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Supreme Court of Canada

REPORTERS
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1928

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Francis Alexander Anglin, C.J.C., P.C.

" " Lyman Poore Duff J., P.C.

" Pierre Basile Mignault J.

" Edmund Leslie Newcombe J., C.M.G.

" Thibaudeau Rinfret J.

" John Henderson Lamont J.

" Robert Smith J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Ernest Lapointe K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Lucien Cannon K.C.

MEMORANDA

On the thirty-first day of March, 1927, the Honourable John Idington, Puisne Judge of the Supreme Court of Canada, retired from the bench; and on the eighth day of February, 1928, he died.

On the second day of April, 1927, the Honourable John Henderson Lamont, a Judge of Appeal of the Court of Appeal for Saskatchewan was appointed a Puisne Judge of the Supreme Court of Canada.

On the eighteenth day of May, 1927, the Honourable Robert Smith, one of the Judges of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable John Idington, retired.

ERRATA

Page 181, footnote (2) should be (3) and footnote (3) should be (2); at the 15th line, (2) should be (3) and at the 18th line, (3) should be (2).

Page 284, in footnote (2), 389 should be 339, and in footnote (7), 371 should be 376.

Page 320, in footnote (1), 539 should be 339.

Page 497, 20th line, *Rullell* v. *Toronto* should be *City of Toronto* v. *Russell,* and footnote (1) should be [1908] A.C. 493.

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF THE PREVIOUS VOLUME OF THE SUPREME COURT REPORTS.

Caledonian Collieries Ltd. v. *The King* ([1927] S.C.R. 257). Leave to appeal granted, 7th March, 1928. Appeal dismissed with costs, 12th June, 1928.

Fada Radio Ltd. v. *Canadian General Electric Co.* ([1928] S.C.R. 239. Leave to appeal granted, 20th July, 1928.

Hirsch v. *Protestant Board of School Commissioners* ([1926] S.C.R. 246). Appeal dismissed with variations, 28th February, 1928.

Home Insurance Co. of New York v. *Gavel* ([1927] S.C.R. 481). Leave to appeal refused, 20th February, 1928.

Pope Appliance Corp. v. *Spanish River Pulp & Paper Mills Ltd.* ([1928] S.C.R. 20). Leave to appeal granted, 12th January, 1928.

Reference re Meaning of the word "Persons" in s. 24 of the B.N.A. Act ([1928] S.C.R. 276). Leave to appeal granted, 29th November, 1928.

Sainsbury v. *Varette* ([1928] S.C.R. 72). Leave to appeal refused, 1st March, 1928.

Tiny Separate School Trustees v. *The King* ([1927] S.C.R. 637). Appeal dismissed, 12th June, 1928.

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MEMORANDUM

The following foot-note should appear on page 103.

REPORTER'S NOTE: On March the 7th, 1928, a similar judgment was given in England on this question of the subject's right to plead a set-off to an information by the Crown. See *The Attorney-General* v. *Guy Motors Limited* (1928) W.N. 75; (1928) 165 L.T.J. 259.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

GEORGE E. WINTER, THE AUTHORIZED TRUSTEE OF THE PROPERTY OF COAST SHINGLE COMPANY LIMITED (PLAINTIFF) ..... APPELLANT;

1927

*May 4, 5.
*May 31.

AND

CAPILANO TIMBER COMPANY LIMITED AND J. A. DEWAR COMPANY LIMITED (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Landlord and tenant—Forfeiture of lease and re-entry—Exercise by lessor, at trial, of option to avoid lease on ground other than that previously claimed—Sufficiency of re-entry.

D. Co. had leased lands to C.S. Co., and, on June 4, 1925, served on it notice of forfeiture for non-payment of rent. C.S. Co. being in financial difficulties, a committee of its creditors was formed to look after its affairs, and this committee negotiated with C.T. Co. for the latter to take a sub-lease, and it was alleged that a sub-lease was agreed upon for three months at a net rental of $2,400. C.S. Co. signed a lease, which C.T. Co. refused to accept. C.T. Co. went into possession on July 9, 1925. On September 28, 1925, C.S. Co. was adjudged bankrupt. On October 1, 1925, C.T. Co. took possession under a lease from D. Co. of that date. An action was brought in the name of the trustee in bankruptcy of C.S. Co. against D. Co. and C.T. Co. for possession. The lease from D. Co. to C.S. Co. contained a proviso for re-entry by the lessor on non-payment of rent, but the question arose whether D. Co.'s. notice of forfeiture was sufficient to terminate the lease and allow it to re-enter without a demand for rent according to the formalities of the common law (which demand was not made), this question depending on whether the lease should be construed as being subject to the *Short Forms of Leases Act*, R.S. B.C., 1924, c. 234.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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TIMBER CO.,
LTD.

Held, without deciding the question last mentioned, the defendants were entitled to have the lease from D. Co. to C.S. Co. treated as void, under a covenant in the lease that the lease would cease and become void, at the option of the lessor, if the lessee became insolvent or made an assignment for the benefit of creditors, D. Co. having, at the end of the trial, exercised its option to avoid the lease on this ground. The taking of possession by C.T. Co. on October 1 as tenant of D. Co. was a sufficient re-entry by D. Co. in so far as requisite.

Held, further, that plaintiff could not recover from C.T. Co. the $2,400 above mentioned, either as for rent or by way of compensation for use and occupation, for the following reasons: that C.S. Co. did not profess to be in possession of the foreshore (part of the lands in question) when, at its instance, C.T. Co. entered on July 9; on the contrary, C.S. Co. was then denying the title of its landlord, D. Co., and endeavouring to obtain a lease of the foreshore from the Crown; there was no demise, and possession was never effectively given to C.T. Co. by C.S. Co.; furthermore, C.T. Co. was obliged to pay to D. Co. for its occupation compensation amounting to the said sum of $2,400.

Judgment of the Court of Appeal for British Columbia (38 B.C. Rep. 401) reversed in part.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) in so far as it held (sustaining in this respect the judgment of D. A. McDonald J.) that a certain lease from the defendant J. A. Dewar Company Limited to the Coast Shingle Company Limited was no longer a valid and subsisting lease, but had been effectually terminated through forfeiture and re-entry; and cross-appeal by the defendant Capilano Timber Company Limited from the said judgment in so far as it held (reversing in this respect the judgment of D. A. McDonald J.) that the plaintiff should recover from it the sum of $2,400 for rent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, and the cross-appeal allowed with costs.

Alfred Bull for the appellant.

A. Geoffrion K.C. and *E. F. Newcombe* for the respondents.

(1) 38 B.C. Rep. 401; [1927] 1 W.W.R. 811.

The judgment of the court was delivered by

MIGNAULT J.—This is an action which one Frank King, who had large interests in the Coast Shingle Company, Limited, was authorized to bring in the name of the trustee in bankruptcy of that company under s. 35 of *The Bankruptcy Act*. The facts which gave rise to the litigation are as follows:

At all material times referred to hereinafter, the J. A. Dewar Co., Limited, was lessee under a lease granted by the Canadian Pacific Railway Company, called the head lease, of certain lands and of a portion of the foreshore on the north side of False Creek in the city of Vancouver, on which a shingle mill and other buildings had been erected by different parties holding under sub-leases granted by the Dewar Company. These parties having failed and their leases having become forfeited, the Dewar Company, on the 21st of June, 1922, leased the premises to the False Creek Shingle Company, Limited.

On the 6th of December, 1923, the False Creek Shingle Company having become insolvent and its lease having been forfeited for non-payment of rent, the Dewar Company leased the lands, and the foreshore so far as it had the right to do so, to the Coast Shingle Company, Limited, which I will call the Coast Company.

In view of the controversy that has arisen, the material provisions of this lease—which was virtually a copy of the lease to the False Creek Shingle Company—should be briefly noted.

This sub-lease covered the full term of the lessor's lease from the Canadian Pacific, and of an extension thereto subsequently made. It recited the lease to the False Creek Shingle Company and the termination of the latter's tenancy for non-payment of rent. It also stated that the lessor had applied to the Department of Lands of British Columbia for leasehold or other title to the foreshore and lands covered by water. The rent was to be $200 per month, payable in advance, and in consideration of this rent the lessor gave the lessee the use and possession of the lands and foreshore in so far as it could do so. The lessor also transferred to the lessee any interest which it had or might have in the buildings, machinery, plant, tools, equip-

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Mignault J.

ment and fixtures. It was covenanted that the lessor would use its best endeavours to obtain title to the foreshore or lands covered by water and would lease them to the lessee. The lease contained several covenants, among others the following:—

> Proviso for re-entry by the Lessor on non-payment of rent or non-performance of covenants and this proviso shall extend to and apply to all covenants whether positive or negative.

It was expressly stated that there was no covenant by the lessor for quiet enjoyment, and it was also agreed that in case the lessee should become insolvent, or make an assignment for the benefit of creditors, the lease would, at the option of the lessor, cease and be void and the term would expire.

The Coast Company entered into possession under this lease but soon fell behind in the payment of the rental, several months of which were in arrears when, on June 4, 1925, the Dewar Company caused to be served on the Coast Company a notice of forfeiture of the interest and right of possession of the latter company for non-payment of rent.

About the same time the Coast Company found itself in financial difficulties and called a meeting of its creditors who formed a committee for the purpose of looking after the involved affairs of the company. This committee, of course, had no legal status, but it was expected that the Coast Company would give effect to any measures the committee decided upon. The president of the committee was Mr. Albert Twining. Before the notice of forfeiture of the lease, the Coast Company had ceased to operate the shingle mill, and Mr. Twining and his committee, who were aware of the notice of forfeiture, sought to have the company's lease reinstated by the Dewar Company so that it might grant a sub-lease of the premises.

The chief obstacle to this reinstatement, besides the large amount of rent in arrears, was that the Coast Company, in breach, it is alleged, of its legal obligations under the lease, had itself applied to the provincial government for a lease of the foreshore, without which the property would have but little value. It had been at first assumed

that the Canadian Pacific Rly. Co. had acquired valid title to the foreshore from the Dominion Government, but at the time to which I refer it appears to have been common ground that the title was in the province, and the Dewar Company, as stated in its lease, had applied to the Provincial Government for a lease of this foreshore. In the negotiations entered into with the view of having the lease reinstated, Mr. Dewar on behalf of his company insisted on the withdrawal of the Coast Company's application for the foreshore. This condition was never fulfilled, Mr. King and his associates apparently thinking that their application had a better chance of being granted than that of the Dewar Company.

In the meantime, the creditors' committee endeavoured to sub-lease the property. For that purpose, Mr. Twining entered into negotiations with Mr. Johnson, the general manager of the Capilano Timber Company, which I will call the Capilano Company. It is alleged that the latter agreed to take the property for three months at a rental of $1,000 per month, subject to certain deductions so that the net rental for the three months amounted to $2,400. The Committee of the creditors had, of course, no authority to make such a lease, but apparently it was assumed that the Coast Company would ratify what had been done, and its solicitor prepared a lease signed by it for the three months, which, however, the solicitor of the Capilano Company refused to accept. The latter company entered into possession on the 9th of July, 1925.

Short of taking legal proceedings, Mr. Dewar tried to force the Capilano Company to leave the premises. At his request, the water supply for the mill was shut off and a threat was made, but not carried out, of blocking the road that gave access to the property. Finally the parties got together. It was agreed between their solicitors that the Dewar Company would lease the property to the Capilano Company at the same rental as that charged to the Coast Company, $200 per month, that a demand of assignment for the benefit of creditors would be made to the latter company, that the Capilano Company would pay a premium for the lease of $2,400, which was equal to the

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arrears of rent due by the Coast Company, that the lease and the premium paid would be placed in escrow until the Coast Company had been put in bankruptcy. All this was carried out, and on October 1, 1925, the Capilano Company took possession under a lease from the Dewar Company of that date, a receiving order against the Coast Company which was adjudged bankrupt having been made on the 28th of September. The appellant, Geo. Winter, an authorized trustee in bankruptcy, was named receiver of the estate of the Coast Company.

As I explained in the beginning, this action is taken in the name of the trustee but for the benefit of Frank King. The Dewar Company and the Capilano Company are defendants. The plaintiff asked for a declaration that the Coast Company's lease is a valid and subsisting lease, that the notice of forfeiture of the 4th of June, 1925, is void and of no effect, that the plaintiff is entitled to possession of the premises, that the Capilano Company be ordered to give up possession to the plaintiff and to pay to the latter rent at the rate of $1,000 per month until such possession is given him, or, in the alternative, that the Capilano Company pay damages for wrongfully withholding possession from the plaintiff for the three months' period provided by the *Landlord and Tenant Act.*

The learned trial judge rejected the plaintiff's demand *in toto.* The Court of Appeal granted the plaintiff $2,400 for rental during three months under the arrangement made by the creditors' committee with the Capilano Company, but otherwise dismissed his action. The plaintiff appeals and seeks to obtain a declaration that the Coast Company's lease is valid and subsisting, and has not been legally forfeited, and that its trustee is entitled to possession under that lease. The Capilano Company cross-appeals and prays for relief from the judgment against it in favour of the plaintiff for $2,400 as balance due on rent under the three months' lease.

Many interesting questions are raised by the appeal, the most important being the question whether the Coast Company's lease from the Dewar Company is subject to the *Short Form of Leases Act,* R.S.B.C., 1924, ch. 234. On

this latter question the learned judges of the Court of Appeal were equally divided.

The point, in short, is whether there is in the lease in question a sufficient reference to the Act. If so, the proviso for re-entry, which I have quoted, would be construed according to the second schedule of the Act, and the notice of forfeiture of June 4, 1925, would be sufficient to terminate the lease and allow the lessor to re-enter without a demand of rent according to the formalities of the common law, which demand was not made.

Notwithstanding the interest and importance which attaches to this question, and although Mr. Dewar persisted in saying that he claimed forfeiture only for non-payment of rent, I think the respondents are entitled to have the Coast Company's lease treated as void under the covenant that the lease would cease and become void, at the option of the lessor, if the lessee became insolvent or made an assignment for the benefit of creditors. The Dewar Company, at the end of the trial, exercised its option to avoid the lease on this ground. The taking of possession by the Capilano Company on October 1 as tenant of the Dewar Company is a sufficient re-entry by the latter in so far as requisite. Under these circumstances, it seems unnecessary to express any opinion on the question concerning the *Short Form of Leases Act,* and the main appeal should be dismissed with costs.

As to the cross-appeal, the Coast Company did not profess to be in possession of the foreshore when, at its instance, the Capilano Company entered on the 9th of July, 1925. On the contrary, the Coast Company was then denying the title of its landlord, the Dewar Company, and endeavouring to obtain a lease of the foreshore from the Crown. There was no demise, and possession of the premises was never effectively given to the Capilano Company by the Coast Company. Furthermore, the Capilano Company was obliged to pay to the Dewar Company for its occupation compensation amounting to the sum claimed by the Coast Company. In these circumstances, we think, with great respect, that the claim of the Coast Company, whether as for rent or by way of compensation

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for use and occupation, cannot be maintained and that the cross-appeal must, consequently, succeed.

Appeal dismissed with costs; cross-appeal allowed with costs.

Solicitors for the appellant: *Tupper, Bull & Tupper.*

Solicitor for the respondent Capilano Timber Company Limited: *J. H. Lawson.*

Solicitor for the respondent J. A. Dewar Company Limited: *W. J. Baird.*

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*June 9.

DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* RENFREW ELECTRIC PRODUCTS, LTD.

DURABLE ELECTRIC APPLIANCE CO., LTD. *v.* SUPERIOR ELECTRICS, LTD.

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

Patent—Invalidity—Absence of novelty—Combination of old elements—Combination not involving inventive ingenuity.

CONSOLIDATED APPEALS by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing judgment of Mowat J.) held that the patent in question (relating to improvements in portable electric heaters) and the industrial design in question were invalid, and that the plaintiff's actions for infringement should be dismissed.

O. M. Biggar K.C. for the appellant.

G. F. Henderson K.C. and *Harold G. Fox* for the respondents.

On the conclusion of the argument for the appellant, and without calling on counsel for the respondents, the judgment of the Court was orally delivered by

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

(1) (1926) 59 Ont. L.R. 527.

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DURABLE ELECTRIC APPLIANCE CO., LTD. v. RENFREW ELECTRIC PRODUCTS, LTD.

ANGLIN C.J.C.—We are all of the opinion that this appeal must be dismissed.

The ground on which the Court of Appeal has rested its judgment is, we think, sound. As the case appears to us, there is nothing new in the appellant's device; no novelty is disclosed, notwithstanding the ingenious argument of appellant's counsel to the contrary. Admittedly all the elements of the plaintiff's heater are old. The combination of them effected by him may be new in one sense—that is, precisely such a combination may not have been made before—but it is a combination the making of which did not involve any inventive ingenuity. Any competent and well-informed mechanic could readily have effected it.

The appeal fails and must be dismissed—and with costs.

Appeals dismissed with costs.

Solicitor for the appellant: *S. W. Burns.*

Solicitors for the respondents: *Fetherstonhaugh & Fox.*

BRITISH TRADERS INSURANCE COMPANY LIMITED (DEFENDANT) } APPELLANT;

AND

QUEEN INSURANCE COMPANY OF AMERICA (PLAINTIFF)..... } RESPONDENT.

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*May 3, 4.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance—Oral contract of insurance—Alleged contract of re-insurance—Correspondence—Ambiguity—Construction—Offer to re-insure as to risks to be assumed—Contract of re-insurance arising on assumption of risk.

The judgment of the Court of Appeal of British Columbia, 38 B.C. Rep. 161, holding the defendant liable to the plaintiff under a contract of re-insurance, was affirmed.

It was held that there had been a binding agreement of the plaintiff to insure, constituted by an oral arrangement by its agent with the insured prior to the fire; and that, on the construction of the communications between plaintiff and defendant prior to said agreement, the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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defendant had undertaken to re-insure the plaintiff, to an extent stipulated, in respect of risks to be assumed; and that, under the circumstances, the nature of the defendant's undertaking implied that its obligation was to arise immediately upon plaintiff becoming committed to liability; *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, applied.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of D. A. McDonald J. (2) holding that the plaintiff was entitled to recover against the defendant on an alleged contract of re-insurance.

Among the facts found in the courts below, were the following:

The plaintiff and the defendant each carried on a fire insurance business in British Columbia. The plaintiff's general agent for the province was Rithet Consolidated Limited. The latter was also the defendant's agent at Victoria. Burrard Agencies Limited was an agent of the plaintiff at Vancouver, with authority to take risks and issue policies, although the practice had been that the policies in Vancouver were actually filled out by Horne, Taylor & Co., another agent of the plaintiff at Vancouver, and countersigned and issued by Burrard Agencies Limited. The National Canners Limited had its insurance placed through Burrard Agencies Limited with the plaintiff, which had re-insured with another company the excess over $37,500, which sum was the limit which the plaintiff wished itself to carry on the risk in question. About 6.15 o'clock on the evening of July 31, 1925, the secretary of the National Canners Limited, over the telephone, arranged with Burrard Agencies Limited, through its manager, Mr. Irving, to place an additional amount of $20,000 of insurance upon its stock in trade. Owing to the lateness of the hour, Mr. Irving made a note of the arrangement, leaving it until the following day to have the policy issued. That night the premises of the National Canners Limited were destroyed by fire. On the following day, Mr. Barnes, the manager of Rithet Consolidated Limited, came to Vancouver, made a full investigation, and decided that the plaintiff was liable and

(1) 38 B.C. Rep. 161; [1927] 1 W.W.R. 508.

(2) (1926) 37 B.C. Rep. 202.

must pay the loss. Rithet Consolidated Limited, accordingly, on August 3, issued a policy dated July 31, covering the risk of $20,000. After adjustment, the loss under this policy was paid and of the amount so paid by the plaintiff it sought in this action to recover $12,812.87 from the defendant under an alleged contract of re-insurance.

On July 16, 1925, Mr. Barnes, manager of Rithet Consolidated Limited, spoke to Mr. Elderton, who conducted the defendant's head office for British Columbia at Vancouver, about giving the plaintiff "a line of re-insurance" as to the National Canners Limited, who, it was anticipated, might make applications for further insurance. On July 17, Rithet Consolidated Limited wrote the defendant as follows:

> National Canners, Limited * * * The writer spoke to Mr. Elderton about this line yesterday and he intimated that he would be quite willing to accept a reinsurance of the Queen on this risk and we should be glad if you would kindly look into the matter and let us know how much reinsurance you would accept on behalf of the Queen, which has at present $35,000 on the line.

This was replied to in a letter of July 20, as follows:

> *Re* National Canners * * * I duly received your letter of the 17th inst. in reference to the plant of the above firm, and shall be glad to accept a line of $15,000 as reinsurance of the "Queen." Will you kindly advise me when the Company is bound on the risk.

And the last mentioned letter was replied to by a letter of July 23, as follows:

> National Canners, Ltd.; We thank you for yours of the 20th inst. advising that you are in a position to accept a line of $15,000 as re-insurance of the Queen on the above risk.
>
> We hope to be able to forward some commitments in the course of the next week or so.

Mr. Barnes then showed the correspondence to his insurance clerk, and instructed him that, as to any further insurance taken by the plaintiff from National Canners Limited, the first $15,000 so taken should be re-insured in the defendant company. The insurance clerk made a note in his block sheet to this effect and put a note upon his file.

The questions on the appeal before this Court were: (1) Whether there was a binding contract of insurance between the plaintiff and the National Canners Limited; and (2) If so, was there a binding contract of re-insurance between the plaintiff and the defendant.

A. C. Heighington for the appellant.

E. P. Davis K.C. and *E. F. Newcombe* for the respondent.

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At the conclusion of argument of counsel, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the appeal cannot succeed.

As to the first branch of the appeal—whether the Queen Insurance Company was committed to insure the National Canners—there is really no room for argument against the proposition that there was a binding agreement. In the absence of fraud, which is now out of the case, it is perfectly clear there was a binding agreement.

No doubt there is more room for argument as to whether there was an effective contract of re-insurance. This depends largely on the construction of the letters. Putting it, as Mr. Heighington put it a few moments ago, that the letter of the British Traders Insurance Company's manager, Elderton, is of doubtful construction, the ambiguity must be resolved against him, because, if the letter was of such doubtful construction that Barnes might fairly infer from it that it gave him authority to re-insure, then the letter must be so construed against the Company. The case of *Ireland* v. *Livingston* (1), referred to by my brother Duff in the course of the argument, makes this clear. Barnes swears he did put that construction upon it, that he did consider himself thereby specially authorized to issue a policy of re-insurance or to enter into a contract of re-insurance; and his credibility is not now impugned. Having taken that stand, having had authority for it, the Elderton letter being reasonably susceptible of that construction, the company is undoubtedly bound by his act.

Upon the question of re-insurance, we are of the opinion that there was a contract of re-insurance from the moment that the Queen Insurance Company placed the insurance on the National Canners' property.

Viewing the letters as amounting only to an offer by the appellant Company to undertake re-insurance, to the extent stipulated, of further risks to be assumed by the respondent Company, the principle of *Carlill* v. *Carbolic*

(1) (1872) L.R. 5 H.L. 395.

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Smoke Ball Company (1), cited by Mr. Davis, applies; performance of the condition completes the contract and notification of acceptance is, in such cases, dispensed with. Under the circumstances, the nature of the appellant's undertaking implies that its obligation was to arise immediately upon the respondent becoming committed to liability.

Upon these grounds we would affirm the judgment below, and dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Lane & Thomson.*

Solicitors for the respondent: *E. P. Davis & Company.*

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*Oct. 18.
*Dec. 16.

JOSIAH H. MACQUARRIE, JAMES M. MILNE, AND MCKENZIE FORBES (DEFENDANTS) ..... } APPELLANTS;

AND

THE EASTERN TRUST COMPANY (PLAINTIFF), MARIA F. PERLEY (DEFENDANT), AND ISABEL F. RUDDICK (DEFENDANT) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction of bequest—Ascertainment of class benefited—Time as at which class to be ascertained.

J. W. Forbes by his will left property upon trust, after the death of a brother, "to pay the one-half of the interest arising from said investments yearly to my brothers and sisters then living * * * and to the survivors or survivor of them so long as any one of my said brothers and sisters shall live and upon the death of the survivor of my said brothers and sisters to pay the whole of the principal * * * and the interest remaining to my next of kin, of the name 'Forbes' then living." The testator died a bachelor leaving as next of kin brothers and sisters, who all died leaving no descendants except one brother who left two daughters who survived the last surviving brother or sister of the testator. These daughters were living at the tes-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Smith JJ.

(1) [1893] 1 Q.B. 256.

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tator's death, but subsequently, and before the death of the testator's last surviving brother or sister, had married and become Mrs. P. and Mrs. R. respectively.

Held (reversing judgment of the Supreme Court of Nova Scotia *en banc*, [1927] 3 D.L.R. 70, and restoring judgment of Mellish J.) that the persons who took the principal and remaining interest under said bequest were the testator's nearest of kin in equal degree who bore the name "Forbes" at the time of the death of the testator's last surviving brother or sister; the class was to be ascertained as at the period of distribution, and not as at the time of the testator's death; Mrs. P. and Mrs. R., not bearing the name "Forbes" at the period of distribution, could not take. The principles of construction approved in *Hutchinson* v. *National Refuges for Homeless and Destitute Children,* [1920] A.C. 794, and *Lucas-Tooth* v. *Lucas-Tooth,* [1921] 1 A.C. 594, applied. *Pyot* v. *Pyot,* 1 Ves. Sr. 335, and *Carpenter* v. *Bott,* 15 Sim. 606, discussed and distinguished.

APPEAL by certain of the defendants from the judgment of the Supreme Court of Nova Scotia *en banc* (1), which reversed the judgment of Mellish J. The question in dispute was with regard to the construction of a clause in a will. The clause in question and the material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was allowed.

E. M. Macdonald K.C. for the appellant McKenzie Forbes (representing relatives of the testator, of the name "Forbes," living at the death of the testator's last surviving brother or sister).

J. H. MacQuarrie for the appellants MacQuarrie and Milne (representing, respectively, the estates of two deceased brothers of the testator who survived the testator).

E. C. Phinney for the respondents Mrs. Perley and Mrs. Ruddick.

J. Ross K.C. for the respondent The Eastern Trust Company (trustee of testator's estate).

The judgment of the court was delivered by

NEWCOMBE J.—John W. Forbes, the testator, died on 22nd March, 1893. We were informed at the hearing that he never was married. When he died, his next of kin were his surviving brothers (including his brother Hugh) and

(1) [1927] 3 D.L.R. 70.

sisters, the last of whom, his sister Christine, died on 10th October, 1925. None of them left any descendants, except Hugh; he left two daughters, who are respondents; the one, Maria, who married Mr. Perley on 22nd November, 1898; the other, Isabel, who married Mr. Ruddick on 28th December, 1896. There is evidence of more remote collateral kindred of the name "Forbes" residing in Scotland, and they are represented upon this appeal by McKenzie Forbes, one of their number.

The will, dated 30th December, 1892, has the following clause, which seems to be the only provision material to the case:

> And upon further trust after the death of my said brother, Roderick Alexander Forbes, to pay the one-half of the interest arising from said investments yearly to my brothers and sisters then living in equal proportions share and share alike, and to the survivors or survivor of them so long as any one of my said brothers and sisters shall live and upon the death of the survivor of my said brothers and sisters to pay the whole of the principal of said investments and the interest remaining to my next of kin, of the name "Forbes" then living.

The object of these proceedings is to ascertain who is entitled to receive the principal and interest bequeathed by this clause to the testator's next of kin of the name "Forbes" living at the time thus indicated, and the immediate question is concerned with the interpretation. The case is put upon the assumption that the testator's nieces, upon their marriages, parted with their surname, and that each of them has since been known by the surname of her husband. *Doe* v. *Plumptre* (1).

Mellish J., the trial judge, was of the opinion that the testator meant his nearest of kin in equal degree who bore the name "Forbes" at the time of the death of the last survivor of his brothers and sisters, share and share alike, and that the class was to be ascertained as at the period of distribution, and not as at the time of the testator's death; and, in the absence of sufficient evidence to identify these relatives, he directed an enquiry for the purpose of ascertaining who they were. He held, moreover, that the testator's nieces, Mrs. Perley and Mrs. Ruddick, not bearing the name "Forbes," did not qualify.

Upon appeal this judgment was reversed. There was, however, a difference of opinion. The Chief Justice with

(1) (1820) 3 B. & Ald. 474, at p. 482.

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whom Graham J. concurred, considered that the testator's next of kin should be determined as at the time of his death, excluding his brothers and sisters, and that therefore Mrs. Perley and Mrs. Ruddick, being then unmarried and bearing the name "Forbes," were entitled. He also intimated a doubt, arising out of the application of the case of *Carpenter* v. *Bott* (1), as to whether these ladies did not take, even if the class were to be ascertained as at the period of distribution.

Chisholm J. found evidence of still another intention. He thought that there were two conditions of qualification which must concur, next of kinship and possession of the name "Forbes," and he agreed with Mellish J. that the qualified class was to be ascertained as at the time of the death of the testator's last surviving brother or sister. Therefore he held that the testator's nieces, although they constituted at that time his next of kin, must fail, because not of the name "Forbes," and that the more remote relatives were likewise disentitled, because not true next of kin, and so he concluded for intestacy.

How is the class described by the testator in his will as "my next of kin of the name 'Forbes' then living" to be ascertained? There are many authorities, but the principles of interpretation have recently been considered by the House of Lords in *Hutchinson* v. *National Refuges for Homeless and Destitute Children* (2), and in *Lucas-Tooth* v. *Lucas-Tooth and others* (3), and applying these principles, I have reached the conclusion that the judgment at the trial must be restored. I think the testator has, by the words of his will, sufficiently indicated that the class should be determined at the death of the survivor of his brothers and sisters. He could not have meant next of kin at the time of his death, because they were, as he anticipated, his brothers and sisters, and the bequest was to go only to persons who survived them. It is said that the will shows an intention to establish the class subject to an exception of the brothers and sisters, but there are no express words of exception or exclusion, and one would be surprised to find them, because such an exception would be as comprehen-

(1) (1847) 15 Sim. 606. (2) [1920] A.C. 794.
(3) [1921] 1 A.C. 594.

sive as the class, and a gift to next of kin, excluding next of kin, is nonsense. Then I can see no justification for introducing into the gift of the residue, as would be necessary to maintain the respondent's contention, an implication that the next of kin mentioned should be those who would be the testator's next of kin at the time of his death if he should survive his brothers and sisters. Moreover, if you read the words "next of kin" in the sense of the rule that *prima facie* the next of kin are to be ascertained at the death of the testator, you are apt to get a result which is contrary to the testator's manifest intention, for the qualification, "of the name 'Forbes' then living", would upon that reading naturally have reference to the date of the testator's death and therefore mean the testator's brothers and sisters who were living at his death. This would seem to follow if the meaning alleged to be implied were expressed in the will; but an implied intention cannot well exist if it will not stand expression consistently with the context.

As was pointed out by the Lord Chancellor in the *Lucas-Tooth Case* (1), one must take care to regard the testator's intention, and not so to apply a canon of construction as to produce consequences contrary to that intention. The name "Forbes" dominates the purpose of the gift, and evidently a claimant for this bequest must, if he is to succeed, "be of the name Forbes," whatever that expression means, upon the death of the survivor of the testator's brothers and sisters. The claimant must then be living, and, if he is not required to be of the testator's next of kin at the time of his death, the clause must refer to next of kin at the time of distribution, which, moreover, is most natural, if that be the time for determining the other characteristics of the class. It is true that the words "then living" in one aspect seem to point to a class of persons some of whom may not be living at the time fixed for the payment, but the inference to be drawn from that is, I think, overborne by the other considerations which I have mentioned. The case is within the application of the lan-

(1) [1921] 1 A.C. 594.

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guage of Lord Dunedin who, in his speech in the *Lucas-Tooth Case* (1), at p. 608, said:

> Prima facie the heir of A. is the person who holds that character when A. dies. If, however, the period of distribution is owing to the interposition of a life interest or by explicit direction postponed, and it is clear that the favoured person is only to be sought at the time of distribution, then it is legitimate to hold that the *prima facie* meaning is displaced and that the person indicated is he who would have the character of heir of A. if A. had really died at the date of the period of distribution. Everything, therefore, turns as Thesiger L.J. put it in *Mortimer* v. *Slater* (2), (for I do not read his judgment as a monograph on the word "then"), on its being clear from the words used that the person is to be found, or the class selected, only when the succession opens.

If, as I hold, the testator has shown that he does not mean his next of kin living at his death, the words "then living" serve to indicate in contradistinction the time when his next of kin, for the purposes of the gift, are to be ascertained.

In any event, since, referring to the death of the survivor of the testator's brothers and sisters, the bequest is to his then living next of kin of the name "Forbes," his nieces are not within the description, for they had parted with that name before the time set for ascertaining the class. If female next of kin can be admitted, they must be of the name "Forbes" at the time directed for payment. There is no authority by which we are bound to substitute any such word as "stock," "blood" or "family" for "name," and to do so would, I think, be to fail in due regard to the testator's intention. *Pyot* v. *Pyot* (3), depends upon its own special considerations. Lord Hardwicke held the description in that case to refer, not to the actual bearing of the name "Pyot," but to the stock "of the Pyots." There seems to have been some confusion as to what precisely was the language to be interpreted. The words "of the Pyots" are put in quotation in the Lord Chancellor's judgment, and, in a note to the report, it is stated that these were the words used and not "of the name of the Pyots." The case is considered in the text of Mr. Jarman's first edition, which has been reproduced by the learned authors of the 6th edition at pp. 1650 et seq. In

(1) [1921] 1 A.C. 594. (2) (1877) 7 Ch. D. 322.
(3) (1749) 1 Ves. Sr. 335.

Leigh v. *Leigh* (1), Lawrence J. says that, according to a manuscript note of the case which he had, the bequest was "to my nearest relation of the name, not 'of Pyot,' but 'of the Pyots,'" and that that circumstance appears to weigh with Lord Hardwicke. Moreover, Thompson B., at p. 111 of the same case, says that the disposition was in favour of the testatrix's nearest relation of the name "of the Pyots," adding "so it appears in the Register's book; which I have examined; and not 'of Pyot'". Therefore I think the *Pyot Case* (2) is distinguishable, and this apparently was the view of the Vice-Chancellor in *Carpenter* v. *Bott* (3), which was the case of a fund bequeathed in trust for the testator's next of kin "of the surname of Crump," although it was held that these words were the equivalent in meaning of the expression interpreted in *Pyot's Case* (2). But I may be permitted to doubt that the learned Vice-Chancellor would have gone the step further which would be necessary to substitute "stock" for "name" in the present case. Indeed if it were the testator's intention that the fund should go to a person named "Forbes," it is not easy to perceive by what other words he could more plainly have expressed that intention.

As to the reasoning of Chisholm J., I think he fails to recognize the effect of the description "of the name 'Forbes' then living" which, in my judgment, is intended to constitute a special class of next of kin, and his conclusion is moreover in conflict with the golden rule enunciated by Lord Esher that "you ought, if possible, to read the will so as to lead to a testacy, not to an intestacy." *In re Harrison* (4).

I am therefore of the opinion that the appeal should be allowed, and that the judgment of Mellish J. should be restored. As to costs, they should be governed throughout by the same direction as in the court below—to be paid out of the fund; and, for the Trust Company, as between solicitor and client.

Appeal allowed.

(1) (1808) 15 Ves. 92, at p. 99.
(2) (1749) 1 Ves. Sr. 335.
(3) (1847) 15 Sim. 606, at p. 607.
(4) (1885) 30 Ch. D. 390, at pp. 393, 394.

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MACQUARRIE v. EASTERN TRUST CO.

Solicitor for the appellant Josiah H. MacQuarrie: *Josiah H. MacQuarrie.*

Solicitor for the appellant James M. Milne: *R. Douglas Graham.*

Solicitor for the appellant McKenzie Forbes: *J. Welsford Macdonald.*

Solicitor for the respondent The Eastern Trust Company: *J. U. Ross.*

Solicitor for the respondents Maria F. Perley and Isabel F. Ruddick: *E. C. Phinney.*

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*Nov. 8, 9.
*Dec. 16.

POPE APPLIANCE CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

THE SPANISH RIVER PULP AND PAPER MILLS, LIMITED (DEFENDANT) ..... RESPONDENT.

POPE APPLIANCE CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

ABITIBI POWER AND PAPER COMPANY, LIMITED (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—Lack of invention—Combination of old elements for old purpose

The judgment of the Exchequer Court of Canada, [1927] Ex. C.R. 28, dismissing the plaintiff's action for infringement of patent, was affirmed, on the ground that the plaintiff's patent (for an appliance for carrying, in a paper manufacturing machine, the paper from the drying rolls to and through the calenders) was invalid, because the device, however useful, did not involve invention; the patentee's claim rested on a combination, all the elements of which, and the very purpose for which it was designed, were old and well-known in the art; there was no room for novelty, except possibly in certain features which were not of a nature to justify the patentee's claim.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Smith JJ.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada, dismissing its actions against the respective defendants for infringement of patent (1), the judgment resting on the ground of invalidity of the patent. The appeal was dismissed with costs.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

A. W. Anglin K.C. and *J. G. Gibson* for the respondent The Spanish River Pulp and Paper Mills, Limited.

Christopher C. Robinson K.C. and *L. A. Landriau* for the respondent Abitibi Power and Paper Company, Limited.

The judgment of the court was delivered by

MIGNAULT J.—These two appeals were argued together. They relate to the same controversy.

The appellant is the assignee of Charles E. Pope, now deceased, and as such is the owner of Canadian patents, nos. 186,500 and 192,726, "for improvements in method and machine for making paper," granted to Pope on the 10th of September, 1918, and the 16th of September, 1919, respectively. It brought two actions for infringement, one against the Spanish River Pulp and Paper Mills, Limited, hereinafter termed the Spanish River Company, and the other against the Abitibi Power and Paper Company, Limited, which I will call the Abitibi Company. In the action against the Spanish River Company it was alleged that that company had infringed both patents, and at the trial the defendant admitted infringement of patent no. 186,500, so that the action succeeded with respect to that patent, but went on to trial as to patent no. 192,726. The action against the Abitibi Company alleged infringement merely of patent no. 192,726, which accordingly is the only patent of which the validity is now in question.

The action against the Spanish River Company was tried first and, by consent, the evidence adduced was made applicable to the action against the Abitibi Company, the

(1) [1927] Ex. C.R. 28. Both actions were dismissed upon the same grounds.

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Mignault J.

trial of which immediately followed, some additional evidence having been introduced. In both cases the actions were dismissed by the Exchequer Court, on the ground that patent no. 192,726 was invalid. The appellant now appeals in each case.

The patent is for an appliance for carrying, in a paper manufacturing machine, the paper from the drying rolls to and through the calenders. The modern paper machine presents this feature that a solution of pulp and water is introduced at one end, and at the other end, some 200 feet away, the fully manufactured paper emerges and winds itself upon rolls. This involves first the gradual removal of the water, the pressing and drying of the residuum of pulp, and finally what is called the calendering of the paper, which is done by passing it through several heavy steel rolls in order to give it a proper gloss or smoothness of surface.

The patented device deals with the dried paper as it passes from the drying rolls onto and through the calender rolls. These calender rolls, eight or ten in number, are in a vertical stack; the motive power is applied to the lowermost and much the largest roll, and each of the other rolls revolves by friction with the roll below it, each turning in an opposite direction from the one immediately above and below. The paper web, which may be, and frequently is, twenty feet in width, enters the stack of calender rolls at the top, or between the two uppermost rolls, and moves in the same direction as the lower roll, that is to say it winds around each successive lower roll, thus changing its direction from side to side at each roll, and it emerges at the bottom in a fully manufactured state.

The patented device is intended to facilitate the passage of the paper through the stack of calender rolls. It is stated to consist in a combination between the calenders of a paper machine, an appliance called the "doctor" arranged to strip the paper from an upper calender roll, and an air passage designed to direct a current of air against the upper calender roll beneath the point of contact of the "doctor" therewith, so as to impinge on such roll and be directed against the paper passing between the upper and lower calender roll, and press the paper against the latter roll.

In explanation of this description, we are told that the paper web has a tendency to continue revolving around the same roll after it has passed through the nip or bite between the two rolls. To prevent this, there is first the "doctor," which consists in a sharp knife on a rigid frame extending the whole width of the paper web. The shape of the "doctor" varies, but in the drawings of the patent in suit it is shewn as having two arms at right angles, one horizontal containing the scraping knife and the other vertical extending downwards. The "doctor" can at will be brought into contact with the roll or removed some distance therefrom. When it is in the former position, as far as one can judge from the drawings, the knife scrapes the upper roll at about 10 or 15 degrees beyond the nip or bite, and thus the paper is prevented from revolving around the upper roll. In addition there is in the vertical arm of the "doctor" a pipe through which a stream of compressed air is directed against the upper roll just below its point of contact with the knife, and this stream of air, after reaching the upper roll, deflects downwards towards the lower roll, thus pressing against the paper and forcing it to revolve around the lower roll. This operation is repeated at each roll until the paper emerges from the nip between the two lower rolls and the calendering process is complete.

