway—Damages—Solatium doloris—Verdict—New trial.* **205**

See DAMAGES 1.

7——*Statutory contract—Construction—Bonds of railway company—Government guarantee.* **505**

See CONTRACT 6.

8——*Leasor and lessee—Covenant to renew—Severance of term — Consent of lessor—Enforcement of covenant — Expropriation—Persons interested* ... **600**

See LEASE.

REGISTRY LAWS—*Mines and mining—Mining agreement—Interest in order to be mined — After-acquired chattels — Transfer and delivery—Registration — B.C. Bills of Sale Act,* 1905—*Construction of statute.* **514**

See MINES 1.

RES JUDICATA—*Arbitration and award—Statutory arbitrators—Jurisdiction — Awards "from time to time"* **161**

See ARBITRATION AND AWARD 1.

RIVERS AND STREAMS—*Right of floating logs—Servitude—Faculty or license—Possessory action—Injunction.*] In the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal. PRICE BROS. *v.* TANGUAY. **133**

AND *see* APPEAL 1.

SALE—*Sale of land—Principal and agent —Commission for procuring purchaser— Sale to person introduced by broker.*] The judgment appealed from (13 B.C. Rep. 389), which was affirmed, held that the appellant (plaintiff), was not entitled to commission for the introduction of a purchaser of land which was sold to the person so introduced, as he had been engaged only to sell the land at a price higher than that for which the sale was subsequently made and he had failed to prove an agreement of pay commission on the lower price. BRIDGMAN *v.* HEPBURN **228**

2——*Sale of land—Misrepresentation— Deceit—Contract—Warranty.*] The defendant, respondent, on negotiations for the sale of wild lands, which he had not seen, represented that they were fairly goods for farming. A large portion of the lands proved unfit for farming purposes. The court below (17 Man. R. 597), following *De Lasalle* v. *Guilford* ([1901] 2 K.B. 215), held that the plaintiff could not recover damages by reason of the defendant's misrepresentations, which should be considered merely as expressions of opinion not amounting to a warranty. The appeal was dismissed with costs. MEY *v.* SIMPSON. **230**

3—— *Action for deceit—Agreement for sale — False representations — Compromise—Notice.*] P., living in Montreal, owned stock in a Cobalt mining company, and D., of Ottawa, looked after his interests therein. Being informed by D. that the mine was badly managed and the property of little value, and that other holders were selling their stock, P. signed an agreement to sell his at par. D. assigned this agreement to a third party. Later P., learning that the stock was selling at a premium and, believing that he had made an improvident bargain, entered into negotiations with the holder of his agreement, and a compromise was effected by a portion of P.'s holdings being sold to the assignee at par and the remainder returned to him. It transpired afterwards that D. and the assignor were in collusion to get possession of the stock, and P. brought action against D. for damages.—*Held*, that the compromise having been effected when P. was in ignorance of the real state of affairs, it did not bind him as against D. from whom he could recover as dam-

SALE—*Continued.*

ages the difference between the par value of his remaining shares and their market value at the date of such compromise.—Judgment of the Court of Appeal (12 Ont. W.R. 824) reversed and that of the trial judge (9 Ont. W.R. 380) affirmed by a Divisional Court (11 Ont. W.R. 127) restored. PITT *v.* DICKSON **478**

(Leave to appeal to Privy Council refused, 22nd February, 1910.)

4—— *Privileges and hypothecs—Tramway—Operation on highway — Title to land—Immobilization by destination — Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Construction of statute, 3 Edw. VII. c.* 91 *(Que.)—Priority of claim—Collocation and distribution — Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code* **267**

See PRIVILEGES AND HYPOTHECS.

5——*Contract for sale—Time of essence —Delay of vendor——Description—Statute of Frauds—Specific performance* **251**

See SPECIFIC PERFORMANCE.

6——*Agreement for sale of lands—Construction of contract—Right of action— Partition—Administration by co-owners —Trust—Interim account—Partial discharge of trustees.* **416**

See TRUSTS 1.

7——*Contract—Supplying electrical energy—Delivery—Condition—Payment at flat rate—Obligation to pay for pressure not utilized—Sale of commodity—Agreement for service.* **431**

See CONTRACT 5.

SCHOOLS—*Appeal—Special leave—Public interest—Important questions of law — Exemption from taxation — School rates* **691**

See APPEAL 9.