When a web of paper is to be started through the calender rolls, the practice is to cut off a portion of the paper from the web, thus leaving, at the inside edge of the paper machine, a strip of about six inches wide, called the lead strip, and when this strip has successfully passed through the rolls it is gradually widened until the whole width of the paper web goes through the calender rolls. It is stated that in the modern paper machine the paper passes through these rolls at a speed of from 600 to 1,000 feet per minute. What the specifications chiefly emphasize is that, before the alleged invention, the operation whereby the lead strip was made to go through the calender rolls was attended with great danger to the operatives, inasmuch as they had to direct this strip by hand, so as to cause it to engage the nip or bite between the two rolls, with the result that not infrequently their fingers were caught and crushed. With this appliance there is stated to be a saving of manual labour as well as the prevention of injury to

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the men. I think its utility can be granted, and this apparently was the opinion of the learned President of the Exchequer Court, who, however, did not regard that as conclusive of the validity of the patent. The crucial question is whether this device, however useful, involves invention. This brings me to the appellant's actions and to the defences set up by the respondents.

Both actions were based on infringement by the defendants, with the usual demand for damages, an injunction, an account of profits, etc.

The principal defences of the respondents may be briefly summarized. They were:

1. That the patent in suit had not been infringed;

2. That it was void for lack of novelty and invention;

3. That the patent was void because the alleged invention had been in public use or on sale with the consent or by allowance of the alleged inventor for more than one year previous to the application for a patent in Canada;

4. That at all events the respondents were protected, as to their use of the device, by subs. 2 of s. 7 of the Patent Act of 1921 (11-12 Geo. V, c. 44).

The learned trial judge did not give effect to the last two defences. He dealt at considerable length with the second defence. Generally agreeing with the contention that, in view of the state of the prior art, the patent in suit lacked invention, he rested his judgment dismissing the plaintiff's action on the ground that all that Pope had done was to apply a well known thing to an analogous use, and that there was no invention in the mode of application.

It must be remembered that the plaintiff's patent does not claim to have invented a new principle for directing the paper web, or the lead strip to which its width has been reduced, towards the lower roll. The evidence shews, and it is not disputed, that the appliance called the "doctor," of which there are two standard forms, was well known, and it is employed by Pope for the very purpose for which it was designed. The use of a stream of compressed air for pressing the paper against the lower roll was also familiar in the prior art. It is true that different appliances were devised and patented for directing this

stream of air towards the paper, so as to press it against the lower roll, these appliances sometimes taking the shape of a windshield surrounding a part of the lower roll, with perforated holes on the inside surface through which the current of air was forced against the paper, sometimes of cylindrical pipes, also with perforated holes for the same purpose; but although there was a difference in the shape of these appliances, the function they were designed to perform was identically the same as in the patent in suit. Moreover, Pope himself had patented, in 1915, a device, not dissimilar to that in question, which dealt in a like manner with the wet web as it passed through the press rolls, by delivering a thin sheet of air substantially tangential to the cylindrical surface of the press roll, so as to take off the web from the press roll in case it should have a tendency to adhere thereto. It does not appear to have required invention to adopt a similar method for directing the dry paper through the calendar rolls, which is a use analogous to that mentioned in the Pope patent of 1915.

Nothing more is claimed here than a combination between a "doctor," which was old, the calenders of a paper machine, also old, and an air passage to direct air against the surface of the upper calender, below its point of contact with the "doctor." All this was well known in the art, noticeably the use of a stream of compressed air to force the paper downwards along the revolving surface of the lower roll until it reached the nip or bite, when the same process was repeated. There was no room for novelty except perhaps in the shape of the appliance, or possibly in the precise point towards which the stream of air was directed. Such features, however, cannot justify the claim of the patentee, who did not seek a patent for an improvement of an existing device, but rested on a combination, all the elements of which, and the very purpose for which it was designed, were old and well known in the art. I have very carefully read the testimony and considered the patents put in evidence, and I do not think the patent in suit can be supported. The learned trial judge has so fully discussed the issues and the evidence that I feel I cannot usefully add anything further to what he has said. The existence or

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not of invention involves merely a question of fact, and on this question of fact I think the appeal fails. It is not necessary to express any opinion as to the other defences of the respondents.

I would dismiss both appeals with costs.

Appeals dismissed with costs.

Solicitor for the appellant: *Russel S. Smart.*

Solicitors for the respondent The Spanish River Pulp and Paper Mills, Limited: *Gibson & Gibson.*

Solicitors for the respondent Abitibi Power and Paper Company, Limited: *Kilmer, Irving & Davis.*

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*May 6, 9.
*Oct. 10.

BANQUE CANADIENNE NATIONALE (PLAINTIFF) ..... APPELLANT;

AND

JOHN TENCHA, JOSEPH TENCHA AND IGNACE TENCHA..... (DEFENDANTS);

AND

IRENE TENCHA (CLAIMANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Fraudulent conveyance—Husband and wife—Farm transferred by husband to wife, both continuing to occupy and work it—Grain grown thereon subsequent to transfer seized under execution against husband—Grain claimed by wife—Interpleader—Relevancy of evidence of circumstances of transfer—Transfer alleged to have been in fraud of creditors—Effect as to right to the grain—Exemption—Married Women's Property Act, R.S.M. 1913, c. 123, ss. 5, 2 (b), 14—Real Property Act, R.S.M. 1913, c. 171, s. 79—Executions Act, R.S.M. 1913, c. 66, ss. 29, 34 —Apportionment of costs.

T., who had bought a farm under agreement of sale, transferred his interest therein (and also his stock and farming implements) to his wife, who subsequently obtained title from the vendor and became the registered owner. The consideration of the transfer was expressed to be natural love and affection and $1. T. and his wife continued to occupy and work the farm as formerly. Plaintiff recovered a judgment

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

against T., and under execution issued thereon the sheriff seized certain grain which had been grown on the farm since T.'s wife became the registered owner and which grain had been shipped in her name. T.'s wife claimed the grain.

Held (reversing in part judgment of the Court of Appeal for Manitoba, 36 Man. R. 135, and restoring in part judgment of Macdonald J., *ibid;* Anglin C.J.C. and Mignault J. dissenting): The trial judge's finding that the transfer was made to defraud T.'s creditors should be affirmed; (*held,* that the evidence presented as to this was open to consideration, having regard to the form of the issue and the course of the trial); therefore (subject to the effect of the *Executions Act,* Man.) the transfer was void as against them, and as against the sheriff representing them, even though as between T. and his wife, it may have been intended to operate irrevocably as an absolute gift, and, the conveyance being voluntary, it made no difference whether it was a sham or not; hence the creditors could look to T. as having the equitable and beneficial title to the farm, to which the possession and right to the crops were incident (applying the rule derived from the Roman Law, by which, at least as against a purchaser other than a *bona fide* possessor, the owner of the principal thing becomes the owner also of the fruits; and not adopting the law as stated in certain cases resting upon *Kilbride* v. *Cameron,* 17 U.C.C.P., 373, which case is discussed). T.'s wife could not justify her claim upon the evidence that she directed the farming operations and contributed to the necessary labour in which T. was also engaged. The grain was, therefore, liable to seizure under plaintiff's execution, but subject to the *Executions Act,* R.S.M. 1913, c. 66. The effect of that Act was to exempt from such seizure the grain grown on 160 acres of the farm. The grain seized was the product of 150 acres of wheat and 100 acres of rye, and, having regard to the choice allowed the judgment debtor under the Act (which choice the claimant might justly exercise) the exempted grain should be fixed as comprising all the wheat (the more valuable grain) and $\frac{1}{10}$ part of the rye. Costs of the interpleader order to go to plaintiff; all other costs in all courts to be apportioned *pro rata* according to the value of the grain as to which the parties respectively succeed (*Dixon* v. *Yates,* 5 B. & Ad. 347, and other cases, referred to).

Per Anglin C.J.C. and Mignault J. (dissenting): The wife, after the transfer to her, actually carried on the farming operations on her own account and without her husband having any "proprietary interest" therein or control thereof. The grain was "property acquired" by her in an "occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest" within s. 2 (*b*) of the *Married Women's Property Act,* R.S.M. 1913, c. 123. As to the *bona fides* of her claim in that respect, evidence of the circumstances under which she acquired the farm was admissible. But, once it is found that she so carried on the farming operations, the facts that the transfer of the farm to her was fraudulent and void as against her husband's creditors (if a finding to that effect was justified) and that the husband resided on the farm and aided in the farming, did not prevent her from claiming the crops grown as her own to the exclusion of his creditors (*Kilbride* v. *Cameron,* 17

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U.C.C.P. 373, and *Standard Trusts Co.* v. *Briggs*, [1926] 1 W.W.R. 832, approved on this point). S. 14 of the *Married Women's Property Act* had no bearing on the question in issue.

APPEAL by the plaintiff (by leave of the Court of Appeal for Manitoba) from the judgment of the Court of Appeal for Manitoba (1) which, by a majority, reversing the judgment of Macdonald J. (2), held that the grain referred to in the interpleader order herein, was, at the time of the seizure thereof by the sheriff, the property of the claimant as against the plaintiff, and was not liable to seizure under the writ of execution issued on behalf of the plaintiff against the defendant Ignace Tencha, husband of the claimant. The material facts of the case are sufficiently stated in the judgment now reported.

N. A. Belcourt K.C. for the appellant.

H. A. Bergman K.C. for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The appellant, formerly known as the Banque d'Hochelaga, obtained judgment in the Court of King's Bench of Manitoba against the defendant, Ignace Tencha, on 25th July, 1924, for $1,643.34 debt, and $51.80 costs, upon a promissory note which had been given to the bank by the defendant, John Tencha, and guaranteed by the defendants, Joseph Tencha and Ignace Tencha. The liability was originally contracted by these parties by a promissory note of 7th August, 1922, which in the interval had been renewed from time to time. Execution was issued upon this judgment on 22nd August, 1924, and was subsequently renewed for two years from 19th August, 1926. The writ was delivered to the sheriff of the Eastern Judicial District of Manitoba, who was directed to levy the amount. The bank, at the same time, held other judgments amounting to a considerable sum against Ignace Tencha. He was a farmer residing, with his wife, Irene Tencha, the claimant, and adopted children, on a farm in Manitoba known in the case as the Johnston farm, consisting of the west half of section 19, township 8, range

(1) 36 Man. R. 135; [1926] 3 W.W.R. 532, 702.

(2) 36 Man. R. 135; [1926] 1 W.W.R. 867.

3, East, which they had occupied and worked since January, 1918, when it was bought by the husband from Hugh Johnston, who appears to have been the registered owner of the farm, subject to a mortgage to the Great West Life Assurance Company for the principal sum of $6,500. Johnston says he sold the farm to Ignace Tencha for $15,000 and received a cash payment on account of $1,600. It is said also that the sale included some stock and farming machinery or implements; the agreement was in writing but the writing is not produced. It appears, however, as will be shown, that Johnston, while he retained the legal title, received the crops of grain which were grown upon the land, and that the proceeds, in considerable part at least, went in reduction of the purchase price, of which the amount due upon the mortgage formed part.

On 15th November, 1922, Ignace Tencha, the judgment debtor, gave a deed to his wife whereby he granted, released and quitted claim to her all his " estate, right, title, interest, claim and demand whatsoever both in law and in equity " in the Johnston farm for the expressed consideration of natural love and affection and the sum of $1. At the same time, and for the like consideration he gave her a bill of sale of all his stock and farming implements. The learned trial judge found that " at this time the husband was heavily involved financially to the knowledge of his wife, and, by the giving away of his lands and chattels, he was stripped of every possible available means or power of satisfying his creditors "; and that the transfers were executed " for the purpose of defrauding creditors of the husband by preventing the recovery of their claims against him."

Mrs. Tencha, having thus acquired her husband's interest in the farm, concluded an arrangement with Johnston, who had the legal title, whereby he transferred his title to her in consideration of the assignment of a mortgage of $900, which she had upon the property of one Sawchuk, and it is said that she agreed to assume the Great West Mortgage, upon which the principal still remained unpaid. The registered title to the Johnston farm is proved by the deputy district registrar, and it appears by his evidence that Johnston transferred to Mrs. Tencha on 22nd April,

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1924, subject to the mortgage, and that there is a certificate of title outstanding in her name.

After the transfer by the husband to his wife, they continued to reside on the farm and to work it as formerly, she doing a man's work on the place, as she had been accustomed to do. There is evidence that she was the better manager, and that she planned the farming operations. The husband was not called.

On 18th November, 1925, grain grown during that season upon the Johnston farm was shipped in three cars in the name of Mrs. Tencha from Cartier Siding in Manitoba, consigned to the Manitoba Wheat Pool, an institution of which Mrs. Tencha seems to have been a member. In one of these cars, no. 321371, there were 1,052.30 bushels of damp rejected 2 C.W. Amber Durum Wheat; in another, no. 310797, 1,145.50 bushels tough rejected 3 C.W. Amber Durum Wheat, while the third car, no. 406159, contained 632.52 bushels net brake and damp rejected Rye. It was upon this grain that the Sheriff proposed to levy the amount of the plaintiff's execution against the judgment debtor, Ignace Tencha, the plaintiff claiming that the grain was liable to answer the judgment debt notwithstanding the transfers to Mrs. Tencha and her certificate of title; Mrs. Tencha, however, claimed the property as her own, and the sheriff, on 5th December, 1925, obtained an interpleader order directing that the plaintiff and the claimant should proceed to trial of an issue in the Court of King's Bench at Winnipeg wherein the bank should be plaintiff, and that the question to be tried should be whether the grain shipped

from Cartier Siding in Manitoba on or about the 18th day of November, 1925, in railway cars Nos. C.N 321371 and C.N. 310797, consigned to The Manitoba Wheat Pool, and that part of the grain in car No. 406159, claimed by the above named Irene Tencha, is liable to seizure under the writ of *Fieri Facias* herein as against the claim of the said Irene Tencha.

This issue was accordingly tried, and the trial judge found for the plaintiff, but his judgment was reversed by the Court of Appeal, two of the learned justices dissenting.

There was considerable discussion in both courts about the *Married Women's Property Act,* and there is in the respondent's factum an elaborate review of the provincial decisions interpreting the various acts, although it is not denied on either side that the legislation confers upon the

wife adequate capacity to acquire and hold the property; *Married Women's Property Act*, R.S.M., 1913, ch. 123, ss. 3 et seq. It is however expressly declared by s. 14 that:

> nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife, of any property, in fraud of his creditors,

and, that being so, I apprehend that while Mrs. Tencha acquired title to the land conveyed by her husband and by Johnston, as to which she subsequently obtained a certificate of title, that title, notwithstanding anything in the *Married Women's Property Act*, remained subject to the infirmity by which it was affected by reason of the statute, 13 Elizabeth, c. 5. Section 79 of the *Real Property Act*, R.S.M. 1913, c. 171, which provides that a certificate of title, while in force, shall be conclusive evidence in law and in equity that the person named is entitled to the land described therein for the estate or interest therein mentioned, is also expressed to be subject to the right of any person

> to show fraud wherein the registered owner, mortgagee or encumberancer (*sic*) has participated or colluded and as against such registered owner, mortgagee or encumbrancee; but the onus of proving * * * such fraud shall be upon the person alleging the same.

It follows from these enactments and from their interpretation as affirmed in the judgment of this court in *Fraser* v. *Douglas* (1), that, in the absence of fraud, the conveyance by Ignace Tencha to his wife would have been effective as against his creditors. I shall assume, then, that if the conveyance had not been fraudulent, the wife would have had a vindicable right to the crops; and therefore, if this action is to succeed, it must be because it is established that, as against the husband's creditors, the conveyance of the farm by the husband to the wife was fraudulent, and that the husband, as the owner of the land, was also the owner of the grain as to which the right of seizure is now in question.

I have read the evidence and judgments very attentively, and I entertain no doubt in the result that the findings of the learned trial judge upon the facts should be allowed to stand, except in so far as they are affected by the *Executions Act*, to which I shall presently refer. It would, of course, have been more satisfactory if the written agree-

(1) (1908) 40 Can. S.C.R. 384.

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ment between Johnston and Ignace Tencha had been produced, or if there had been acceptable proof of its contents, particularly with relation to the crops, because it seems that, although after the agreement the crops were raised by the Tenchas, they were shipped by Johnston, who received them and their proceeds, and made the payments which were made thereout. Johnston, who was called for the claimant, in direct examination says:

Mr. BOWLES: Q. How were their payments made during the first four years. Did they make them promptly?

A. Yes. We just shipped the grain, and I looked after the grain for them. Mrs. Tencha doesn't know very much English, and she shipped the grain, and it went to the Station.

Q. There was a mortgage to the Great West Life?

A. Yes. They assumed it, and I paid it.

His LORDSHIP: Who did you sell to?

A. To the Tenchas, Irene and Ignace.

Q. Was your agreement with both of them?

A. No. It was drawn in Ignace Tencha's name—I am not sure.

Mr. BOWLES: Q. You made the payments to the Great West Life on that mortgage?

A. Yes.

Q. And you handled the grain yourself, you say?

A. Yes.

Q. Was there any dissatisfaction on the part of the Great West Life Assurance Company, about the money that they were getting?

A. No, except they complained one year because they didn't get the money, because we were holding the grain to try and get the higher price in the spring, which Mrs. Tencha thought we should do.

* * * * * *

Mr. BOWLES: It is an agreement in writing between yourself and Ignace Tencha?

A. Yes.

Q. It provided for the payment—the instalments?

A. Yes, it does.

Q. Have you a copy of that agreement?

A. No. I didn't bring it here, no.

Q. You haven't got it with you now?

A. No, I didn't bring it here, of course.

And further in cross-examination:

His LORDSHIP: You sold the property for $15,000?

A. Yes.

Q. And you got $1,500 in cash?

A. Yes.

Q. And you got this $850 mortgage?

A. Yes.

Q. And they assumed the mortgage for about $7,000?

A. $6,500 I think it was.

Q. You had about $6,000 coming to you?

A. I had. I was getting a share of the grain during this time, and I applied that on my agreement, of course.

Mr. BERGMAN: Did you get any payments from Ignace Tencha direct, on your agreement, apart from the cash payment?

A. No.

Q. All the rest of the payments that you got on the agreement until Mrs. Tencha took it over, were, what you realized by taking possession of the crop each year?

A. Yes.

Ignace Tencha, as I have said, gave no evidence. He was not called by either side. Mrs. Tencha, in her examination for discovery, speaking of the Johnston farm and the period before she received the conveyance from her husband, had said:

Q. And he was putting in the seed?
A. Yes.
Q. That time he was looking after it himself?
A. Yes, he was boss.
Q. He was boss at that time?
A. Yes.
Q. He got the money from the crop?
A. When?
Q. He got the money from the crop that time?
A. Yes.
Q. He sold the wheat?
A. Yes.
Q. And got the money?
A. Yes.

And, when called at the trial on her own behalf, she said:

Q. Did you have any conversations with him about the buying of the land, that is, with Mr. Johnston, I mean?

A. Yes, I had.

Q. What conversations did you have? What was said?

A. After my husband bought the land I told Mr. Johnston to sell the crop and take the money.

This evidence suggests that the annual crops may have been the subject of some stipulation in the agreement of sale, and that Johnston evidently had an interest in them. It is, of course, a necessary part of the plaintiff's case to show that they belonged to Ignace Tencha under a title which could be upheld in competition with that of Mrs. Tencha, who succeeded to Johnston's rights under his agreement of sale when he conveyed the property to her in 1924; but that burden was *prima facie* satisfied by the proof of Tencha's title and possession upon which the plaintiff relied, and when the transfer from Tencha to his wife, under which she claimed the crops, was shown to be void against

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the plaintiff, and when she introduced the evidence which I have quoted, if the purpose were to show that she had derived title to the crops as the assignee of Johnston, I think it was incumbent upon the claimant to prove the Johnston agreement; it was in her possession, or in that of Johnston under whom she claimed, and she was therefore in a position to produce it, and no doubt would have done so if its provisions had been favourable to her claim. Therefore I think it must be taken that, as between Johnston or his assignee and Ignace Tencha, the crops belonged to the latter.

Then, if the transfer by Ignace Tencha to his wife were, as is found, fraudulent and void against his creditors, has Mrs. Tencha nevertheless a right to the grain subsequently grown upon the land? The Court of Appeal answers this question in the affirmative, relying upon the cases of *Kilbride* v. *Cameron* (1), and others to which I shall refer. *Kilbride* v. *Cameron* (1) was heard before two judges of the Court of Common Pleas of Ontario, Adam Wilson J. and John Wilson J., on appeal from Richards C.J., the Chief Justice of that court. It was an interpleader issue to try whether the crops mentioned below were the property of the claimant as against the defendant, who was an execution creditor of John Kilbride, the claimant's father. There were twenty-four acres of hay in stack, also sixteen acres of wheat and four acres of peas growing upon a lot which John Kilbride, the former owner, had conveyed to one of his sons, either Thomas or another who conveyed it to Thomas, who devised it to his brother Patrick, who conveyed it to the claimant. Patrick had got the land subject to a mortgage; the maintenance of his father and mother; a small annuity to them during their lives, and other charges, and he had conveyed to the claimant subject to these. The consideration of the deed from John Kilbride was that his son should pay him $500, and also pay his debts. It was contended at the trial that all these conveyances and transactions were fraudulent and voluntary and not intended to pass the land in fact, but the Chief Justice was of opinion upon the evidence that there was an intention to pass the property in the land, and that there

(1) (1867) 17 U.C.C.P. 373.

was no evidence upon which the jury could be satisfied that the intention was otherwise. He was also of the opinion that even if the conveyances were fraudulent, still the grain and crops raised upon the land by the plaintiff or his brothers by their labour and at their expense could not be taken in execution to satisfy the father's debts and he directed a verdict for the plaintiff. Upon motion for a new trial, A. Wilson, J., considered that, even if the transactions relating to the land were not valid as to the creditors of the father, that would not determine the right of property to the crops in question, because it was shown that the father did not raise the crops nor furnish the means for doing so, and that the labour and means were contributed by the sons alone. He thought that, assuming the deed to be fraudulent, the sheriff's right to seize the crops depended upon whether John Kilbride, the judgment debtor, had contributed to the expense of raising them. He proceeded to say, moreover, that the burdens imposed by the devisor upon the devisee, and which the devisee assumed to discharge, constituted an actual and valuable consideration which would support the prior fraudulent deed, unless both devisor and devisee could be charged with notice of the fraudulent object, and he concluded upon the evidence that the crops were the sole property of the plaintiff as against the execution creditor. J. Wilson J., on the other hand, considered that the evidence rather pointed to the fact that the conveyances were colourable, and that the crops therefore belonged to the father, and he thought there should be a new trial. The report adds that Richards, C.J., expressed an opinion in favour of the view of A. Wilson J., but took no part in the judgment, as he had not been present at the argument, and that, the court therefore being equally divided, the rule could not be discharged, and the verdict consequently stood. There is thus nothing conclusive about this case, even for the court by which it was decided. In *Johnston Lumber Co.* v. *Hager* (1), Clarke J.A., delivering his judgment of the Appellate Division of the Supreme Court of Alberta, quotes with approval the judgment of J. Wilson J., in *Kilbride* v. *Cameron* (2); and, in *Standard Trust Co.*

(1) (1924) 20 Alta. L.R. 286. (2) (1867) 17 U.C.C.P. 373.

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v. *Briggs* (1), Harvey C.J., of the same court, refers to these cases as showing that, if the conveyance of the land were fraudulent, the crops raised for the transferee do not belong to the transferor. Newlands, J., expressed the same view, citing *Kilbride* v. *Cameron* (2), in *Massey-Harris* v. *Moore* (3), and in *Cotton* v. *Boyd* (4). Thus all these cases, for which no other authority is cited, rest upon *Kilbride* v. *Cameron* (2), a very indecisive case, the reasoning of which, moreover, depends upon facts the opposite of those now in proof. I prefer to apply the rule derived from the Roman Law, by which, at least as against a purchaser other than a *bona fide* possessor, the owner of the principal thing becomes the owner also of the fruits. Here there was no case of *bona fide* possession, because it was at the instance and by the contrivance of Mrs. Tencha that she received the voluntary conveyance, and, as to the possession in fact, husband and wife continued thereafter to occupy and work the premises as they had done before. It is laid down in Blackstone's Commentaries, Vol. II, p. 404, that

> The doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman Law, it any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, in the reign of King Henry III; and have since been confirmed by many resolutions of the courts.

This passage is reproduced with some enlargement in Stephen's Commentaries, 17th ed., Vol. II, p. 525, including the statement that even when the offspring or produce is separated from the principal corporeal object it still belongs to the owner of the latter. It must therefore follow, since the judgment debtor's conveyance of the land was void when brought into competition with the claims of his creditors, that it should, for the purpose of adjudi-

(1) [1926] 1 W.W.R. 832.
(2) (1867) 17 U.C.C.P. 373.
(3) (1905) 6 Terr. L.R. 75.
(4) (1915) 8 Sask. L.R. 229.

cating their rights, be treated as frustrate and not existing, and then it comes to this—that Tencha had the equitable or beneficial title, to which the possession and right to the crops was incident, while his wife, after she had obtained the legal title from Johnston, had the rights that the latter would have had if he had not conveyed to her. She cannot, I think, justify her claim upon the evidence that she directed the farming operations and contributed with her own hands to the necessary labour in which her husband was also engaged.

It is argued, and I think held by some of the judges of the Court of Appeal, that evidence should not have been admitted to prove that the transfer from Ignace Tencha to his wife was fraudulent, and the case of *Donohoe* v. *Hull et al* in this Court (1), is cited; but, looking to the form of the issue, which was settled by agreement between counsel, and having regard to the course of the trial, I think the case as presented must be considered, seeing that the character of the conveyance was regarded by the parties throughout as a question of fact upon which the right of seizure depended. Fullerton J.A., who delivered the dissenting judgment in the Court of Appeal, states that:

> On the trial, counsel for defendant objected to all evidence tendered with a view to showing that the transfer of the land from the husband to the wife was fraudulent against creditors.

He considers, however, for the reasons which he gives, that the evidence was relevant to the issue and therefore admissible. But I think that the learned judge was mistaken in supposing that such an objection was taken. I do not find it noted in the record; on the contrary, when the bank manager was being examined for the plaintiff at the very outset, and was asked to prove some promissory notes which had been given by Ignace Tencha, claimant's counsel said:

> I object to this on the grounds that it is in reference to some dealings between the bank and Ignace Tencha.

Then, upon the discussion which followed, plaintiff's counsel having stated that he was attacking the transfer as fraudulent as against the creditors, there was no answer on the part of the claimant's counsel to that contention, and the judge intimated that he would allow the evidence. The trial proceeded without further reference to the point,

(1) (1895) 24 Can. S.C.R. 683, at p. 692.

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and a great part of the testimony, and of the subsequent discussion in the case, is taken up with the question as to whether or not the transfer was fraudulent. It was held by Ritchie C.J. in *Royal Insurance Company* v. *Duffus* (1), following a similar ruling of Lord Denman in *Rex* v. *Grant* (2), that.

When evidence is tendered the judge and opposing counsel are entitled to know the ground on which it is offered, and none can be urged on appeal that has not been put forward at the trial.

This ruling expresses a sound principle, well recognized in practice. If the conveyance be fraudulent the sheriff has the right and is compellable to seize, and the question of fraud is therefore one which enters into the very heart of the issue. It is no more immune from trial in interpleader proceedings than any other material fact.

It has always been common practice to determine, in an action against the sheriff for conversion or for a false return, the character and effect of a conveyance alleged to be fraudulent against creditors. It is not necessary to invoke the jurisdiction of the court to declare the conveyance void or to set it aside. In Baron Parke's well known judgment in *Imray* v. *Magnay* (3), he says:

The conclusion to which we have arrived is, that where there are goods seized under a former writ, founded on a judgment fraudulent against a creditor seeking to enforce a subsequent execution, and such goods remain in the hands of the sheriff, or are capable of being seized, the sheriff is compellable to seize and sell such goods under that subsequent execution; and this by virtue of the statute 13 Eliz. c. 5. (His Lordship read the second section of that statute). The judgment is by the statute made void against creditors, but by implication it is void against a sheriff, who acts in right of a creditor; as a deed is, which is fraudulent against creditors; *Turvil* v. *Tipper* (4). And it is now of frequent occurrence that the sheriff is bound to take goods which have been fraudulently conveyed or assigned to defeat creditors, and is responsible in an action for a false return at the suit of a creditor; and the statute seems to us to put both on the same footing. The creditor has no other way of avoiding the judgment, than by enforcing his execution for his debt, notwithstanding an execution upon it; or by application to the equitable jurisdiction of the court to set it aside, which we apprehend has arisen in comparatively modern times; and whatever right the creditor had at the time of the statute he has now.

The issue under the Interpleader Rules is devised as a convenient means to enable the sheriff and the parties to have the question determined as to whether the sheriff is

(1) (1890) 18 Can. S.C.R. 711.
(2) (1834) 5 B. & Ad. 1081, at p. 1085.
(3) (1843) 11 M. & W. 267, at p. 275.
(4) Latch, 222.

compellable to seize and sell the goods, and for the information of the court the issue is framed to include all questions which arise as to the title. There are no pleadings, and when the parties and the court understand, as they did in this case, that the object is to ascertain whether or not the conveyance upon which the claimant relies was fraudulent as against the creditors of the judgment debtor, the trial ought, I should think, to proceed upon that footing. In any event, it is, I think, too late to object upon appeal that there was a mistrial because the fraud was not pleaded.

It is suggested, if not held by the Court of Appeal, that the transfer cannot be attacked by the sheriff if it be intended to operate between the parties—that it must be shown to be a mere sham or device for keeping off the sheriff. But it is, I think, certain, and it is unnecessary to quote cases for the proposition, that a deed, like that of Ignace Tencha to the claimant, made without valuable consideration and with the intention of defeating the grantor's creditors, is void as against them, and as against the sheriff representing them, although, as between grantor and grantee, it be intended to operate irrevocably as an absolute gift. Transfers of that nature are not to be confounded with those which were intended to prefer one or more of the grantor's creditors, or to avoid an execution by granting such a preference. Although the debtor's right of preference has been abrogated or modified by the Bankruptcy Acts or other statutes, it was admissible by Common Law, and was not affected by the Statute of Elizabeth, and a conveyance creating preferences was therefore formerly good, subject however to be avoided if it were shown to be a mere sham or pretext to keep off an execution and to enable the debtor to have the property back again; that, in a proper case, was a question for the jury, but it does not arise in a case like the present, which involves no question of preference, and where the purpose is to put the property out of reach of the creditors. Such a conveyance does not operate against them, sham or not. *Twyne's case* (1); *Riches* v. *Evans* (2).

(1) (1601) 3 Co. Rep. 80b.

(2) (1840) 9 C. & P., 640.

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There is, however, difficulty in the plaintiff's way arising out of a point which does not appear to have been raised in the courts below nor by the respondent's factum, and which nevertheless has been pressed in this Court without any objection on the ground of prejudice. In any case, it invokes a statutory rule and the Court is bound to consider it. It is declared by s. 29 of the *Executions Act*, R.S.M., 1913, ch. 66, that:

> The following personal and real estate are hereby declared free from seizure by virtue of all writs of execution issued by any court in this province, namely, * * * *
>
> (*h*) the land upon which the judgment debtor or his family actually resides or which he cultivates either wholly or in part, or which he actually uses for grazing or other purposes;
>
> Provided the same be not more than one hundred and sixty acres; in case it be more, the surplus may be sold, subject to any lien or encumbrance thereon.

And by s. 34, it is provided that:

> The judgment debtor shall be entitled to a choice from the greater quantity of the same kind of property or articles which are hereby exempted from seizure.

It is said in the appellant's factum that the Johnston farm was a 240 acre farm, but I see no evidence in support of that statement. The farm appears to have consisted of 320 acres, that is the statutory complement of a half section, and Mrs. Tencha says that in 1925 they sowed on the Johnston farm 150 acres of wheat, 20 acres of oats, and 100 acres of rye. She says, moreover, that there were 30 acres not worked or ploughed, and that the farm comprised in all 320 acres. This leaves 20 acres, the use of which is unaccounted for. The issue to be determined is whether the wheat and rye are liable to seizure under the execution: but transfers of property which is not available to creditors are not, I take it, avoided by the Statute of Elizabeth. Therefore I think the Statute may be taken as declaring, in its application to the case, that the 150 acres of wheat and 10 acres of rye are exempt, because the judgment debtor having a choice, which it would seem to be just that the claimant should exercise, would naturally elect for the exemption of the more valuable part of the crop. The plaintiff can therefore in these circumstances succeed upon the issue only as to nine-tenths of 632.52 bushels net brake and damp rejected rye. As to so much the plaintiff appears to be entitled to the proceeds.

The plaintiff should have the costs of the interpleader order; and, as the costs with relation to the wheat and the rye are not separable upon any other basis, all other costs in all Courts should be apportioned *pro rata* according to the value of the grain as to which the respective parties succeed. *Dixon* v. *Yates* (1); *Lewis* v. *Holding* (2); *Clifton* v. *Davis* (3); Annual Practice 1927, p. 1336.

The judgment of Anglin C.J.C. and Mignault J., dissenting, was delivered by

ANGLIN C.J.C.—In this interpleader issue the question for determination is whether the grain seized by the sheriff under a writ of *fieri facias* issued by the plaintiff (appellant) against the lands of Ignace Tencha was liable to such seizure against his wife, Irene Tencha, the defendant.

The grain when seized was upon cars of the Canadian National Railway consigned to the Manitoba Wheat Pool by Irene Tencha, who was a member of that organization. It had been grown in the year 1925 on land known as the Johnston Farm, which had stood in her name in the land titles register since 1922, and for which she held a certificate of title.

By the *Married Women's Property Act* (R.S.M. 1913, c. 123, s. 5) it was enacted that

all property which * * * * shall be, standing in, or allotted to, or placed, registered or transferred in or into, or made to stand in, the sole name of a married woman, shall be deemed, unless and until the contrary be shown, to be her property * * * ; and she alone shall be entitled to deal therewith, and to receive the rents, issues, dividends, interests and profits thereof;

and by s. 2 (*b*) " property " is defined as meaning

any real or personal property, of every kind and description, of a married woman

and as including

all wages, earnings, money and property, gained or acquired by a married woman in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest * * *.

Apart, therefore, from any question of onus arising from the facts that the execution creditor is the plaintiff and the

(1) (1833) 5 B. & Ad. 313, at p. 347.
(2) (1841) 2 Man. & G. 875.
(3) (1856) 6 E. & B. 392.

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claimant is the defendant, the property in question must be regarded as that of Irene Tencha "unless and until the contrary be shown" by the execution creditor. Accordingly, the question for determination is: Did the evidence establish such an ownership of, or interest in, the consigned grain on the part of the judgment debtor, Ignace Tencha, as was exigible under the execution against him? The learned trial judge held that it did, explicitly resting that conclusion on the two distinct grounds:

1. That the transfer to the wife was a fraudulent transaction, executed for the purpose of defrauding creditors of the husband by preventing the recovery of their claims against him, and that, although the land is registered in the name of the wife, it is not hers, and the crops grown thereon are his.

2. That even if the farm were the property of the wife she was not carrying on the farming business separate and apart from her husband within the meaning of the statute, and, adopting the language of Mr. Justice Killam in the *Slingerland* v. *Massey* case (1), "I cannot think that the legislature intended to protect from the husband's creditors the produce of his labour in an occupation which the wife allows him to carry on upon her lands—or to permit him thus to bestow the fruits of his labour on his wife against his creditors.

By a majority the Court of Appeal reversed this decision, questioning the soundness of the finding that the transfer of the Johnston Farm to Mrs. Tencha was fraudulent and void as against her husband's creditors, but holding that, although it were, inasmuch as the transfer was *inter partes* intended to be effective and was not a mere sham and the farming operations had been carried on by Mrs. Tencha as proprietor and without her husband having any interest in or control over them, the grain seized was her exclusive property and was not exigible under the plaintiff's execution against the husband. The dissenting judges also expressed the views that

there is no issue on the record * * * that the transfer of land * * * was fraudulent against creditors

and that a finding that it was

is by no means conclusive of the question as to the ownership of the grain;

and they agreed with the trial judge that

the question of how she (the wife) became the owner cannot be enquired into * * * in any way to affect her registered title, but it seems to me that it can be gone into for the purpose of ascertaining the *bona fides* of her (the wife's) claim to be engaged in the business of farming these lands separate and apart from her husband.

(1) (1894) 10 Man. R. 21.

In holding that the farming operations on the Johnston Farm were not carried on in 1925 by Mrs. Tencha separately from her husband, the learned trial judge rested his conclusion on some early decisions of the Manitoba courts, of which *Striemer* v. *Merchants' Bank* (1), is, perhaps, the strongest. These cases discussed the words "which she carries on separately from her husband" before the amendment had been made which attached to them the words: "and in which her husband has no proprietary interest." They, in effect, held that if the husband resides with his wife on the farm and assists her in the raising of the crops, although the farm belonged to the wife and she conducted it on her own account, employing her husband to aid in the work, the crop is liable to seizure under an execution against the husband.

The learned judge did not find that the carrying on of the farming operations by Mrs. Tencha was merely colourable or a sham; and the evidence, as we read it, would not warrant such a finding. On the contrary, there is abundant evidence to support the view expressed by the learned judges who constituted a majority in the Court of Appeal that, after 1922, the farming operations on the Johnston Farm were actually and *bona fide* carried on by Mrs. Tencha on her own account and without her husband having any "proprietary interest" therein or any control thereof.

If the question whether Mrs. Tencha is the owner of the Johnston Farm as against the creditors of her husband were to be determined in this proceeding, we should have to consider the evidence very carefully indeed before holding that she is not. It seems to us extremely doubtful whether Ignace Tencha had any real or substantial equity in that farm—whether the whole beneficial interest did not belong to Johnston and did not vest in Mrs. Tencha by virtue of his conveyance to her. But that issue is not before us and in our view its determination is of very little importance in deciding the ownership of the grain in question.

We shall, therefore, assume, but without so deciding, that the evidence of the circumstances under which Mrs. Tencha acquired the Johnston Farm justified the finding

(1) (1894) 9 Man. R. 546.

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that the transfer of it to her was void as against the creditors of Ignace Tencha. We accept the view that such evidence was admissible as relevant to the question of the *bona fides* of Mrs. Tencha's claim that she had actually carried on the farming operations since 1922 separately and on her own account and that her husband had no proprietary interest therein. We are, however, satisfied that the conclusion of the majority of the learned judges of the Court of Appeal, that the operations were in fact so carried on by Mrs. Tencha, as she asserts, must also be accepted.

We are further of the opinion that the construction placed by the learned trial judge on the words of s. 2 (*b*) of the *Married Women's Property Act* was erroneous, and that the contrary view held by the majority of the learned judges of the Court of Appeal as to its meaning and effect was correct; and we agree in the unanimous view of that court, to quote from the dissenting judgment of Fullerton J.A., that

> a finding that a transfer is fraudulent as against creditors is by no means conclusive of the question as to the ownership of the grain.

On the point last mentioned the various provincial Courts of Appeal appear to have uniformly held that the invalidity of the title of the transferee of land as against an execution creditor of the transferor by no means determines the right of such creditor to have crops grown on the land taken under his execution. It was so decided in Ontario, in 1867, in the case of *Kilbride* v. *Cameron* (1), by the Court of Common Pleas (Adam Wilson and John Wilson JJ.) affirming Richards C.J. So far as we can ascertain, that decision has never since been questioned and has been followed and approved in recent years by the Supreme Courts of the Western Provinces in cases cited in the judgments of Dennistoun and Trueman, JJ.A., in the Court of Appeal.

It was pointed out in the *Kilbride Case* (1) by Adam Wilson J., that

> the parties intended to pass the estate in the land by the different conveyances

and that

> there was no proceeding whatever which directly impeached the land transfer, for the execution was against goods, not against lands

(1) (1867) 17 U.C.C.P., 373.

The admission, he said, that the transactions as to the land were not valid as against the creditors of the father * * * would by no means determine the right of property to the crops in question.

John Wilson J., said

If * * * as against creditors (the conveyances) were fraudulent and void, the crops would not belong to the (transferor); but if * * * the whole was colourable only * * * then the crops were the property of John Kilbride (the grantor).

The last of the decisions cited, *Standard Trusts Co.* v. *Briggs* (1), was rendered by the Court of Appeal for Alberta. The circumstances very closely resemble those now before us. Indeed they were stronger in favour of the execution creditor, inasmuch as the land had there been transferred to the wife after the execution against her husband had issued and the wife admitted that the farming operations were carried on by her and as her separate business, although with her husband's assistance, because of the existence of the execution against him. The judgment of the Court was delivered by Harvey C.J.A., who said, at p. 833:

Even if the conveyance of the land were fraudulent—*Kilbride* v. *Cameron* (2), and *Johnstone Lbr. Co.* v. *Hager* (3), show that crops raised by the transferee do not belong to the transferor. The crops in question were, of course, not transferred by the husband to the wife. If they ever were his, his creditor has a right to seize them. If they were not, equally, the creditor has no such right. The question is really whose business the farming operations which produced the crops, was * * *

and, at p. 835,

In the present case the only oral testimony is that of the wife. She is quite evidently a very clear minded, intelligent woman and one may judge quite capable of managing any ordinary business enterprise. The learned trial judge made no finding of fact whatever helpful as to the decision whether she is the real manager of the farming operations * * *

and, at p. 836,

There is no law of which I am aware that gives an execution creditor the right to compel the debtor to work for him though we have laws which impose obligations upon a man to provide for his wife and children. The plan adopted here was for the purpose of enabling the husband to work efficiently, to perform his legal obligations to his family without furnishing his creditor with the opportunity to deprive them of the fruits of his labour. When the wife was asked if she paid her husband anything for his labour she said she did not but that he was receiving the same reward for his labour that she had received for hers during the preceding 12 years of their married life. She said, however, that she employed and paid all the hired labour that was required and paid all other

(1) [1926] 1 W.W.R. 832. (2) (1867) 17 U.C.C.P., 373.
(3) 20 Alta. L.R., 286; [1924] 1 W.W.R. 389.

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expenses and, while her husband apparently worked much as he had done before, she and her children also themselves worked to some extent in the fields and that her husband in respect to any acts of management acted as her foreman.

The resemblance between these facts and those of the case now before us is very striking. The Court (Harvey C.J.A., Beck and Clarke JJ.A.) set aside the judgment of the trial judge in favour of the execution creditor.

In our opinion the statement of the law, bearing on the question now being considered, in *Kilbride* v. *Cameron* (1) and the decisions following it is correct. But, if we thought its soundness dubious, we should hesitate to reject a view so distinctly enunciated and which has prevailed so long and has been so uniformly acted upon. We, accordingly, agree with what appears to have been the unanimous opinion of the Manitoba Court of Appeal in the present case that, although the transfer of the land to the wife should be deemed a fraudulent transaction as against the creditors of the husband, it does not follow that he had an interest in the crops which would make them seizable under an execution against him.

On the second ground taken by the learned trial judge we are of the opinion with the majority of the learned judges of the Court of Appeal that the grain in question was " property acquired " by the respondent in an occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest within the meaning of clause (*b*) of s. 2 of the *Married Women's Property Act,* R.S.M., 1913, s. 123.

Once the conclusion is reached that the carrying on of the farming operations by Mrs. Tencha was not a mere sham but was *bona fide* intended to be for her exclusive benefit and that her husband had no proprietary interest therein or control thereof, we are satisfied that the facts that he resided on the farm and aided in the farming do not prevent the wife from claiming the crops grown as her own to the exclusion of his creditors. We should have viewed the farming operations as having been carried on by Mrs. Tencha " separately from her husband " had the case arisen under the Manitoba *Married Women's Property Act* of 1892, i.e., before the addition of the words:

(1) (1867) 17 U.C.C.P. 373.

" and in which her husband has no proprietary interest." We agree with the construction placed on the words " carried on separately from her husband," as they stood in the early Ontario statute, by Spragge C.J.O., and Cameron J., in *Murray* v. *McCallum* (1), rather than with the narrower construction given them by Burton and Patterson JJ.A. That the Ontario Legislature intended that the view taken by the two former judges of the effect of the legislation should prevail was made clear by its action in substituting in 1887 the words: " and in which her husband has no proprietary interest " for the words: " separately from her husband." (50 V., c. 7, s. 22).

In Manitoba, instead of making such a substitution, the Legislature in 1900 merely added the words: " and in which her husband has no proprietary interest," leaving the words " separately from her husband " still in the Act. (63-64 V., c. 27, s. 2 (2)). Unless the words so added be regarded as designed to indicate the view of the legislature that the phrase: " Separately from her husband " shall be taken to mean what Cameron J. (at p. 306) held it did in *Murray* v. *McCallum* (1), it is difficult to understand why these words were inserted. If that be not their effect they are mere surplusage. It should, perhaps, be noted that the Manitoba statute speaks of an " occupation " carried on by the wife " separately from her husband," and not " separately and apart from her husband " as the learned trial judge expressed it.

Where the occupation is *bona fide* carried on as the business of the wife and without her husband having any proprietary interest in it or any right of interference in or control over it—when he takes no part in it other than as his wife's employee—the facts, that he resides with and aids her in carrying it on, do not prevent its being, for the purposes of the *Married Women's Property Act*, her business and an occupation carried on separately from her husband. As Osler J.A., in delivering the judgment of the Court in *Baby* v. *Ross* (2), said, at p. 446:

> There is no law which compels (the husband) to work for his creditors if he chooses to live in idleness, or which prevents him from giving away his time and services, or devoting them towards satisfying one creditor's demand. The arrangement (that he should work for his wife

(1) (1883) 8 Ont. A.R., 277. (2) (1892) 14 Ont. P.R. 440.

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BANQUE CANADIENNE NATIONALE. v. TENCHA.

Anglin C.J.C.

alone, she receiving the whole of the proceeds and he getting nothing but his board) which the plaintiff complains of was neither unreasonable nor illegal; and I am unable to comprehend on what principle it can be said to be a making away of property in order to defeat or defraud creditors.

We have not overlooked the provision of s. 14 of the *Married Women's Property Act* of Manitoba that

> nothing in this Act contained shall give validity as against creditors of the husband to any gift by a husband to his wife, of any property, in fraud of his creditors.

The only gift suggested to have been made by Tencha to his wife is of the land comprised in the Johnston Farm. The title to that farm is not in issue; we determine nothing as to it; and the plaintiff is entirely at liberty to impeach it in any way in any other proceeding it may be advised to take. There was no gift of the crops by Tencha to his wife. He never had any interest in, or claim upon, them which could be the subject of such a gift. Section 14 has no bearing on the matter of which we dispose.

We are, for these reasons, of the opinion that the judgment *a quo* is right and should be affirmed.

Appeal allowed in part.

Solicitor for the appellant: *J. T. Beaubien.*

Solicitor for the respondent: *A. E. Bowles.*

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*Oct. 18, 19.
*Oct. 31.

THOMAS E. NUGENT, ADA H. DOLAN AND CHARLES P. NUGENT (PLAINTIFFS) ..... APPELLANTS;

AND

HUGH H. McLELLAN, JOHN A. WARNOCK, GILBERT G. MURDOCH, AND CHARLES A. OWENS (DEFENDANTS) ..... RESPONDENTS.

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

Landlord and Tenant—Covenant in lease—Construction—Option of renewal—Appeal to Supreme Court of Canada—Jurisdiction—Value of matter in controversy.

A lease of land for a term of 10 years contained a covenant by the lessor that he "shall if requested by [the lessee, his executors, administrators or assigns] at least three months before the expiration of the

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

term hereby demised, pay to [the lessee, etc.] a sum of not more than $500 for the buildings now upon the said property and any further buildings that may be erected or built upon the said property during the term hereby created if being thereon at the expiration of the said term, or else grant a new lease of the aforesaid premises to [the lessee, etc.] for the further term or time of 10 years * * * and also a further renewal * * * for a further term of 10 years * * * at and under the same yearly rent."

Held, that under this covenant the lessor had the option of paying for the buildings at the expiration of the term of the lease or renewing the lease; it did not give the lessee an option to require a renewal.

Held further, that this Court had jurisdiction to hear the appeal; the matter in controversy was defendants' right to a lease for 10 years at $50 a year; the evidence showed that the property had an annual rental value of at least $400; if defendants' contention (that they had a right of renewal) was correct, plaintiffs would receive a rental of $50 a year, or a sum of $500 for the next 10 years; if plaintiffs' contention was correct they would receive a rental for the next 10 years of probably not less than $4,000; the difference between these two sums was the value of the matter in controversy, and it was more than sufficient to clothe the Court with jurisdiction.

APPEAL by the plaintiffs from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, affirming the judgment of Grimmer J., held that the defendants had a right of renewal of the lease in question. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

F. R. Taylor K.C. for the appellants.

Harold Fisher K.C. and *G. H. V. Belyea K.C.* for the respondents.

The judgment of the court was delivered by

LAMONT J.—In their statement of claim the plaintiffs allege that they are the owners of certain lands described therein (which border upon a portion of Wood lake) together with all the fishing privileges and other rights in or to the said lake. They also allege that the defendants trespassed upon their said property, broke down the fences, and broke and destroyed the locks on the buildings situated thereon, and they claim an injunction restraining the defendants from further trespassing upon the property and damages for the trespass already committed.

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NUGENT v. MCLELLAN.

Lamont J.

In their statement of defence the defendants, who are members of the Wood Lake Fishing Club, set up that at the time of the alleged trespass they had possession of the said property and had the right of possession thereto under and by virtue of a lease thereof, dated the first day of June, 1916, from Patrick H. Nugent, the then owner, to Martin R. Dolan, who, they alleged, took the lease as trustee for the members of the Wood Lake Fishing Club. The lease was for a term of ten years and the rent reserved $50 per year. Both Patrick H. Nugent and Martin R. Dolan died before the expiration of the term granted, and it is not disputed that the plaintiffs are the present owners of the property or that the defendants entered upon the property and committed acts thereon which would constitute trespass if not done under legal right.

The defendants justify their entrance upon the property under a clause in the lease which reads as follows:—

> And the said Patrick H. Nugent for himself, his heirs, executors and assigns covenants, promises and agrees to and with the said Martin R. Dolan, his executors, administrators and assigns that he the said Patrick H. Nugent, his heirs, executors and assigns shall if requested by the said Martin R. Dolan, his executors, administrators or assigns at least three months before the expiration of the term hereby demised, pay to the said Martin R. Dolan, his executors, administrators or assigns a sum of not more than five hundred dollars for the buildings now upon the said property and any further buildings that may be erected or built upon the said property during the term hereby created if being thereon at the expiration of the said term, or else grant a new lease of the aforesaid premises to the said Martin R. Dolan, his executors, administrators or assigns for the further term or time of ten years to commence from the expiration of the said term hereby granted and also a further renewal of the said lease for a further term of ten years after the expiration of the said preceding terms at and under the same yearly rent, payable half-yearly as aforesaid.

This clause, the defendants contend, gave them an option, at the expiration of the term demised upon giving the required notice, either to demand payment for the buildings they had placed upon the lands or to have a renewal of the lease—whichever they might desire. They also contend that they duly requested a renewal of the lease from the present owners but failed to obtain it, and in their counterclaim they ask that specific performance of the covenant be decreed and that the plaintiffs be ordered to execute a renewal lease of the premises.

The plaintiffs, on the other hand, contend that the above clause, on a true construction thereof, gives an option to the lessor either to pay for the buildings or grant a renewal of the lease—whichever he may choose.

The evidence shews that prior to the expiration of the lease the plaintiffs offered to pay to the Fishing Club $500 for the buildings on the property. The learned trial judge upheld the defendants' contention and construed the clause as follows:—

> I am of the opinion that the meaning of the condition of the lease relating to the renewal is that if the lessee so requested the lessor at least three months before the expiration of the lease, he, the lessor, would pay him $500 for the buildings upon the demised premises and the lease would expire and the term of the demise end. Should the lessee not wish to take this course but desire a renewal of the term he must request the lessor to grant a new lease which would be granted upon the same terms as to rental that prevailed with the original lease.

Upon appeal the majority of the Appellate Division upheld this construction, while Hazen C.J. construed the clause as giving to the lessor the option of renewing the lease or paying for the buildings.

From the judgment of the Appellate Division the plaintiffs now appeal to this Court.

The first question we have to determine is, has this Court jurisdiction to hear the appeal? We are of opinion that it has. The matter in controversy is the right of the defendants to a lease of the property in question for ten years at a rental of $50 a year. The evidence shews that the property has an annual rental value of at least $400. If the defendants' contention be correct the plaintiffs will receive a rental of $50 a year, or a sum of $500 for the next ten years. If the plaintiffs' contention be correct the rental received by them for the next ten years would probably amount to not less than $4,000. The difference between these two sums is, in our opinion, the value of the matter in controversy in this action and it is more than sufficient to clothe the court with jurisdiction.

The next question is as to the construction to be placed upon the clause above quoted. We are of the opinion that the construction placed upon it in the dissenting judgment of Hazen C.J., is the correct one. The material words of the clause are ". . . Patrick H. Nugent * * * shall if requested by the said Martin R. Dolan * * * three

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months before the expiration of the term * * * pay * * * a sum of not more than five hundred dollars for the buildings * * * or else grant a new lease of the aforesaid premises * * *."

We find no ambiguity in this language. Nugent here was agreeing to do one of two things; he would, upon request, at the expiration of the ten years either pay for the buildings or renew the lease. The natural and ordinary meaning of the language used is that he had the choice, that the option was his, not Dolan's. The words "or else grant a new lease" imply an alternative, and the renewing of the lease was the alternative of paying for the buildings. To give the clause the construction placed upon it in the courts below would require, as pointed out by Hazen C.J., the insertion of the words "if not so requested" between "else" and "grant," so as to make it read "or else, if not so requested, grant a new lease." This, in our opinion, would be altering the meaning of the unambiguous language of the clause and making a new contract for the parties.

As the defendants have failed to justify the acts of trespass alleged against them the appeal must be allowed with costs both here and in the courts below. As the actual damage resulting from the trespass was slight and was not of the real substance of the action the plaintiffs will have nominal damages only. They are, however, entitled to an order restraining the defendants from further trespassing upon the premises.

Appeal allowed with costs.

Solicitor for the appellants: *Fred. R. Taylor.*

Solicitor for the respondents: *George H. V. Belyea.*

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*Oct. 12.

WINNIPEG ELECTRIC COMPANY V. SCOTT

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Street railways—Non repair of crossing—Injury to pedestrian—Liability of railway company—Sufficiency of inspection—Jury's findings—Appeal.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) affirming the judgment

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) 36 Man. R. 357; [1927] 1 W.W.R. 739.

of Adamson J. (on findings of a jury) in favour of the plaintiff against the defendant company, in an action for damages for personal injuries to the plaintiff caused by his being tripped by a loose plank in a crossing on a railway track of the defendant, for which accident the defendant was alleged to be responsible.

R. D. Guy K.C. for the appellant.

H. Hudson K.C. and *H. J. Symington K.C.* for the respondent.

At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, the judgment of the court was orally delivered by

DUFF J.—We are all of the opinion that the appeal should be dismissed with costs. It is quite unnecessary to go into the questions of law suggested on the argument—in particular, as touching the precise responsibility cast upon the Railway Company by the by-law and the statute and the agreement. It was not disputed—and, of course, it could not be disputed in the circumstances—that, if the Railway Company was negligent and that negligence was the cause of the accident, then they are responsible; and, from that point of view, negligence or no negligence turns entirely upon whether there was a reasonably sufficient inspection. This question was left to the jury and the jury found that the Railway Company had not discharged its responsibility in this respect. We are unanimously of the opinion that the court below was right, and that, the evidence being such as it was, it would have been quite out of the question to withdraw the case from the jury.

Appeal dismissed with costs.

Solicitors for the appellant: *Anderson, Guy, Chappell & Duval.*

Solicitors for the respondent: *Hudson, Ormond, Spice & Symington.*

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*Oct. 12.

ARTHUR BRADSHAW (DEFENDANT). APPELLANT;

AND

MINISTER OF CUSTOMS AND EXCISE (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

Taxation—Sales Tax—S. 19BBB of Special War Revenue Act, 1915 (c. 8), as amended (Dom.)—Exemption of "nursery stock" in subs. 4 of s. 19BBB—Cut flowers—Potted plants.

Sales by florists of cut flowers and potted plants are not exempt from the sales tax imposed by s. 19BBB of the *Special War Revenue Act, 1915* (c. 8) (Dom.) as amended, such articles not being covered by the phrase "nursery stock" in subs. 4 of s. 19BBB.

APPEAL by the defendant (by special leave granted by the Court of Appeal of British Columbia) from the judgment of the Court of Appeal of British Columbia affirming the judgment of Murphy J (1).

The action was brought for consumption or sales tax, pursuant to s. 19 BBB of the *Special War Revenue Act, 1915* (c. 8) (Dom.) as amended, and for the penalty for failure by the defendant to take out an annual license pursuant to subs. 6 of s. 19 BBB.

The question in dispute was whether cut flowers and potted plants, as sold by the defendant, came within the expression "nursery stock" in subs. 4 of s. 19 BBB, so as to be exempt from the sales tax imposed by that section.

The defendant admitted the following facts:

1. That he was during the year 1926, and previously thereto, a producer of the products of flori culture, plant culture and vegetable culture.

2. That he did during the year 1926, produce flowering plants of miscellaneous varieties and having cut flowers from the plants so produced, did sell the same within British Columbia, namely, cut flowers to the retail trade and did not account for and pay consumption or sales tax in respect thereof.

3. That he did, during the year 1926, and previously thereto, produce and sell to the retail trade within British Columbia, potted plants which said potted plants were not capable of being propagated and grown from year to year wholly out of doors and without the protection of glass or any like protection.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1927) 38 B.C. Rep. 251.

The plaintiff admitted the following facts:

1. That the defendant operates a green-house with an adjoining plot of land classed and assessed as agricultural land as distinguished from building lot, and either in the green-house or on the adjoining land he grows the following classes or products:

(*a*) Cut flowers from plants or bulbs, such as chrysanthemums, carnations, hyacinths, tulips, etc.

(*b*) Flowering plants sold in pots so that the ultimate purchaser will have them at the time of their early and full blooming, such as lilies, begonias, azaleas, calceolaria, geraniums, fuschias, cinnerarias, calceolaria (hybrid).

(*c*) Bulb plants, likewise in pots sold so that the ultimate purchaser will have them at the time of early and full bloom, such as cyclamen, primulas, hyacinths.

(*d*) Plants sold in pots such as ferns, palms, rubber plants, auralias.

(*e*) Annual flowering plants sold sometimes in pots or flats, sometimes as individual plants such as asters, stocks, zinnias, lobelia, sunflowers, marigolds.

(*f*) Annual plants for the growth of vegetables sold in flats or pots, or as individual plants such as cabbage, celery, tomatoes, cucumber, cauliflower.

(*g*) Perennial plants such as calceolaria, lupin, digitalis, poenies, primulas, delphinium, bellis, pyrethrum.

(*h*) Vegetable and fruit products such as grapes, tomatoes, lettuce and cucumber.

(*i*) Shrubs and trees such as rhododendrum, laurel, holly, etc.

2. That the defendant sells his products to the retail and/or wholesale trade.

(*a*) Entirely within the province of British Columbia.

3. That all of the products grown by the defendant are grown either under glass or in special plots of ground where they are reared and nurtured either to maturity as a finished product such as sub-paragraphs (*a*) and (*h*) of paragraph 1, herein, or reared to partial or near maturity or readiness for use or consumption such as the products mentioned in sub-paragraphs (*b*) to (*g*), inclusive, and sub-paragraph (*i*) of paragraph 1 herein.

4. That the products mentioned in sub-paragraphs (*e*), (*f*), (*g*), and (*i*) of paragraph 1 are grown by the defendant to partial maturity only and require further growth and cultivation before they are ready for consumption or achieve the object of their growth, and the products mentioned in sub-paragraphs "*b*," "*c*" and "*d*" of paragraph 1 hereof, may or may not, but generally do require further growth and cultivation before they are ready for consumption or achieve the object of their growth.

5. That all of the products grown by the defendant up to the time or sale or delivery by the defendant require and receive nurture and special care, attention and protection (including artificially controlled moisture and temperature) for production.

6. That the products mentioned in paragraph 1 hereof, sub-paragraphs (*b*), (*c*), (*e*), (*f*), and (*h*), are largely if not entirely nurtured by the defendant under glass or with special care and production in order to advance and stimulate their growth in advance of their natural season beyond what is possible if the same were grown without such care for production.

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7. That all of the products grown by the defendant are products of the soil of his own production and are sold in their natural state by the defendant individually.

8. That the defendant is a member of the British Columbia Hot House Association, an Association with an expressed aim or object to test the validity of the tax herein sued for in its application to the various products such as are grown by the defendant and that this action is a test action to that end and that the defendant in the bona fide belief that there is a question to be so tested has refused to take out any license or account for, up to commencement of this action, any tax for this purpose only.

Murphy J. gave judgment for the plaintiff (1) which was affirmed by the Court of Appeal. The defendant appealed to this Court.

R. L. Reid K.C. for the appellant.

E. Lafleur K.C. for the respondent.

At the conclusion of the argument the judgment of the Court was orally delivered by

DUFF J.—We are all of the opinion that this appeal should be dismissed.

The question shortly is, whether or not the phrase "nursery stock," as used in subs. 4 of s. 19 BBB of c. 8 of 5 Geo. V, includes cut flowers and potted plants, with the result that sales of such articles by florists are exempt from the sales tax.

It is not necessary to say anything further with regard to cut flowers. It seems perfectly clear to us that cut flowers cannot be brought within the term "nursery stock."

As to potted plants—"nursery" implies a place devoted to the cultivation of trees, shrubs, and plants—for the purpose of transplantation; bringing them to a degree of maturity in which that is practicable.

That this is the signification of the word as used in the phrase in question is indicated by the quotation made from the *Customs Tariff Act* at page 4 of Mr. Lafleur's factum (*a*), and this view of the effect of the phrase is also borne out by the French version, in which nursery stock is described as "*plants de pépinière.*" The nursery is conceived

(1) (1927) 38 B.C. Rep. 251.

(*a*) "Trees, plants and shrubs, commonly known as nursery stock" in item 82, schedule A of *The Customs Tariff, 1907*, 6-7 Edw. VII, c. 11.

by the statute as a "*pépinière,*" a place in which "*plants*" are grown for the purpose mentioned; the word describing the articles, as Mr. Lafleur points out, is "*plants*", not "*plantes*". Potted plants, in our view, are not within the ordinary meaning of the phrase "nursery stock." We think the appeal should be dismissed, with costs.

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Duff J.

Appeal dismissed with costs.

Solicitors for the appellant: *Dickie & De Beck.*

Solicitors for the respondent: *Congdon, Campbell & Meredith.*

JOSEPH WALTER McFARLAND, OFFICIAL LIQUIDATOR OF D. E. BROWN, HOPE & MACAULAY LIMITED (PLAINTIFF)..... APPELLANT;

AND

LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA (DEFENDANT)..... RESPONDENT.

1927
*Feb. 3.
*April 20.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Guarantee—Company—Bond guaranteeing true accounting by liquidator of company—Default by liquidator—Dispute as to extent of guarantor's liability—Moneys received by liquidator as personal agent of a secured creditor of the company under power of attorney given to facilitate realization of securities—Claim against guarantor for interest.

Defendant by its bond guaranteed the true accounting by L. for what he "shall receive or become liable to pay as official liquidator" of a company "at such periods and in such manner as the Judge shall appoint, and pay the same as the Judge hath by the said orders directed, or shall hereafter direct." Auditors reported a shortage in L.'s accounts, and plaintiff, who had succeeded L. as liquidator, was, by order, given leave to proceed against L. under s. 123 of the *Winding-up Act* (R.S.C. 1906, c. 144), and subsequently an order was made declaring L. guilty of misfeasance and breach of trust in relation to the company, and directing him to pay to plaintiff the amount of the alleged shortage. Defendant, in paying under its bond, refused to pay part of the shortage on the ground that such part did not come within its bond, and plaintiff sued therefor.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Held, affirming judgment of the Court of Appeal for British Columbia (37 B.C. Rep. 373), that defendant was not liable; on the evidence, the moneys in question were received by L. as the personal agent of one O., a secured creditor of the company, when acting under a power of attorney from O., authorizing L. to deal with O.'s securities, and given to facilitate the realization thereof; the moneys never belonged to, and were never accountable for by, the company of which L. was liquidator, and could not properly have been made the subject of a misfeasance order under said s. 123; while some of the moneys in question appeared to have passed into L.'s account kept by him as liquidator, payment thereof into that account was without authority and L. would have been, and was, within his rights as against the company in withdrawing them and placing them to his own personal credit; the condition of the bond had no application to the moneys in question.

A claim by plaintiff for interest was disallowed, in view of the terms of the condition of the bond, and the absence of any order for payment of interest.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) which, reversing the judgment of Hunter C.J.B.C., held that the defendant was not liable under its guarantee bond in respect of the moneys in question. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

E. Lafleur K.C. for the appellant.

W. N. Tilley K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The company, of which the appellant is now official liquidator, was ordered to be wound up in June, 1916; the defendant Lockwood was appointed official liquidator in August of that year, and the guarantee bond, upon which the action was brought, was executed on the 25th of that month.

At the date of the winding up, one Ormrod was a secured creditor in $30,000 odd, that sum being due to him in respect of a loan made to the company by him in December, 1912. All the usual steps were taken in the winding up proceedings. No claim was made by Ormrod, and in two reports made by the district registrar of the court respecting claims of creditors, it was stated that there was no

(1) 37 B.C. Rep. 373; [1926] 3 W.W.R. 290.

creditor holding security. In March, 1918, Ormrod executed a power of attorney, appointing Lockwood, described not as official liquidator, but simply as " of 739 Hastings Street West, in the city of Vancouver, in the province of British Columbia, Broker," as his attorney, authorizing him to deal with the Ormrod securities as he might see fit; to execute all necessary conveyances; and to give receipts and discharges for all or any the sum or sums of money "which shall come into his hands, in virtue of the powers herein contained."

Lockwood received no authority from the court to accept this power of attorney, and it is quite clear that it was given to him on the suggestion of Ormrod's Vancouver agents for the purpose of facilitating the realization of Ormrod's securities. Lockwood proceeded to realize these securities by acquiring titles to properties affected by them, and to dispose of the properties. The details of these proceedings are immaterial, although it may be observed that a considerable part of the proceeds of each security was paid by Lockwood direct to Ormrod's agents, Richards & Company, apparently without any authority from the court. Lockwood's accounts having been investigated by auditors, a shortage was reported of $18,329.02, and on the 26th of May, 1923, an order was made, giving the appellant liberty to prosecute proceedings against Lockwood, under s. 123 of the *Winding-Up Act;* and on the 12th of June, 1923, an order was made declaring Lockwood guilty of misfeasance and breach of trust in relation to the company, and directing him to pay that sum to the appellant, together with the expenses of audit and costs. In July, 1923, the respondent company paid to the appellant the sum of $8,217.75, being the difference between the total misappropriation reported by the auditors and the moneys included therein which were alleged to belong to Ormrod. The present action was brought at the instance of Ormrod, who agreed to indemnify the appellant against the costs of the action. At the trial, the appellant's claim was sustained, but this judgment was reversed by the Court of Appeal except as to certain items not material to be considered, Macdonald C.J.A., dissenting. The bond, upon which the action is brought, is upon the condition that " the said

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Duff J.

Herbert Lockwood * * * shall truly account for what [he] shall receive or become liable to pay as Official Liquidator * * * at such periods and in such manner as the Judge shall appoint, and pay the same as the Judge hath by the said orders directed, or shall hereafter direct." And the question is whether the moneys sued for were received by Lockwood as official liquidator, or are moneys which he became liable to pay as official liquidator.

The evidence seems to establish clearly that these moneys were received by Lockwood as the personal agent of Ormrod, when acting under the power of attorney above mentioned. They never were at any time the moneys of the company, and never could properly have been made the subject of a misfeasance order under s. 123 of the *Winding-Up Act*. The order of the 12th of June, 1923, appears to have been, as regards these moneys, an order made without jurisdiction.

It is contended on behalf of the respondent company that the condition of the bond above quoted applies only to moneys which are the moneys of the company within the meaning of s. 123. It does not appear to be necessary to decide whether or not that is the true construction of the bond. It seems sufficiently clear that the condition is limited in its application at least to moneys which are the moneys of the company or moneys in respect of which the company is by law accountable to others. Some of the moneys in question, it is true, seem to have passed into Lockwood's account kept by him as official liquidator, but the payment of these moneys into that account was a payment wholly without authority, and he would have been, and was, quite within his rights as against the company in withdrawing them, and placing them to his own personal credit. It is difficult to see upon what principle the company could be charged with responsibility in respect of such moneys. Such being the case, it appears to me that the language of the condition has no application to the facts.

A point was argued by Mr. Lafleur with some elaboration, to the effect that on a true view of the accounts, the shortage in respect of the company's moneys (that is to

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Duff J.

say, moneys which were admittedly such), after allowing for the sum paid by the respondent company, was sufficient to justify the judgment. The point was very fully considered on the argument, and a further examination of the record leaves no doubt in my mind that there is no sufficient ground for doubting the accuracy of the auditor's report.

A further question is raised as regards interest. As respects that question, the answer of the respondent company seems conclusive. The condition provides for the payment of moneys received and for moneys he is "liable to pay * * * at such periods and in such manner as the judge shall appoint." There has been no order in respect of the payment of interest, and that claim, in consequence, must also be disallowed.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh, McKim, Housser & Molson.*

Solicitors for the respondent: *Pattulo & Tobin.*

CANADIAN RAYBESTOS COMPANY, LIMITED v. BRAKE SERVICE CORPORATION, LIMITED, ET AL.

1927

*June 2, 6, 7.
*June 17.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Action for infringement—Invalidity of patent—Anticipation—Lack of invention

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada, dismissing the plaintiff's action for infringement of patent on the ground of invalidity of the patent, holding that it had been anticipated by one Cady, and also that it was invalid for lack of invention (1). The patent had been granted to plaintiff as the assignee of one McBride, and was for an alleged new and useful improvement in brake band lining machines.

*PRESENT:—Duff, Mignault, Rinfret, Lamont and Smith JJ.

(1) [1926] Ex. C.R. 187.

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CANADIAN RAYBESTOS CO., LTD. v. BRAKE SERVICE CORP., LTD.

Duff J.

The appeal was dismissed with costs. The judgment of the court, delivered by Duff J., said in part as follows:

"It is not disputed that Cady's machine is the mechanical equivalent of McBride's. The learned trial judge has found as a fact that Cady's machine was completed in 1918, and that McBride's work did not pass beyond the experimental stage until the 1st of July, 1919; in other words, that McBride had not reduced his ideas to definite and practical shape until after Cady's invention was completed."

"There appears to be no satisfactory ground for disagreeing on these points with the learned President of the Exchequer Court, but I have come to the conclusion also that McBride's action must fail on the second ground, namely, that there was no patentable invention. There is nothing new, either in McBride's devices or in the end he sought to attain, except that these devices were applied by him to a new material. Machines had been constructed for boring and countersinking in one operation, and devices were well known for guiding the operation so that the axis of the hole bored in the blind side of the material should correspond with the axis of the existing hole. Then the stop for limiting the depth of the countersink was a perfectly well known device; indeed, the uncontradicted evidence is to the effect that every commercial press operated by power contains that element."

Appeal dismissed with costs.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. L. Scott K.C. for the respondent.

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*Feb. 9.
*April 20.

MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA LTD. *v.* BAXTER BROTHERS ET AL

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contract—Date—Evidence—Date of mailing—Findings of fact in courts below—Farm Implement Act, R.S.S. 1920, c. 128, ss. 19, 31.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judg-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) 21 Sask. L.R. 81; [1926] 2 W.W.R. 805.

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MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA LTD. v. BAXTER.

ment of Bigelow J., who held that the making of the contract between the plaintiff and defendants was not completed until May 10, 1920; that, therefore, s. 31 of the *Farm Implement Act,* R.S.S., 1920, c. 128, applied, the contract was invalid, and the plaintiff's claim under it must fail.

The contract was for the sale of certain farm implements from the plaintiff to the defendants. In certain respects it did not comply with s. 31 of said Act. S. 31, by its terms, applies to contracts made after 31st March, 1920. S. 19 of the Act provides that

> The signing of such contract by the purchaser shall not bind him to purchase the implement therein described until the same is signed by the vendor or some agent * * * and a copy thereof is delivered to or deposited in a post office addressed to the purchaser, postage prepaid and registered.

The question was whether a binding contract was completed within s. 19 on or before the 31st March, 1920, so as to avoid the application of s. 31. This depended on the question of fact whether or not the plaintiff, as was contended, actually deposited a copy of the contract in the post office addressed to the defendants, postage prepaid and registered, on or before the 31st March, 1920.

After hearing counsel on behalf of the appellant and the respondents, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs, Newcombe J. dissenting.

Appeal dismissed with costs.

F. L. Bastedo K.C. for the appellant.

P. H. Gordon K.C. for the respondents.

BOWMAN *v.* PANYARD MACHINE AND MANUFACTURING CO.

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*May 9.

Appeal—Delay in prosecuting—Appearance of bad faith—Motion to quash granted

Where an appellant is in serious default in the prosecution of his appeal, and his conduct in defending the action without disclosing that he had parted with his interest in the subject matter, with the result that his transferee would not be bound by the judgment, if maintained, savours of bad faith, indulgence will be refused and the appeal will be quashed at the instance of the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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BOWMAN v. PANYARD MACHINE & MFG. CO.

MOTION by the respondent to quash the appeal by the defendant to this Court from the judgment of the Exchequer Court of Canada (1) on the grounds (1) That the Court had not jurisdiction to hear the appeal; (2) That the appeal was devoid of merit and substance and was taken against good faith; and (3) That the appellant had unduly delayed to prosecute his appeal.

W. D. Herridge for the motion.

M. Powell contra.

At the conclusion of the argument, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the motion should be granted. There is every appearance of bad faith. The action in the Exchequer Court from the first was admittedly allowed to proceed on the erroneous assumption that the defendant was still carrying on the business. The proceedings, except as to the claim for damages, were thus rendered useless. The court was allowed to go through the idle form of granting an injunction in complete ignorance of what the defendant well knew would render it of no avail because he had parted with his interest to the company formed to take it over and of which he is the President. When asked by the Court whether he would consent on behalf of the company to its being added as a party so that it might be bound by the determination of the appeal on the question of infringement, counsel for the defendant-appellant stated that he was without instructions to do so.

Under these circumstances, an appeal is brought to this Court against a judgment entered nearly a year ago, and although several terms have elapsed, that appeal is not yet inscribed. The delay is not satisfactorily explained. Should the appeal be allowed to go on, and fail, the respondent will then be obliged to proceed against the company, which will not be bound by the result. Such tactics should not be encouraged by the granting of indulgence. The appellant is in grave default.

We are satisfied that the motion should be granted, and the appeal dismissed with costs.

Appeal quashed with costs.

(1) [1926] Ex. C.R. 158.

HIS MAJESTY THE KING (RESPONDENT)..APPELLANT; 1927

AND *Nov. 12. *Dec. 16.

DOMINION BUILDING CORPORATION LIMITED (CLAIMANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Claim against—Reference by Minister to Exchequer Court—Jurisdiction—Motion for permission to withdraw reference—Appeal to Supreme Court of Canada—Jurisdiction—Exchequer Court Act, R.S.C. 1906, c. 140, s. 82—Claim not arising "in connection with the administration of" the Minister's department (Exchequer Court Act, s. 38)—Order in Council purporting to direct withdrawal of reference—Res judicata—Pleadings—Restriction of statement of claim to claim as referred to the court—Amendment.

The claimant presented, in a letter to the Minister of Railways and Canals, a claim for damages for breach of an alleged contract for sale by the Crown to claimant's assignor of certain land occupied by the Canadian National Railways. The contract involved the erection by the purchaser of a 26 storey building, four floors of which were to be leased to the Canadian National Railways, and five floors to the Department of Customs and Excise, and it was apparent from the claimant's letter that the successful financing of its project depended on these leases being entered into, and that the failure to obtain them was the substantial basis of its claim. Several cabinet ministers took part in the negotiations for the alleged contract, and it was the subject of cabinet discussions and Orders in Council. The Acting Minister of Railways and Canals, purporting to act under s. 38 of the *Exchequer Court Act*, referred the claim, as set out in claimant's letter, to the Exchequer Court. The Crown subsequently moved for permission to withdraw the reference, or, alternatively, for the statement of claim to be struck out, on the grounds: (1) that the reference was not authorized by s. 38, and was, therefore, *ultra vires* of the Minister of Railways and Canals; (2) that an Order in Council purporting to direct the withdrawal was effective, if the reference had been validly made; and (3) that the statement of claim as delivered was not within the purview of the reference authorized. The motion was dismissed ([1927] Ex. C.R. 101) and the Crown appealed.

Held, this Court had jurisdiction to hear the appeal, under s. 82 of the *Exchequer Court Act;* the rejection of the first and second grounds of the motion was tantamount to allowing a demurrer by the claimant to two prospective defences of the Crown, and effectively excluded them from the issues; moreover, the first ground challenged the Exchequer Court's jurisdiction, and the judgment affirming that jurisdiction was a final judgment.

Held, further, that the claim did not arise "in connection with the administration of" the Department of Railways and Canals, within s. 38 of the *Exchequer Court Act;* the project was a governmental undertak-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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ing, as distinguished from a merely departmental transaction; the Minister of Railways and Canals, if he executed the contract, was acting, not in the exercise of his administrative powers as such minister, but in the execution of a special authority deputed to him by the Government; the reference was, therefore, unauthorized, and the Exchequer Court had no jurisdiction to entertain the claim. On this ground, the appeal was allowed.

Dealing with the other grounds of the Crown's motion, it was *held,* that its contention that the reference had been withdrawn by Order in Council, was successfully met by claimant's answer of *res judicata,* this contention having been rejected by the Exchequer Court on a previous motion; that, as to the statement of claim, in so far as it might substantially depart from or exceed the claim set out in claimant's letter, it transcended the jurisdiction of the Exchequer Court, which was restricted to the very claim referred to it by the Minister; but the objection in this respect (if a proper subject of appeal to this Court) presented matter for the exercise of discretion as to amendment, rather than a ground for striking out the claimant's pleadings or otherwise summarily determining its action.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1) dismissing its motion for an order granting leave to withdraw a reference to that court of the claim against His Majesty presented by the claimants, or, alternatively, for an order striking out the statement of claim filed. The material facts of the case, and the grounds of the motion, are sufficiently stated in the judgment now reported. The appeal was allowed.

Lucien Cannon K.C. and *C. P. Plaxton K.C.* for the appellant.

G. H. Kilmer K.C. and *R. V. Sinclair K.C.* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The Crown appeals from an order of the Exchequer Court dismissing a motion made on its behalf that it be permitted to withdraw the reference to that Court of a claim against His Majesty presented by the claimants, or, alternatively, that their statement of claim be struck out. The Acting Minister of Railways and Canals, purporting to do so under s. 38 of the *Exchequer Court Act,* referred to that Court this claim, then before

(1) [1927] Ex. C.R. 101.

him in the form of a letter from the claimants, demanding payment of $981,000 damages said to have arisen from breach of an alleged contract for the sale by the Crown to their assignor of a certain property occupied by the Canadian National Railways, situate at the northwest corner of King and Yonge streets in the city of Toronto.

The motion before the Exchequer Court was based on three grounds:

1. That the reference was not authorized by s. 38 of the *Exchequer Court Act* and was, therefore, *ultra vires* of the Minister of Railways and Canals:

2. That an Order in Council purporting to direct the withdrawal of the reference was effective, if such reference had been validly made;

3. That the statement of claim as delivered was not within the purview of the reference authorized.

A question of the jurisdiction of this Court to entertain the present appeal, raised by a preliminary motion to quash, stood over to the hearing on the merits and must now be dealt with.

Under s. 82 of the *Exchequer Court Act,* in any judicial proceeding in which the amount in controversy exceeds $500, there is a right of appeal to this Court from a final judgment of the Exchequer Court or a judgment pronounced by it upon any demurrer or question of law raised by the pleadings. In rejecting the first and second grounds of the Crown's motion, the Exchequer Court has determined that, assuming the facts to be as stated in the claimants' letter preferring the claim referred to the court, two grounds of defence, which might otherwise have been set up by the Crown, are not available to it because not good in law, inasmuch as it has held that the reference was validly made and that the Order in Council directing its withdrawal is without legal force. That is tantamount to allowing a demurrer by the claimant to two prospective defences of the Crown, and effectively excludes them from the issues to come before the court. Moreover, the first ground of the motion challenges the jurisdiction of the Exchequer Court to entertain the claim, and the judgment affirming that jurisdiction is final. We are of the opinion

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that this appeal is, therefore, competent. It is within the intendment, if not within the literal terms, of s. 82 of the *Exchequer Court Act.*

The second ground of the Crown's present motion was, in our opinion, successfully met by the claimants' answer of *res judicata.*

On a previous motion by the claimants for an order that their claim be taken *pro confesso* for default in delivery of a statement of defence thereto by the Crown, the learned President of the Exchequer Court had rejected the Crown's answer that the reference had been withdrawn by Order in Council (1). In his reasons for judgment he had said:

> I am of opinion that there was no authority for the withdrawal of the Reference by Order in Council, that the reference is still effective, and that the statement of claim is properly before the Court * * *. I am not aware of any statute or other authority which enables the Crown of its own motion to withdraw a reference, * * *

In disposing of the motion now before us the same learned judge, referring to the earlier motion, said (2):

> Recently the plaintiff moved for judgment upon the ground that the respondent was in default in filing a statement of defence, which was refused, and the respondent was given further time to file his defence. Upon the hearing of that motion before me, the respondent contended that the reference had been revoked by the Order in Council referred to, and I decided against this contention.

The ground that the reference had been withdrawn by Order in Council was, therefore, not open on the present motion.