SERVITUDE — *Rivers and streams — Right of floating logs—Faculty or license —Possessory action — Injunction.*] In

SERVITUDE—*Continued.*

the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal. PRICE BROS. & CO. *v.* TANGUAY. **133**

AND *see* APPEAL 1.

SHAREHOLDER — *Action for deceit — Agreement for sale—False representations—Compromise — Notice.* **478**

See DECEIT 1.

SHIPS AND SHIPPING—*Perils of the sea—Unseaworthy ship — Evidence — Warranty—Inspection of shipping—Certificate of seaworthiness—Construction of statute — R.S.C.* 1906, *c.* 113, *s.* 342 — *Drowning of sailors — Negligence of master — Liability of owner.*] Actions were brought against the owner of the tug "Mersey" (wrecked on the Lower St. Lawrence), to recover damages in consequence of the drowning of two of her crew. On an investigation, the wreck commissioner reported that the ship was seaworthy when she left Quebec on her last voyage; that her life-boat and appliances were sufficient to have saved all lives on board had the master made proper use of them, and that the evidence did not explain the use of the casualty by which these sailors' lives were lost. It was also found that the master and mate had been guilty of cowardice and desertion of the ship and their certificates were cancelled. The actions were first brought in the District of Quebec, but the court declared itself incompetent and referred the case to the Superior Court for the District of Montreal. In the latter court the defendant (appellant), pleaded prescription, a year having elapsed before the actions came before a court of competent jurisdiction; that deceased were not passengers, but were engaged as part of the ship's crew; that the ship was seaworthy, and that the disaster was due to the perils of the sea. At the trials and by the judgments appealed from (Q.R. 34 S.C. 405) the plea of prescription was dismissed and judgments were entered in favour of the plaintiffs, respectively. The Supreme Court of Canada dismissed the appeals with costs. CONNOLLY *v.* GRENIER; CONNOLLY *v.* MARTEL **242**

SPECIFIC PERFORMANCE — *Sale of land—Contract for sale—Time of essence —Delay of vendor—Description—Statute of Frauds.*] The plaintiff, F., made an offer by letter to purchase defendant's land in Toronto, describing it as "No. 22 Ann Street," and stating the dimensions. The deed was to be prepared at vendor's expense and there was a provision that "time shall be of the essence of this offer." The defence to the action for specific performance of the contract to purchase was that plaintiff had not performed his part within the time limited by the offer and that the description of the property being defective, as there was no lot on Ann Street numbered 22, the Statute of Frauds was not complied with.—The Court of Appeal (16 Ont. L.R. 565) held that time was of the essence of all the terms of the contract and did not relate only to the acceptance of the offer as held by the Divisional Court (15 Ont. L.R. 362); that the delay by the plaintiff was due to defendant's failure to prepare the deed and was, therefore, no answer to the action; and that as the property was sufficiently described without reference to the number of the lot the Statute of Frauds was complied with.—The judgment appealed from was affirmed. ANDERSON *v.* FOSTER **251**

STATUTE — *Title to lands—Homestead and pre-emption rights—Unpatented Dominion lands—"Transfer"—Incumbrance —Charge to secure debts—Sanction of minister—Absolute nullity—Construction of statute*—60 *&* 61 *Vict. c.* 29, *s.* 5, *R.S.C.* (1906) *c.* 55, *s.* 142.] On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands, in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior.—*Held*, affirming the judgment appealed from (11 West. L.R. 185) that the instrument was in effect a "transfer" and was absolutely

STATUTE—*Continued.*

null and void under the provisions of the Dominion Lands Act. AMERICAN-ABELL ENGINE AND THRESHER CO. *v.* MCMILLAN. **377**

2—— *Construction of statute—General and special Act—Inconsistency—Ontario Railway Act, 6 Edw. VII. c. 30, ss. 5 and 116—Charter of Toronto Railway Co., s. 17.*] The Ontario Railway Act of 1906 (6 Edw. VII. ch. 30) is, by sec. 5, made applicable to street railway companies incorporated by the legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By sec. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by sec. 17 of the Act incorporating the Toronto Railway Co., a passenger in such case is liable to a fine only.—*Held,* that these two provisions are not inconsistent, and the conductor of a street railway car may lawfully eject therefrom a passenger who refuses to pay his fare. —In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence. TORONTO RY. CO. *v.* PAGET **488**