The objection based on an alleged departure in the statement of claim from the terms of the reference authorized, while, no doubt, important (if a proper subject of appeal to this Court), seems to us rather to present matter for the exercise of discretion as to amendment than to afford a ground for striking the pleading from the records of the court or otherwise summarily determining the claimants' action.

The claim put forward in the statement of claim, we should perhaps assume, was intended to be that set forth in the claimants' letter upon which the reference was directed. Its purview must be gathered from the terms in which it is couched in the letter, since the document by which the reference was made reads as follows:

(1) [1927] Ex. C.R. 79. (2) [1927] Ex. C.R. 101, at p. 104.

IN THE EXCHEQUER COURT OF CANADA

In the matter of

DOMINION BUILDING CORPORATION, LIMITED.....CLAIMANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.

Dated at Ottawa, this sixteenth day of September, 1926.

(Sgd.) H. L. DRAYTON,
Acting Minister of Railways and Canals.

To the Registrar of the Exchequer Court of Canada.

The " annexed claim " was the claimants' letter of the 4th of September, 1926. In so far as the claim set forth in the statement of claim may substantially depart from or exceed that contained in the claimants' letter, it transcends the jurisdiction of the Exchequer Court, which is restricted to the very claim referred to it by the Minister. For that claim only could judgment be given.

The first ground of the appellant's motion, and that most urgently pressed upon us, requires careful consideration.

By s. 38 of the *Exchequer Court Act* it is enacted that

Any claim against the Crown may be prosecuted by petition of right or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

The important question now presented is whether the claim which forms the subject matter of the present proceeding arises " in connection with the administration of " the Department of Railways and Canals within the meaning of the section just quoted.

In construing that section it is important to note that, while " any claim against the Crown may be prosecuted by petition of right," no doubt for convenience and to avoid the necessity of obtaining the fiat of the Governor General, which is essential to the filing of a petition of right, intra-departmental claims may be summarily referred by the presiding Minister. But such claims must

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Anglin C.J.C.

arise "in connection with the administration of" the department and they must exclusively concern such administration.

Taking up the claim as presented in the letter of the 4th of September, 1926, we find that, while the formal demand is for a sum of $981,000,

> the amount which the undersigned (the claimants) have lost or are liable for, by reason of the cancellation of the contract

(i.e., the contract for the purchase of the lands in question), the letter in describing the claim and the circumstances in which it is alleged to have arisen, says:

> It was well understood from the inception of the negotiations by the Rt. Hon. the Prime Minister, by the Rt. Hon. the Minister of Railways and Canals, the Hon. the Minister of Public Works, and by other members of the Cabinet, * * * that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by (*sic*) the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary Orders in Council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase, could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

In an earlier passage the claimants, referring to the Order in Council sanctioning the sale, had said:

> It was a term of the Order in Council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the Order in Council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the Order in Council, the ground floor and three floors of the building.
>
> It was part of the original negotiations that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by Order in Council, and an Order in Council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed, at the request of the Government, an extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned Order in Council would be passed. This Order in Council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to

have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary Order in Council to make the contract completely effective.

It is, therefore, apparent on the face of the claim, as referred to the court, that the leasing of the nine floors of the projected building—four to the Canadian National Railways and five to the Department of Customs and Excise—was an essential feature of the project of the claimants, so essential that its being successfully financed was wholly dependent on these leases being entered into and that without them the contract had no financial value to the claimants. Indeed their failure to obtain such leases is the substantial basis of the present claim, although in form it is a claim for breach of the contract of sale. The erection of the 26 storey modern fireproof office building was a term of the sale of the property to the claimants' assignor. The financing of the entire operation depended upon the claimants being assured of the two leases, one to the Canadian National Railways and the other to the Department of Customs and Excise.

Moreover, the contract, with all its terms, must be considered as a whole. It was negotiated not by the Minister of Railways and Canals alone, but

by the Rt. Hon. the Prime Minister, the Rt. Hon. the Minister of Railways and Canals, the Hon. the Minister of Public Works and by other members of the Cabinet as well as by the Canadian National Railways.

The claimants' letter in effect says so. The Minister of Customs and Excise must have been a party to the negotiations, inasmuch as they covered the leasing of floor space for his department. If, therefore, the contract for breach of which damages are claimed, was entered into, by His Majesty represented by the Minister of Railways, the latter, in executing that contract, was acting, not in exercise of his administrative powers as Minister of Railways and Canals, but in the execution of a special authority deputed to him by the Government. As Minister of Railways and Canals he could not bind the Departments of Customs and Excise and of Public Works, and it may be doubtful how far he could bind the Canadian National Railways. Yet, admittedly, unless engagements to take leases for the Department of Customs and Excise and for the Canadian National Railways were assured, the contract could not be carried out; it had no financial value to the claimants or

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their assignor. The whole project was a governmental undertaking, as distinguished from a merely departmental transaction. As such, it became the subject of cabinet discussion and of Orders in Council. So, too, in communicating the withdrawal of the Crown from the project, the Minister of Railways must have acted as the agent and representative of the Government. Only in that capacity could he properly take that action in regard to such a contract.

For these reasons, we are satisfied that the claim of the Dominion Building Corporation for damages for the repudiation of the alleged contract is not a claim which arises "in connection with the administration of" the Department of Railways and Canals, within the purview of s. 38 of the *Exchequer Court Act*. It follows that the Exchequer Court is without jurisdiction to entertain it.

The appeal must be allowed. Under the circumstances there will be no order as to costs.

Appeal allowed.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent: *R. V. Sinclair.*

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*Nov. 3.
*Dec. 16.

O. E. VARETTE (DEFENDANT).....APPELLANT;

AND

S. SAINSBURY, I. W. C. SOLLOWAY, C. A. GENTLES AND D. M. HOGARTH (PLAINTIFFS) .....} RESPONDENTS.

AND

TREMOY LAKE SHORE MINING SYNDICATE .....} (DEFENDANT).

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

New trial—Discovery of new evidence as ground for

A new trial, applied for on the ground that new evidence has been discovered since the trial, should be granted only where the new evidence proposed to be adduced could not have been obtained by reasonable

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

diligence before the trial and is such that, if adduced, it would be practically conclusive. (*Young* v. *Kershaw*, 16 T.L.R. 52, at pp. 53-54, cited).

An action for specific performance of an alleged agreement for sale of a "unit" in a mining syndicate was dismissed at trial. Plaintiffs appealed, and, alternatively, asked for a new trial on the ground of discovery of new evidence. The Appellate Division, Ont., without passing on the main appeal, granted a new trial. Defendant appealed to this Court and asked that the judgment at trial be affirmed.

Held: The new trial should not have been granted; the proposed new evidence could have been ascertained with reasonable diligence before the trial; also, it could not conclusively establish plaintiff's case, as the fact proposed to be proved could not affect the judgment unless the relation of vendor and purchaser existed between the parties, and this Court, on the evidence, sustained the trial judge's finding that that relation did not exist. The appeal was allowed, and the judgment at trial, in its result, restored.

APPEAL by the defendant Varette from the judgment of the Appellate Division of the Supreme Court of Ontario, which vacated and set aside the judgment of Masten J. dismissing the plaintiffs' action, and ordered a new trial.

The action was for specific performance of an agreement alleged to have been made by the defendant Varette for sale of a "unit" in a certain mining syndicate, or, in the alternative, for damages for failure to make delivery. Masten J. dismissed the action. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario, asking for a reversal of the trial judgment, and in the alternative, for a new trial on the ground of the discovery of new evidence. The Appellate Division did not pass upon the main appeal, but granted the plaintiffs' motion for a new trial. The defendant Varette appealed to this Court, and asked that the judgment of Masten J. be affirmed. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs, and the judgment of Masten J. restored.

G. H. Kilmer K.C. and *H. H. Davis* for the appellant.

W. N. Tilley K.C. and *J. F. Boland* for the respondents.

The judgment of the court was delivered by

RINFRET J.—The Tremoy Lake Shore Mining Syndicate owned certain mining claims in the province of Quebec. It had already disposed of 90 per cent of its interests to the

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Rinfret J.

Noranda Mines Limited and the remaining 10 per cent was also under option to the same company. This 10 per cent interest was divided into 100 parts, called units or points; and between the members of the syndicate—thirteen in all—these units or points were held in unequal proportions formed of several entire units or portions of units. It was understood that, pending the exercise of its option by the Noranda company, each owner could deal with any of his units or portions of units as if they had been shares in a company.

The Noranda Mines Limited had formed The Horne Copper Corporation. For a time, and until the Noranda company exercised its option, the 10 per cent interest was represented by shares of the Horne corporation held by the syndicate in undivided ownership and evidenced by one certificate of that corporation. For that reason, the units were sometimes referred to as Horne units. A stock ledger was kept for the syndicate, in which the names of the transferees of units or portions thereof were successively registered.

The appellant Varette was a bookkeeper for a firm of contractors in New Liskeard and acted as secretary-treasurer for the syndicate. The respondents Sainsbury and Solloway were mining brokers of Toronto, having their offices together, and jointly interested in making commissions out of the sale of these units.

On the 16th September, 1925, Solloway wrote to Varette:

> I phoned you last evening and wired you to-day and am now awaiting a reply * * * I can place all the units amongst my friends that you can let me have at a reasonable figure. What I shall expect you to do is that you are in touch with the owners and you can get a price from them, make a fair profit for yourself and pass them on to me * * *.

No reply to this communication appears to have been made by Varette.

Almost two months later, on November 10, Varette wired to Solloway:

> I have offered to-day for sale subject to immediate acceptance one unit of Tremoy Lake Shore Mining Syndicate at $8,750 flat. If interested, wire at once.

Both parties agree that the telegram should be read: "I am offered to-day, etc." or "I have, offered to me to-day for sale * * * , one unit, etc."

Solloway wired, on November 14, to Varette:

Will accept your offer on Noranda unit at price quoted. Meet me on 47 to-morrow without fail as I cannot stop off.

The unit thus offered and accepted was subsequently taken up and there is no controversy over it.

As agreed, Solloway met Varette at the New Liskeard railway station, on the arrival of train no. 47. He confirmed the purchase already made and expressed his desire to buy other units. Varette said he might be able to send another; and it is this second unit that is the subject of the present litigation.

Solloway was going into the north country and expected to be away for a few weeks. He told Varette that, during his absence, Sainsbury would act for him and would look after the units. By telegraph from New Liskeard he advised Sainsbury in Toronto of the result of his interview with Varette and again, by letter the same day from Ramore, a station further north. Telephone messages and telegrams were afterwards exchanged between Sainsbury and Varette concerning the forwarding of papers to complete the sale of the first unit and the possibility of procuring other units.

On November 21, Varette sent a telegram addressed to Solloway as follows:

Can offer one unit same price delivered Toronto Wednesday morning.

This telegram went to Sainsbury in due course and the offer was accepted by telephone. At the same time, there was talk of a third unit.

On the 26th November, Varette telegraphed:

One unit leaving twenty-seventh. Have still one more. This will be the last available. Wire reply if satisfactory.

The "one unit leaving twenty-seventh" was the second unit, which is the subject-matter of this action. The "one more" unit referred to in the telegram was the third one, with which we are not concerned.

The second unit was never delivered. On November 30, Varette telegraphed:

Other parties have offered more money. Cannot procure the unit offer (sic).

Sainsbury went to New Liskeard in an effort to procure units himself from the holders. He was offered one at $9,500. He could not go beyond $9,100, and could find none at that price.

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Rinfret J.

Sainsbury, having vainly attempted to procure delivery of the second unit from Varette, brought action for specific performance. He alleged he had entered into the agreement on behalf of C. A. Gentles and D. M. Hogarth, and they were joined as co-plaintiffs. At the beginning of the trial, Solloway was also added as a party plaintiff.

The action was dismissed by Masten J. on the ground that its subject-matter was realty and the Statute of Frauds afforded a sufficient defence. He also expressed the view that Varette "never agreed to act as a personal or direct vendor," but only "as an agent in securing offers from members of the syndicate who were willing to sell one or more shares and submit them to Solloway."

The plaintiffs served the ordinary notice of appeal praying for the reversal of the trial judgment. They subsesequently served a supplementary notice of motion to set aside the judgment upon the ground that the learned trial judge had erred in refusing an application made by them at the close of the trial to amend by claiming damages for breach of warranty of authority; and, in the alternative, for a new trial on account of the discovery of new evidence.

The Appellate Division did not pass upon the main appeal, but granted the motion for a new trial.

Varette now appeals and submits that the judgment of the trial judge should be affirmed. The respondents, while upholding the order of the Appellate Division, contend that judgment should have been given in their favour and their action should be maintained.

On an application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that, if adduced, it would be practically conclusive. *Young* v. *Kershaw* (1).

The new evidence upon which the respondents based their application was produced—as it had to be—before the Court of Appeal and, for the present purpose, no other evidence can be relied on. The only new disclosure it makes is the precise date of the sale of a unit to one Tim-

(1) (1899) 16 T.L.R. 52, at pp. 53-54.

mins. The fact of the sale itself had already been stated by Varette in his examination for discovery and at the trial. Counsel for respondents then had full opportunity of cross-examination, and the papers in respect of that transaction were produced. It was then noticed that the document evidencing the Timmins' sale did not bear a date; but it can hardly be contended that, with reasonable diligence, such date could not have been ascertained before the trial. The subsequent ascertainment of the exact date under those circumstances was not, in our view, a discovery of new evidence within the rule of law governing the right to a new trial.

But the respondents' application lacked yet another requirement, which is that the proposed new evidence would not conclusively establish the plaintiffs' case.

Even assuming that the unit sold to Timmins was the same unit previously offered to Solloway on the 21st November—an assumption at best doubtful upon the evidence of record—that fact could not affect the judgment unless the relation of vendor and purchaser was proven to have existed between Varette and Solloway or Sainsbury. The trial judge held that such relation did not exist. The Appellate Division directed a new trial without hearing counsel for Varette on that point. It now becomes the duty of this court to consider that question.

The best way to approach this aspect of the case is first to determine with which of the two Toronto mining brokers, Solloway or Sainsbury, the appellant Varette contracted, if at all, in making the bargain alleged in connection with the second unit. Before deciding upon the intention of the parties to an agreement, it is, of course, necessary to ascertain who the parties were.

In our view, Solloway was the man with whom Varette made whatever bargain was made, and Sainsbury acted throughout merely on behalf of Solloway.

It should first be noticed that Sainsbury and Solloway both had desks in the same office in the Royal Bank Building. They were working together. In the words of Sainsbury:

> The idea was that he (Solloway) had several prospective buyers for a number of units and we were working together.
>
> Q. You and Solloway were working together? Yes.

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Rinfret J.

The proposition for the purchase of the second unit came up during the conversation between Solloway and Varette at their meeting at the New Liskeard railway station on November 15. The agreement concerning the first unit was then concluded and Varette advised Solloway that he might be able to "pick up" some other units. Solloway said he was going to Lightning River and would be away possibly three weeks, but to send them down to his office, "that he had a man in his office who would look after it the same as if he were there."

Prior to his leaving for the north, Solloway had told Sainsbury about his relations with Varette. Sainsbury knew of Varette's letter to Solloway of November 10 concerning the first unit and of Solloway's reply of the 14th November that he would take the unit. On that date, Sainsbury himself telephoned to Varette "to tell him of the circumstances that Solloway was leaving and that he would take care of the business at this (the Toronto) end * * * in Solloway's place." Further, Sainsbury knew that Solloway was advising Varette to the same effect.

After his interview with Varette at New Liskeard, on the 15th November, Solloway telegraphed to Sainsbury from Swastika:

One Horne unit (N.B.—That was the first unit) going to Imperial Bank Monday at price quoted in letter stop Varette may be able to send another unit end of week. Present this telegram to Wilkinson as authority for you to get unit.

He confirmed this by letter from Ramore (another railway station up north) on the same day:

I saw Varette and he promised me to send a Horne Unit to Imperial Bank to-morrow at same price he wrote me and to try and *get me* another unit by the end of the week.

I wired you from Swastika to 304 Royal Bank. Now don't fail to take up the unit and don't fail to keep me a share of your profit.

There is no use of wiring Varette for units, as he will do his best to get another one.

Sainsbury admits that this letter made clear to him that Varette was buying a unit for Solloway.

Varette got busy and on November 21 he was able to telegraph the offer of the second unit:

Can offer one unit same price delivered Toronto Wednesday morning. Telephone me 157 New Liskeard.

This telegram was addressed to Solloway. In accordance with his arrangements with the latter, Sainsbury re-

ceived and opened the telegram. He thereupon telephoned to Varette: "I got your wire addressed to Solloway." He pretends having then told Varette that "he was the buyer and not Solloway" and that afterwards he went on to deal with Varette under his own name. This is denied by Varette who swears positively that the offer was accepted "on behalf of Solloway." Varette's statement was accepted by the trial judge, who said: "Where his (Varette's) evidence differs or varies from that of Sainsbury and Solloway, I prefer the evidence of Varette." On the record, we agree with the learned trial judge and accept Varette's version, which is more consistent with the course of events and, moreover, does not present the difficulty involved in Sainsbury's story that he had taken advantage of Solloway's absence and had broken faith with him.

When Solloway returned, he wrote Varette that Sainsbury had advised him that he was "sending two more units" and thanked him "for this business." On the whole, the conclusion must be that, in these transactions, Sainsbury was "Solloway's man." So Varette understood; and, in that he was perfectly justified. For that reason, he sent all his communications to the office where Sainsbury was acting in Solloway's place. There is no doubt that Sainsbury completed the transaction in respect of the first unit for Solloway's account. He acted in the same capacity with regard to the second unit. The agreement as to the latter, as in the case of the first one, was a bargain between Varette and Solloway, represented by Sainsbury.

The other question to be determined is what was, between Varette and Solloway, the agreement concerning this second unit. As already stated, it took form during the interview of Varette with Solloway at the New Liskeard railway station, on November 15. We have the account of that interview in a letter written shortly afterwards by Varette and with which Solloway expressed himself to be in complete accord. This letter derives singular value from the fact that, at the time it was written, Sainsbury was threatening suit. Solloway knew it and therefore was apt to be more careful in his assent to Varette's statements.

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Rinfret J.

It is nothing to the purpose that later, when called as a witness, he attempted to explain away the force of this assent on the ground that he had then no "knowledge of the telegrams that had passed between Sainsbury and Varette." Knowledge of those telegrams could have no bearing on the question of what had been the original agreement between Varette and Solloway and the nature of the relations thereby created between them. In our view, moreover, these relations were not by the telegrams referred to modified in any essential particular.

Upon returning from the North, Solloway had written to Varette, on November 28:

Dear Mr. Varette,—I just returned to the city yesterday and Mr. Sainsbury advised me that you are sending two more units. I wish to thank you for this business and, upon receipt of this letter, I wish you would kindly write and let me know if there are any other units for sale and I shall be very grateful indeed if you will send on to me, at the Imperial Bank, Adelaide and Victoria Sts. Branch, Toronto, any units that come on the market, and advise me that they are coming.

Thanking you and hoping to hear from you at your earliest convenience, I am,

Yours very truly,
I. W. C. SOLLOWAY.

On December 13, Varette wrote:

Dear Mr. Solloway,—In going over my correspondence to-night for filing, I run across yours of November 28. (We leave out the passages having no reference to the point we are now discussing).

The day I met you at the Station I advised I had one unit and you said to pick up any more available—that Sainsbury, acting for you, would look after same.

I immediately set to work to obtain some more—and got the promise of one and a partial promise on another, I did not have them tied up—only a promise. In the meantime I wired Sainsbury, but also in the meantime word came from Toronto that some one was offering more money and I could not get the units. This offering of more money for four units, as far as I can find out, was only talk.

I could not and have been unable so far to obtain anything further. I do not feel that I was dealing with Sainsbury at all, but with you under your instructions that Sainsbury was acting for you.

This is the exact position I am in at present and I told Sainsbury, when he was here, I would do the best I could. He advised that a writ would be issued against me if I did not produce.

On December 21, Solloway replied (and again we leave out whatever is unnecessary):

Dear Mr. Varette,—I have been out of town and received your letter of December 13 yesterday. I am expecting you into the office should you

come to Toronto and I will look forward with much pleasure to having a talk with you.

* * * *

I quite agree with what you say in your letter and I do not see that they have any complaint to make. However I hope to see you in the near future.

Yours very truly,
I. W. C. SOLLOWAY.

As will therefore appear, both Solloway and Varette agree on the crucial point that the understanding between them was not an agreement to transfer and sell, but only an agreement to procure units "that came on the market." We have already stated that, to our mind, the subsequent letters and telegrams exchanged with Sainsbury did not affect this original agreement. They are all reproduced in this judgment. Taken as a whole and viewed in the light of the initial interview with Solloway, they bear out the view taken by the learned trial judge that "Varette never agreed to act as a vendor of his own shares" and the relations of vendor and purchaser never existed between Varette and Solloway.

The result is that the motion for a new trial ought not to have been granted and that the appeal should be allowed, for the reasons we have given. Our judgment does not imply approval of the application made by the learned trial judge of the *Statute of Frauds.*

Nor do we express any opinion on the question of misrepresentation by Varette of his authority as an agent. The trial judge gave his reasons why he thought the amendment putting this claim forward should not be permitted and he did so without prejudice to the right of either Sainsbury or Solloway making this claim later. This was a matter of discretion with which this court would interfere only under most exceptional circumstances, which are not present in this case.

The appellant should have his costs here and in the Court of Appeal and the judgment of Masten J. should be restored.

Appeal allowed with costs.

Solicitor for the appellant: *F. L. Smiley.*

Solicitors for the respondents: *Macdonell & Boland.*

1927
*May 20.

MENARD v. La SOCIETE d'ADMINISTRATION GENERALE

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

Contract—Balance due on purchase price—Sale—Nullity—Fraud of third party—Knowledge—Art. 993 C.C.—Art. 1116 C.N.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duclos J., and maintaining the respondent's action and dismissing the appellants' counter claim.

The respondent, as testamentary executor of one L., claimed from the appellants, forming part of a financial syndicate, the sum of $15,900 as balance of the purchase price of a certain land property. The appellants pleaded fraud and false representations on the part of one G., a co-associate, to the knowledge of the vendor L., in order to obtain illegally their consent to the deed of sale and to procure to G. a secret profit of $5,000. The appellants also took a counter-action asking that the deed of sale be declared null and that they should be reimbursed of the money paid by them. The respondent's action was dismissed and the appellants' action was maintained by the Superior Court, Duclos J., but the Court of King's Bench reversed this judgment.

The Supreme Court of Canada, at the conclusion of the argument of the appellant's counsel, and without calling in the respondent's counsel, dismissed the appeal with costs.

Appeal dismissed with costs.

C. Laurendeau, K.C., and *A. E. J. Bissonnet, K.C.*, for the appellants.

E. H. Godin, K.C., and *L. E. Beaulieu, K.C.*, for the respondent.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1926) Q.R. 41 K.B. 204.

GAUTHIER *v.* JACOBS

1927

*May 19.

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

Lease—Landlord and tenant—Repairs due to fire—Clause in the lease—"Repairs"—Art. 1660 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the trial judge, Surveyer J., and maintaining the respondent's action asking for repairs by the appellant as owner to a building rented and partially destroyed by fire.

On the 28th July, 1921, the appellant leased to the respondent certain manufacturing premises on Campion street in Montreal for a period of ten years from the 1st May, 1922. On the 17th March, 1926, a fire occurred which destroyed the roof, part of the floor and all the windows on the third floor, but the lower stories seem only to have been damaged by water and smoke, although many of the other windows were broken.

On the 29th of March, 1926, the respondent took action against the appellant to have him ordered to proceed to repair and restore the premises to the condition in which they were prior to the fire and in default to have the respondent authorized to do so, at the cost, expense and charge of the appellant. The plea sets forth that the damages caused by the fire were so great that it had become reasonably impossible to occupy the premises and, therefore, the lease had come to an end. The Superior Court maintained the action holding that the fire did not render the occupation of the premises reasonably impossible, and the Court of King's Bench affirmed this judgment.

The Supreme Court of Canada, at the conclusion of the argument of the appellant's counsel and without calling in the respondent's counsel, dismissed the appeal with costs.

Appeal dismissed with costs.

R. Taschereau K.C. for the appellant.

E. Languedoc, K.C. for the respondent.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1926) Q.R. 42 K.B. 225.

1927

*June 9, 10.
*Oct. 4.

HIS MAJESTY THE KING (DEFENDANT). APPELLANT;

AND

SINCENNES-McNAUGHTON LINE, LTD. (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Collision—Canal—Probable cause of accident—Exchequer court Act, s. 20.

The J.B.K. was proceeding down the Lachine Canal to Montreal and she had passed through basin no. 1 into lock no. 1 where she was duly moored to the side. While the water in the lock was being lowered to enable her to pass out, the gates between the basin and the lock, being closed, were subjected to increasing pressure as the water below receded and they gave way releasing the water in the basin and causing the steamer to part her moorings and to break through the lower gates. While the J.B.K. was thus out of control, she came into contact with the respondent's tug V., causing damages for the recovery of which action was taken against the Crown. The trial judge held that, as it appeared upon the evidence that the breaking of the gates could only have occurred if they were not properly mitred by the servants of the Crown in charge thereof, the court should draw that inference of fact and find liability of the Crown for negligence under s. 20, subs. *c* of the *Exchequer Court Act*.

Held that, upon the evidence, there was a preponderance of probability which constituted sufficient ground for the finding of the trial judge: there was ample evidence that a faulty bevel- or mitre-joint would be a not improbable cause of the accident and there was no proof of any competing cause.

Judgment of the Exchequer Court ([1926] Ex. C.R. 150) aff.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1), maintaining the respondent's petition of right to recover damages for injuries caused to the tug boat *Virginia* by reason of the alleged fault of the servants of the Crown.

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

A. Geoffrion K.C. for the appellant.

A. R. Holden K.C. and *Lucien Beauregard* for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1926] Ex. C.R. 150.

The judgment of the court was delivered by

NEWCOMBE J.—The respondent, suppliant by petition of right, seeks to recover damages for injury caused to its tug boat *Virginia,* with which, on 29th August, 1922, the SS. *John B. Ketchum* collided in the harbour of Montreal at the foot of the locks of the Lachine canal. While the *Ketchum* was lying in lock no. 1, moored to the side, and the water was being lowered to enable her to pass out, the gates of the basin above, being closed, were of course subjected to increasing pressure as the water below receded, and unfortunately they gave way, causing a great fall and surge of water, which carried the *Ketchum* from her moorings, through the lower gate, and out into the harbour. It was while the *Ketchum* was thus out of control, being swept along by the flood, that she came into contact with the *Virginia,* and it is admitted that the ensuing damage to the *Virginia* was caused by the breaking of the gates, which were intended on such occasions to hold back the water in the basin.

The canal was a public work of Canada, operated by the officers and servants of the Crown, and the question is whether the action was attributable to their negligence within the meaning of s. 20, clause (*c*) of the *Exchequer Court Act,* upon which the liability of the Government depends.

The evidence is found to exclude the suggestion of any defect in the construction of the gates, but it is found that they were not well closed, or, as said by the learned trial judge, that " they broke owing to improper mitring." His view was that when, in the process of closing, the gates were swung together by the lockmen under the direction of the lockmaster, they did not meet evenly, and that in consequence the bearing surfaces did not properly articulate. The witnesses who were charged with the work maintained that the gates were safely closed. But the circumstances of the case, the appearance of the gates after the accident, and the injuries which they had received, were consistent with and suggestive of the view that the damage was produced by pressure of the gates upon each other when in contact, but not truly joined; and there was ample evidence that the closing ought to have been effect-

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THE KING v. SINCENNES-MCNAUGHTON LINE LTD.

Newcombe J.

ed with care in order to avoid such a result, and that a faulty bevel- or mitre-joint would be a potential and not improbable cause of their failure to withstand the great pressure to which they became subject when the level of the water in the lower lock was reduced.

It must be remembered that it was the duty of the lock-master and his men to see that an accident did not happen through lack of reasonable and proper care in the working of the gates, and the fact that such an extraordinary occurrence took place from a cause which, upon the evidence, may probably have consisted in their neglect, affords the basis of a finding, especially when, as in this case, there is no proof of any competing cause. I think there is here a preponderance of probability which constitutes sufficient ground for the finding of the learned trial judge.

In *Cooper* v. *Slade* (1), Willes J., refers to the proposition as elementary that in civil cases the preponderance of probability may constitute sufficient ground for a verdict, and he says that, so long since as the 14th of Elizabeth, Chief Justice Dyer and a majority of the other Justices of the Common Pleas laid it down that, when the parties are at issue the Justices may, if the matter be doubtful,

found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence.

Newis v. *Lark* (2). I see no reason to doubt that the present case should be governed by that rule, and the appeal therefore fails. *Appeal dismissed with costs.*

Solicitor for the appellant: *Aimé Geoffrion.*

Solicitors for the respondent: *Atwater, Bond & Beauregard.*

GRENIER MOTOR CO. *v.* BERNIER

1927

*Oct. 20.

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

Sale—First class automobile—Nullity—Error as to the substance or essential qualities of the thing sold—Arts. 992, 993, 1530 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (3), reversing the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

(1) 6 H.L.C. 772, 773. (2) Plowd. 412.

(3) (1926) Q.R. 41 K.B. 488.

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GRENIER MOTOR CO. v. BERNIER.

judgment of the trial judge, Wilson J., and maintaining the respondent's action for cancellation of the sale of an automobile.

The trial judge dismissed the action and the appellate court reversed the judgment.

The Supreme Court of Canada, at the conclusion of the argument of the appellant's counsel and without calling in the respondent's counsel, dismissed the appeal.

Appeal dismissed with costs.

Chas. Laurendeau K.C. and *Jules Desmarais K.C.* for the appellant.

Eug. Lafleur K.C. and *N. K. Laflamme K.C.* for the respondent.

HALL *v.* KNOX

1927

*Oct. 6, 7.
*Oct. 31.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Arrangement for selecting, cruising and checking timber berths —Repudiation—Damages—Measure of.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Macdonald J., and maintaining the respondents' action.

The respondents brought an action in damages against the appellants based on the alleged repudiation by the latter of a contract by correspondence in relation with the sale of timber limits in British Columbia.

The trial judge dismissed the action, holding that the appellants were in the circumstances of the case justified in repudiating the contract; but this judgment was reversed by the Court of Appeal.

The appeal to the Supreme Court of Canada was allowed with costs and the judgment of the trial judge was restored.

Appeal allowed with costs.

I. F. Hellmuth K.C. and *W. F. Johnson* for the appellant.

D. L. McCarthy K.C. for the respondent.

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*PRESENT:—Anglin C.J.C., Mignault, Newcombe, Rinfret and Smith JJ.

(1) (1927) 38 B.C. Rep. 348

1927

*May 18, 19.
*May 26.

J. E. CHARLEBOIS (DEFENDANT) .....APPELLANT;

AND

L. S. BARIL (PLAINTIFF) .....RESPONDENT.

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

Contract by correspondence—Offer—Acceptance—Delivery of offer by messenger—Mailing of acceptance of communication to party—Presumption.

The defendant, on the 14th of August, 1924, made an offer in writing to the plaintiff to purchase a certain property and handed the document to one B. representing the plaintiff for delivery to the latter. On the 25th of August, the plaintiff deposes he wrote a letter of acceptance which, duly addressed to the defendant, he gave to his son to post and it was mailed the same day. The defendant denied receipt of this letter. On the 6th of September, the plaintiff received from the defendant a letter withdrawing the offer of the 14th of August. The action is to compel the defendant to carry out the transaction.

Held that the decision of this court in *Magann* v. *Auger* (31 Can. S.C.R. 186), holding that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him, has no application to a case where the offer is communicated, as in the present case, not by mail, but by other means. The *Magann Case* was one of contract by correspondence; and, the offer having been sent by mail, that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended or to his authorized agent.

Judgment of the Court of King's Bench, (Q.R. 43 K.B. 295) reversed.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), varying the judgment of the Supreme Court at Montreal, de Lorimier J., and maintaining the respondent's action.

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

L. E. Beaubien K.C. and *D. L. Desbois K.C.* for the appellant.

E. Lafleur K.C. and *D. Baril* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The defendant, on the 14th of August, 1924, made an offer in writing to the plaintiff to purchase a

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1926) Q.R. 43 K.B. 295.

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CHARLEBOIS v. BARIL.

Anglin C.J.C.

certain property. He handed this document to one T. E. Baril, a representative of the plaintiff, for delivery to the latter. On the 25th of August, the plaintiff deposes, he wrote a letter of acceptance which, duly addressed to the defendant, he gave to his son to post and which was mailed the same day. The defendant denies receipt of this letter. On the 6th of September the plaintiff received from the defendant, mailed the previous day, a letter withdrawing the offer of the 14th of August. Evidence was given designed to raise a presumption of actual receipt by the defendant of the plaintiff's acceptance in due course of mail, i.e., on the 26th of August. The present action is to compel the defendant purchaser to carry out the transaction.

Other questions arise as to undisclosed encumbrances affecting the property and the sufficiency and terms of the deed tendered to the purchaser for acceptance and as to the power of the court to amend the deed so tendered to make it conform to the plaintiff's offer. But these it is not now necessary further to consider.

The courts below, while they undoubtedly cast serious doubt on the defendant's denial of the receipt of the plaintiff's acceptance, refrained from making a finding on this question of fact, no doubt deeming it unnecessary because they regarded the judgment of this court in *Magann* v. *Auger* (1) as determining that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him.

With great respect this is an erroneous view of the scope and effect of the decision of this court. That case was one of contract by correspondence, i.e., the offer was sent by mail and that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. The civil law of Quebec was held to be the same in this regard as the law of England (p. 193). But this decision has no application to a case where the offer is communicated, as here, not by mail, but by another means. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended, or to his authorized agent.

(1) 31 Can. S.C.R. 186.

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CHARLEBOIS v. BARIL.

Anglin C.J.C.

Here there was nothing to constitute the post office the defendant's agent and a finding of actual receipt by him of the plaintiff's acceptance was, therefore, essential. The burden of procuring such a finding was upon the plaintiff. Without it he cannot succeed.

We are not in a position to pass upon this question of fact. Its solution depends upon the credibility of the defendant and that, in turn, largely upon the view taken of his demeanour as a witness—thus presenting a question eminently for the tribunal which sees and hears him give his testimony.

But, under all the circumstances, we think that the plaintiff should, as a matter of indulgence, be given another oportunity to obtain, if he can, a finding that his letter was actually received by the defendant. Upon payment to the defendant of his costs of the appeals to the Court of King's Bench and to this court within one month, the plaintiff may have a new trial, the costs of the former trial to be in the discretion of the trial judge. In default of such payment, the appeal will be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *D. L. Desbois.*

Solicitors for the respondent: *Baril & Tousignant.*

1927

*Feb. 16, 17.
*April 20.

HILL *v.* MOISAN

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

Contract—Sale—Liability to deliver—Liability for payment—Art. 1202 C.C.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) reversing the judgment of the trial judge, Lane J., and dismissing the plaintiff appellant's action.

The appellant claimed by his action the sum of $22,000 for the outstanding instalments of a "bonus" and a further amount for royalties, the whole resulting from the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1926) Q.R. 40 K.B. 515.

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HILL v. MOISAN.

execution in favour of the respondent by the appellant of a sub-license of a Canadian patent for improvements in the method of manufacturing articles from pulp, known as "Drake Process."

The action was maintained by the Superior Court, but dismissed by the appellate court.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

F. J. Laverty, K.C., and *D.C. Nicholson* for the appellant.
André Fauteux, K.C., for the respondent.

NICKERSON *v.* MANNING

1927

*Oct. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Malicious prosecution—Swearing out and executing search warrant—S. 73 (1) Government Liquor Act—Reasonable and probable cause—Malice—Indirect and improper motive—Quantum of damages.

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

The respondent brought an action against the appellant for damages for maliciously and without reasonable and probable cause swearing out, obtaining and executing a warrant to search the house of the respondent. The appellant, a police officer and a member of the "dry squad," purported to act under s. 73 (1) of the *Government Liquor Act*, R.S. B.C., 1924, c. 146.

The trial judge found in favour of the respondent on the verdict of a jury and the judgment was affirmed by the Court of Appeal.

The appeal to the Supreme Court of Canada was dismissed with costs.

Appeal dismissed with costs.

C. W. Craig K.C. for the appellant.
H. S. Wood for the respondent.

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1927] 2 W.W.R. 623.

1927

*Oct. 5.
*Oct. 6.

PACIFIC STAGES LIMITED (DEFENDANT) APPELLANT;

AND

HENRY H. JONES (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Motor vehicle—Injury to passenger—Autobus—Defence of inevitable accident—Knowledge of driver as to icy condition of street.

The appellant's motor "bus" was being driven down a steep incline on a frosty and foggy morning, the street being in an icy condition, when the driver saw that a street car had stopped in front of him. He tried to stop the "bus" and in order to avoid a collision ran it sharply to the right over the curb and sidewalk, struck a telephone pole and injured the respondent who was a passenger in the bus. The trial judge held that "having regard to the conditions, the short range of visability, the fact that there was a street car line upon the road, and the condition of the pavement, as it was, *or ought to have been known* to the driver, the motor bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage," and he gave judgment in favour of the respondent, which judgment was affirmed by the Court of Appeal.

Held that there was not sufficient evidence to support the finding of the trial judge. Under the circumstances of this case it cannot be reasonably said that the driver knew or ought to have known the icy condition of the pavement, as he had been faced with an unexpected situation such that, had it not existed, no difficulty would have been experienced in negotiating the hill.

Judgment of the Court of Appeal ([1927] 2 W.W.R. 692) rev.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, D. A. McDonald J. (2), and maintaining the respondent's action for damages for personal injuries caused by negligence.

The material facts of the case, as stated by the trial judge and his findings on the evidence are the following:

"This is an action for damages for injuries suffered by a passenger proceeding from Port Moody to Vancouver in a motor bus operated by the defendant for hire.

"The decision of the case rests not I think upon the credibility of any of the witnesses, for I believe that all the witnesses told the truth, as best they could, but rather

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

(1) [1927] 2 W.W.R. 692. (2) (1926) 38 B.C. Rep. 81.

upon the inferences to be drawn from the evidence given. The motor bus in question, having earlier in the morning proceeded from Vancouver to Port Moody, was returning over the same route at about 9 o'clock through a dense fog through which the range of visibility was from 40 to 50 feet. Having climbed a grade to the intersection of Slocan street with Hastings street the motor bus proceeded over the brow down a grade of 5.44 per cent toward Clinton street. When nearing Clinton street it was noticed by the driver that a street car had stopped immediately in front to take on passengers, and that a Ford truck had stopped behind the street car. The driver of the motor bus, in his effort to stop, lost control and, in order to avoid a collision, turned sharply to the right, mounted a 6-inch curb and brought his motor bus to rest with its left side against a telegraph post and its front against a store building. There seems no doubt that when the emergency arose the driver handled his car in the best possible manner. Immediately following the motor bus came the chief of police driven by his expert chauffeur, who also, on trying to bring his car to a stop, met with difficulties and skidded into the Ford truck driving it across the street. The chief of police ran back to flag any further cars coming down the hill with the result that the drivers of some eight or ten cars, suddenly faced with this alarming signal, lost control of their cars and skidded down the hill or across the street. The only car that came down the hill safely and rested behind the street car was the Ford truck.

"Admittedly the street, which consisted of a wooden block pavement, was in a very slippery and icy condition. The evidence goes to show that this condition was not observable to a driver, and it is suggested that this particular block was in worse condition than any other part of the road. It seems difficult to understand why this should be so.

"The driver says that he went down the hill in second gear at about ten or twelve miles an hour. In my opinion, on the whole of the evidence, the motor bus was proceeding at too great a rate of speed."

W. N. Tilley K.C. and *J. de G. Audette* for the appellant.

C. W. Craig K.C. for the respondent.

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PACIFIC STAGES LTD. v. JONES.

The judgment of the court was orally delivered by

ANGLIN C.J.C.—There is no finding of fact in this case as to the rate of speed at which the defendant's omnibus was moving. There is a finding by the learned trial judge that it was travelling at an excessive speed, having regard to all the conditions—short range of visibility, the fact that there was a tram car line upon the street, and (the crucial point), the condition of the pavement, which, in his opinion, was, or ought to have been, known to the driver. He makes no finding apart from that. The case really turns upon the question whether or not the icy condition was, or ought to have been, known to the driver. That it was not in fact known to him seems abundantly clear. We are also of opinion that it cannot be said that it ought to have been known to him. That the condition of the pavement was quite abnormal and not to be expected is shown by the evidence of half a dozen witnesses. The driver of the bus realized the existence of that icy condition only when he came to apply his brakes. It was then too late to avoid the accident because the wheels of the bus "skidded" on the icy surface of the road way.

Mr. Justice Galliher who dissented seems to us to have best realized what the situation was. He points out, what I have already alluded to, the learned trial judge's assumption that the driver ought to have known the condition of the highway. "The main feature," he then goes on to say is, did the driver know, or should he have known, of the icy condition of the pavement? He had passed over the same pavement an hour or two before that same morning. Other witnesses had done the same and they all say that the condition of the pavement had undergone a marked change in the meantime not observable until they attempted to stop, and when we find that all but one of a number of cars that came over the brow of the hill at that time and attempted to stop, mixed up and got out of control, it would seem to indicate that no one expected to encounter the conditions they were met with. Under such circumstances can it reasonably be said that the driver knew, or ought to have known, the condition of the pavement? I think the driver was faced with an unexpected situation which, had it not existed, no difficulty would have been experienced in negotiating the hill, and it should not be held that he knew, or ought to have known, of the condition of the pavement.

With that statement, having regard to the evidence, I, and I believe my learned brothers also, are fully in accord. In our opinion there is not sufficient evidence to support the finding of the learned trial judge.

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PACIFIC STAGES LTD. v. JONES.

Anglin C.J.C.

The appeal is allowed with costs here and in the Court of Appeal, and the action is dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Walsh, McKim, Housser & Molson.*

Solicitor for the respondent: *R. P. Stockton.*

THOMAS *v.* GUAY

1927

*Feb. 18.
*April 20.

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

Action pétitoire—Titles from same owner to more than one person—Priority of title—Good faith—Reimbursement for improvements—Evidence —Arts. 417, 462, 1488, 1571, 2098 C.C.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1) varying the judgment of the Superior Court, Belleau J.

The respondent by his action sought to revendicate from the appellant two parcels of land. The appellant alleged that he was the owner of the property with a good title; and he also claimed a right of retention until reimbursed for the costs of repairs and improvements made to the property.

The Superior Court maintained the respondent's action and dismissed the appellant's plea. Both parties appealed to the Court of King's Bench, the respondent in order to have struck off the reserve of a right of servitude in favour of the appellant and the latter to have his plea of compensation maintained. The main appeal was allowed by the appellate court and the cross-appeal dismissed.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Ls. St-Laurent, K.C., for the appellant.

C. Dessaulles, K.C., and *Ls. St-Jacques* for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1926) Q.R. 41 K.B. 454.

1927

*May 27.
*June 17.

JOSEPH SAMSON (DEFENDANT) .....APPELLANT;

AND

ODILON DROLET AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Quo warranto—Municipal election—Contestation—Mayor—Inability to perform duties—Joinder of claims—Propriety—Prescription—Arts. 87, 177 (6), 980, 987, 988, 1150, et seq. C.C.P.—R.S.Q. (1909) Arts. 5936, 5937, 7532, 7533.

The respondents brought a petition (*quo warranto*) to have the appellant's election as mayor of Quebec declared null, to remove him from that office, to disqualify him for municipal office for five years, to have him condemned to pay a fine of $400 to the Crown and to obtain an order for a new election. The joinder of these several claims was objected to by the appellant by way of a dilatory exception.

Held that, while the competence of an appeal from the disposition made of such an exception is doubtful, this court would in any event be loath to interfere with the judgment appealed from, as the propriety of the joinder is largely a question of practice and procedure; but, on the merits, this court is of opinion that there is nothing incompatible or contradictory in the several "causes of action" preferred by the respondents.

Held, also, that the fact that the requirements of art. 980 C.C.P. (which were imposed by art. 988 C.C.P.) do not apply to a proceeding for a declaration of disqualification imposed by art. 5936 R.S.Q. (1909) does not preclude the joinder of the "cause of action" given by the latter article with a proceeding properly instituted under art. 987 C.C.P.

Held, further, that the prescription under arts. 7532, 7533 R.S.Q. (1909), invoked by the appellant has no application to a demand for disqualification based on arts. 5936, 5937 R.S.Q. (1909).

Held, further, that it is within the power of a provincial legislature to impose disqualification from municipal office as a consequence of the contravention of statutory prohibitions enacted by it to ensure the proper conduct of municipal affairs. (B.N.A. Act, s. 92).

Judgment of the Court of King's Bench (Q.R. 43 K.B. 160) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Gisborne J., and maintaining the respondents' petition for the issue of a writ of *quo warranto* against the appellant.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1926) Q.R. 43 K.B. 160.

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

L. St. Laurent K.C. for the appellant.

L. G. Belley K.C. and *S. Lapointe K.C.* for the respondents.

The judgment of the court was delivered by

ANGLIN C.J.C.—Upon the several points discussed by Allard J. (whose judgment is concurred in by Greenshields and Howard JJ.), we find ourselves entirely in accord with the views which that learned judge has expressed. There is no room to doubt the right of the Superior Court to entertain a proceeding such as that instituted by the respondents. Each of the several claims presented by them was properly the subject of the jurisdiction of that court. The propriety of their joinder in one proceeding (art. 87 C.C.P.) is largely a question of practice and procedure. Objection to such joinder is properly the subject of a dilatory exception (art. 177 (6) C.C.P.). While the competence of an appeal from the disposition made of such an exception is, to say the least, probably doubtful, we should, in any event, be extremely loath to interfere with the determination by the provincial court of appeal that the joinder was properly made. In the present instance, however, we see no reason to doubt the soundness of the views that have prevailed. There appears to be nothing incompatible or contradictory in the several "causes of action" preferred by the plaintiffs; they seek condemnations of a like nature; they are susceptible of the same mode of trial, i.e., by summary proceedings (arts. 1150 et seq. C.C.P.); and their joinder is not prohibited by any express provision. The fact that the requirements of art 980 C.C.P. (which were imposed by art. 988 C.C.P.) do not apply to a proceeding for a declaration of the disqualification imposed by art. 5936 R.S.Q. does not preclude the joinder of the "cause of action" given by the latter article with a proceeding properly instituted under art. 987 C.C.P.

On three points, two of them not expressly covered by the reasons for judgment of Mr. Justice Allard, we think it well to add a few words.

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SAMSON v. DROLET.

Anglin C.J.C.

The prescription under arts. 7532-3 R.S.Q. (1909), invoked by the appellant, has no application to a demand for disqualification based on arts. 5936-7 R.S.Q. (1909).

It is undoubtedly within the power of the provincial legislature to impose disqualification from municipal office as a consequence of the contravention of statutory prohibitions enacted by it to ensure the proper conduct of municipal affairs. "Municipal institutions within the province" is one of the subjects of provincial jurisdiction enumerated in s. 92 of the B.N.A. Act. The right of a provincial legislature to prescribe appropriate penalties for disobedience to statutory prohibitions which it is within its power to enact has been time and again affirmed by this court and in the Judicial Committee.

Whether the penalty of disqualification, when imposed, shall relate back so that the municipal officer shall be deemed not to have been duly elected where the offence has been committed during a previous term of office, or attaches only upon his being found guilty of the offence for which the penalty is imposed, is quite immaterial in the present case. The appellant merely ceased to hold office from the moment he was held disqualified. No penalties for his having acted as mayor prior to that date have been awarded against him. The suggestion, however, that there must be first a proceeding to determine the guilt of the accused and then a subsequent proceeding for the imposition of the penalty of disqualification savours so much of unnecessary circuity that it cannot be seriously entertained.

For these reasons we would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondents: *Lapointe & Rochette.*

M. J. O'BRIEN AND ANOTHER (SUPPLIANTS) ..... } APPELLANTS;

AND

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

1927
*Feb. 14.
*April 20.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown lands—Timber limits—License—Expiration—Duration—Fire—Damages—Rights of holders

On the 12th of September, 1918, M. & O. acquired from the province of Quebec a license to cut timber on the line of the Transcontinental Railway Company, which license expired on the 30th of April, 1919. The license, transferred in December, 1918, to O. & D., the appellants, was not renewed until the 11th of December, 1919. Such a license could only be granted under s. 3598, R.S.Q. (1909), for a period of 12 months. The appellants claim damages for destruction of timber on the limit covered by the license, arising from a fire, in June, 1919, alleged to have occurred owing to the negligence of the servants of the railway company.

Held that the appellants cannot recover from the Crown the damages claimed. They had no title to the timber at the time it was destroyed by fire and there is no evidence that they were then in possession of the limit nor in such possession alleged. Therefore no retroactive effect can be given to the license subsequently issued in December in such a way as to confer upon the appellants rights as against the railway company.

Judgment of the Exchequer Court of Canada ([1927] Ex. C.R. 154) aff.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the appellants' action for damages.

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

G. A. Campbell K.C. and *P. Bigué K.C.* for the appellants.

F. Lajoie K.C. and *L. Garneau K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—On the 12th of September, 1918, MacDonell & O'Brien, contractors, acquired from the province of Quebec, under the authority of Art. 1309 R.S.Q., a license to

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1927] Ex. C.R. 154.

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O'BRIEN v. THE KING.

Duff J.

cut timber in the township of Bazin, on the line of the Transcontinental Railway Company, a license which according to its terms, expired on the 30th of April, 1919. This license was transferred in December, 1918, to O'Brien & Doheny, and the petition is brought by O'Brien, the survivor of the firm, and the Capital Trust Company, executors of Doheny.

The license was renewed on the 11th of December, 1919, and by the action damages are claimed for destruction, in June, 1919, of timber on the limit arising from a fire alleged to have occurred owing to the negligence of the servants of the Transcontinental Railway Company.

Section 3598, R.S.P.Q. (1909), declares, in reference to such licenses, that

> no license shall be granted for longer than twelve months from the date thereof.

It is settled law that under such a provision as this the licensee cannot be given the right by any departmental or executive regulation to a renewal of his yearly license. *Booth* v. *The King* (1); *Edwards* v. *D'Halewyn* (2); *Gillies* v. *Railway Commission* (3); *Smylie* v. *the Queen* (4). The appellants clearly had no title to the timber which was destroyed by the fire in June at the time the fire occurred, and there is no evidence that at that time they were in possession of the limit, nor is such possession alleged. In these circumstances, one cannot see on what ground retroactive effect can be given to the license subsequently issued in December, so as to confer upon them rights as against the Transcontinental Railway Company.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bureau, Bigué & Gouin.*

Solicitors for the respondent: *Lajoie & Lajoie.*

(1) 51 Can. S.C.R. 20.
(2) Q.R. 18 Q.B. 419.
(3) 10 Ont. W.R. 971.
(4) 27 Ont. A.R. 172.

GOSSE-MILLERD LIMITED (PLAINTIFF)..APPELLANT; 1927

*Oct. 11, 12.
*Dec. 16.

AND

ANDREW C. DEVINE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Lease—Action for rent—Counterclaim—Misrepresentation—Damages—Several claims based upon distinct alleged causes of action—Jury—General verdict—New trial.

The appellant company, a canning concern, leased a sawmill and equipment to the respondents and brought action under the lease to recover rent. The respondents, by the lease, covenanted to "take up" the appellant's logging contracts, and in particular one with the Clayton Logging Company. The respondents' counterclaim was based upon three distinct alleged causes of action: first, a claim based upon the allegation that the appellant had induced the respondents to enter into the agreement by falsely and fraudulently representing the contract with the Clayton Logging Company to be a subsisting contract at the date of the lease; second, a claim for damages for breach of a contract to take and pay for box shooks which the respondents by the terms of the lease agreed to manufacture from the box lumber in the yard of the mill at the time of the lease; and third, a claim for damages arising from a series of malicious acts on the part of the appellant. A general verdict was given by the jury for the respondents for $19,460. The respondents admit in their factum that they failed to establish either the second or the third of these causes of action.

Held that, under the circumstances of this case, there must be a new trial. The charge of the trial judge was calculated to lead the jury to think that they might properly hold the appellant company responsible as for breach of the agreement to take and pay for the box shooks and, moreover, from some of the judge's observations, they may have received the impression that the respondents were entitled to reparation in respect of the alleged malicious acts. The jury did not disclose by their verdict how much (if any) of the damages awarded should be attributed to these alleged causes of action now admitted to be without substance; and *prima facie*, therefore, the observations in the charge cannot be overlooked as innocuous, and they may have led the jury into substantial error. As the verdict was a general one, and as the trial judge gave the jury no guidance concerning the method by which damages should be measured, it is impossible to determine how far they may have deviated from the appropriate rule.

Held, also, assuming the charge of fraud established as to the misrepresentations by the appellant company touching the Clayton Co.'s contract, the respondents would be entitled to recover compensation for

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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GOSSE-MILLERD LTD. v. DEVINE.

the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?" *McConnell* v. *Wright* [1903] 1 Ch. 546; *Johnston* v. *Braham* [1917] 1 K.B. 586.

Held, further, that the respondents, if their allegations are well founded, were, on learning the true facts, entitled to repudiate the lease and the contracts, but they were not bound to do so; and, having elected against repudiation, they were entitled to maintain an action for deceit, if the elements of such a cause of action were disclosed by the facts in evidence.

Held, further, that the damages recoverable would include not only sums paid in execution of the obligations entered into, but also all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made, of course, for moneys received and the pecuniary value of advantages gained.

Held, further, that the present case is one in which effect must be given to the British Columbia Statute, R.S.B.C., c. 58, s. 55.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of Macdonald J. and maintaining the respondents' counterclaim for $19,460, upon a verdict by a jury.

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

C. W. Craig K.C. and *R. L. Reid K.C.* for the appellant.

A. Geoffrion K.C. and *J. A. Prud'homme K.C.* for the respondents.

The judgment of the court was delivered by

DUFF J.—We have come to the conclusion that there must be a new trial; and consequently all unnecessary discussion of the facts will be avoided.

By an instrument of the 15th of March, 1925, the respondents, the Devines, leased a sawmill at Namu from the appellant company (a canning concern), and by agreements of the same date the Devines and the company

(1) (1927) 38 B.C. Rep. 499.

mutually agreed, first, that the Devines were to manufacture all the box lumber in the yard of the mill into box shooks and to provide any additional lumber which might be necessary for that purpose, for which the appellant company was to pay at certain nominated rates; and, second that the Devines were to supply power for lighting and pumping, and steam for the cannery.

By the lease, the Devines covenanted to "take up" the appellant company's logging contracts, and in particular two specified contracts, of which one was with the Clayton Logging Company.

Three claims, based upon distinct alleged causes of action, were set forth in the statement of the counterclaim by the respondents: first, a claim based upon the allegation that the appellant company had induced the respondents to enter into the transactions mentioned, by falsely and fraudulently representing the contract with the Clayton Logging Company to be a subsisting contract at the date of the lease; second, a claim for damages for breach of the contract to take and pay for box shooks; third, a claim for damages arising from a series of malicious acts on the part of the appellant company, aimed, it is alleged, at compassing the ruin of the respondents.

The respondents in their factum admit that they failed to establish either the second or the third of these causes of action, and, as respects them, the counter-action should be dismissed; but we agree with the majority of the Court of Appeal that there was some evidence to go to the jury in support of the allegations of fraud, and, that accordingly the finding upon the issue raised by them cannot properly be set aside as perverse.

We are, however, constrained to the view that there was a mistrial. The charge was calculated to lead the jury to think that they might properly hold the appellant company responsible as for breach of the agreement to take and pay for box shooks under the contract of the 3rd of March; and, moreover, from some of the learned judge's observations, they may have received the impression that the respondents were entitled to reparation in respect of the alleged malicious acts, referred to above as constituting the respondents' third cause of action.

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GOSSE-MILLERD LTD. v. DEVINE.

Duff J.

The jury did not disclose by their verdict how much (if any) of the damages awarded should be attributed to these alleged causes of action now admitted to be without substance; and *prima facie,* therefore, the observations in the charge cannot be overlooked as innocuous. In truth, they may have led the jury into substantial error. Upon both causes of action their respondents founded a claim for compensation for loss of profits in support of which evidence was copiously received—a claim which could not be supported upon the grounds stated in the pleadings, as the respondents now admit; nor, for reasons to be outlined, could such a claim be sustained for damages arising out of the fraud, according to the respondents' present contention. Yet, as the verdict was a general one, and as the learned trial judge gave the jury no guidance concerning the method by which damages should be measured, it is impossible to determine how far they may have deviated from the appropriate rule.

As already mentioned, the respondents alleged, by their statement of claim, that they had been induced to enter into the lease and the contemporary contracts, by the appellant company's fraudulent misrepresentations touching the Clayton Company's contract. Assuming the charge of fraud established, the respondents would be entitled to recover compensation for the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter?" *McConnell* v. *Wright* (1); *Johnston* v. *Braham* (2).

The respondents, if their allegations are well founded, were, on learning the true facts, entitled to repudiate the

(1) [1903] 1 Ch. 546. (2) [1917] 1 K.B. 586.

lease and the contracts; but they were not bound to do so, and having elected against repudiation, they were entitled to maintain an action for deceit, if the elements of such a cause of action were disclosed by the facts in evidence. *Arnison* v. *Smith* (1); *Peek* v. *Derry* (2); *McConnell* v. *Wright* (3); *Goold* v. *Gillies* (4).

The damages recoverable would include not only sums paid in execution of the obligations entered into, but also all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made, of course, for moneys received and the pecuniary value of advantages gained.

It must be distinctly understood that nothing which has been said implies any opinion as to the effect or the weight of the evidence adduced either to support or to repel the charges of fraud, or upon any other question of fact within the province of the jury.

We have come to the conclusion that this is a case in which effect must be given to the British Columbia statute, R.S.B.C., c. 58, s. 55.

> Nothing herein, or in any Act, or in any rules of court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: Provided also that the said right may be enforced by appeal, as provided by the *Court of Appeal Act*, this Act, or rules of court, without any exception having been taken at the trial: Provided further that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the court.

Having regard to the conduct of the trial and to the character of the learned judge's charge, we do not think the course taken by counsel for the defence was such as to disentitle the appellant company from taking advantage of this enactment, although, in the special circumstances, there should be an exceptional order as to costs.

Therefore, as to the first of the above mentioned causes of action there will be a new trial, and as to the second and third causes of action the action will be dismissed.

(1) 41 Ch. D. 348.
(2) 37 Ch. D. 574.
(3) [1903] 1 Ch. 546.
(4) 40 Can. S.C.R. 437.

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GOSSE-MILLERD LTD. v. DEVINE.

Duff J.

The respondents are entitled to the costs of the appeal to the Court of Appeal, which are to be set off against the appellant company's costs of the appeal to this court, the residue, if any, of such last mentioned costs to be the appellant company's costs in the cause in any event.

The costs of the abortive trial and of the action, in so far as they are to be attributed to the alleged causes of action upon which the respondents fail, will be the appellant company's costs in the cause in any event; subject to that, the general costs of the abortive trial will abide the event of the new trial.

New trial.

Solicitors for the appellant: *Reid, Wallbridge & Gibson.*

Solicitor for the respondent: *H. Castillon.*

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*Oct. 4, 5.
*Dec. 16.

THE CANADIAN NATIONAL RAILWAY COMPANY ..... APPELLANT;

AND

THE PROVINCE OF NOVA SCOTIA AND OTHERS ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railway—Shipping—Freight rates—Board of Railway Commissioners—Validity of orders—Maritime Freight Rates Act—St. John and Ste. Rosalie "gateways"—"Eastern lines"—"Select territory"—"Preferred movements"—Leave to appeal granted by Board—Question of jurisdiction within the Railway Act.

The lines of the Canadian National Railways run from Sydney, Halifax and other places in Nova Scotia through Nova Scotia, New Brunswick and eastern Quebec by way of Moncton, Levis, Diamond Junction and Ste. Rosalie to stations in central and western Canada; the Canadian National Railway Co. also owns and operates a line of railway between Moncton and Saint John. The Canadian Pacific Railway Co. owns and operates a railway line which extends from Saint John to Montreal, with a branch running to Ste. Rosalie. Both of these railway systems directly or indirectly connect the Maritime Provinces with all the commercially important sections of Canada west of these provinces. For some years prior to 1925, shipments originating on the lines of the Canadian National Railways, in the Maritime prov-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

inces, could be routed, first, over the Canadian National Railways as far as Saint John or Ste. Rosalie, and thence over the Canadian Pacific Railway to their destination; and, as regards goods shipped to destinations reached by both railways, there existed parity of rates for three classes of routes; first, over the Canadian National Railways direct; second, over the Canadian National Railways to Saint John and thence by the Canadian Pacific Railway and third over the Canadian National Railways to Ste. Rosalie and thence over the Canadian Pacific Railway. In 1925, the Canadian National Railway Co. published supplementary tariffs which purported, as to classes of traffic affected by them, "to eliminate the alternative routings by way of Saint John and Ste. Rosalie," and the Board of Railway Commissioners, October 19, 1926, disallowed the "provisions" of these supplements "in so far as they proposed to eliminate routings via Saint John and Ste. Rosalie," thus restoring "the parity of rates" mentioned above. Such was the situation when the *Maritime Freight Rates Act* of 1927 was passed. Section 2 of the Act gives the meaning of the phrase "eastern lines," as "the lines of railway now operated as a part of the Canadian National Railways and situated within the provinces of New Brunswick, Nova Scotia and Prince Edward Island, and the lines of railway, similarly operated, in the provinces of Quebec extending from the southern provincial boundary near Matapedia and near Courchesne to Diamond Junction and Levis." Section 8 defines the phrase "select territory," as including Nova Scotia, New Brunswick and Prince Edward Island in addition to the localities on "the lines in the province of Quebec mentioned in section 2." Section 3, requires the cancellation of tolls in force at its date (normal tolls), in respect of the "movements of freight traffic" described as "preferred movements," and the substitution therefor of tariffs of reduced tolls (statutory tolls). The "preferred movements" comprise three classes, first, of local traffic between points on the "Eastern lines," second, of export traffic destined overseas between points on the "Eastern lines" and ocean ports on the "Eastern lines," and third, of westbound traffic originating on the "Eastern lines," and extending westward beyond those lines. As respects the first and second of these classes of "preferred movements," the statutory tolls are ascertained by making a deduction from the normal tolls of approximately twenty per cent. As respects the third class of such movements, the statutory rate is ascertained by making a deduction, also of twenty per cent, but, in this case, the deduction takes effect only upon that part of the "through rate," which the statute in section 4 describes as the "Eastern lines proportion of" that rate. Section 9 provides for the non-compulsory reduction of rates by companies, other than those concerned with the "Eastern lines," which own or operate railways "in or extending into the select territory." Such companies are permitted, in order to "meet" the compulsory statutory rates, to file tariffs of reduced rates "respecting freight movements similar to the preferred movements." Those non-compulsory reductions, sanctioned by section 9, are not ultimately borne by the companies whose tolls are affected by them, as by that section provision is made for the transfer of that burden to the Dominion Government, the Minister of Railways and Canals being required, at the end of each year, to pay to the companies availing themselves of the privileges of the section the difference, as certified by the Board of Railway Commissioners, be-

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tween the amount which would have been payable in normal tolls but for the tariffs filed under it, and the sums actually "received under those tariffs." The question, whether the compulsory reductions under sections 3 and 4 applied (as shippers in the "select territory" contended) to joint tolls in respect of "movements" over joint routes through Saint John or Ste. Rosalie, or whether (as contended by the Canadian National Railway) they affected only "movements" of traffic routed over the Canadian National Railways from point of origin to point of destination, was submitted to the Board of Railway Commissioners for determination, and the adjudication by the Board in the sense adverse to the contention of the railway company is formally embodied in the two orders now under appeal. The appeal raises the question whether the orders are within the jurisdiction of the Board.

Held that, when the question at issue is examined by the light of the preamble, of the declarations in the body of the statute and of the railway situation of the Maritime provinces, "movements of freight traffic" originating on the "Eastern lines" and passing over joint routes by way of Ste. Rosalie, established at the date of the passing of the Act, are "preferred movements" within the meaning of sections 3 and 4; if such movements fall within the definition of "preferred movements," then the tariffs of tolls in force respecting them became subject to cancellation and reduction on the passing of the Act, and all persons and companies concerned in the preparation and publication of such tariffs were obliged by section 3 to concur in such cancellation, and in the substitution therefor of tariffs of statutory tolls; and the Board was acting within the limits of its jurisdiction in pronouncing the orders under consideration; but as regards the joint routes by way of Saint John, the orders of the Board are not within the ambit of its powers.

Held, also, that the question stated in the order giving leave to appeal is one of jurisdiction within the meaning of the *Railway Act*. The first of the above mentioned orders of the Board, in explicit terms, applies the compulsory reduction provided for by ss. 3 and 4 tariffs for the through routes in question and the second does the same thing in effect. Therefore, if such tariffs do not fall within ss. 3 and 4, then, by force of s. 7, the Board of Railway Commissioners is debarred from applying to them the principles of those sections. Where by statute the Board is given authority to make orders of a certain class in a defined type of case, and is disabled from making such orders in other cases, the question whether, in given circumstances, a case has arisen in which an order of that class can lawfully be made by the Board under the statute, is a question of competence—that is to say, a question of jurisdiction within the meaning of the *Railway Act*.

APPEAL from two orders of the Board of Railway Commissioners for Canada on a question of the jurisdiction of the Board.

The question to be considered is defined in the order granting leave to appeal and is stated at the beginning of the judgment now reported.

E. Lafleur K.C. and *A. Fraser K.C.* for the appellant.

C. B. Smith K.C. for the respondents: The province of Nova Scotia, the Halifax Board of Trade and the Saint John Board of Trade.

F. R. Taylor K.C. for the respondent: The province of New Brunswick.

W. N. Tilley K.C. and *E. P. Flintoft* for the respondent: The Canadian Pacific Railway Company.

The judgment of the court was delivered by

DUFF J.—The question to be considered is defined in the order granting leave to appeal in these terms:

Had the Board of Railway Commissioners for Canada power or jurisdiction under the *Maritime Freight Rates Act*, 1927, or under the *Railway Act*, 1919, or under both the said Acts, to make

(1) (*a*) as to St. John.
(*b*) as to Ste. Rosalie.
Order of the Board of Railway Commissioners for Canada numbered 39348?

(2) (*a*) as to St. John.
(*b*) as to Ste. Rosalie.
Order of the Board of Railway Commissioners for Canada numbered 39349?

The orders mentioned are dated the 14th of July, 1927, and are as follows:—

(The first, no. 39348.)

The Board orders that the Canadian National Railway Co. will forthwith publish tariffs of through rates by Saint John and Ste. Rosalie, from points in the Maritime Provinces through stations in Canada beyond eastern lines. Said through rates to be the rates in existence between such points on June 30, 1927, less approximately 20 per cent as provided in section 3 of c. 44, 17 Geo. V.

(The second no. 39349.)

The Board orders that the Canadian Pacific Railway Co. and the Canadian National Railways be, and they are hereby directed to publish forthwith joint tariffs naming through rates from points in the Maritime provinces to stations west thereof, in Canada, via Saint John and Ste. Rosalie Junction which will be the same as published between the same points via the Canadian National Railways direct: such tariff to cover all traffic and the same territorial application as existed June 30, 1927.

The Canadian Pacific Railway Co. assents to and supports these orders. The Canadian National Railway Co. seeks to rescind them.

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For many years facilities have existed for interchange of freight traffic between the two systems of railway at St. John and Ste. Rosalie (a station near Montreal), which came to be designated in common speech as the Saint John and Ste. Rosalie "gateways."

In consequence of these facilities, for some years prior to 1925, shipments originating on the lines of the Canadian National Railways, in the Maritime Provinces, could be routed, first, over the Canadian National Railways as far as Saint John or Ste. Rosalie, and thence over the Canadian Pacific Railway to their destination; and, as regards goods shipped to destinations reached by both railways there existed, as the Chairman of the Board of Railway Commissioners observes, parity of rates for three classes of routes; first, over the Canadian National Railways direct, second, over the Canadian National Railways to Saint John and thence by the Canadian Pacific Railway, and third over the Canadian National Railways to Ste. Rosalie and thence over the Canadian Pacific Railway.

In 1925 the Canadian National Railway Co. published supplementary tariffs, which, to quote the chairman of the Board, purported, as to classes of traffic affected by them "to eliminate the alternate routings by way of Saint John and Ste. Rosalie," and the Board by its order of October 19, 1926 (no. 38275), disallowed the "provisions" of these supplements "in so far as they proposed to eliminate routings via Saint John and Ste. Rosalie." The learned Chairman says that the effect of this order "was to restore the parity of rates" mentioned above.

This was the situation when the *Maritime Freight Rates Act* of 1927 was passed. In explaining the provisions of the Act, the phrase "Eastern lines" will frequently be used, and it is convenient at this place to quote textually section 2 of the Act which gives the meaning of that expression.

> For the purposes of this Act the lines of railway now operated as a part of the Canadian National Railways and situated within the provinces of New Brunswick, Nova Scotia and Prince Edward Island, and the lines of railway, similarly operated, in the province of Quebec extending from the southern provincial boundary near Matapedia and near Courchesne to Diamond Junction and Levis are collectively designated as the "Eastern lines."

For a similar reason, section 8 should also be mentioned, which defines the phrase "select territory," as including Nova Scotia, New Brunswick and Prince Edward Island in addition to the localities on "the lines in the province of Quebec mentioned in section 2."

The Act, by section 3, requires the cancellation of tolls in force at its date (which we shall speak of as normal tolls), in respect of the "movements of freight traffic" described as "preferred movements," and the substitution therefor of tariffs of reduced tolls (which we shall refer to as the statutory tolls). The "preferred movements" comprise three classes, first, of local traffic between points on the "Eastern lines," second, of export traffic destined overseas between points on the "Eastern lines" and ocean ports on the "Eastern lines," and third, of westbound traffic originating on the "Eastern lines," and extending westward beyond those lines.

As respects the first and second of these classes of "preferred movements," the statutory tolls are ascertained by making a deduction from the normal tolls of approximately twenty per cent. As respects the third class of such movements, the statutory rate is ascertained by making a deduction, also of twenty per cent, but, in this case, the deduction takes effect only upon that part of the "through rate," which the statute in section 4 describes as the "Eastern lines proportion of" that rate. The statute also provides for the non-compulsory reduction of rates by companies, other than those concerned with the "Eastern lines," which own or operate railways "in or extending into the select territory." Such companies, by section 9, are permit-

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ted, in order to "meet" the compulsory statutory rates, to file tariffs of reduced rates "respecting freight movements similar to the preferred movements."

It is part of the scheme of the Act that these non-compulsory reductions, sanctioned by section 9, shall not be ultimately borne by the companies whose tolls are affected by them; and by that section provision is made for the transfer of that burden to the Dominion Government, the Minister of Railways and Canals being required, at the end of each year, to pay to the companies availing themselves of the privileges of the section the difference, as certified by the Board of Railway Commissioners, between the amount which would have been payable in normal tolls, but for the tariffs filed under it, and the sums actually "received under those tariffs."

After the Act came into force, a controversy arose on the question whether the compulsory reductions under sections 3 and 4 applied (as shippers in the "select territory" contended) to joint tolls in respect of "movements" over joint routes through Saint John or Ste. Rosalie, or whether (as contended by the Canadian National Railways) they affected only "movements" of traffic routed over the Canadian National Railways from point of origin to point of destination. This dispute came before the Board of Railway Commissioners for determination, and the adjudication by the Board in the sense adverse to this contention of the Railway Company is formally embodied in the two orders now under appeal.

The appeal raises the question whether the orders are within the jurisdiction of the Board. In passing upon that question none of the operative sections of the Act can be ignored; but it appears to us that the critical question (which must of course be examined by the light of the preamble, of the declarations in the body of the statute, and of the railway situation of the Maritime Provinces as summarily sketched above), is whether or not "movements of freight traffic" originating on the "Eastern lines" and passing over joint routes by way of Saint John, or joint routes by way of Ste. Rosalie, established at the date of the passing of the Act are "preferred movements" within the meaning of sections 3 and 4. If such movements fall within the definition of "preferred movements,"

then the tariffs of tolls in force respecting them became subject to cancellation and reduction on the passing of the Act, and all persons and companies concerned in the preparation and publication of such tariffs were obliged by section 3 to concur in such cancellation, and in the substitution therefor of tariffs of statutory tolls; and the Board was acting within the limits of its jurisdiction in pronouncing the orders under consideration.

We have come to the conclusion that in relation to the joint routes through Ste. Rosalie, the Board had jurisdiction to pronounce the orders under appeal; but as regards the joint routes by way of Saint John, our conclusion is that the orders of the Board are not within the ambit of its powers. The reading of the statute which governed the Board, in applying these orders to joint routes by way of St. John, is open, in our opinion to insurmountable objections; objections which do not proceed upon niceties of interpretation, but upon the unmistakeable effect of the substantive enactments of the Act.

Before entering upon an analysis of the operative sections some pertinent considerations drawn from the general features of the statute should be emphasized.

As appears from recitals and declarations in the preamble and in the body of the Act, the statutory rates, whether compulsory under section 3 and 4, or non-compulsory under section 9, are envisaged by the statute not as providing a fair return for railway services, but as arbitrary rates, established with the design of affording special "statutory advantages to persons and industries" in the "select territory"; it was therefore considered just to transfer from the railway companies to the Dominion Treasury the burden of reductions authorized by section 9, which in the legal sense are non-compulsory, but, which it was recognized, might be exacted from the companies concerned, by the force of competition. It should also be observed, that the only enactment of the Act which confers a right of compensation upon railway companies (other than those concerned in the operation of the "Eastern lines") in respect of reductions sanctioned by the Act is the provision in section 9 already mentioned and that provision relates only to non-compulsory reductions authorized by the section. Indemnity to companies in respect of

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loss of revenue arising from a compulsory reduction is not provided for and not contemplated by the Act.

Sufficient perhaps has been said to make it evident that a decision supporting the validity of the orders of the Board would necessarily rest upon the view that the obligatory provisions of sections 3 and 4 are, in relation to the tariffs in question, binding upon the Canadian Pacific Railway Co. with the same force and to the same extent as they affect the persons and companies concerned in the preparation and publication of tariffs of rates for the "Eastern lines." But the point is of cardinal importance and it is perhaps desirable to develop it a little further. If movements over these routes are "preferred movements," then all persons and companies concerned in the joint rates applicable to them are required by section 3 to concur in, first, the cancellation of the existing tariffs, and second, the substitution of statutory tariffs therefor. There is nothing in the section which lends colour to the suggestion that the cancellation of existing tariffs within the purview of that section, that is to say the cancellation of tariffs of rates for "preferred movements," can, in any instance, be optional with one or more of the parties concerned. If a given movement is a "preferred movement" then the duty of all parties interested in the appropriate tariff, both as to cancellation and as to reduction, is by the unequivocal words of the section, an absolute duty. If a given movement is not within the class of "preferred movements," then the section has no application to rates chargeable in respect of it; and by virtue of section 7, the Board is disabled from either requiring, or sanctioning, for such a movement, a rate determined according to the arbitrary standard of the statute. If, therefore, the joint routes in question by way of Saint John and St. Rosalie are preferential routes, within the operation of sections 3 and 4, it was as much the duty of the Canadian Pacific Railway Company as of the officials of the "Eastern lines" to concur in the cancellation of the existing tariffs and the substitution of statutory tariffs; and, if not, the Board had no jurisdiction either to require or to authorize either substitution or cancellation.

The necessary effect, therefore, as observed already, of the view of the Board, that such movements are "pre-

ferred movements," is that the Canadian Pacific Railway Co's. share in the joint toll is subject, as well as the share of the "Eastern lines," to the statutory reduction, a reduction in respect of which no compensation is provided under the Act. This would be incompatible with the policy which dictated section 9, because it seems impossible to reconcile the policy of compensating for losses of revenue arising from non-compulsory reductions, due to economic pressure, with the policy of withholding compensation for losses arising from reductions imposed by express statutory compulsion. It is not less difficult to reconcile such a policy with the declarations above referred to, touching the inadequacy of the statutory rates as remuneration for the services to which they apply.

Coming now to the verbal structure of sections 3 and 4. The controversy turns largely upon the effect of section 4, as will now be apparent from what has been said, and particularly upon the meaning to be ascribed to sub-paragraph 4, 1 (*b*), which is in these words:—

> Traffic moving outward, westbound, all rail—From points on the Eastern lines westbound to points in Canada beyond the limit to the Eastern lines at Diamond Junction or Levis; for example, Moncton to Montreal,—the twenty per cent reduction shall be based upon the Eastern lines proportion of the through rate or in this example upon the rate applicable from Moncton west as far as Diamond Junction or Levis.

The description of the through westbound routes

> from points on eastern lines westbound to points in Canada beyond the limit of the "Eastern lines" at Diamond Junction or Levis.

is perhaps not quite free from ambiguity. When, however, the sub-paragraph is read as a whole, there is little room for dispute that the only routes contemplated by it are routes passing through Diamond Junction or Levis. In the concrete example given, the reduction is calculated by reference to "the rate applicable from Moncton west as far as Diamond Junction or Levis." As designating part of a route from Moncton to Montreal which touches neither Diamond Junction nor Levis, this does not seem a very appropriate phrase. The only routes from points on the "Eastern lines" which carry westbound traffic through Diamond Junction or Levis, are over the Canadian National lines. But it is more important to observe that the

> rate applicable from Moncton West as far as Diamond Junction or Levis is given as the equivalent of the Eastern lines proportion

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of the through rate for the route from Moncton to Montreal, or, to follow the natural reading of the words,

"the proportion" of the through rate earned by the transport service on the "Eastern lines."

It is impossible to suppose that the words in this paragraph were selected with a view to describing a route which deviates from the "Eastern lines" at any point east of Diamond Junction or Levis.

But the matter does not rest here. By section 6 it is declared that

the reductions herein authorized * * * shall be borne by the Eastern lines.

It is true that the sentence in which this declaration occurs is dealing with a matter of accounting as between the "Eastern lines" and the Canadian National Railways generally. But the decisive point is that the reductions (they can be none other than the reductions authorized by section 3), are treated by the section as a charge upon the revenues of the Canadian National Railways, to be met, in case of deficit, by a special parliamentary apropriation. In view of the fact that this is the sole provision dealing with the ultimate incidence of the reductions authorized by section 3, it seems impossible to doubt that all such reductions were envisaged by the legislature as reductions affecting tolls or parts of tolls belonging to the Canadian National Railways as earned by a transport service on the "Eastern lines."

On behalf of the respondent, the Canadian Pacific Railway Co., a point is made which must be noticed. Movements of freight traffic, by way of joint routes through Saint John, if not "preferred movements" within sections 3 and 4, are, it is argued, "movements similar to preferred movements," within the meaning of section 9. While this may be unobjectionable as an application of this particular phrase, found in section 9, when taken by itself it does not advance the argument of the respondents. Section 9 applies only to tariffs filed by some company other than the companies concerned with the "Eastern lines" or the Canadian National Railways, and the frame of that section clearly shows that it does not contemplate a tariff of tolls which are subject to apportionment between connecting companies. The difference between normal tolls and tolls under tariffs filed under that section is payable to the

company in its entirety; there is no provision for apportionment. The company filing the tariff is treated as the only company concerned. This right, under section 9, evidently could have no possible operation or, indeed, meaning, as applied to tolls in respect of joint routes by way of Saint John. The substance of the contention is that, by the joint application of ss. 3, 4 and 9, joint rates, which are not within the operation of ss. 3 and 4 alone, or within the operation of section 9, alone, can be subjected to a reduction (bringing them into conformity with the statutory rates in respect of corresponding movements over the Canadian National Railways) which, as affecting the share of the Eastern lines in the joint rate, is compulsory, but, as affecting that of the Canadian Pacific Railway Company, is voluntary. The learned Chairman of the Board appears to have been influenced by this argument in arriving at the view expressed by him, that the assent of the Canadian Pacific Railway Co. to the orders impeached satisfactorily meets the objection that the Board has no jurisdiction under the Act to exact from the Canadian Pacific Railway Co., any compulsory reduction of any rate in which it is interested.

The conclusive answer to these contentions is manifest from what has already been said. The obligation imposed by section 3 has no relation to any tariffs except tariffs of tolls chargeable in respect of "preferred movements." Upon tolls in respect of other movements, the statutory reduction under that section cannot take effect; and as regards such tolls, no reduction is required, nor is any authorized, save only those sanctioned by section 9. Movements over joint routes by way of Saint John not being "preferred movements," the Board, let it be said again, is without jurisdiction either to direct or to sanction the establishment of rates in respect of them which are ascertained according to the special rule laid down in the statute.