3——*Statutory contract—Construction—Bonds of railway company—Government guarantee.*] The Government of Canada, in a contract with the Grand Trunk Pacific Railway Co., published as a schedule to and confirmed by 3 Edw. VII. ch. 71, agreed to guarantee the bonds of the company to be issued for a sum equal to 75 per cent. of the cost of construction of the Western division of its railway. By a later contract (sch. to 4 Edw. VII. ch. 24) the government agreed to implement its guarantee, in such manner as might be agreed upon, so as to make the proceeds of said bonds a sum equal to 75 per cent. of such cost of construction.—*Held,* that this second contract only imposed upon the government the liability of guaranteeing bonds, the proceeds of which would produce a defined amount and not that of supplying, in cash or its equivalent, any deficiency there might be between the proceeds of the bonds and the said 75 per cent. IN RE GRAND TRUNK PACIFIC RY. CO. . . **505**
(Leave to appeal to Privy Council granted, 18th March, 1910.)

STATUTE—*Continued.*

4——*Mines and mining—Mining agreement—Interest in ore to be mined — After-acquired chattels—Transfer and delivery—Registration—B.C. Bills of Sale Act, 1905—Construction of statute.*] An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under the provisions of the British Columbia Bills of Sale Act, 5 Edw. VII. ch. 8.—Judgment appealed from (14 B.C. Rep. 183) affirmed. TRAVES *v.* FORREST **514**

5——*Appeal—Quo warranto—Action by ratepayer—Municipal corporation—Payment of money—Statutory procedure—Matter of form—"Montreal City Charter," ss. 42, 334, 338—Construction of statute—3 Edw. VII. c. 62, ss. 6 and 27.*] An action by a ratepayer of the City of Montreal to compel the members of the finance committee of the city council to reimburse the city for moneys which it was alleged they authorized to be illegally expended and asking for their disqualification under sec. 338 of the "City Charter" is not a proceeding in *quo warranto* under the provisions of articles 987 *et seq.* of the Code of Civil Procedure. —By section 334 of the charter (3 Edw. VII. ch. 62, sec. 27) the city council of Montreal must at the end of each year appropriate the revenues of the city for the services during the coming year, including a reserve of five per cent, of the total revenues, three per cent. of which is to provide for unforeseen expenses. By section 42 of the charter, as amended by 3 Edw. VII. ch. 62, sec. 6, the finance committee of the council must consider all recommendations involving the expenditure of money, unless an appropriation has been already voted for the purpose. An item of unforeseen expenditure came before the council and was passed and sent to the finance committee, which directed the city treasurer to pay the amount, and it was paid accordingly.—*Held,* the Chief Justice and Girouard J. *contra,* that the reserve of the three per cent. for unforeseen expenses was not an appropriation of the amount so directed to be paid.—*Held,* also, the Chief Justice and Girouard J. dissenting, that under the provisions of the charter it is essential that every recommendation for the payment of money, where there has been no previous appropriation for the payment to be made, must receive the

STATUTE—*Continued.*

consideration of the finance committee and be sanctioned or rejected by that committee before being finally acted upon by the council. That any such payment made without this formality, even when made *bonâ fide* and though, in fact, sanctioned by the finance committee after it had been finally dealt with by the council, and though the city suffered no prejudice in consequence of such payment, is an illegal expenditure and involves the consequences provided in such cases by the 338th section of the "City Charter." LARIN *v.* LAPOINTE **521**

(Leave to appeal to Privy Council granted, 16th February, 1910.)

6—— *Street railway—Franchise — Assumption by municipality—Principle of valuation—Operation in two municipalities—Compulsory taking—R.S.O.* [1897] *c.* 208.] By sec. 41 of the Ontario Street Railway Act (R.S.O. [1897] ch. 208), no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration where ownership was assumed under this provision.—*Held*, reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise.—*Held*, also, that in view of the provisions in the Street Railway Act authorizing the municipality to assume ownership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the Town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo.—On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six months more had elapsed. During the extended time an Act was passed by the legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the court.—*Held*, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.—The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. over and above the actual value of the property. TOWN OF BERLIN *v.* BERLIN AND WATERLOO ST. RY. CO. **581**

7——*Privileges and hypothecs — Tramway — Operation on highway — Title to land—Immobilization by destination — Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Construction of statute, 3 Edw. VII. c. 91 (Que.)—Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code* **267**

See PRIVILEGES AND HYPOTHECS.

8——*Ships and shipping—Perils of the sea—Unseaworthy ship—Evidence—Warranty—Inspection of shipping—Certificate of seaworthiness—Construction of statute—R.S.C.* 1906, *c.* 113, *s.* 342 — *Drowning of sailors — Negligence of master—Liability of owner*. **242**

See SHIPS AND SHIPPING.

9——*Municipal corporation—Assessment and taxes—Exemption—Charter of Edmonton—Construction of statute—"License fee."* **363**

See LIQUOR LAWS 1.

10—— *Railways—Fencing — Uninclosed lands—Jurisdiction of Board of Railway*

STATUTE—*Continued.*

Commissioners—Construction of statute —The Railway Act, R.S.C. 1906, *c.* 37, *ss.* 30, 254. .... **443**

See RAILWAYS 3.

11——*Appeal—Limitation of time—Jurisdiction of Board of Railway Commissioners — Leave by judge — Powers of Board—Completed railway — Order to provide station* **557**

See BOARD OF RAILWAY COMMISSIONERS 2.

12——*Railway—Jurisdiction of Board of Railway Commissioners — Highway — Dedication—User—"Public way or means of communication"—Access to harbour—Deviation of tracks—Navigable waters—Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2(11) (28), 3, 237, 238, 241—*"Special Act,"* 58 *V. c.* 48(*D.*) **613**

See RAILWAYS 5.

STATUTE OF FRAUDS—*Sale of land—Contract—Delay* **251**

See SPECIFIC PERFORMANCE.

STATUTES—30 *V. c.* 3, *ss.* 91, 92 (*Imp.*) [*B.N.A. Act,* 1867] **211**

See CONSTITUTIONAL LAW 2.

2——*R.S.C.* 1906, *c.* 37, *ss.* 30, 254 [*Railway Act*] **443**

See RAILWAYS 3.

3——*R.S.C.* 1906, *c.* 37, *ss.* 26, 151, 158-9, 166-7 *and* 258 [*Railways*] **557**

See BOARD OF RAILWAY COMMISSIONERS 2.

4——*R.S.C.* 1906, *c.* 37, *ss.* 2(11), (28), 3, 237, 238, 241 [*Railway Act*] **613**

See RAILWAYS 5.

5——*R.S.C.* 1906, *c.* 55, *s.* 142 [*Dominion Lands*] **377**

See TITLE TO LANDS 2.

6——*R.S.C.* 1906, *c.* 113, *s.* 342 [*Seaworthiness of shipping*] **242**

See SHIPS AND SHIPPING.

STATUTES—*Continued.*

7——*R.S.C.* 1906, *c.* 139 [*Supreme Court Act*] **146**

See APPEAL 2.

8——*R.S.C.* 1906, *c.* 139, *s.* 48 [*Supreme Court*] **691**

See APPEAL 9.

9——*R.S.C.* 1906, *c.* 139, *s.* 58 [*Supreme Court Act*] **361**

See PRACTICE 8.

10——*R.S.C.* 1906, *c.* 140 [*Exchequer Court*] **1**

See CONSTITUTIONAL LAW 1.

11——*R.S.C.* 1906, *c.* 140, *s.* 20(*c*) [*Exchequer Court Act*] **350**

See PUBLIC WORK.

12——58 *V. c.* 48(*D.*) [*Toronto Esplanade*] **613**

See RAILWAYS 5.

13——60 *&* 61 *V. c.* 29, *s.* 5(*D*) [*Dominion Lands*] **377**

See TITLE TO LANDS 2.

14——3 *Edw. VII. c.* 71(*D.*) [*G.T.P. Railway* **505**

See CONTRACT 6.

15——4 *Edw. VII. c.* 24(*D.*) [*G.T.P. Railway*] **505**

See CONTRACT 6.

16——*R.S.O.* 1897, *c.* 208 [*Street Railways*] **581**

See TRAMWAY 4.

17——55 *V. c.* 99 (*Ont.*) [*Toronto Railway*] **488**

See STATUTE 2.

18——6 *Edw. VII. c.* 30, *ss.* 5, 116 (*Ont.*) [*Railways*] **488**

See STATUTE 2.