These considerations (leading to the conclusion that the Board's orders, in so far as they affect tolls chargeable for joint routes by way of Saint John, cannot be supported) have for the most part no application to joint routes by way of Ste. Rosalie. Ste. Rosalie is a station near Montreal, a considerable distance west of "select territory," and

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is reached by the Canadian Pacific Railway Co's. line running from Saint John to Montreal direct, as well as by the Canadian National Railways lines running from Moncton to Montreal by way of Diamond Junction and Levis. Movements of traffic originating at points on the "Eastern lines," and routed over the Canadian National Railways by way of Diamond Junction or Levis to Ste. Rosalie, and thence by the Canadian Pacific Railway, are within the scope of the definition of westbound "preferred movements" contained in section 4 (1) b. We encounter in this case, none of the difficulties which meet us, as noted above, when endeavouring to apply this definition to movements over joint routes by way of Saint John. As movements by way of Ste. Rosalie over the Canadian National Railways pass through Diamond Junction or Levis, the "Eastern lines proportion" of the through rate is that attributable to the haul as far as Diamond Junction or Levis. Every element of the definition is satisfied. Such movements are, therefore, "preferred movements" within the meaning of section 3, unless by reason of something in that section or elsewhere in the Act it appears that they are not such within the true intendment of the legislation. Section 3, as applied to such movements, would impose upon the Canadian Pacific Railway Co., as well as upon the persons and companies concerned with the preparation of tariffs for the "Eastern lines," the duty of concurring in the cancellation of the joint tariffs applicable, and in the substitution of the statutory tariffs, ascertained by appying the statutory reduction calculated according to the rule laid down by sub-paragraph (*b*) of section 4. As we have seen, such a calculation would present no difficulty. Movements over joint routes by way of Ste. Rosalie appear, therefore, to be "preferred movements" within the meaning of ss. 3 and 4, when those sections are read and construed according to the ordinary and natural meaning of the words employed, nor is such a result out of harmony with the other provisions of the Act, or with any feature of the parliamentary scheme as disclosed by the statute. The compulsion directed against the Canadian Pacific Railway Co. does not affect the share of that company in the joint rate, because the whole of the statutory reduction falls upon the part of the rate belonging to the

Canadian National Railways. No difficulty arises therefore as to compensation, and the ultimate incidence of the reductions is provided for by section 6. Moreover, the effect of this view is to maintain unimpaired and in full operation the transfer facilities at Ste. Rosalie; and this construction is in perfect consonance with the spirit of the provisions of the *Railway Act*.

It remains to discuss some arguments, founded upon general considerations, advanced in support of the contentions of the respondents, and, in the main, accepted by the Board of Railway Commissioners.

We are urged to reject the appellant company's contentions in relation to both the Saint John and the Ste. Rosalie "gateway" on the ground that acceptance of them would have the effect of defeating the purpose of the statute, which, it is contended, is disclosed either explicitly or inferentially by the preamble coupled with section 8—to provide some relief for the industries of the Maritime Provinces from the oppressive costs of transport which were incident to the marketing of their products in central or western Canada. Then it was pressed upon us with great emphasis that it could not have been the intention of Parliament to deprive those industries of the advantages due to the existence of competitive and alternative routes by way of Saint John and Ste. Rosalie before the passing of the Act, which again, it is said, would be the practical result of adopting the appellant company's construction of the Act. We need not now concern ourselves with these considerations in so far as they relate exclusively to Ste. Rosalie, but in so far as they relate to the Saint John "gateway," they must be considered.

At the date of the passing of the Act, as we have seen, joint tariffs were in force applicable to joint routes through both "gateways." Shippers in the select territory, as in other parts of Canada, are, it must be conceded, entitled to enjoy the benefit of the provisions of the *Railway Act* as to joint tariffs and joint routes. For the Maritime Provinces, it is insisted, these provisions, as applied in the orders of the Board of Railway Commissioners in relation to both "gateways" had, prior to the passing of the statute, a special value as securing the benefits of competition in

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railway service and as securing an alternative route in the event of transport over one route being interrupted or unduly impeded.

Owing to the manner of distribution of railway lines in the Maritime Provinces, the right of routing traffic through both these groups of joint routes is, it is argued, for these industries, an almost invaluable privilege; and the loss of that privilege would, it is further argued, in substance, result from the construction advocated by the appellant company. And thus to take away this privilege, it is said, would have the effect of investing the Canadian National Railways with a virtual monopoly of westbound traffic. The value attributed to these joint routes, by the people of the Maritime Provinces was, it is said, notorious, and it is impossible to suppose, it is argued, that Parliament, while bestowing with one hand the benefit of reduced rates for traffic over the Canadian National Railways exclusively, or over the Canadian Pacific Railway exclusively, was, with the other, withdrawing from the Maritime Provinces the right to enjoy at the same time the advantages which they believed to flow from the maintaining of these joint routes.

These considerations, as presented in argument, seemed in themselves to lack neither versimilitude nor weight; and although they are less weighty, as applied to the Saint John "gateway" alone, still, given operative sections fairly capable, when the Act is read as a whole, of the construction adopted by the Board, it is undeniable that they might provide forcible arguments in support of the respondents' contentions. Indeed, if, as is suggested, the policy giving birth to the legislation was broadly conceived with the view of redressing commercial disadvantages affecting the select territory by reason of its geographical situation, by granting, in the phrase of section 8, "statutory advantages in rates to persons and industries" in that territory, it would not be difficult to understand a legislative scheme permitting shippers in that territory to enjoy at one and the same time the benefits of the statutory standard together with the option of routing their shipments by either of the two "gateways."

The appeal to these general considerations, however, rather assumes the possession by this court of an authority which is not vested in it as a court of law. The function

of this court is to give effect to the intention of the legislature, as disclosed by the language selected for the expression of that intention. Whatever views may have inspired the policy of a statute, it is no part of the function of a court of law to enlarge, by reference to such views, even if they could be known with certainty, the scope of the operative parts of the enactment in which the legislature has set forth the particular means by which its policy is to be carried into effect. If the language employed is fairly open to a given construction, then the policy of the Act, as disclosed by the statute itself, read in light of the known circumstances, in which it was passed, may legitimately be called in aid. But as already observed, the language of the operative sections of the Act before us, when fairly read, does not lend itself to the construction advocated by the respondents in so far as it affects the Saint John "gateway." And, indeed, if the meaning of the language employed by the legislature to express its intention (in those sections) were less unambiguous than it is, one can find little that could, even then, be adduced in support of the respondents' position, in the recitals and declarations in the preamble and the body of the Act, on which they also rely, when the effect of these is clearly apprehended.

The preamble professes to be for the most part a summary of the relevant portions of the report of a Royal Commission of September, 1926, through which, as it recites, Parliament has been advised that the Intercolonial Railway was designed, *inter alia,* to afford to Maritime merchants, traders and manufacturers the larger market of the whole Canadian people; but that in "determining" the construction of the railway, commercial considerations were subordinated to considerations of a national, Imperial, and strategic character, which dictated a longer route than would otherwise have been necessary, and that, to this extent,

> the cost of the railway should be borne by the Dominion and not by the traffic which might pass over the line.

The preamble proceeds:—

> And whereas the Commission has, in such report, made certain recommendations respecting transportation and freight rates, for the purpose of removing a burden imposed upon the trade and commerce of such provinces since 1912, which, the Commission finds, in view of the pronouncements and obligations undertaken at Confederation, it was never intended such commerce should bear; and whereas it is expedient that

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effect should be given to such recommendations, in so far as it is reasonably possible so to do without disturbing unduly the general rate structure in Canada.

To the recitals in the preamble there should be added the declaration contained in s. 8:—

> The purpose of this Act is to give certain statutory advantages in rates to persons and industries in the Maritime provinces.

It will be observed that the recitals in so far as they are pertinent, may be summed up in the proposition that, by reason of the circumstances attending the institution of the Intercolonial Railway system, "the cost of the Railway" should be borne by the Dominion, and not by the traffic on the line, in so far as that cost is due to national, Imperial and strategic considerations, as contradistinguished from commercial considerations, and that certain recommendations founded upon this view in the report of the Royal Commission ought to receive effect.

The report of the Royal Commission was not referred to in argument; although strictly, in view of the preamble, it would not be improper to consult it. It seems to contain nothing which gives additional strength to the respondents' argument. The recommendations relate only to reductions of tolls chargeable by the Canadian National Railways. The reference to other railways is limited to a single sentence, in which it is suggested that the legitimate interests of the Canadian Pacific Railway Co. cannot be ignored. It will be observed also that the language of s. 8 is very guarded. The purpose of the Act is declared to be to give "certain statutory advantages in rates."

There is nothing here pointing to an application of the principle of compulsory reduction of rates broader than that prescribed according to the fair reading of ss. 3 and 4. There is no hint of an all-round reduction of rates in respect of all westbound through routes. It was assumed, no doubt, that the Canadian Pacific Railway Co. would be compelled, by pressure of competition, to take advantage of the privilege given by s. 9, but nothing in the preamble, or in s. 8, supplies a juridical ground for deducing an intention to apply the principle of that section to the joint routes by way of St. John.

It was argued by the respondents that the question stated in the order giving leave to appeal is not a question of jurisdiction within the meaning of the *Railway Act*. The first of the above-mentioned orders, in explicit terms,

applies the compulsory reduction provided for by ss. 3 and 4 to tariffs for the through routes in question. The second does the same thing in effect. It follows, from what has already been said, that if such tariffs do not fall within ss. 3 and 4, then, by force of s. 7, the Board of Railway Commissioners is debarred from applying to them the principles of those sections. It seems to be sufficient to say that where by statute the Board is given authority to make orders of a certain class in a defined type of case, and is disabled from making such orders in other cases, the question whether, in given circumstances, a case has arisen in which an order of that class can lawfully be made by the Board under the statute, is a question of competence —that is to say, a question of jurisdiction within the meaning of the *Railway Act*.

The orders of the Board are set aside in so far as they relate to tariffs for joint rates by way of Saint John; in other respects the appeal is dismissed. As success is divided, there will be no costs of the appeal.

The questions stated in the order giving leave to appeal are answered as follows:—

Question 1 (*a*) as to Saint John,—No.
Question 1 (*b*) as to Ste. Rosalie,—Yes.
Question 2 (*a*) as to Saint John,—No.
Question 2 (*b*) as to Ste. Rosalie,—Yes.

Maritime Freight Rates Act

3. (1) All persons or companies controlling, or concerned in the preparation and issue of tariffs of tolls to be charged in respect of the movements of freight traffic, whether on behalf of His Majesty or otherwise, upon or over the Eastern lines specified in section four of this Act, and hereinafter called "preferred movements," are hereby authorized and directed upon and after the first day of July, 1927, to—

(*a*) Cancel all existing freight tariffs in respect of such preferred movements

(*b*) Substitute other tariffs for the tariffs so cancelled showing a reduction in such tariffs of approximately twenty per cent;

4. (1) (*b*) Traffic moving outward, westbound, all rail—From points on the Eastern lines westbound to points in Canada beyond the limit of the Eastern lines at Diamond Junction or Levis; for example, Moncton to Montreal—the twenty per cent reduction shall be based upon the Eastern lines proportion of the through rate or in this example upon the rate applicable from Moncton west as far as Diamond Junction or Levis.

6. For accounting purposes, but without affecting the management and operation of any of the Eastern lines, the revenues and expenses of the Eastern lines (includes the reductions herein authorized which shall be borne by the Eastern lines) shall be kept separately from all other accounts

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respecting the construction, operation or management of the Canadian National Railways. In the event of any deficit occurring in any Railway fiscal year in respect of the Eastern lines the amount of such deficit shall be included in a separate item in the estimates submitted to Parliament for or on behalf of the Canadian National Railways at the first session of Parliament following the close of such fiscal year.

7. The rates specified in the tariffs of tolls, in this Act provided for, in respect of preferred movements, shall be deemed to be statutory rates, not based on any principle of fair return to the railway for services rendered in the carriage of traffic. No argument shall accordingly be made, nor considered in respect of the reasonableness of such rates with regard to other rates, nor of other rates having regard to the rates authorized by this Act.

8. The purpose of this Act is to give certain statutory advantages in rates to persons and industries in the three provinces of New Brunswick, Nova Scotia and Prince Edward Island, and in addition upon the lines in the province of Quebec mentioned in section two (together hereinafter called "select territory"), accordingly the Board shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages in favour of persons or industries located elsewhere than in such select territory.

9. (1) Other companies owning or operating lines of railway in or extending into the select territory may file with the Board tariffs of tolls respecting freight movements similar to the preferred movements, meeting the statutory rates referred to in section seven of this Act. The Board, subject to all the provisions of the Railway Act, respecting tariff of tolls, not inconsistent with this Act, shall approve the tariffs of tolls filed under this section.

(2) The provisions of subsection two of section three and of sections seven and eight of this Act shall apply to the tariffs of tolls filed under this section.

(3) The Board on approving any tariff under this section shall certify the normal tolls which but for this Act would have been effective and shall, in the case of each company, at the end of each calendar year promptly ascertain and certify to the Minister of Railways and Canals the amount of the difference between the tariff tolls and the normal tolls above referred to on all traffic moved by the company during such year under the tariff so approved. The Company shall be entitled to payment of the amount of the difference so certified, and the Minister of Railways and Canals shall submit such amount to Parliament if then in session (or if not, then at the first session following the end of such calendar year) as an item of the estimates of the Department of Railways and Canals.

Solicitor for the appellant: *George F. Macdonnell.*

Solicitor for the respondents: The province of Nova Scotia, the Halifax Board of Trade, and the Saint John Board of Trade: *C. B. Smith.*

Solicitor for the respondent: The province of New Brunswick: *J. B. M. Baxter.*

Solicitor for the respondent: The Canadian Pacific Railway Company: *E. P. Flintoft.*

CHRISTOPHER WALTER HALLS (PLAINTIFF) ..... } APPELLANT;

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*Nov. 2.
1928
*Feb. 7.

AND

J. P. MITCHELL (DEFENDANT) ..... RESPONDENT.

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

Libel—Privilege—Letters written by medical officer of railway company, while investigating claim by company's employee to Workmen's Compensation Board—Disclosure of alleged communications by claimant when consulting medical officer as his personal physician—Principles underlying right to protection of privilege.

The underlying principle on which is founded protection for a communication otherwise actionable as defamatory, is "the common convenience and welfare of society." The communication is only protected when it is fairly warranted by some reasonable occasion or exigency, and when made in discharge of some public or private duty such as would be recognized by people of ordinary intelligence and moral principles, or is fairly made in the legitimate defence of a person's own interests. It is not sufficient that the person making the statement believes, honestly and not without some ground, that the duty or interest exists. There must, in fact, be such a duty or interest as, under all the circumstances, warrants the communication.

Professional secrets acquired from a patient by a physician in the course of his practice, are the patient's secrets, and, normally, are under his control and not under that of the physician. *Prima facie* it is the patient's right that the secrets be not divulged; and that right is absolute unless there is some paramount reason overriding it.

The fact that the disclosure of a patient's secret is made by one physician to another is not a decisive factor to justify it, although in some cases that fact may have significance.

Even where the circumstances may justify a physician in disclosing his patient's secret, the justification does not extend to a wanton disclosure; and the fact that a statement is made unnecessarily (though without malice) may, having regard to its nature, make it a wanton disclosure, and bar the claim of privilege with respect to it. Also, even where a disclosure of a patient's secret may be justified, the physician should take every practicable precaution to avoid inaccuracy and unfairness, and his failure to do so (though without malice) may be fatal to a claim of privilege.

A medical officer of an industrial concern, charged with investigating an employee's claim made to the Workmen's Compensation Board (Ont.), and in preparing the evidence, (and even where any sum awarded will be paid, not by the employer, but by the Dominion Government, by reason of the claimant being a returned soldier), is not so situated that he is under a duty, for the purpose of securing information in preparing his case, to divulge, without the claimant's assent, facts which he has confidentially ascertained from the claimant as his personal medical adviser.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

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The absolute privilege protecting the testimony of witnesses in court is applicable to protect statements by an intending witness, as to the nature of the evidence he can give, made to persons engaged professionally in preparing the evidence to be presented in court (*Watson* v. *McEwan*, [1905] A.C. 480); but does not extend to such statements made to persons not concerned in preparing the evidence.

Certain statements made by defendant, assistant chief medical officer of a railway company, and charged with investigating a claim made by plaintiff, an employee of the company, to the Workmen's Compensation Board (Ont.), which statements were contained in two letters, written, respectively, to an officer of the Department of Soldiers Civil Re-establishment, for information, and to an eye specialist whose opinion was required, and disclosed communications alleged by defendant to have been made to him by plaintiff when consulting defendant as a physician some years before to the effect that plaintiff had had a certain disorder, were held, in the circumstances in question, not to come within the protection of privilege.

Macintosh v. *Dun*, [1908] A.C. 480, at pp. 390, 398, 399; *London Assn. for Protection of Trade* v. *Greenlands Ltd.*, [1916] A.C. 15, at pp. 22-23, 28, 29; *Stuart* v. *Bell*, [1891] 2 Q.B. 341, at p. 350, and other cases, cited.

Judgment of the Appellate Division of the Supreme Court of Ontario (59 Ont. L.R. 590, reversing judgment of Wright J., 59 Ont. L.R. 385) reversed in part.

Smith J. dissented in part, holding that the second letter was privileged, being written in the performance of defendant's duty of investigating the claim, and submitting facts, as he had gathered them, on which an expert opinion was to be based; that defendant could not properly, under the circumstances, have suppressed the facts (as he understood them) which he believed would show the claim to be unfounded; as to the first letter, however, the defence of qualified privilege could not prevail; it was a letter seeking information, and there was no necessity of making therein the libellous statement complained of; and in respect thereof the plaintiff was entitled to at least nominal damages.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of Wright J. (2).

The action was for damages for alleged libel and slander. Wright J. held the plaintiff entitled to recover $500 for libel and $200 for slander. His judgment was reversed by the Appellate Division, which held that the plaintiff's action should be dismissed. This Court, in its judgment now reported, held that the plaintiff should succeed as to the libels, and allowed the appeal with costs in this Court and in the Appellate Division, and directed judgment to be entered for the plaintiff for $500 damages for libel, and costs

(1) (1926) 59 Ont. L.R. 590. (2) (1926) 59 Ont. L.R. 355.

of the action. Smith J. dissented in part, as indicated in the above headnote. The material facts of the case are sufficiently stated in the judgments now reported.

R. T. Harding K.C. for the appellant.

D. L. McCarthy K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault and Lamont JJ.) was delivered by

DUFF J.—The appellant was a member of the Canadian Expeditionary Forces, in which he enlisted on the 8th of October, 1915, and was discharged as no longer fit for service, on the 10th of April, 1918, by reason of valvular disease of the heart, which had been contracted in the army. In May, 1924, while in the service of the Canadian National Railways at Toronto, as a draftsman, he suffered an attack of iritis, which permanently affected his vision; and in the following September he applied to the Ontario Workmen's Compensation Board for compensation, ascribing the affection from which he suffered to a blow received from a swinging door in the office where he was employed, and supporting his application by a certificate from Dr. Angus Campbell, the physician who had treated him. Shortly afterwards, he was requested by the Claims Department of the Canadian National Railways to submit himself for examination to the respondent, who was Assistant Chief Medical Officer of the railway company, at Toronto, and was in due course examined by the respondent, and later by Dr. James McCallum, an eye specialist.

On the 22nd of December, 1924, the Board notified him that his application had been rejected. His request for permission to inspect the evidence upon which the Board had proceeded was refused, but he was granted a re-hearing, which took place on the 8th of January, 1925. On the re-hearing, he was asked by the Secretary of the Board if, while in the army, he had contracted a disease referred to in the evidence as "g. c. infection"; and this he denied. On this re-hearing, the respondent also gave evidence, that the appellant had been a patient of his in 1920, and had then admitted to him that, two years before, he had suffered from that malady. This the appellant denied, and the hearing was adjourned for further evidence. The ap-

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pellant then, having been given an opportunity of inspecting the material before the Board, discovered that, in addition to a communication from the respondent, similar in tenor to that of the testimony just mentioned, there had been placed before the Board a communication from Dr. Hewitt, the Chief Officer of the Department of Soldiers' Civil Re-establishment in Toronto, stating that the military records contained an entry indicating that the appellant had been affected by this disorder, while in the army. After considerable delay, the appellant's exertions were successful in having the original records, giving his army medical history, transferred from Ottawa to Toronto for inspection; from which it appeared that they contained no such entry. Thereupon the appellant requested the respondent to withdraw the statements he had made as to the facts ascertained by him as the appellant's physician in 1920, which, through some channel, had been reported to the appellant's family. The appellant, in his evidence, stated that at this interview the respondent declared he would never have made the communication he did make to the Board, but for the information he had received from Dr. Hewitt, as to the entries in the military record; and the learned trial judge finds as a fact that the respondent promised then to write a letter which the appellant had demanded, withdrawing the statement that the appellant had admitted having contracted g. c. infection. A day or two after this interview, the appellant received from the respondent a letter, written, it is stated, after consultation with the Railway Company's Claims Agent, declining to make any "further report" upon the subject to the appellant. The appellant then brought the action out of which this appeal arises, claiming damages for defamation. Justification was not pleaded, but the respondent alleged that the communications complained of were severally published on privileged occasions, and without malice.

In substance, the learned trial judge held that in fact the appellant had not informed the respondent that he had suffered from the malady mentioned; that the publications complained of were not privileged; and, moreover, that in disclosing to the detriment of the appellant information supposed to have been received by him under the seal of professional confidence, the respondent was not

actuated by a sense of duty, but by a determination to defeat the appellant's claim for compensation. This judgment was reversed, and the action dismissed, by the Second Appellate Division.

The publications complained of in the statement of claim are four, all in October or November, 1924. First, to the Workmen's Compensation Board, in writing; second, to Dr. Angus Campbell, orally; third, to Dr. Hewitt, in writing; fourth, to Dr. McCallum, in writing.

As to the first of these publications, the learned trial judge held that the respondent was protected by an absolute privilege, on the principle of *Watson* v. *McEwan* (1), and no question now arises as to this communication. As to the second, the Appellate Division held, and we think rightly, that there was nothing in the conversation upon which the charge was based which, in terms or in effect, upon the evidence adduced, can properly be held to have imputed to the appellant a presently existing infection. We need only concern ourselves, therefore, with the communications on the third and fourth occasions. Before proceeding to the discussion of the evidence, it should be mentioned that, after declining, on the advice of the Claims Agent, to write the letter he had previously promised to write, the respondent says that he appeared before the Workmen's Compensation Board on behalf of the Railway Company, and insisted upon the correctness of his previous statement. The appellant's claim was dismissed upon grounds which the Board stated in their reasons for judgment, included the fact that there was before them evidence of a g. c. infection. Later, the appellant having taken the only means left to vindicate himself, by bringing this action, he was, because he had taken that step, dismissed from his employment with the Canadian National Railways.

In all this, if the learned trial judge was not mistaken in his finding, the appellant has evidently been the victim of a cruel error; and it behooves us to examine with some attention the reasons given by the Appellate Division for their reversal of Wright J's judgment.

(1) [1905] A.C. 480.

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Let us, then, consider these communications, in respect of their origin, purport and object. In each case, the subject matter of the communication was a fact which the respondent supposed the appellant had stated to him as his medical attendant, in circumstances which clothed the communication with a confidential character. The respondent, looking up his notes of his treatment of the appellant, found an entry on one of his cards to the effect that, two years before the date of the entry, the appellant had suffered from g. c. infection; and a further entry, that, in treating the appellant, he had administered anti-g. c. vaccine. He had no actual recollection of any statement by the appellant on the subject; and at the trial he was unable to say with certainty when the memorandum had been made. The learned trial judge found— a finding which must, I think, be accepted in this Court—that the note was not made at the time of, or immediately after, the interview to which it relates, but some weeks, at least, later. Before the publication of any of these libels, the respondent had interviewed Dr. Angus Campbell, who had treated Halls quite recently, and had been informed by Dr. Campbell that, when first consulted by Halls, he had, with a view to ascertaining the cause of the iritis from which he was suffering and the proper treatment for it, asked Halls if he had ever suffered from g. c. infection, and had received an answer in the negative; and his treatment had proceeded on that basis. The respondent, in these communications, therefore, was professing to give the substance of information confidentially imparted to him by the appellant as the appellant's medical adviser, but without any actual recollection of what the appellant had told him, and with a knowledge of the fact that, for the purposes of diagnosis, the appellant had recently informed the physician who was treating him that he had never suffered from the complaint imputed to him in the entry on the respondent's card.

As to the occasion, the respondent, acting in his capacity as Assistant Chief Medical Officer of the Canadian National Railways, was engaged in investigating, at the request of the Claims Department, the appellant's claim for compensation, and in collecting the evidence to be presented to the Board upon the subject of that claim, for the purpose of assisting the Board in determining the

questions raised, in their medical aspects. The respondent, in applying to Dr. Hewitt, wished to obtain, to assist him in his investigations, the medical history of the appellant as disclosed in the records of the Department, of which Dr. Hewitt was an official—the chief official in Toronto. Iritis, it seems, is commonly the result of a systemic affection, and as, according to the respondent, his entries suggested the existence of rheumatism, although there is there no express entry to that effect, he was particularly anxious to ascertain, he says, whether the military records threw any light upon that subject; and primarily, the application to Dr. Hewitt was made with that object in view. He first made a personal visit to Dr. Hewitt, taking with him his cards, and gave to Dr. Hewitt the history of his interviews with, and treatment of, the appellant as disclosed by his notes; and received from Dr. Hewitt, orally, a statement of the contents of his record, including the entry "v.d.g.", indicating "g. c. infection." On his examination for discovery, he affirmed quite unreservedly that he had read the document, and that the interview had lasted about half an hour. At the trial, he agreed with the suggestion of cross-examining counsel that any competent physician, reading the history as given by the document, intelligently, must have realized that the entry of the letters "v. d. g." was a mistake, and that the letters should have been " v. d. h."; but he there stated that he did "not think" he had inspected the document, and that his attention had been attracted almost exclusively by the entry " v.d.g.", read to him by Dr. Hewitt. On the 30th of October, he wrote the letter containing the statements complained of. Before the letter of the 30th of October was written, Dr. Hewitt had already, on the 27th of October, communicated with Ottawa, and by letter dated the 3rd of November, he received authority to give the information desired, and this was done by letter dated the 6th of November.

The other occasion with which we are concerned is the occasion of the respondent's letter of the 17th of November to Dr. McCallum, who was an eye specialist; and the ostensible purpose of the letter to Dr. McCallum was to put him in possession of the relevant facts, so far as they were known to Dr. Mitchell, in order to enable Dr. Mc-

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Callum to conduct an examination of the appellant, and report upon the probable cause, in his opinion, of the appellant's malady.

The first question for consideration is whether the statements made in the letters of the 30th of October and the 17th of November, disclosing confidential communications alleged by the respondent to have been made by the appellant to him as his medical attendant, and imputing to the appellant the disorder mentioned, were made in such circumstances as, *prima facie,* to bring them under the protection of privilege.

The circumstances of the alleged libel are very exceptional, and cases similar, in the nature and origin of the defamatory matter, must have been rare; and it is therefore desirable to be quite sure that we are on the solid ground of fundamental principles. Fortunately, we have for our guidance a statement of the law proceeding from the very highest authority, and I at once quote from the judgment of the Judicial Committee, delivered by Lord Macnaghten in *Macintosh* v. *Dun* (1). The members of the Board for whom Lord Macnaghten spoke were, Lord Loreburn, Lord Ashburne, Lord Robertson, Lord Atkinson and Lord Collins. The passage is as follows:—

> The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood* v. *Spyring* (2), Parke B., delivering the judgment of the Court of Exchequer, says: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits."
>
> That passage, which, as Lindley L.J. observes, is frequently cited, and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class, but, to use the words of Erle C.J., in *Whiteley* v. *Adams* (3), "the general interest of society."
>
> Communications injurious to the character of another may be made in answer to inquiry or may be volunteered. If the communication be made

(1) [1908] A.C. 390, at pp. 398 and 399.

(2) (1834) 1 C.M. & R. 181, at p. 193.

(3) (1863) 15 C.B. (N.S.) 392 at p. 418.

in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle," to borrow again the language of Lindley L.J., it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

The defamatory statement, therefore, is only protected when it is fairly warranted by some reasonable occasion or exigency, and when it is fairly made in discharge of some public or private duty, or in the conduct of the defendant's own affairs in matters in which his interests are concerned. The privilege rests not upon the interests of the persons entitled to invoke it, but upon the general interests of society, and protects only communications "*fairly* made" (the italics are those of Parke B. himself) in the legitimate defence of a person's own interests, or plainly made under a sense of duty, such as would be recognized by "people of ordinary intelligence and moral principles."

Referring to the enunciation of the principle by Parke B., in the passage quoted above, in *London Assn. for Protection of Trade* v. *Greenlands Ltd.* (1), Lord Buckmaster said:—

> I do not think that any of the subsequent explanations, or definitions, have made any variation in the principle thus enunciated, nor added anything by way of explanation to this clear exposition of the law. The long list of subsequent authorities to which your Lordships were referred do nothing but afford illustrations of the different circumstances to which this principle may be applied * * * Indeed, the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact * * * It is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained.

Again, in *James* v. *Baird* (2), Lord Loreburn said:—

> In considering the question whether the occasion was an occasion of privilege, the Court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives rise to a social or moral right or duty, and the consideration of these things may involve the consideration of questions of public policy, as had to be done in a comparatively recent case in the Privy Council—(See *Macintosh* v. *Dun* (3), considered in *Barr* v. *Musselburgh Merchants Association* (4)).

(1) [1916] 2 A.C. 15, at pp. 22-23.
(2) [1916] S.C., (H.L.) 158, at pp. 163-4.
(3) [1908] A.C. 390, at p. 400.
(4) [1912] S.C. 174, at p. 180.

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It is not sufficient—it is, perhaps, unnecessary to say—that the defendant may, quite honestly and not without some ground, have believed that the interest or the duty existed. There must, in fact, be such an interest or such a duty as, when all the circumstances are considered, warranted the communication. *Stuart* v. *Bell* (1). Was there any duty, then, resting upon the respondent, was there any interest which he was bound or entitled to protect, which, upon these principles, could justify the disclosure of the facts stated, which he believed, but which he believed had come to his knowledge under the seal of professional confidence?

It is pointed out in the judgment of the Appellate Division that the Canadian National Railways had, strictly, no substantial pecuniary interest in any question raised by the appellant's claim for compensation. In order to obviate some of the difficulties encountered by returned soldiers in securing employment, the Dominion Government had agreed to assume the payment of awards for compensation made in their favour under the Workmen's Compensation Acts. A fund had been set apart for this purpose, and the administration of this was committed to the Department of Soldiers' Civil Re-establishment. The Canadian National Railways was technically interested in the appellant's claim, as a claim, if valid, payable by the company in point of law, but in fact its chief concern was that, having assumed the investigation of such claims, it was under a duty (whether legal or moral is of no importance) to take the usual steps to assist the Board in ascertaining the facts. The parties, in point of substantial interest, were the appellant and the Crown. Primarily, and at the outset of the proceedings, the appellant's interest was exclusively a pecuniary one, although, as we have seen, his interest assumed a much graver character in the later stages. The Crown also, as the ultimate payer in the event of the claim being established, had a pecuniary interest, and an interest not, perhaps, easily distinguishable from that of any high-minded employer

(1) [1891] 2 Q.B. 341, at p. 350.

concerned to do his full duty by his employees. No official could be under a duty to secure the defeat of such a claim by unfair or improper methods. As to Dr. Hewitt, and the officials of the Department of Soldiers' Civil Re-establishment, and the officers of the Department of National Defence, they had no special concern with the investigation of these claims: their duty, as regards the medical records in their hands, would be to observe the practice of the department, which, we may assume, included measures to prevent any improper use of such records; and it is difficult, if not impossible, to suppose, although there is no evidence on the point, that the practice could authorize giving out such information without the knowledge of the soldier to whom it related, to be used by the person receiving that information, equally without his knowledge, to his intended prejudice; or, in any case, in the absence of the strictest care to prevent the publication, to his detriment, of misleading statements.

As to Dr. Mitchell, no doubt, when engaged in investigating a claim for compensation made by a returned soldier, he would be quite within the limits of his duty in consulting, subject to the conditions prescribed by the practice, the military records of such a soldier, and making such fair and proper use of information obtained therefrom as the practice might permit; but it would be a mistake to suppose,—in considering the assertions made by him to the D.S.C.R., in connection with an application for permission to inspect such a record (whether merely casual or with the deliberate object of inducing the Department to permit inspection)—it would be a mistake to suppose (as we have seen) that we can properly disregard the fact that the matter of them was derived through confidential communications received from the appellant.

The Judicial Committee, in *Macintosh* v. *Dun* (1), in summarizing their reasons for holding that the communications, in question there, were not within the protection of the law, said:

> Information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation * * * It

(1) [1908] A.C. 390, at p. 400.

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may be picked up from discharged servants. It may be betrayed by disloyal employees;

and in *Greenlands' Case* (1), the Law Lords agreed that every circumstance connected with the origin and publication of the defamatory matter must be considered, in determining whether or not the necessary conditions of protection exist.

We are not required, for the purposes of this appeal, to attempt to state with any sort of precision the limits of the obligation of secrecy which rests upon the medical practitioner in relation to professional secrets acquired by him in the course of his practice. Nobody would dispute that a secret so acquired is the secret of the patient, and, normally, is under his control, and not under that of the doctor. *Prima facie,* the patient has the right to require that the secret shall not be divulged; and that right is absolute, unless there is some paramount reason which overrides it. Such reasons may arise, no doubt, from the existence of facts which bring into play overpowering considerations connected with public justice; and there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations *prima facie* imposed by the confidential relation.

In Comyn's Digest, Action on the Case for Deceit, (A. 5) "For Deceit in his Trust", the action is said to lie

> if a man, being entrusted in his profession, deceive him who entrusted him; as, if a man retained of counsel, become afterward of counsel with the other party in the same cause, or, discover the evidence, or secrets of the cause.

Communications made in confidence to, or knowledge acquired in confidence by members of the medical profession, are not at common law privileged from disclosure in courts of justice, as are communications to legal advisers; but Lord Brougham many years ago declared himself unable to appreciate the grounds of this distinction; and other eminent judges have expressed their regret that such a distinction should be recognized. Lord Mansfield, in a famous case, used strong language concerning the voluntary disclosure of confidences by medical practition-

(1) [1916] 2 A.C. 15.

ers. The right of the client to insist upon the nondisclosure of information acquired by his solicitor when acting for him is not limited in its application to those matters which are privileged from disclosure in courts of justice. The right is founded upon the necessities of the business of life, which require that people shall be able fearlessly to entrust their affairs to legal advisers, and applies to all confidential communications received professionally. Consequently, a solicitor is not permitted to make use, for his own benefit, or for the benefit of another client, of admissions or communications made to him by a person for whom he is acting as solicitor (*Moore* v. *Terrell* (1); *Taylor* v. *Blacklow* (2); *Cleave* v. *Jones* (3); and a solicitor will be restrained from acting for a new client in matters so closely connected with the business of a client for whom he is already acting as to justify an apprehension that some prejudicial disclosure may take place.

A similar duty is broadly incidental, not only to the relationship of principal and agent, or that of master and servant, but, speaking generally, to all cases in which confidence is given and accepted, subject, of course, to the implied qualification springing from the maxim *de minimis*. In Scotland, the clerk of a firm of accountants engaged in winding up the affairs of a firm of writers, who disclosed to the Board of Inland Revenue information derived from books and documents to which he had access for that purpose, and which seemed to indicate that the returns to the Board had not correctly stated the profit and loss account of the defunct firm, was held liable to pay damages for this breach of confidence, although no special damages were proved. Lord McLaren, in delivering judgment, in which the Lord President (Lord Robertson), Lord Adam and Lord Kinnear, concurred, observed,

> The act was defended as being done in discharge of a public duty, but I have never heard nor read that the duty of assisting the Treasury in the collection of the public revenue was of such a paramount nature that it must be carried out by private individuals at the cost of the betrayal of confidence and the invasion of the proprietary rights of other people.

There is apparently no reported judgment of any English court in which the principle stated in the passage

(1) (1833) 4 B. and Ad. 870. (2) 1836) 3 Bing N.C. 235.
(3) 1852) 21 L.J. Ex. 105.

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quoted above, from Comyn, has been applied to a medical practitioner. In Scotland, the liability is sanctioned by decision as well as by principle. *A.B.* v. *C.D.* (1).

The general duty of medical men to observe secrecy, in relation to information acquired by them confidentially from their patients is subject, no doubt, to some exceptions, which have no operation in the case of solicitors; but the grounds of the legal, social or moral imperatives affecting physicians and surgeons, touching the inviolability of professional confidences, are not, any more than those affecting legal advisers, based exclusively upon the relations between the parties as individuals.

It is, perhaps, not easy to exaggerate the value attached by the community as a whole to the existence of a competently trained and honourable medical profession; and it is just as important that patients, in consulting a physician, shall feel that they may impart the facts touching their bodily health, without fear that their confidence may be abused to their disadvantage. Was there, as to the communication to Dr. Hewitt, any reason for the disclosure of such weight (when these considerations are kept in view) as to attract to the respondent's statement the protection which the law, for the welfare of society as a whole, affords to privileged communications? The direct interest of the Crown was a pecuniary interest—an interest in the proper application of the fund. The duty of the respondent had relation only to the protection of that interest. It was not, as already observed, a duty of stricter obligation than that of any employee or agent called upon to investigate such a claim, and instructed by his employer to take all proper measures to assist the Board in arriving at the facts. Having regard to the character of the disclosures, I confess my inability to treat very seriously the notion that the existence of such a duty or such an interest could afford a ground for holding that the welfare of society requires the protection of them. The Appellate Division seems to have treated the communication as a confidential communication between doctors. I do not perceive the force of the fact that the official to whom the communication was made was

(1) (1851) S.C. 14 D., 2nd series, 177.

a doctor. The occasion was not a consultation between physicians; still less a consultation in the interests of the appellant. The communication was made to an official for the purpose of securing official information, to be used adversely to a claim which the appellant was asserting. No special precautions were taken to secure secrecy. The respondent's letter would pass through the usual clerical and official channels. Moreover, the official was the local head of the Department to which, as a pensioner, the appellant periodically reported. A communication made by a medical adviser, with regard to the state of his patient's health, for the purposes of consultation, for the benefit and with the authority, express or inferential, of his patient, is a thing bearing no resemblance to that with which we are concerned in this case.

From beginning to end, the respondent was actuated by the intention of placing the medical secrets which he had acquired from the appelllant before the Workmen's Compensation Board, and before others, for the purpose of securing reports or evidence (for the information of the Board) that were expected and intended to have some effect in influencing the Board to take a view adverse to the appellant's claim.

No doubt there may be cases in which the fact that the communication is made to a physician is not without significance; but to regard it as a necessarily decisive factor is not an admissible view. As Lord Loreburn said, in *Greenlands' Case* (1):

> The Court has to hold the balance, and, looking at who published the libel, and why, and to whom, and in what circumstances, to say whether it is for the welfare of society that such a communication, honestly made, should be protected by clothing the occasion of the publication with privilege;

and in a passage in which it appears to me the law is accurately stated, in Pollock, Torts, 12th Ed., p. 270, it is said:

> The nature of the interest for the sake of which the communication is made (as whether it be public or private, whether it is one touching the preservation of life, honour or morals, or only matters of ordinary business), the apparent importance and urgency of the occasion, * * * will all have their weight.

(1) [1916] 2 A.C. 15, at p. 29.

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Considering the present case from all these points of view, I am unable to agree that the duty of a chief medical officer of an industrial concern, for example charged with investigating a claim made by an employee for compensation under the *Workmen's Compensation Act,* and in preparing the evidence, is so "situated" that "it," to use the language of Blackburn, J. in *Davies* v. *Snead* (1), " becomes right in the interests of society that he should tell ", for the purpose of securing information in preparing his case, the facts he has confidentially ascertained from the claimant as his personal medical adviser; or that he is under a duty recognized by people of " ordinary intelligence and moral principle," to divulge such facts without the assent of the patient.

The judgment of the Appellate Division refers to a remark of the trial judge, that the interest with which the respondent was concerned was a pecuniary interest.

The question, in the last resort, with which everyone was concerned, was this, was the appellant to be awarded a certain sum of money, to be paid by the Crown? Neither the Canadian National Railway Company nor the respondent, as already observed, had any immediate pecuniary interest in this question. But to repeat what has been said above, I do not agree that, because of that, the duty under which he rested, was of a quality more potent for justifying his disclosures than the interest or the duty coming into play in the case of a practitioner acting for a private employer in investigating a claim for compensation by any employee.

The duty devolving upon the company, and upon the respondent as a servant of the company, was to take measures to see that the Board was properly informed; as the Appellate Division observes, to ascertain the facts and report them. But did this duty involve this professional man in any obligation to betray the professional confidences of his personal patient? If he chose to do so, was there any occasion or exigency which fairly warranted it? Does the welfare of society require that his communications should receive the protection which the law affords to privileged communications? Or is it not right that, having done so, to quote again from Lord Macnaghten's

(1) (1870) L.R. 5 Q.B. 608, at p. 611.

judgment, he "should take the consequences," if he did "overstep the law?" That question is, I think, best answered by citing another passage from the judgment of the Judicial Committee, in *Macintosh* v. *Dun* (1):

> It may not be out of place to recall the striking language of Knight Bruce, V.C., in reference to a somewhat similar subject * * * "The discovery and vindication and establishment of truth," His Honour says, "are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, * * * cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them * * * Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for truth itself."

"Following up this train of thought," as their Lordships did in *Macintosh* v. *Dun* (2)—however convenient or even advantageous it may be to employers to have access to the secrets entrusted by their employees to their own medical advisers, such information "may be bought too dearly —at least for the good of society in general."

The Appellate Division have agreed with the trial judge that the statement in the letter to Dr. Hewitt was not necessary. The substance of the statement being such as it was, that alone seems to be a conclusive bar to the claim of privilege. Even in a case in which circumstances might, in the last resort, require a doctor to give up his patient's secret, or justify him in doing so, justification could not extend to a wanton disclosure. A statement, such as that we are discussing, made unnecessarily, is, in my opinion, a wanton disclosure. Plainly, it is not a disclosure, to quote the language of Parke B., "fairly warranted by any reasonable occasion or exigency." Plainly, also, persons of ordinary intelligence and moral principle, situated as the respondent was, would not feel themselves under a duty unnecessarily to make such a disclosure.