19——57 *V. c.* 50 (*Que.*) [*Early Closing of Shops, etc.*] **211**

See CONSTITUTIONAL LAW 2.

STATUTES—*Continued.*

20——3 *Edw. VII. c.* 62 (*Que.*) [*Montreal City Charter*] **521**

See MUNICIPAL CORPORATION 3.

21——3 *Edw. VII. c.* 91, *s.* 1 (*Que.*) [*Levis County Railway Debentures*]. **267**

See PRIVILEGES AND HYPOTHECS.

22——4 *Edw. VII. c.* 39 (*Que.*) [*Early Closing of Shops, etc.*] **211**

See CONSTITUTIONAL LAW 2.

23——5 *Edw. VII. c.* 8 (*B.C.*) [*Bills of Sale*] **514**

See MINES 1.

24——7 *Edw. VII. c.* 3 (*Alta.*) [*Procedure*] **264**

See APPEAL 7.

25——*N.W.T. Con. Ord., c.* 89 [*Liquor Licenses*] **363**

See LIQUOR LAWS 1.

26——*N.W.T. Ord.* 1904, *c.* 19 [*Charter of Edmonton*] **363**

See LIQUOR LAWS 1.

TIMBER—*Rivers and streams—Floating logs — Servitude — Faculty or license — Possessory action—Injunction* **133**

See APPEAL 1.

TIME —*Appeal—Limitation of time — Jurisdiction of Board of Railway Commissioners—Leave by judge—Powers of Board—Completed railway — Order to provide station* **557**

See BOARD OF RAILWAY COMMISSIONERS 2.

TITLE TO LAND—*Appeal — Jurisdiction—Matter in controversy—Municipal franchise—Demolition of waterworks — Future rights.*] The action, instituted in the Province of Quebec, was for a declaration of the plaintiff's exclusive right under a municipal franchise to construct and operate waterworks within an area defined in a municipal by-law, for an injunction against the defendants constructing or operating a rival system of waterworks within that area, an order for the removal of water-pipes laid by them within that area, and for $86 damages. On an appeal from a judgment maintaining the plaintiff's action.—*Held*, Girouard and Idington JJ. dissenting, that, as it did not appear from the record that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec nor that any title to lands or future rights were affected, an appeal would not lie to the Supreme Court of Canada. LA CIE. D'AQUEDUC DE LA JEUNE-LORETTE *v.* VERRETT. **156**

2——*Homestead and pre-emption rights —Unpatented Dominion lands—"Transfer"—Incumbrance — Charge to secure debts—Sanction of minister — Absolute nullity—Construction of statute*—60 & 61 *Vict. c.* 29, *s.* 5; *R.S.C.* (1906) *c.* 55, *s.* 142.] On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands, in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior. —*Held*, affirming the judgment appealed from (11 West. L.R. 185) that the instrument was in effect a "transfer" and was absolutely null and void under the provisions of the Dominion Lands Act. AMERICAN-ABELL ENGINE AND THRESHER CO. *v.* MCMILLAN **377**

3——*Extinguishment of title to Indian lands—Payment by Dominion—Liability of Province* **1**

See CONSTITUTIONAL LAW 1.

4——*Easement—Private way—Unity of ownership—Subsequent severance — Revival of easement—Reservation*.... **249**

See EASEMENT.

5—— *Privileges and Hypothecs —Tramway—Operation of highway—Immobilization by destination—Sale of tramway by sheriff as a "going concern"—Unpaid vendor—Lien on price of cars—Pledge—Contract—Construction of statute,* 3 *Edw. VII. c.* 91 (*Que.*)—*Priority of claim—*

TITLE TO LAND—*Continued.*

Collocation and distribution—Arts. 379, 2000 *C.C.—Art.* 752 *Mun. Code*..... **267**

See PRIVILEGES AND HYPOTHECS.

6——*Lessor and lessee—Covenant to renew — Severance of term—Consent of lessor—Enforcement of covenant—Expropriation—Persons interested* **600**

See LEASE.

TRADE AND COMMERCE — *Constitutional law — Legislative jurisdiction — "Early closing by-law" — Municipal affairs—Property and civil rights—Local and private matters—Regulation of trade and commerce* **211**

See CONSTITUTIONAL LAW 2.

TREATIES.

See INDIANS.