And here an observation becomes necessary which, in principle, applies to the communication to Dr. McCallum as well as to the letter to Dr. Hewitt. In *Greenlands' Case* (3), Lord Loreburn said (at pp. 28 and 29):

(1) [1908] A.C. 390, at p. 400. (2) [1908] A.C. 390.
(3) [1916] 2 A.C. 15.

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> We should look at who and what are the persons to whom and by whom the libellous communication is made, and to the manner in which they conducted themselves, before admitting the privilege claimed * * *
>
> But we must remember that private reputation and credit are at stake, and I cannot think that privilege should be allowed unless there is not merely good faith but also real care to make inquiry only in reliable quarters, and to verify it where practicable. The absence of such care may, no doubt, be evidence of malice, but it is also relevant on the point whether there is privilege or not, and may, in my judgment, be fatal to the privilege even if malice is disproved.

First, as to the letter to Dr. Hewitt. The sentences which are important are as follows:—

> Halls tells me that he was discharged from the army on account of valvular disease of the heart, resulting from rheumatism earlier in life. He also stated that he had had g. c. infection about 1918. I would be glad if you would advise me as to the heart condition which necessitated his discharge, also whether his records show a history of rheumatism and g. c. infection.

As to the first sentence, the appellant denies that he ever told the defendant he had suffered from rheumatism. The respondent does not dispute this; his evidence is to the effect that he had inferred rheumatism from the entries on his card, as to the disease of the heart, and as to the initial treatment. The learned trial judge might have regarded this sentence not only as inaccurate but even as misleading. As to the second sentence, the respondent admits, that he had no recollection of any statement to that effect by the appellant. He was here also drawing an inference from his notes. He had been told that the appellant had informed his own physician in answer to questions put for purposes of diagnosis that he had never suffered from the infection mentioned. The respondent, if he had given the matter the slightest thought, must have realized that his letter was calculated to give the impression that there was no dispute about the facts he was stating, if indeed the letter was not also calculated to create the impression that his application was being made with the assent of the appellant; that, in truth, he was speaking for the appellant, although he knew he was, in effect, stating what the appellant had recently denied to his own physician.

From this point of view, Dr. Hewitt's reply is rather important. Dr. Hewitt evidently was under the impression that the information he was giving from the army records added nothing material to what the respondent already knew from the lips of the appellant himself.

The judgment of the Appellate Division, as I have said, treats this letter as innocuous. There is only too much reason to think that, next to the respondent's fatal mistake in proceeding with the investigation after discovering the former relation between himself and the appellant, this communication and the form in which it was couched had much to do with the mistakes that followed. I repeat that Dr. Hewitt's reply indicates, if it does not conclusively establish, that he believed he was giving to the respondent from the records, information which he had already received from his patient, and as to the correctness of which there was no sort of dispute between the respondent and the patient; a view which the respondent's letter was naturally calculated to produce, as we have seen. This seems to me the most natural explanation of the failure on the part of Dr. Hewitt to observe that the letters v. d. g. had been entered in his *précis* by mistake; a mistake which the respondent admits must at least have been suspected by any competent person reading the *précis* with care. It is not easy to understand why Dr. Hewitt was not sufficiently struck by the incongruity between the letters v. d. g. and their context, and the practice, to have realized at least the desirability of some inquiry as to the accuracy of his *précis*. His mistake most naturally is to be ascribed, I think, to the fact that he had before him this letter from the respondent, a physician, professing to give his patient's own account of his medical history, with which the entry (the letters v. d. g.) was wholly in accord. The learned trial judge might very well have taken the view, and this may go far to account for the severity of some of his strictures, that if the respondent had informed Dr. Hewitt that the application was not made with the assent of the appellant; that the appellant denied having had the infection indicated; that he himself had no recollection of any admission by the appellant; that he was proceeding solely upon the entries in his cards; that the attention of the appellant had not been called to these entries; that he purposed using Dr. Hewitt's reply in opposition to the appellant's claim, without notifying the appellant, and without giving him an opportunity of meeting it—if all these facts had been fairly placed before Dr. Hewitt, the learned trial

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judge might have found it difficult (if not impossible) to think that Dr. Hewitt's reply would have been sent without further inquiry.

The letter to Dr. McCallum (17th Nov.) consisted largely of a repetition of communications said to have been received by the respondent from the appellant. Assuming that a duty did rest upon the respondent in the last resort to disclose the facts touching the appellant's confidential statements to him in 1920, and touching his treatment of the appellant, he was under no obligation in doing so to conceal from the appellant the fact of his disclosures; and he was under a duty at least to take every practicable precaution to avoid inaccuracy.

He wrote in part as follows:

> Mr. Halls had been a patient of my own in 1920, when he consulted me for a painful condition of the right side of the sacrum about its middle, which had been bothering him for some five weeks prior to that. He gave a history of having been discharged from the Army on account of valvular disease of the heart, and when I saw him in 1920, he had a mitral systolic lesion. I at first, gave anti-rheumatism treatment, but this did not affect the painful sacral condition, and in view of this, and the fact that Halls admitted having had a g. c. infection two years before I saw him and still had shreds in the urine, I administered anti-gonococcus vaccine. After a short course of treatment, my records show that he felt some improvement. He now tells me that very shortly after the last injection the painful condition in the sacrum cleared up.

This last sentence distinctly conveys the impression that Halls had, in a very recent discussion of his g. c. infection with the respondent and of the doctor's treatment of it, admitted that he had benefited by that treatment. There had, in fact, been no such discussion. Neither the subject of g. c. infection nor that of the treatment had been mentioned between them. The statement seems to have been founded upon some inference drawn by Dr. Mitchell from an explanation given to him by Halls of the discontinuance of his visits to the doctor in 1920. The appellant denied that the treatment had been of any value, and the learned trial judge seems to have accepted his evidence. The letter contains more than one assertion conveying the idea that facts are either admitted or indisputable, which would have been disproved or vigorously disputed by the appellant.

It is difficult to understand why he did not take the course of frankly informing the appellant of what he was

doing; in the interests of accuracy, since the facts placed before Dr. McCallum so largely rested upon "admissions" ascribed to the appellant, that would appear to have been an obvious precaution.

In justice to the respondent, it should be said that he was no doubt convinced by his notes, and the entry in Dr. Hewitt's *précis*, that the appellant's claim was groundless, and his conviction as to this, no doubt, explains the tone of his letter to Dr. McCallum. It cannot, however, justify his conduct in disclosing the contents of his notes without giving the appellant an opportunity of explaining, or presenting his side of the matter, or taking any measures to protect his reputation. I cannot think that public policy requires that such communications, made in such circumstances should receive the protection accorded to privileged communications.

It was rather suggested that the letter to Dr. McCallum should be protected as within the principle of *Watson* v. *McEwan* (1). The basis of the judgment in *Watson* v. *McEwan* (1) is that statements made by a witness as such, in court, are absolutely privileged, and that this privilege would become illusory, were it not applicable for the protection of a statement by an intending witness, as to the nature of the evidence the witness can give, made to professional persons preparing the evidence to be presented in court. As the protection by privilege of the testimony of witnesses in court is regarded by the law as essential to the administration of justice, and as the extension of that protection to such preliminary statements is regarded as essential to the effectiveness of the substantive privilege, such preliminary statements are held to fall within the rule; but, as Lord Halsbury points out, this strict necessity is the basis of the privilege. In *Watson* v. *McEwan* (1) there was no question, as Lord Halsbury observes, of communications to persons other than those engaged professionally in preparing the evidence to be presented in court, and obviously the principle does not extend to such collateral statements. It protects the respondent, whatever his motives may have been, in respect of statements made before the

(1) [1905] A.C. 480.

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Workmen's Compensation Board and in respect of statements made to the Claims Agent, voluntary though they were, as to the evidence which he was prepared to give; but this privilege has no relation to the statements made to Dr. Campbell, to Dr. Hewitt, or to Dr. McCallum.

There was also a suggestion that the respondent may plead in excuse the fact that he was acting under the instructions of the Claims Department of the Canadian National Railway Company. In disclosing to the officials of that Department the nature of the evidence he could give, the respondent was within the principle of *Watson* v. *McEwan* (1), and is protected accordingly. But as regards other defamatory communications, the railway company, in requiring, or knowingly taking advantage of, breaches of confidence on his part, would share his responsibility. In respect of communications in breach of confidence, the courts afford protection as against the person in whom confidence was originally reposed; and the law is not so futile as to withhold such protection as against third persons, who, in acquiring knowledge of confidential matters, have also become acquainted with their character and origin. As the judgment in *Macintosh* v. *Dun* (2) shews, the fact that defamatory matter has originated in breach of confidence, to the knowledge of the defamer, or indeed, the fact that it was produced under a system which contemplated the violation of confidence as a source of information, may constitute a conclusive reason for rejecting the claim of privilege.

It is, perhaps, desirable to mention a passage in a textbook by a well known author: Bower, on Actionable Defamation (2nd Ed.), p. 111, which seems, superficially at least, not to be entirely in consonance with the view here expressed. The passage is as follows:

> Where the party defaming is entitled to such defeasible immunity as aforesaid, he is not deprived of the benefit thereof, as a defence to any action of defamation, by reason only of the circumstance that the communication was, as between himself and the party defamed, a breach of duty or a wrongful act not being in the nature of defamation.

If this passage is to be read as enunciating the proposition that in determining the existence or non-existence of privilege, it is, in point of law, immaterial that the defamatory

(1) [1905] A.C. 480. (2) [1908] A.C. 390.

matter originated or was published in breach of confidence, then the passage is plainly inconsistent with the decisions in *Macintosh* v. *Dun* (1), and *Greenlands' Case* (2). The authorities cited in support of the passage are, indeed, of doubtful purport. In *Robshaw* v. *Smith* (3), it does not appear that the court was really concerned with anything amounting to a breach of confidence on the part of the defendant. No such point was discussed or considered, and generally, as regards that case, the observations of Hamilton L.J. in the *Greenlands' Case* (4) must not be overlooked. That eminent judge suggests that the case is incompletely reported; and he declines to accept the expressions of opinion imputed to Lindley and Grove JJ. as authoritative. In *Thurston* v. *Charles* (5), no question of breach of confidence arose.

To summarize my reasons for thinking that the conditions have not in this case been satisfied in which the law protects privileged communications that otherwise would be actionable as defamatory. "The underlying principle" upon which that protection is founded is "the common convenience and welfare of society"—not the interests of individuals or of a class, but "the general interest of society." The court must consider whether the communication was made plainly under a duty—and a sense of that duty—which in all the circumstances would be "recognized by people of ordinary intelligence and moral principle"; and in considering that, the court will take into account the origin of the matter of the communication and "every circumstance connected with the publication" of it; and must "hold the balance and looking at who published the libel, and why, and to whom, and in what circumstances" must say "whether it is for the welfare of society that such a communication honestly made should be protected by clothing the occasion of the publication with privilege." There was no duty resting upon the respondent, and no interest committed to his charge, of sufficient weight and importance to require that the libels in question, involving the disclosure of profes-

(1) [1908] A.C. 390.
(2) [1916] 2 A.C. 15.
(3) (1878) 38 L.T. 423.
(4) [1916] 2 A.C. 15.
(5) (1905) 21 T.L.R. 659.

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sional confidences, should be protected in the "general interests of society." Moreover, assuming such a duty or interest existed as might warrant such disclosures if necessary in the last resort, the protection ought not, (considering the gravity of the matter of the libels), to be extended beyond the strict necessities of the occasion, or to disclosures made secretly without communicating with the appellant giving him an opportunity of explanation, and endeavouring to attain the object sought by other means, entailing no injury to the appellant's reputation. In all the circumstances, such disclosures made in the absence of such precautions, can not be said to be "fairly warranted by any reasonable occasion or exigency."

In this view it is unnecessary to consider the finding of the trial judge, that assuming the occasion of the publications in question to have been privileged, the respondent was actuated by some ulterior motive, and that in each case the occasion was abused. No opinion is expressed upon that finding beyond this: there is no adequate ground for disagreeing with the finding of the trial judge that the appellant's account of the interviews between himself and the respondent in 1920 should be accepted; and that the entry in the respondent's notes on the subject of the g. c. infection was the result of an error.

The appeal therefore succeeds as to the libels. The appellant is entitled to judgment for $500 and Wright J.'s judgment should be varied accordingly. He is also entitled to his costs of both appeals.

SMITH J. (dissenting in part).—The grounds of appeal that require serious consideration are those in reference to the libels alleged to be contained in the letter of respondent to Dr. Hewitt of 30th October, 1924, Ex. I, and in his letter to Dr. McCallum of 17th November, 1924, Ex. 20. In the judgment appealed from it was held that there was qualified privilege in connection with these communications.

The contention here is that there rests on a medical practitioner at least a strong moral obligation to keep secret information received by him from patients for the purpose of enabling him to properly and intelligently minister to their ailments. It is, however, I think, conceded

that there may be circumstances which may make it proper to disclose, even voluntarily, such information; and the question here is as to whether the circumstances in this case were such as to warrant the respondent in making such disclosure.

It is to be noted in the first place that a medical practitioner, unlike a solicitor, can be compelled to disclose, as a witness, relevant confidential information received in connection with professional services rendered, so that the statements complained of, when made in the witness box, were absolutely privileged, and the evidence could not have been excluded at the instance of appellant on the ground that the communication was confidential. It does not seem to me that the legal result would be different if a medical practitioner were to offer voluntarily to become a witness, though it might amount to a serious breach of professional etiquette.

The respondent was the Assistant Chief Medical Officer of the Canadian National Railway Company. In addition, he practised his profession of physician; and the appellant, while in the employ of the railway, consulted him, in May, 1920, and received treatment from him. Four years afterwards—on May 3rd, 1924—the appellant, while still in the employment of the Railway Company, was struck on the right eye by a swinging door that had been pushed open by a fellow employee; and on 10th June following, consulted Dr. Angus Campbell, who found him then suffering from acute iritis of that eye. In the following September he filed a claim with the Ontario Compensation Board against the Railway Company, alleging that the iritis arose from the stroke received from the swinging door. While any award against the Railway Company would be paid by the Dominion Government, it was none the less the duty of the Railway Company to see that no unfounded claim was allowed, and to make all proper investigations and present all proper evidence to the Board tending to show the claim to be unfounded. It was part of the regular duty of the respondent towards the Railway Company to investigate the medical aspect of the appellant's claim. This was a duty that he was under contract to faithfully and honestly perform for the Company.

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In the ordinary course, the respondent was called upon to investigate the plaintiff's claim. Dr. Campbell had certified that the iritis was the result of the blow from the swinging door. The respondent, as a medical man, was unable to connect the one with the other, particularly in view of the time that elapsed between the blow and the development of iritis; and it seems that such a lapse of time is quite unusual, and would ordinarily suggest the probability of some other cause. The respondent remembered having treated the appellant previously, and consulted his history card of that treatment, which he had on file, and which recorded that the appellant had had g. c. infection two years previous to the time of making out this card on May 1st, 1920, with some shreds still. The card continues, showing three treatments for this g. c. infection of two years previous. The respondent was of opinion that lingering constitutional effects of this former disorder of 1918 was a possible cause of the iritis. The appellant had been in the army, and the respondent pursued his enquiries by interviewing Dr. Hewitt, Medical Director for the Department of Soldiers' Civil Re-establishment at Toronto, as to appellant's medical history in the army, and was informed by Dr. Hewitt that the records showed that the appellant had suffered from rheumatism, and that there was one item of v.d.g. The respondent asked for this information in writing, but was informed that it would be necessary to make a written application for it. The respondent made this written application, which is Ex. I, complained of, and received the reply of November 6th, 1924—Ex. 5—which states that the appellant's medical history shows a single record of him having v.d.g.

With the information thus gathered from his own card of his treatment of appellant in 1920 for this disease of 1918, and from the army medical history, which went to confirm the statement in the card, the respondent was confirmed in his view that the iritis could not be connected with the blow from the door, and advised his Company to take the opinion of Dr. McCallum, an expert, and received directions to obtain Dr. McCallum's opinion. In the letter to Dr. McCallum of 17th November, 1924, Ex. 20, complained of, he submitted the facts as he had

gathered them, on which the expert opinion was to be based.

I think it is clear that the company had a right, in resisting what it believed to be an unfounded claim, to take expert advice as to whether or not the iritis could be regarded as flowing from the blow, and for the purposes of such advice to submit all material facts that it expected to establish by the evidence. The fact of v.d.g. infection was one that the company had strongest grounds for supposing would be established beyond question, in view of the respondent's card and the army record. It is not denied that this infection, if a fact, was most material. It would have been a manifest absurdity to ask Dr. McCallum for expert advice and to have suppressed a fact upon which his whole opinion might hinge. The respondent was the only party who had knowledge of this piece of material evidence. He was the proper medium for the company to use in laying the facts before Dr. McCallum. It is argued that, because of the confidential relationship between the appellant and respondent in connection with the treatments of 1920, the respondent should have suppressed this most important bit of evidence, which he had every reason at the time to suppose would establish that there was no valid claim against his company. It is suggested that, because of the moral obligation not to disclose what he had received in confidence from the consultations in 1920, he should have refused to have anything to do with investigating the claim, and should have suppressed the knowledge he had of facts he believed would show the claim to be unfounded. It was part of his duty to his company that he had contracted to perform and that he was being paid for, to investigate such claims where medical opinion was a factor, and, in my opinion, he could not honestly stand by under the circumstances and allow a claim to be established against his company by suppressing evidence that would go to show that the claim was unfounded. The higher duty, I think, was to have the evidence that he alone knew of placed fairly before the tribunal trying the rights between his company and the appellant.

It was finally established that the information furnished by Dr. Hewitt to the respondent as to the appellant's army

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medical history was in fact erroneous, and that the history did not contain any record of appellant having been afflicted with v.d.g. A most unfortunate mistake had been made in the copy of the record from which Dr. Hewitt gave his information in writing, the letters v.d.g. having been used, instead of the letters v.d.h., which have an entirely different signification. The correction of this mistake greatly weakened the evidence of the fact of the appellant having had g.c. infection, but the respondent had no knowledge of such mistake at the time he was submitting facts for the opinion of Dr. McCallum. In the final determination of the claim, the fact of the alleged infection rested solely on the correctness of the respondent's card record, made, as the respondent says, from the appellant's own statement to him. The appellant denies having made such statement and having had such infection, and gives as his explanation a misunderstanding between himself and respondent of questions and answers, and says he did not know he was receiving treatment for g.c. infection. The learned trial judge has accepted this testimony, finding as a fact that the respondent was not told by the appellant that he had had g.c. infection. This finding is not questioned in the Appellate Division nor here, and the appellant has the full benefit of it, regardless of the result of the litigation on the question of damages.

The letter of the respondent to Dr. Hewitt of 30th October, 1924, Ex. I, stands on a different footing from that to Dr. McCallum, which I have just discussed, and the difference is clearly recognized in the judgment appealed from. The respondent was simply seeking information from Dr. Hewitt, and in asking for information the protection of privilege is not required at all, as there can be no libel in a mere request for information. There is no necessity for allegations of facts or alleged facts in connection with such requests. At all events, there was no necessity in this instance for the allegation by respondent to Dr. Hewitt in Ex. I, "He also stated that he had had a g.c. infection about 1918," and the Appellate Division so holds, but excuses it on the ground that there was qualified privilege in connection with the letter itself. In my view this excuse cannot prevail. A litigant is, of course, within his right

in seeking any information that would be of service to him in connection with the action, but this, as I have stated, would not, in my opinion, warrant him in making libellous statements to those from whom he might be seeking the information. If, for instance, a servant were suing for wages or false dismissal, and the defence were dishonesty, the defendant would be within his right in inquiring as to the servant's conduct in other employment, but could not justify specific allegations of dishonesty on the part of the servant, if they were in fact untrue, on the ground of privilege.

Here we have a specific allegation of fact in a letter that was simply a request for information and could not be libellous if confined to such request. The allegation was entirely unnecessary, as held by the Appellate Division, and was, in fact, untrue, according to the undisturbed finding of the trial judge. The untrue allegation was undoubtedly libellous in its character, and gives, I think, technically a right of action with nominal damages. It could not have affected Dr. Hewitt's mind, because he had before him his own record that contained the same allegations, which he had just communicated to the respondent. It may be argued that when this record was corrected, an erroneous opinion of the appellant might still remain in Dr. Hewitt's mind as a result of the respondent's allegation, and that the allegation would remain permanently on the file.

It may be noted that the appellant would not necessarily have succeeded in establishing his claim before the Board if the respondent's evidence as to infection had not been offered, because it might still have been held that the connection between the blow and the iritis had not been established.

I agree with the trial judge that there was no malice on the respondent's part in the nature of ill-will towards the appellant, and with the Appellate Division that there was no malice in the legal sense of indirect or improper motive.

I therefore agree with the Appellate Division that the claim for libel in the letter of the 17th November, 1924, to Dr. McCallum should be dismissed, but am of opinion that

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the appellant is entitled to at least nominal damages for the untrue and unnecessary allegation in the letter to Dr. Hewitt of the 30th of October, 1924.

Appeal allowed with costs.

Solicitors for the appellant: *Harding & Clark.*

Solicitors for the respondent: *D. L. McCarthy.*

1926

*May 25.

BRIDGE *v.* EGGETT

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

Appeal—Jurisdiction—Amount in controversy—Inclusion of interest in computing amount—Supreme Court Act, ss. 39, 40.

Where the judgment of a court of first instance for recovery of a sum of money is affirmed by a provincial court of appeal, the interest running on the judgment of the court of first instance up to the date of the judgment of the court of appeal must be included in computing the "amount in controversy" (Supreme Court Act, s. 39) in the defendant's further appeal to this Court.

MOTION to quash appeal for want of jurisdiction.

The action was to recover from the defendant (appellant) the sum of $2,000 damages, claimed on the ground that defendant had used certain promissory notes delivered to him, without the conditions alleged to have been attached to their use having been fulfilled.

Lennox J. gave judgment for the plaintiff, which was affirmed by the Appellate Division of the Supreme Court of Ontario. The defendant appealed to the Supreme Court of Canada, and the plaintiff moved to quash the appeal for want of jurisdiction, on the ground that the amount in controversy did not exceed $2,000.

Sections 39 and 40 of the *Supreme Court Act* (now R.S.C. 1927, c. 35), read as follows:

39. Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless,—

(*a*) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,

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*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(*b*) special leave to appeal is obtained as hereinafter provided.

40. Where the right to appeal or to apply for special leave to appeal is dependent on the amount or value of the matter in controversy such amount or value may be proved by affidavit, and it shall not include interest subsequent to the date on which the judgment to be appealed from was pronounced or any costs.

The trial judge's reasons for judgment stated that "there will be judgment * * * against the defendant Bridge for the amount claimed with costs * * *." The formal judgment adjudged "that the plaintiff do recover from the defendant John Bridge the sum of $2,009.31" and costs. The action was tried on February 2, 1926, and judgment was given on February 20, 1926. The plaintiff's (respondent's) solicitor, in an affidavit, claimed that the $9.31, which was apparently intended to cover subsequent interest, must have been included in the formal judgment through error, and that he did not notice it until the applications before the Appellate Division (in this action and in another action brought by another plaintiff on a similar claim in which the amount involved was $1,100) for leave to appeal to the Supreme Court of Canada (which applications were made immediately after the hearing and judgment in appeal, and were refused by the Appellate Division). On the present motion there was conflicting affidavit evidence as to certain facts in connection with the inclusion of the sum of $9.31 in the formal judgment at trial.

The motion to quash the appeal to this Court was dismissed with costs, the Court, without passing upon the question as to the inclusion of the $9.31 in the formal judgment of the trial court, expressing the view that, since interest on that judgment up to the date of the judgment of the Appellate Divisional Court must be included in computing the amount in controversy in the appeal, this Court had jurisdiction (*a*).

Motion refused with costs.

Geo. F. Henderson K.C. for motion.

Geo. F. Macdonnell contra.

(*a*) *Hamilton* v. *Evans,* [1923] S.C.R. 1, was not alluded to in the argument.

See also *Dominion Cartage Co.* v. *Cloutier* reported later in this volume.

The appeal to this Court in *Bridge* v. *Eggett* was dismissed, by judgment delivered orally after argument on the merits, on November 2, 1926.

1928

*Feb. 11.
*Feb. 14.

FRANCIS HILL .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Appeal—Motion for leave to appeal from judgment of Second Divisional Court of Appellate Division, Ont.—Alleged conflict with judgment of an "other court of appeal" in "a like case" (Cr. Code, R.S.C. 1927, c. 36, s. 1025)—First Divisional Court of same Appellate Division an "other court of appeal"—Alleged error in trial judge's charge to jury.

The First Divisional Court of the Appellate Division of the Supreme Court of Ontario is, in relation to the Second Divisional Court, an "other court of appeal" within the meaning of s. 1025 of the *Cr. Code*, R.S.C. 1927, c. 36.

The judgment of the Second Divisional Court (33 O.W.N. 301) dismissing an appeal from a conviction on a charge of rape, which conviction was attacked on the ground of error in the charge to the jury, was held not to be in conflict with the judgment of the First Divisional Court in *R.* v. *Hall* (31 O.W.N. 451) or with the judgment of this Court in *Brooks* v. *The King* ([1927] S.C.R. 633), neither of them being "a like case" (*Cr. Code*, s. 1025) to that in question; and a motion for leave to appeal to this Court was refused.

MOTION for leave to appeal to this Court from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario (1) dismissing the accused's appeal from his conviction on a charge of rape. The motion was made on the ground that the judgment sought to be appealed from conflicts with the judgment of the First Divisional Court of the said Appellate Division in *Rex* v. *Hall* (2) and with the judgment of the Supreme Court of Canada in *Brooks* v. *The King* (3). The material facts of the case are sufficiently stated in the judgment now reported. The motion was dismissed.

L. P. Sherwood for the motion.

A. W. Rogers contra.

*PRESENT:—Mignault J. in chambers.

(1) (1928) 33 O.W.N. 301. (2) (1927) 31 O.W.N. 451.
(3) [1927] S.C.R. 633.

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MIGNAULT J.—Francis Hill, who was convicted on an indictment for rape on the person of a Mrs. Hazel Blow, has applied to me for leave to appeal from the unanimous judgment of the Second Appellate Divisional Court of Ontario which confirmed the conviction. Hill was a taxi driver of Fort Frances, Ont., and the crime was committed about one o'clock of the morning of the 16th of September, 1927. The complainant had come to Fort Frances on the 15th to get some provisions, and could only return home the following day. She registered at the Fort Frances Hotel, and employed Hill, whom she had never seen before, to drive her to a dance at Pithers' Point, a pleasure resort some three miles from Fort Frances. She returned from the dance in Hill's taxi, a closed sedan car, and her story is that when she reached Fort Frances, Hill insisted on her going for a drive with him. It was on this drive, on a cross road, that the crime was committed, Hill, according to the complainant's testimony, having forced her to leave the front seat which she occupied with him and to go on to the rear seat where she was assaulted by him.

The trial took place at Fort Frances before Mr. Justice Logie, and the only point in dispute—Hill having admitted that he had connection with the complainant on the occasion mentioned by her—was whether the connection was with or without her consent. On this point, the Crown undertook to show that the prosecutrix complained of the assault at the first reasonable opportunity. Hill brought her back to the hotel after the assault. She saw the night clerk there, but said nothing to him of the matter. The next morning she went to see Dr. Hartrey of Fort Frances to get a prescription for a friend. Dr. Hartrey had already treated her, and she says she wanted to speak to him about the assault, but did not have the courage to do so. She took the two o'clock train home, to Bear Pass, where her husband was station agent, and on her arrival told him the whole story. The following day Mrs. Blow returned to Fort Frances, and laid before the Crown Attorney a complaint against Hill. It was said that the complainant did not make any outcry, but, as far as she knew, there was no house in the vicinity, and it was about one o'clock in the morning.

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On the question of complaint by the prosecutrix, the learned trial judge gave the following instructions to the jury:

> In this class of case certain statements made after the event are admissible. Statements made after the transaction are generally irrelevant and inadmissible in favour of the person making them, but in cases of rape and similar offences the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge be given in evidence by the prosecution not as evidence of acts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and to negative consent.
>
> Now, that class of evidence is admissible, of course, where consent is or is not material evidence in the charge, but the complaint must be shown to be made at the first opportunity which reasonably presents itself after the commission of the offence.
>
> I admitted the statement to her husband because I felt on the evidence it was the first reasonable opportunity she had to make the complaint. She did not make complaint to the hotel clerk. She thought of making it to her doctor, but she said she could not bring herself to do it, and then she went home and within 12 hours, or whatever time it was, told her husband. If I am wrong in admitting that and I do not think I am wrong, the prisoner will get the benefit if he appeals. But I have admitted the statement and have told you the effect of the complaint and you are not to consider it as anything other than what I have told you.

Counsel for Hill contended that by the final words of the passage just quoted the learned trial judge had in effect instructed the jury that they must consider that the complaint had been made by the complainant on the earliest reasonable opportunity. In my view, the final words, fairly construed with the context, refer to what the learned judge had already told the jury, that "particulars of such complaint may, so far as they relate to the charge, be given by the prosecution, not as evidence of acts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and to negative consent." There was no objection to the charge, and if the passage quoted could be misconstrued, the prisoner's counsel did not call the learned judge's attention to it.

I have referred to these circumstances somewhat in detail in order to determine whether, as contended by counsel for the prisoner, and that is the only question with which I am concerned, the unanimous judgment of the appellate court herein is in conflict with the decision of

another court of appeal in a like case (s. 1025 *Criminal Code,* R.S.C., 1927, c. 36).

The decision to which counsel for the prisoner referred me is *Rex* v. *Hall,* of which there is a short report in 31 Ontario Weekly Notes, p. 451, but counsel furnished me with a complete copy of the judgment which I have very carefully considered. This is a decision of the First Appellate Divisional Court of Ontario, rendered on the 17th of February, 1927, whereby a conviction for rape before the same trial judge was set aside and a new trial ordered because the trial judge had misdirected the jury and had failed to place the defence fully and fairly before them.

Mr. Rogers contended that this decision cannot be said to be a decision of "another court of appeal," as required by s. 1025, inasmuch as both divisions of the Appellate Divisional Court of Ontario are one court of appeal, so that the decision now in question is a judgment of the same court of appeal as that which decided the other case. He relied on the definition of the words "court of appeal" in s. 2, subs. 7, of the *Criminal Code,* and also on the Ontario *Judicature Act,* R.S.O., 1927, c. 88, ss. 4 and 11.

I am unable to accept this contention. Section 2, subsection 7, of the *Criminal Code* states that "court of appeal" includes, in the province of Ontario "the Appellate Division of the Supreme Court of Ontario." This Appellate Division is composed of two Divisional Courts, numbered consecutively and designated the First Divisional Court and the Second Divisional Court (Ontario *Judicature Act,* ss. 39 and 40). The Chief Justice of Ontario and four Justices of Appeal form the First Divisional Court, and the Second is composed of a Chief Justice and four Justices of Appeal. I cannot doubt that they are distinct appellate courts, and one of them in contradistinction to the other would be not misdescribed by calling it "another court of appeal" within the meaning of s. 1025 of the *Criminal Code.* A conflict on a question of law between these two courts is not readily conceivable, but if it did arise, it obviously would create such a situation as Parliament must have contemplated when it enacted s. 1025. The *ratio legis* here strongly applies and there is certainly

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nothing in the language of the section which prevents its being carried out.

This brings me back to *Rex* v. *Hall* (1), and the only matter to be considered is whether it conflicts with the unanimous judgment of the Second Appellate Division in the present case. Of course, it must be " a like case," and I take it that the conflict mentioned by s. 1025 is a conflict on a question of law. I do not think there was any such conflict or difference of opinion between the First Appellate Division in the *Hall Case* (1) and the Second Appellate Division in this case as to the duty of a trial judge in instructing the jury. Everything turned on the circumstances of the particular case and, in my opinion, the facts in the *Hall Case* (1), were materially different from those in the present one. The appellate court there was of opinion that the trial judge had practically told the jury to disregard evidence showing that the complainant " was not in the state of mind of one who has been outraged and desired to make an outcry about it." Moreover, in the *Hall Case* (1), there was evidence of admissions by the complainant that previously she had had connection with the prisoner, and she did not deny in rebuttal the statement of the prisoner that he had had sexual intercourse with her about twenty-five times. The appellate court further found that the trial judge had not placed the defence fully and fairly before the jury. In my opinion, the present case stands on an altogether different footing.

I may perhaps further add that *Rex* v. *Hall* (1) could not be considered as an authority in a case where the facts were not the same. In other words, it is not " a like case." To borrow the well known language of Lord Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (2),

> when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account.

Counsel for the prisoner also sought to show a conflict between this case and the recent judgment of this court in

(1) (1927) 31 O.W.N. 451.

(2) [1914] A.C. 25, at p. 40.

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Brooks v. *The King* (1). To the latter case, what I have said of *Rex* v. *Hall* (2) may well apply, for an established rule of law was applied to a particular set of facts. In *Brooks* v. *The King* (1), this court in substance found that the trial judge had not, under the circumstances, fairly charged the jury. I am unable to find any conflict between it and this case.

Upon the whole, I do not think that the decision from which the prisoner seeks leave to appeal is in conflict with the judgment of any other court of appeal in a like case The application for leave to appeal is therefore dismissed.

Motion dismissed.

Solicitor for accused: *H. A. Tibbets.*

MICHEL BRUNET .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*Feb. 17.
*Feb. 20.

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

Leave to appeal—Criminal law—Conflict with "any court of appeal"—English decisions—Similar law—Applicability—Cr. C. ss. 995, 996, 998, 1025 (R.S.C. [1927], c. 36).

Upon a motion for leave to appeal under section 1025 of the Criminal Code and in order to decide whether the "judgment appealed from conflicts with the judgment of *any other court of appeal* in a like case," the judge may look at decisions not only of Canadian courts of appeal but also of English courts of criminal appeal, provided the statute governing the matter be to the same effect.

Sections 995, 996 and 998 of the Criminal Code respecting the "evidence under commission of a person dangerously ill" are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6, 7. The judgment appealed from which held that the evidence of a dying witness was regularly taken and could be considered by the jury is, if these sections apply (a point on which no opinion was expressed), in conflict with the decision of the English Court of Crown Cases Reserved in *Reg.* v. *Shurmer* (16 Cox C.C. 94). This decision strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. Under the circumstances of this case and inasmuch as there is already

*PRESENT:—Mr. Justice Mignault in chambers.

(1) [1927] S.C.R. 633. (2) (1927) 31 O.W.N. 451.

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an appeal by the appellant before this court, leave to appeal is granted as to the question of the admissibility at the trial of the *ante mortem* deposition.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1024*a* (now 1025) of the Criminal Code, from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant for manslaughter.

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

Alleyn Taschereau K.C. for the motion.

Valmore Bienvenue K.C. contra.

MIGNAULT J.—This is an application made before me, on the 4th of February, for leave to appeal from a judgment of the Court of King's Bench, Quebec, of the 14th of January, 1928, dismissing an appeal by Brunet from his conviction for manslaughter following an abortion practised by him on one Alice Couture who died as a result of the operation. Brunet's appeal to the Court of King's Bench was on four questions of law, as to one of which—misdirection or non-direction of the trial judge to the jury as to the danger of convicting an accused on the evidence of an accomplice—there was a dissent (that of Mr. Justice Letourneau) in the appellate court, and on this point the petition alleges that an appeal has already been taken to this court under section 1023 of the Criminal Code (according to the numbering of the sections in R.S.C., 1927, c. 36). The object of this application is to seek leave to appeal on the following points with respect to which the learned judges were unanimous:

(1) The evidence of Alice Couture taken at the hospital by a magistrate should not be accepted without following the rules of art. 955 of the Criminal Code of Canada, concerning "evidence, under commission, of person dangerously ill."

(2) Sufficient instructions were not given to the jurors regarding the crime of manslaughter and abortion.

(3) The defence was not sufficiently put before the jury.

I will consider point 1 only, for with respect to points 2 and 3, the petitioner has not established a case for granting leave to appeal.

Point 1 is as to the admission of the evidence of Alice Couture at the trial. The petition refers to art. 955 of the Criminal Code, but this is a clerical error. It should be section 995 and the following sections, the effect of which the parties discussed, and I will consider the petition as amended accordingly.

Under section 1025 of the Criminal Code, leave to appeal from a unanimous judgment of a court of appeal may be granted.

if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

In *The King* v. *Boak* (1), it was held that decisions prior to the enactment of s. 1013 in 1923 might properly be considered as coming within the intendment of section 1025, if they were rendered in a like case. In another case, *De Bortoli* v. *The King* (2), my brother Newcombe appears to have been of the opinion that a decision of the Supreme Court of Canada might, if in conflict and in a like case, be brought within the meaning of s. 1025.

In view of the generality of the words " any other court of appeal," I think I am at liberty to look at decisions not only of the Canadian courts of appeal, but also of English courts of criminal appeal, provided of course the statute governing the matter be to the same effect.

Coming now to the evidence of Alice Couture, there are two depositions of this witness in the record:—

The first is intituled:

Déposition *ante mortem* de Alice Couture, âgée de 23 ans, de la cité de Québec, 482, rue St. Vallier, prise sous serment à l'Hôtel-Dieu du Précieux Sang, à Québec, devant l'Honorable Arthur Lachance, Juge des Sessions de la Paix pour la province de Québec, ce quatorzième de mai, 1927.

As stated, this deposition was taken on the 14th of May, 1927. It does not appear that the accused, or any counsel appearing for him, was present. The deposition is certified at the foot by the stenographer.

The second deposition was taken at the " Hôpital Hôtel-Dieu du Précieux Sang de Québec " on the 16th of May,

(1) [1926] S.C.R. 481. (2) [1926] S.C.R. 492.

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Mignault J.

1927. The heading is "Bureau de la Paix (Instruction préliminaire)," and the deposition is stated to have been taken before the judge of the Sessions of the Peace in presence of the accused. The witness was cross-examined by Mr. Léo Pelland, a barrister, on behalf of Brunet. The deposition is followed by a certificate signed by Arthur Lachance, Esq., Judge of Sessions of the Peace.

I am informed that an information was on the later date, 16th May, 1927, pending against Brunet for having illegally used instruments to bring about an abortion.

It appears by the evidence, as well as by statements of counsel, that the first deposition was taken at the hospital before any complaint had been laid against Brunet. Counsel for the Crown informs me that this deposition remained among the papers of the preliminary inquiry, but was not used at the trial nor read to the jury.

The second deposition was read to the jury, the objection of the accused's counsel to its admission as evidence having been overruled. The petitioner now contends that it should have been rejected. He relies on sections 995 and following of the Criminal Code.

Counsel for the Crown argues that section 995 has no application here, that the deposition of Alice Couture (the reference is to the second one) was taken as a part of the preliminary inquiry on the information then pending against the accused, and that it could be read at the trial under section 1000 of the Criminal Code.

The sections of the Criminal Code in question (and more particularly sections 995, 996 and 998) are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6 and 7. If they govern this case, I must find that the decision of the appellate court that the evidence of Alice Couture was regularly taken and could be considered by the jury, is in conflict with the decision of the English Court of Crown Cases Reserved in *Reg.* v. *Shurmer* (1), which strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. *Reg.* v. *Shurmer* (1) has been since followed in England. See *Rex* v. *Harris* (2).

I do not think I should take upon myself on this application to decide whether sections 995 and following do or

(1) 16 Cox C.C. 94.

(2) 26 Cox C.C. 143.

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BRUNET v. THE KING.

Mignault J.

do not govern this case. The question is a very important one and there is conflict if the sections apply. Under these circumstances, and inasmuch as there is already an appeal by the accused before the court, I have decided to grant the petitioner leave to appeal on point 1 above mentioned.

This application was made to me within the twenty-one days mentioned by section 1025, but if an extension of time be necessary, I hereby extend it to the date of this judgment.

Leave to appeal granted.

1927

*Oct. 21.
*Dec. 16.

LA VILLE DE JONQUIERES (DEFENDANT) ..... } APPELLANT;

AND

DAME GEORGIANA BRASSARD (PLAINTIFF) ..... } RESPONDENT.

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

Workmen's Compensation Act—Municipal employee—Cleaning streets and occasionally working in "dangerous" premises—Injury—Compensation—R.S.Q. (1909) s. 7321—R.S.Q. (1925), c. 274, s. 2.

An employee of a municipal corporation, whose main duties are those of cleaning streets and repairing sidewalks, but who occasionally does some work on municipal premises "in which machinery is used, moved by power other than that of men or of animals," is not entitled to claim under the Workmen's Compensation Act, if he be injured while performing his usual work upon the streets of the municipality. Judgment of the Court of King's Bench (Q.R. 43 K.B. 355) rev.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, d'Auteuil J. and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

A. Chase-Casgrain K.C for the appellant.

J. C. Gagné K.C. for the respondent,

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*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1926) Q.R. 43 K.B. 355.