TRAMWAYS— *Operation of tramway — Negligence—Injury to infant—Reckless running of car.*] Upon seeing a child (aged one year and eleven months) approaching the tracks, the company's motorman sounded the whistle of the car he was driving; the child stopped for a moment and looked towards the car; the motorman then applied full speed without waiting to see whether the child retreated or making any effort to remove it from the dangerous position; the child moved quickly towards the tracks and received the injuries for which damages were claimed. The court below held (41 N.S. Rep. 153) that the conduct of the motorman was recklessness for which the company was liable, that failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time-table and preventing delay to passengers and that the failure of the company to provide its car with a fender was evidence of negligence. The appeal was dismissed with costs. SYDNEY AND GLACE BAY RAILWAY CO. *v.* LOTT **220**

2—— *Privileges and hypothecs—Operation of tramway—Highway — Title to land—Immobilization by destination—Sale of tramway by sheriff as "going concern"—Unpaid vendor—Lien on price*

TRAMWAYS—*Continued.*

of cars—Pledge—Contract—Construction of statute, 3 *Edw. VII. ch.* 91 (*Que.*)—*Priority of claim—Collocation and distribution—Arts.* 379, 2000 *C.C.—Art.* 752 *Mun. Code.*] A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture-bonds hypothecated its real property, tramways, cars, etc., used in connection therewith, to trustees for the debenture-holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. ch. 91, sec. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern.—*Held*, that whether, at the time of such sale, the cars in question were movable or immovable in character the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale in execution.—*Per* Girouard J. Duff J. *contra.* After the cars in question had been delivered to the tramway company and used by it in the operation of their tramway, they became immovable by destination.—In the result, the judgment appealed from (Q.R. 18 K.B. 82) was affirmed. AHEARN & SOPER *v.* NEW YORK TRUST CO. **267**

3—— *Construction of statute — General and special Act—Inconsistency—Ontario Railway Act,* 6 *Edw. VII. c.* 30, *ss.* 5 *and* 116—*Charter of Toronto Railway Co., s.* 17.] The Ontario Railway Act of 1906 (6 Edw. VII. ch. 30) is, by sec. 5, made applicable to street railway companies incorporated by the legislature, but, by the same section, if provisions of the general and special Acts are inconsistent, those of the latter shall prevail. By sec. 116 of the general Act, a passenger on a railway train or car who refuses to pay his fare may be ejected by the conductor; and by sec. 17 of the Act incorporating the Toronto Railway Co., a passenger in such case is liable to a fine only.—*Held*, that these two provisions are not inconsistent, and the conductor

TRAMWAYS—*Continued.*

of a street railway car may lawful eject therefrom a passenger who refuses to pay his fare.—In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence. TORONTO RY. CO *v.* PAGET 488

4—— *Street railway — Franchise — Assumption by municipality—Principle of valuation—Operation in two municipalities—Compulsory taking—R.S.O.* [1897] *c.* 208.] By sec. 41 of the Ontario Street Railway Act (R.S.O. [1897] ch. 208), no municipal council shall grant to a street railway company any privilege thereunder for a longer period than twenty years, and at the expiration of a franchise so granted, or earlier if so agreed upon, it may, on giving six months' previous notice to the company, assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of the value of the same to be determined by arbitration where ownership was assumed under this provision.—*Held,* reversing the judgment of the Court of Appeal (19 Ont. L.R. 57), that the proper mode of estimating the value of the "railway and all real and personal property in connection with the working thereof," was not by capitalizing its net permanent revenue and taking that as the value, but by estimating what it was worth as a railway in use and capable of being operated, excluding compensation for loss of franchise.—*Held,* also that in view of the provisions in the Street Railway Act authorizing the municipality to assume ownership of a street railway operating in two or more municipalities the company in this case whose railway was taken over by the Town of Berlin was not entitled to compensation for loss of its franchise in the municipality of Waterloo.—On the expiration of its franchise the company executed an agreement extending for two months the time for assumption of ownership by the municipality, but did not relinquish possession until six months more had elapsed. During the extended time an Act was passed by the legislature reciting all the circumstances, ratifying and confirming the agreement for extension and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the court.—

TRAMWAYS—*Continued.*

Held, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise its effect was, not to confer on the municipality a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.—The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. over and above the actual value of the property. TOWN OF BERLIN *v.* BERLIN AND WATERLOO ST. RY. CO. 581

TRUSTS—*Agreement for sale of lands—Construction of contract—Right of action—Partition—Administration by co-owners—Interim account—Partial discharge of trustees.*] A. and S., being holders of the entire capital stock of the C. and W. Railway Company, agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H. and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, in so far as they had not been disposed of, remained in the company. In an action by the plaintiffs against H. for partition of the lands and to have an order for an interim account by and partial discharge of A. and S. as trustees.—*Held,* that as, at the time of action, the title to the lands was still vested in the railway company which was not a party to the agreement, the order for partition could not be granted, and that, independently of partition or other final determination of their trust, the plaintiffs were not entitled to the relief of an interim accounting and partial discharge as trustees.—Judgment appealed from (14 B.C. Rep. 157) affirmed. ANGUS *v.* HEINZE 416

2——*Appeal—Findings of fact—Division of partnership profits—Collateral business affairs—Trust* 240

See PARTNERSHIP 1.

USER—*Railways—Jurisdiction of Board of Railway Commissioners—Highway* —

USER—*Continued.*

Dedication—"Public way or means of communication" — Access to harbour — Deviation of tracks—Navigable waters—Construction of statute—R.S.C. 1906, *c.* 37, *ss.* 2(11) (28), 3, 237, 238, 241 .. **613**

See RAILWAYS 5.

VERDICT —*Negligence — Operation of railway—Damages — Solatium doloris — Verdict—New trial* **205**

See DAMAGES 1.

AND *see* JURY.

VIS MAJOR—*Construction of contract—Traffic agreement—Furnishing cargoes—Freight rates—Failure to find full cargoes—Damages.*] The alleged breach of contract was that the railway company failed to obtain freight rates at Montreal rates and to provide freight for 60,000 cubic feet of unfilled space in vessels sailing from the port of Quebec. The defence was that the railway company had never been put in default to settle and determine the freight rates obtainable in Montreal; that they were prevented fulfilling the contract by a fortuitous event; that they were not responsible for the empty space as they had not been put in default to fill same, and that the plaintiffs had joined causes of action not susceptible of being united. The Superior Court allowed items as to differences in freight rates only, but the judgment appealed from (Q.R. 32 S.C. 121) allowed the full claim. The Supreme Court of Canada varied in judgment appealed from by reducing to amount assessed for difference in Quebec and Montreal freight rates to the extent of 40 per cent. of the cargo of the ship, in accordance with correspondence relating thereto. GREAT NORTHERN RY. CO. OF CANADA *v.* FURNESS, WITHY & CO. **234**

WARRANTY —*Sale of land—Misrepresentation—Deceit—Contract.*] The defendant, respondent, on negotiations for the sale of wild lands, which he had not seen, represented that they were fairly good for farming. A large portion of the lands proved unfit for farming purposes. The court below (17 Man. R. 597) following *De Lasalle* v. *Guilford* ([1901] 2 K.B. 215), held that the plaintiff could not recover damages by reason of the defendant's misrepresentations, which should be considered merely as expressions of opinion not amounting to a warranty. The appeal was dismissed with costs. MEY *v.* SIMPSON **230**

2——*Ships and shipping—Perils of the sea—Unseaworthy ship—Evidence — Inspection of shipping—Certificate of seaworthiness— Construction of statute — R.S.C.* 1906, *c.* 113, *s.* 342—*Drowning of sailors—Negligence of master—Liability of owner.* **242**

See SHIPS AND SHIPPING.

WATERCOURSES.

See RIVERS AND STREAMS.

WATERWORKS—*Appeal — Jurisdiction —Matter in controversy—Municipal franchise—Demolition of waterworks—Title to land—Future rights.* **156**

See APPEAL 3.

WORDS AND PHRASES.

1——*"Actually delivered"* **431**

See CONTRACT 5.

2——*"Highway"* **613**

See RAILWAYS 5.

3——*"Matter or judicial proceeding"* **146**

See APPEAL 2.

4——*"Municipal affairs"* **211**

See CONSTITUTIONAL LAW 2.

5——*"On a public work"* **350**

See PUBLIC WORK.

6——*"Public way or means of communication"* **613**

See RAILWAYS 5.

7——*"Special Act"* **613**

See RAILWAYS 5.

8——*"Time to time," from* **161**

See ARBITRATION AND AWARD 1.