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VILLE DE JONQUIÈRES v. BRASSARD.

The judgment of the court was delivered by

MIGNAULT J.—L'appelante se plaint d'un jugement de la cour du Banc du Roi (Flynn, Bernier et Hall, JJ.), confirmant, Hall, J., *dissentiente,* un jugement de la cour supérieure, siégeant dans le district de Chicoutimi, D'Auteuil, J., qui accordait à l'intimée une indemnité de $3,050, sous la loi des accidents du travail, pour la mort de son mari, le nommé Joseph Thibault, à la suite d'un accident pendant qu'il travaillait pour le compte de l'appelante, comme balayeur des rues, le 16 juillet 1924. La seule question que nous ayons à décider, c'est de savoir si la loi des accidents du travail s'applique dans l'espèce.

Thibault, lors de cet accident, nettoyait une des rues de la municipalité avec son cheval et sa voiture. C'est le cheval d'un tiers, lancé à l'épouvante, qui causa cet accident. Thibault fut frappé par la voiture que traînait ce cheval, et il est mort de ses blessures le lendemain. La preuve ne nous éclaire pas quant aux conditions de l'engagement de Thibault. Le trésorier de la ville a fait des recherches afin de découvrir, si possible, une résolution du conseil le nommant, mais ces recherches ont été infructueuses. Cependant on admet que Thibault était un employé permanent de l'appelante, et qu'il était payé tant de l'heure, avec une légère augmentation quand il fournissait son cheval et sa voiture.

D'après un état produit par le trésorier de la ville, Thibault aurait commencé son travail le 1er mai 1923, et c'était surtout au département de la voirie, sous les ordres du contremaître Harvey, qu'il était employé. La ville de Jonquières possède un aqueduc et des égouts, et elle vend et distribue l'électricité, soit pour l'éclairage, soit pour la force motrice. Elle a également des machines mues par une force autre que celle de l'homme et des animaux—on mentionne un rouleau à vapeur, un concasseur et un malaxeur —et il y a naturellement une dynamo au département de l'électricité. Un témoin dit que Thibault a été engagé pour faire marcher le concasseur et qu'il l'y a vu travailler, mais cela paraît avoir été au début de son engagement. Dans l'été de 1924, Harvey, le contremaître de la voirie, employait Thibault pour faire le nettoyage des rues et aussi pour la réparation des trottoirs en bois. Il dit qu'il ne s'est pas servi de machines pendant cet été. Bien que

le travail de Thibault relevât presque exclusivement du département de la voirie, l'état produit par le trésorier fait voir que, de temps à autre, Thibault donnait un peu de temps aux autres départements. Harvey explique que lorsque le contremaître du département électrique lui demandait un homme, il y envoyait Thibault, quand il pouvait s'en passer, pour une heure des fois, d'autres fois pour une journée. Noël, le contremaître du département électrique, dit que Thibault a travaillé pour lui lors de la construction des dynamos, et qu'il a été occupé à cette construction du 1er novembre 1923 au 1er janvier 1924.

Le juge de première instance n'a fait aucune constatation de fait, se contentant de dire que la demanderesse avait prouvé les allégations essentielles de sa déclaration. En vue du manque de précision de la preuve testimoniale, il paraît plus sûr de s'en rapporter à l'état produit au dossier, et qui est un extrait du livre de paye de la ville. Or cet état démontre, je l'ai déjà dit, que l'ouvrage pour lequel Thibault a été payé relevait en très grande partie du département de la voirie, et que ce n'est qu'exceptionnellement qu'il a travaillé ailleurs que dans les rues. Ainsi, depuis le 1er mai 1923 jusqu'au 16 juillet 1924, Thibault a reçu les sommes suivantes comme prix de son travail: rues, $796.29; aqueduc, $39.62; égouts, $32.15; département électrique, $113.85; entretien des bâtisses "et autres," $16.80. Pour la période entre le 1er janvier et le 16 juillet 1924, la disproportion est encore plus accentuée, car on a payé à Thibault $281.32 pour les rues; $20.27 pour l'aqueduc; $13.55 pour les égouts; $8.55 pour le département électrique, et $13.35 pour entretien des bâtisses "et autres".

Dans ces circonstances, la question qui se pose est de savoir si un journalier qui d'ordinaire travaille dans les rues d'une municipalité, mais qui exceptionnellement a pu de temps à autre faire de l'ouvrage dans des départements municipaux où on fait usage de machines mues par une force autre que celle de l'homme ou des animaux, bénéficie des dispositions de la loi des accidents du travail lorsqu'il lui arrive un accident pendant qu'il fait son travail habituel dans les rues.

Citons ici la disposition introductive et fondamentale de cette loi, l'article 7321 S.R.Q., 1909. J'en donne le texte

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Mignault J.

tel qu'il se lisait lors de l'accident, en y comprenant les amendements jusqu'à cette date:

7321. Les accidents survenus par le fait du travail, ou à l'occasion du travail, aux ouvriers, apprentis et employés occupés dans l'industrie du bâtiment, dans les usines, manufactures et ateliers, et dans les chantiers de pierre, de bois ou de charbon; dans les entreprises de transports par terre ou par eau, de chargement ou de déchargement, dans celles de gaz ou d'électricité, de construction, de réparation ou d'entretien de chemins de fer ou tramways, d'aqueducs, d'égouts, de canaux, de digues, de quais, de docks, d'élévateurs et de ponts; dans les mines, minières, carrières, et, en outre, dans toute exploitation industrielle, dans laquelle sont fabriquées ou mises en oeuvre des matières explosives, ou dans laquelle il est fait usage d'une machine mue par une force autre que celle de l'homme ou des animaux, donnent droit, au profit de la victime ou de ses représentants, à une indemnité réglée conformément aux dispositions ci-après.

La présente loi peut être citée sous le nom de *Loi des accidents du travail de la province de Québec*, et elle ne s'applique pas à l'industrie agricole ni à la navigation à voile. (9 Ed. VII, c. 66, s. 1, et 8 Geo. V, c. 71, s. 1).

Lorsqu'une corporation municipale entreprend ou fait exécuter elle-même des travaux publics dans des conditions qui rendraient l'entrepreneur sujet aux dispositions de la présente loi, elle y devient soumise elle-même. (10 Geo. V, c. 75, s. 1. Amendement de 1920).

Le jugement de la cour d'appel dit que

la majorité des travaux pour lesquels la victime de l'accident était engagée par l'appelante, tombaient, soit par leur nature, soit par la manière dont ils étaient exécutés, sous les dispositions de la Loi des accidents du travail, et que le travail particulier auquel était employé la victime au moment de l'accident, quoique ne tombant pas sous cette loi, ne pouvait lui faire perdre à lui, ou à ses ayants cause, le bénéfice de cette loi à laquelle l'appelante était soumise.

Nous ne pouvons juger des conditions de l'engagement de Thibault que par les travaux qu'il a actuellement faits pour l'appelante, et alors il m'est impossible de dire, avec la cour d'appel, que la majorité de ces travaux tombaient sous les dispositions de la loi des accidents du travail. Au contraire, la très grande majorité de ces travaux, nous l'avons vu, étaient des travaux dans les rues, sans machines, semblables à l'ouvrage que faisait Thibault lors de l'accident, et qui, la cour d'appel le reconnaît, ne tombait pas sous la loi des accidents du travail. Le fait ici domine le droit, et je n'ai pas besoin de discuter les décisions citées de part et d'autre.

Ces décisions, du reste, me paraissent être des arrêts d'espèce. Ainsi, dans la cause de *Ferron* v. *Cité de Shawinigan* (1), sur laquelle l'intimée s'appuie, il s'agissait de

(1) (1925) Q.R. 39 K.B. 370.

trottoirs en béton qu'on construisait avec l'aide d'un malaxeur mû à la vapeur, et le gardien de nuit qui veillait aux travaux obtint de la cour d'appel une indemnité pour accident de travail. De même, dans *Nicholaichook* v. *City of Westmount* (1), que cite l'appelante, la victime n'était employée que pour de simples travaux de rues, semblables à ceux que faisait Thibault, et la cour de revision n'a pas eu égard au fait que

the corporation may occasionally have operated a steam roller in its streets, and had a macadam mixer in its yard run by steam.

Ce qui importe en ces matières, c'est la nature de l'entreprise dans laquelle l'ouvrier est occupé. Le législateur, par l'énumération de l'article 7321, a reconnu que certaines entreprises entraînent pour l'ouvrier un risque d'accident contre lequel il a voulu le protéger. C'est le risque professionnel. En dehors des entreprises énumérées qui entraînent ce risque, l'ouvrier accidenté ne peut obtenir une indemnité que suivant le droit commun, en établissant une faute à la charge de son patron.

Pas plus que les individus, une municipalité n'échappe à la responsabilité créée par la loi des accidents du travail, à la condition, toutefois, qu'il s'agisse d'une entreprise énumérée dans l'article 7321; et, à cette fin, chaque entreprise de la municipalité doit être envisagée séparément. Pour me servir des termes mêmes de l'amendement de 1920, la municipalité est soumise à cette loi quand elle

entreprend ou fait exécuter elle-même des travaux dans des conditions qui rendraient l'entrepreneur sujet aux dispositions de la présente loi,

et alors seulement à l'égard de ceux de ses employés qui sont occupés dans cette entreprise. Cette condition ne s'est pas réalisée dans l'espèce, et il s'ensuit que l'intimée ne peut invoquer cette loi.

Avec toute déférence possible, je suis donc d'avis de maintenir l'appel et de renvoyer l'action, avec dépens dans toutes les cours en faveur de l'appelante.

Appeal allowed with costs.

Solicitors for the appellant: *Casgrain, McDougall, Stairs & Casgrain.*

Solicitor for the respondent: *J. C. Gagné.*

(1) 27 R.L., n.s., 447.

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*Oct. 13.
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*Feb. 7.

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

AND

HICKMAN GRAIN COMPANY LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Carrier—Railway—Bill of lading—Shipments of bulk grain consigned to order—Delivery of grain by carrier without surrender of bills of lading—Transfer of bills as security for advances—Liability of carrier to transferee—Estoppel.

Eight cars of bulk grain, shipped, consigned to order, on defendant's railway, were purchased by M. Co., which acquired the bills of lading and endorsed them to plaintiff as security for advances. As to seven of the cars, defendant delivered the grain to M. Co. while M. Co. held the bills of lading and before its endorsement of them to plaintiff. As to one car, defendant delivered the grain to M. Co. after its endorsement of the bill of lading to plaintiff. Each of the bills was in the standard form approved by the Board of Railway Commissioners for Canada, and provided that it was "not negotiable unless property is consigned 'to order'"; that "it is mutually agreed, as to each carrier * * * and as to each party at any time interested in all or any of said bulk grain, that every service to be performed hereunder shall be subject to all the conditions * * * herein contained * * * and which are agreed to by the shipper, and accepted for himself and his assigns;" and that "the surrender of this original bill of lading, properly endorsed, shall be required before delivery of the bulk grain when consigned 'to order' * * *." Plaintiff, who had taken the bills without knowing of any defect in M. Co.'s title, sued defendant for the value of the grain, claiming that defendant should not have delivered the grain to M. Co. without requiring surrender of the bills. From the evidence it appeared that frequently a consignee is not able, on delivery of the grain, to deliver the bill of lading, and the practice is for the carrier to deliver the goods upon receiving from the consignee a bond of indemnity; of which practice plaintiff was aware.

Held: As to the seven cars, defendant was not liable. Estoppel was not established. The bills were not negotiable except in the limited sense that they could be transferred by endorsement, and that when the effect of the transfer was to pass the property in the goods the benefit of the contract passed also; in that view the transfer of the bills to plaintiff as pledgee did not in itself constitute it the assignee of contractual rights under the bill (*Brandt* v. *Liverpool, etc., Nav. Co. Ltd.*, [1924] 1 K.B. 575, at pp. 594 et seq.); and delivery of the goods to the person entitled, under the bill, to the possession of them at the time of delivery, was a complete answer to any claim based upon an allegation of wrongful delivery (*London Joint Stock Bank* v. *British Amsterdam Maritime Agency*, 16 Com. Cas. 102, at p. 107). The phrase in the bill, "each party at any time interested in all or any of said

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

bulk grain" could not be reasonably extended to apply to persons acquiring an interest in the grain after delivery of it pursuant to the terms of the bill. It could not be said that the form and terms of the bill, or its approval in such form and terms by the Board of Railway Commissioners, manifested an intention to place upon the carrier the burden of protecting transferees by insisting in all cases upon observance of the condition requiring its surrender on delivery of the goods.

Held, further: As to the bill endorsed to plaintiff before delivery of the grain, the defendant was liable. Plaintiff, as pledgee of the bill, acquired, while the goods were still in transit, a special property in the grain. The fact that the car, originally consigned to Fort William, had been diverted to Winnipeg c/o M. Co. before transfer of the bill to plaintiff, did not amount to constructive delivery for any relevant purpose.

Judgment of the Court of Appeal for Manitoba (36 Man. R. 322) affirming, on equal division of the court, judgment of Macdonald J. (*ibid*), reversed in part.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) which, by an equal division of the court, affirmed the judgment of Macdonald J. (2) holding the plaintiff entitled to recover from the defendant the sum of $14,774.89, being the value of eight carloads of grain which the plaintiff claimed the defendant had wrongfully failed to deliver to it.

Each of the cars of grain had been shipped on defendant's railway, in bulk, consigned to order, and a bill of lading was delivered to each shipper by the defendant's agent at point of shipment, the form being the same in each case, and being the standard form approved by the Board of Railway Commissioners for Canada by order no. 14591 of 18th August, 1911, and providing, *inter alia,* that it was

not negotiable unless property is consigned "to order";

that

it is mutually agreed, as to each carrier of all or any of said bulk grain over all or any portion of said route to destination, and as to each party at any time interested in all or any of said bulk grain, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper, and accepted for himself and his assigns;

and that

the surrender of this original bill of lading, properly endorsed, shall be required before delivery of the bulk grain when consigned "to order" or upon application by the owner or consignee for terminal elevator delivery or warehouse receipt.

(1) 36 Man. R. 322; [1927] 1 W.W.R. 317.

(2) 36 Man. R. 322; [1926] 2 W.W.R. 212.

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Some of the cars were, by the terms of the bills of lading, consigned to Winnipeg, and the others to Fort William, but the latter, while in transit, were, by arrangement, diverted to Winnipeg.

The McMillan Grain Co., Ltd., of Winnipeg, became the purchaser of the grain, and acquired the bills of lading. It endorsed these to the plaintiff as security for advances.

The defendant delivered all the grain to the McMillan Grain Co., Ltd., without the surrender of the bills of lading. As to seven of the cars, this delivery took place before the endorsement of the bills of lading to the plaintiff, and while the bills of lading were in the hands of the McMillan Grain Co., Ltd., which was at the time the holder of them and entitled under them to receive, and give a valid acquittance to the defendant for, the grain they affected. As to the other car, the bill of lading had been transferred to the plaintiff before the delivery of the grain by the defendant. This bill of lading, covering a car originally consigned to Fort William, had been acquired by the McMillan Grain Co., Ltd., and the diversion to Winnipeg had been noted on the face of the bill by the words "Diverted to Winnipeg, c/o McMillan Grain Co.," before the transfer of the bill to the plaintiff.

The plaintiff took the bills of lading, as security for advances, without actual knowledge of any defect in the title of the McMillan Grain Co., Ltd., to the bills or to the grain which they purported to cover. The McMillan Grain Co., Ltd., subsequently went into forced liquidation.

As found by this Court, on the evidence, the practice is that the term, above quoted, of the bill of lading, requiring its surrender before delivery of the grain, is not, as a rule, strictly enforced; frequently the consignee is not in a position to deliver the bill of lading, and the practice of the carrier is to deliver the goods shipped upon receiving from the consignee a bond of indemnity; the plaintiff was fully aware of this practice.

The plaintiff, alleging its presentment of the bills of lading and demand for delivery of the grain and defendant's failure to deliver to it, and wrongful delivery, sued defendant for the amount of the value of the grain. Mac-

donald J. gave judgment for the plaintiff (1), which was affirmed, on equal division, by the Court of Appeal (Dennistoun and Prendergast JJA. being for the dismissal of the appeal, and Fullerton and Trueman JJA. being for its allowance) (2). The defendant appealed to this Court.

W. N. Tilley K.C. and *R. D. Guy K.C.* for the appellant.

H. J. Symington K.C. and *H. V. Hudson K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal arises out of an action against the appellant company to recover the value of eight carloads of grain shipped on its railway. The respondent company sued as the holder of eight bills of lading relating severally to these cars. The grain was delivered by the appellant company to a firm, the McMillan Grain Co., who the respondent company says were not entitled to possession of it, and without obtaining in return therefor surrender of the bills of lading pursuant to the terms of the bills. The bills of lading are all in the form prescribed by the Board of Railway Commissioners. Four of the cars in question were, by the terms of the bills, consigned to Winnipeg, and the others to Fort William. These last mentioned cars, while in transit, were, by arrangement, diverted to Winnipeg.

As to one of the last mentioned cars (no. 209554), the bill of lading had been transferred to the respondent company before the delivery of the grain to the McMillans. This bill of lading had been acquired by the McMillans, and the diversion to Winnipeg had been noted on the face of the bill by the words "Diverted to Winnipeg, c/o McMillan Grain Co." before the transfer of the bill to the respondent company. As to the remaining seven cars, the bills of lading were at the time of delivery in the hands of the McMillans, who were the holders of them, and entitled under them to receive and give a valid acquittance to the railway company for the grain they affected. As already mentioned, the railway company did not insist upon the

(1) 36 Man. R. 322; [1926] 2 W.W.R. 212.

(2) 36 Man. R. 322; [1927] 1 W.W.R. 317.

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bills of lading being given up by the McMillans, and, after delivery to them, the McMillans transferred, by indorsement, all of these seven bills of lading to the respondent company, who took them, as security for advances, without actual knowledge of any defect in the title of the McMillans to the bills, or to the grain they purported to cover. As already intimated, one term of each of the bills is expressed in these words "The surrender of this original bill of lading, properly endorsed, shall be required before delivery of the bulk grain when consigned 'to order.'"

The learned trial judge held that, by leaving the bills of lading in the hands of the McMillans after delivering the grain to that firm, the appellant company had put it in the power of the McMillans to represent that the bills of lading were valid and subsisting bills affecting grain then in transit, and that, having in that way assisted the McMillans in their wrongful conduct in pledging them as security for advances, the appellant company was estopped from denying that the grain was still in its hands, at the time the advances were made. In the Court of Appeal, two members of the court agreed and two disagreed with the learned trial judge.

I agree with Fullerton and Trueman JJA., that the evidence fails to establish the existence of the elements essential to the existence of the estoppel relied upon. The practice as shown by the evidence is that the term of the bill of lading above quoted is not as a rule strictly enforced. Frequently the consignee is not in a position to deliver the bill of lading, and the practice of the carriers (both the C.P.R. Co. and the C.N.R. Co.) is to deliver the goods shipped upon receiving from the consignee a bond of indemnity. The respondent company was fully aware of this practice.

It may be that the respondent company was acting under some vague idea that the bond of indemnity would be available for its benefit if it should prove that the transit was at an end when the bill of lading was transferred to it. But it is difficult to understand how that can affect the question of estoppel. The fact of a bill of lading being outstanding would not—this is really undisputed—to a person familiar with the practice, in itself indicate that the grain

affected by it was still undelivered. A lender taking such a bill as pledgee would rely not upon the fact of the bill being outstanding, but upon the honesty of his borrower, or possibly might be influenced by the vague idea adverted to, above, that in some way the railway company's right of indemnity would be available for his benefit, if difficulties arose. On neither of these hypotheses could the estoppel contended for be maintained.

It is also argued that by the terms of the bill of lading the respondent company was a party to the contract, and entitled, as a party, to insist upon the term above quoted. There are several objections to that; and on the whole I think the preferable view of the bill of lading is that taken by Trueman JA., and that negotiability as contemplated by the bill means negotiability in the limited sense in which bills of lading are sometimes spoken of as negotiable, that is to say that the bill can be transferred by endorsement, and when the effect of the transfer is to pass the property in the goods, the benefit of the contract passes also.

In that view, the transfer of the bills to the respondent company as pledgee did not in itself constitute that company the assignee of contractual rights under the bill: *Brandt* v. *Liverpool, Brazil and River Plate Steam Nav. Co., Ltd.* (1); and delivery of the goods to the person entitled, under the bill of lading, to the possession of them, is a complete answer to any claim based upon an allegation of wrongful delivery. *London Joint Stock Bank* v. *British Amsterdam Maritime Agency* (2).

Even if it could be contended that, on the principle of the *Asiatic Banking Corporation's Case* (3), the bill constituted an offer by the railway company to any person into whose possession it might come by way of transfer,—an offer which might be accepted by an endorsee in taking the bill for value,—yet this must be subject to the qualification that such an offer would remain open only so long as the contract remained unperformed. Once the contract had been performed by the railway company by delivery

(1) [1924] 1 K.B. 575, at pp. 594 et seq.
(2) (1910) 16 Can. Cas. 102, at p. 107.
(3) (1867) L.R. 2 Ch. App. 391.

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of the goods, at the place of destination, and to the person then entitled to receive the goods under the bill, such an offer would become meaningless.

The phrase emphasized by Mr. Symington, "each party at any time interested in all or any of said bulk grain," could not be reasonably extended to apply to persons acquiring an interest in the grain after delivery of it by the carrier, pursuant to the terms of the bill of lading.

Mr. Symington, in his able argument, urged that the financing of the grain trade rests upon the credit given to outstanding bills of lading as symbols of property in goods in the possession of the carrier; and he contended that the form and terms of the instrument as settled by the Board of Railway Commissioners manifest (when interpreted from the commercial point of view) an intention to place upon the carrier the burden of protecting transferees of such instruments, by insisting in all cases upon observance of the condition requiring delivery of the bill of lading in exchange for delivery of the goods covered by it. The interests of persons advancing money on the faith of such instruments no doubt deserve proper protection; but the evidence suggests that there may be other interests which might be prejudiced by the establishment of the rule suggested. However that may be, if such were the intention, it has not been very happily expressed. There is nothing, I am convinced, in the form or the terms of the instruments, or in the circumstances of their origin, which furnishes a sound reason for giving to them the effect contended for.

As regards the bill no. 209554, the respondent company, as pledgee of the bill, acquired, while the goods were still in transit, a special property in the grain as pledgee. I am unable to perceive the force of the argument presented on behalf of the appellant company based upon its practice, known to the respondent company, of making delivery upon receipt of an indemnity without production of the bill of lading. There is not the slightest ground for a suggestion that any act or omission, on the part of the respondent company, affected the proceedings of the appellant company. That company merely followed its practice.

Nor can I agree that the diversion of the grain from Fort William to Winnipeg, to be delivered to the "care of Mc-

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Millan Grain Co.," amounted to a constructive delivery for any relevant purpose. A different question might have arisen, if there had been a direction to deliver to a third party. The appeal should therefore be dismissed as to the bill of lading no. 209554; and allowed as to the remaining seven bills of lading, and the judgment against the appellant company should be reduced accordingly. If the parties cannot agree upon the amount, the point may be spoken to. The appellant company is entitled to the costs of both appeals. As to the costs of the action, the respondent company is entitled to the general costs of the action, except such costs as are exclusively attributable to that part of its claim upon which it fails; the appellant company's costs, in so far as so exclusively attributable, will be paid by the respondent company.

Appeal allowed in part, with costs.

Solicitor for the appellant: *L. J. Reycraft.*

Solicitors for the respondent: *Hudson, Ormond, Spice & Symington.*

THE PINDER LUMBER & MILLING CO. LTD. ET AL v. MUNRO ET AL

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*May 16, 17.
*June 17.

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

Real property—Trespass—Action for trespass by cutting timber—Plaintiff's title to the land—Construction of deed—Plaintiff's possession as ground of action.

APPEAL by the defendants from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), affirming the judgment of Byrne J. awarding the plaintiffs the sum of $2,491.48 damages assessed by the jury, in an action for trespass to land consisting in cutting timber upon it.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) [1927] 1 D.L.R. 1200.

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The cutting complained of had been made on land known as the "Queensbury Gore Lot," and the question for determination by this Court was whether the plaintiffs had shown such title to (or possibly, such possession of) that lot as gave them a status to maintain this action for trespass to it. An objection by defendants that trespass on that lot had not been sufficiently alleged in the statement of claim was held not to be open, in view of the course of the proceedings below.

The question of the plaintiffs' title to the said lot depended on the construction of a certain deed from the New Brunswick & Nova Scotia Land Company to Alexander Munro, Jr. The difficulty arose from certain words in the description in the deed. In this regard, the judgment of the Court (delivered by Anglin C.J.C.) said, in part, as follows:

"The title of the grantors in that deed was not contested; nor was it suggested at bar that the plaintiffs were not vested with whatever title it conferred on the grantee. The sole issue in regard to the title was whether or not that deed conveyed the Queensbury Gore Lot.

* * * * *

"After careful consideration of the plans and other relevant matters established by the voluminous evidence, we find it quite impossible to say that the Court of Appeal erred in holding that the deed from the New Brunswick & Nova Scotia Land Company to Alexander Munro, Jr., conveyed 'The Gore Lot' in the Parish of Queensbury."

As to the plaintiffs' right resting on possession, the Court said as follows:

"The defendants have not attempted to prove any sort of title to the Queensbury Gore Lot or anything in the nature of a license to cut upon it. Assuming that that lot was not granted to Alexander Munro, Jr., title to it in the New Brunswick & Nova Scotia Land Company, if set up, and established, would not avail the defendants as against proof of possession by the plaintiffs. (*Glenwood Lumber Co.* v. *Phillips* (1); *The Winkfield* (2)).

* * * * *

(1) [1904] A.C. 405. (2) [1902] P. 42, at p. 54.

"While the plaintiffs rested their claim on title and made no explicit allegation of possession of the locus of the trespass complained of, the defendants evidently regarded such possession as in issue because, in their amended statement of defence, they specifically pleaded that

> the plaintiffs were not at any time * * * in possession of any land in the Parish of Queensbury.

"Evidence of possession was adduced by the plaintiffs at the trial without objection or contradiction and the issue of possession was fought out between the parties. As put by Mr. Justice White, in delivering the judgment of the Court of Appeal:

> As against the defendants, who showed no title whatever to the locus, the possession of the plaintiffs would be sufficient to entitle them to a verdict. It is true that the question of possession was not left to the jury. This was no doubt owing to the fact that neither party asked to have such a question submitted. A great deal of the time taken up by the trial was devoted to proof that the plaintiffs had possession. The evidence that they had such possession was so full and conclusive that had the jury been asked to find whether the plaintiffs had such possession and had answered such questions in the negative, such answer must, upon application to this Court, have been decided to be one which a jury could not reasonably have given under the evidence.

"The Court of Appeal undoubtedly has the right to 'draw all inferences of fact not inconsistent with the finding of the jury and, if satisfied that it has before it all the materials necessary for finally determining the question in dispute, * * * may give judgment accordingly.' (3 Geo. V, c. 23, s. 4; N.B. Sup. Ct. Rules, 1909, 0. 40, r. 10; 0. 58, r. 4).

"That Court found possession to be established and that finding cannot be successfully attacked."

The judgment concluded as follows:

"On both grounds, that the plaintiffs had established title to the land in question and that they were in possession of it, asserting ownership, at the time of the trespass, the judgment appealed against must be affirmed."

Appeal dismissed with costs.

J. B. M. Baxter K.C. and *J. J. F. Winslow K.C.* for the appellants.

P. J. Hughes K.C. for the respondents.

1928

*Feb. 14.

IN RE NORTH SHORE TRADING CO.... (INSOLVENT)

PROVIDENCE WASHINGTON ASSURANCE CO. (APPLICANT) *v.* GAGNON & CLOUTIER, AUTHORIZED TRUSTEES (RESPONDENTS).

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

Bankruptcy—Appeal—Application for leave to appeal to Supreme Court of Canada—Application not within time specified by Bankruptcy Rule 72—Insufficient period of notice—Application dismissed without prejudice to right to obtain extension of time and renew application.

Where an application to a judge of this Court for leave to appeal from a judgment of a provincial court of appeal in a matter arising under the *Bankruptcy Act* is not made within the 30 days specified by Bankruptcy Rule 72, or where the specified 14 days notice has not been given to the adverse party, the application must be dismissed; the judge has no power to extend the time (*Boivin* v. *Larue,* [1925] S.C.R. 275; *In re Hudson Fashion Shoppe Ltd.,* [1926] S.C.R. 26); but the order of dismissal may reserve any right of the applicant to obtain from the court having jurisdiction to grant it (See *Bankruptcy Act*, ss. 68 (5), 2 (*l*)) an extension of time for making the application or for the service of a notice thereof, and to renew the application in the event of such extension being granted (Order as made in *In re Hudson Fashion Shoppe Ltd.* followed; see 7 C.B.R. 80).

Remarks on the desirability of amendment of Rule 72 so as to empower a judge of this Court to extend the time for applying for leave to appeal either before or after its expiration.

APPLICATION for leave to appeal from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec, in a matter arising under the *Bankruptcy Act.*

S. M. Clark for the applicant.

H. Bernier for the respondent.

MIGNAULT J.—In this case, application on behalf of the Providence Washington Assurance Co. was to-day made to me for leave to appeal from the judgment of the Quebec Court of King's Bench, in a matter arising under the *Bankruptcy Act.* This judgment was pronounced on the 14th of January, so that this application is made on the thirty-first day after the judgment, and therefore is not within the time specified by Bankruptcy rule 72. Moreover, fourteen days notice of the application was not given

*PRESENT:—Mignault J. in chambers.

to the adverse party. I have no power to extend the time (*Boivin* v. *Larue* (1); *In re Hudson Fashion Shoppe, Ltd.* (2)) and must dismiss the application.

When the *Boivin Case* (1) was before me, no reference was made by counsel to s. 68, subs. 5, of the *Bankruptcy Act,* which empowers the court (which means the court which is invested with original jurisdiction in bankruptcy under the Act: s. 2, subs. *l*), where by the Act or by the General Rules, the time for doing any act or thing is limited, to extend the time either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

My attention has been called to an order made by Mr. Justice Fisher, sitting in bankruptcy, in *In re Hudson Fashion Shoppe Ltd.* (2) (the same case in which an application for leave to appeal was made to the Chief Justice of this Court, and dismissed because fourteen days notice of the application had not been given (3)) extending the time for applying to a judge of this court for leave to appeal. Mr. Justice Fisher states that my Lord, the Chief Justice, dismissed the application for leave made to him, without prejudice

> to the right, if any, of the applicant to obtain an extension of time for the making of such application, or for the service of a notice thereof from the Court having jurisdiction to grant such extension, and without prejudice to the right of the said applicant to renew the said application to the Supreme Court of Canada for leave to appeal from the judgment of the Appellate Division of the Supreme Court of Ontario, in the event of such extension being granted by the Court aforesaid.

I have decided to follow the decision of the Chief Justice, and to insert this reservation in my order of dismissal of the application for leave to appeal from the judgment of the Court of King's Bench.

I must say, however, that I think General Rule 72 should be amended so as to give a judge of this Court the power to extend the time for applying for leave to appeal, either before or after its expiration. It seems incongruous, and it adds to the costs as well as delays the proceedings, to oblige an applicant to go back to the trial court to obtain

(1) [1925] S.C.R. 275.
(2) (1926) 7 C.B.R. 80.
(3) [1926] S.C.R. 26.

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IN RE NORTH SHORE TRADING CO.

PROVIDENCE WASHINGTON ASSUR. CO. v. GAGNON & CLOUTIER.

Mignault J.

an extension of the time specified by rule 72. I may add that rule 68, governing appeals to the appeal court, gives a like power to a judge of the court of appeal.

The applicant must pay the costs of this application.

Application dismissed.

Solicitors for the applicant: *Savard & Savard.*

Solicitors for the respondents: *Bernier & De Billy.*

1927

*Oct. 25.
*Dec. 16.

ARMAND BOILY (DEBTOR).....APPELLANT;

AND

J. W. McNULTY (PETITIONER).....RESPONDENT.

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

Bankruptcy Act—Petition—Debtor residing and doing business in a judicial district of a province—Petition served in that district, but made returnable in another district—Jurisdiction—S. 2, subs. 1, s. 4, subs. 4b; s. 63, subs. 1d; s. 64, subs. 5.

The respondent, residing in the city of Montreal and a creditor of the appellant, served a petition in bankruptcy upon the appellant at the town of Roberval, district of Roberval, and the petition was made returnable before the Superior Court sitting in bankruptcy at the city of Montreal, district of Montreal. The appellant contested the jurisdiction of the latter court on the ground that he was residing, practising as lawyer and carrying on business in the town of Roberval where all his assets were situate and that the competent court of jurisdiction under the *Bankruptcy Act* was the Superior Court in the district of Roberval.

Held that the Superior Court sitting in bankruptcy at Montreal had jurisdiction. According to s. 63, subs. 1*d*. of the *Bankruptcy Act*, the court having jurisdiction in bankruptcy matters in the province of Quebec is the Superior Court of the province, and, according to s. 64, subs. 5 of that Act "each province of Canada shall constitute for the purpose of this Act one bankruptcy district." So that the Superior Court sitting in any provincial judicial district has jurisdiction to hear a petition in bankruptcy served upon a debtor residing and doing business in any part of the province.

Judgment of the Court of King's Bench (Q.R. 42 K.B. 425) aff.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

1927

BOILY v. MCNULTY.

APPEAL (*a*) from a decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, de Lorimier J., sitting in bankruptcy and dismissing the appellant's contestation of a petition in bankruptcy.

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

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

O. P. Dorais K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—Il s'agit d'une question de juridiction en matière de faillite.

La pétition prie le tribunal de déclarer en faillite Armand Boily, de la ville de Roberval, et elle déclare:

Que le dit Armand Boily, a, au cours des six mois qui précèdent la présentation de la présente pétition, résidé, pratiqué et fait affaires et réside, pratique et fait affaires maintenant à la ville de Roberval, dans les limites de la juridiction de cette cour.

La pétition a été signifiée à Roberval avec avis qu'elle serait présentée à la Cour Supérieure siégeant en matière de faillite, au palais de justice, à Montréal.

Le débiteur, par sa contestation, a décliné la compétence de cette dernière cour de la façon suivante:

5. That the debtor does not come within the jurisdiction of the Superior Court under the *Bankruptcy Act* in the district of Montreal and that the latter court has no jurisdiction to hear the present petition;

6. That the debtor is, as alleged in the said petition, resident, practicing and carrying on business in the town of Roberval, district of Roberval, where there is a competent court of jurisdiction under the *Bankruptcy Act* and before which he should have been summoned;

7. That all the assets of the said debtor are situate in the said district of Roberval at a distance of more than four hundred miles (400) from Montreal and within the jurisdiction of the Superior Court of the district of Roberval;

Le débiteur a conclu au rejet de la pétition ou, comme alternative, à son renvoi devant le tribunal compétent.

Comme on le voit, l'objection de l'appelant fut que la Cour Supérieure, à Montréal, n'était pas le tribunal qu'il convenait de saisir en l'espèce et qu'il ne pouvait être contraint d'y comparaître pour se défendre.

(*a*) Leave to appeal granted by this court ([1927] S.C.R. 275).
(1) (1927) Q.R. 42 K.B. 425.

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La Cour Supérieure et la Cour du Banc du Roi (sauf M. le juge Tellier) se sont prononcés contre cette objection. Elle est maintenant soumise à la Cour Suprême, par autorisation spéciale (1), à cause de la portée générale de la question qu'elle soulève.

Nous croyons que l'appel doit être rejeté pour les raisons suivantes:

Une pétition de faillite doit être présentée à la cour ayant juridiction dans la localité du débiteur (*Loi de faillite,* art. 4, parag. 4, sous-parag. b).

La " localité d'un débiteur " est définie par la loi (art. 2, parag. x):

(*a*) le lieu principal où le débiteur a exercé un commerce pendant l'année qui précède immédiatement la date de la présentation contre lui d'une pétition en faillite ou de la cession autorisée faite par lui; ou (*b*) l'endroit où le débiteur a été domicilié pendant l'année qui précède immédiatement la date de la présentation contre lui d'une pétition en faillite ou de la cession autorisée faite par lui; ou (*c*) dans les cas qui ne tombent pas sous (*a*) ou (*b*), le lieu où la plus grande partie des biens de ce débiteur est située; (1923, art. 2 (3)).

La cour qui a juridiction " en droit et en équité " et qui peut

exercer la juridiction originale, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées

par la loi de faillite est, " dans la province de Québec," " la Cour Supérieure de la province " (*Loi de faillite,* art. 63, parag. 1, sous-parag. d).

Pour les fins de l'administration de la justice, la province est divisée en vingt-cinq districts judiciaires et la *Loi de la division territoriale* (S.R.Q.. 1925, c. 2) décrit le territoire compris dans chacun de ces districts. Les juges de la Cour Supérieure exercent leurs fonctions dans les districts " qui leur sont de temps en temps assignés " (S.R.Q., 1925, c. 145, art. 22). Depuis le 1er janvier 1921, sauf quant aux districts de Saint-François et des Trois-Rivières, les juges ne sont plus chargés de l'administration de la justice dans un district en particulier. Ils doivent, à tour de rôle, remplir leurs fonctions dans chacun des districts de la province, suivant les ordres du juge-en-chef (S.R.Q., 1925, c. 145, art. 27). Cette obligation n'existe pas pour les juges nommés antérieurement au 26 juillet 1920, qui étaient jusqu'alors chargés des districts de Québec, Montréal, Trois-Rivières et Saint-François. Mais, sans y être obligés, ces juges ont le droit d'exercer leurs pouvoirs dans les autres

(1) [1927] S.C.R. 275.

districts; et il est indiscutable que chacun des juges de la Cour Supérieure (même de ceux qui sont chargés des districts de Saint-François et des Trois-Rivières) a juridiction pour administrer la justice dans chacun des vingt-cinq districts judiciaires. La juridiction de la Cour Supérieure est générale et embrasse toute la province (S.R.Q., 1925, c. 145, art. 2).

A priori, la résidence fixée dans la commission du juge de la Cour Supérieure est donc indifférente à la question de sa compétence. Ce qui importe, c'est le lieu où il se trouve au moment de l'exercice de ses fonctions. Il suffit que le juge, à ce moment-là, soit à l'endroit où doivent être tenues les séances de la cour (R.S.Q., arts. 44 et 49.—Comparer avec la loi 11 Geo. V., c. 101, art. 1) dans le district où l'affaire a été légalement introduite.

La loi qui a créé la Cour Supérieure, maintenant consignée dans la *Loi des tribunaux judiciaires* (S.R.Q., 1925,—c. 145, art. 2), ne définit nulle part la juridiction de cette cour *ratione materiæ* ou *ratione personæ.* Elle se contente d'établir le tribunal et de l'organiser. Elle laisse aux législatures compétentes le soin de lui attribuer les affaires dont elle pourra être saisie régulièrement et, suivant l'expression de Japiot (Procédure civile et commerciale, n° 31), de fixer le lien que la personne du défendeur établit entre l'affaire et un point du territoire.

Pour la propriété et les droits civils, qui sont de son ressort, la législature de Québec y a pourvu au moyen du Code de Procédure Civile. C'est là que l'appelant a trouvé les dispositions et les règles qu'il demande à la cour d'appliquer à sa cause. Le pouvoir et la juridiction, en matière civile, de la Cour Supérieure et de ses juges y sont définis dans des articles spéciaux (arts. 40, 48 et suiv., 70 et suivants C.P.C.). Les règles concernant le lieu de l'introduction de l'action y sont également déterminées (94 et suiv. C.P.C.). Mais la compétence de la Cour Supérieure ne se borne pas à celle qui lui est conférée par le code de procédure. Elle lui vient, en outre, de plusieurs autres lois provinciales. Elle lui vient aussi d'un certain nombre de lois fédérales.

Le Parlement du Canada, en référant à cette cour une matière qui est de son domaine, est libre en même temps de prescrire la procédure qui sera suivie et le territoire sur lequel sa juridiction sera exercée. (*Cushing* v. *Dupuy* (1)).

(1) (1880) 5 A.C. 409.

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Il peut bien, comme il l'a fait, par exemple, pour la *Loi des élections fédérales contestées* (S.R.C., c. 7, art. 3), adopter la division territoriale qui prévaut dans le code de procédure. Mais il lui est loisible d'en indiquer une autre; et c'est ce qu'il a fait dans la *Loi de faillite*. Pour les fins de cette loi, chaque province du Canada constitue un district (art. 64, parag. 5) et, dans chaque province, la cour à laquelle les affaires de faillite sont attribuées a juridiction sur toute la province, sans égard à la délimitation des districts judiciaires. Le Parlement a autorisé le Gouverneur en conseil à diviser chaque province (district de faillite) en deux ou plusieurs divisions de faillite, à les nommer et à les numéroter. Mais cela n'a pas encore été fait, excepté pour l'administration de la loi par les séquestres officiels. Et encore, cette division restreinte établie par l'arrêté-en-conseil publié le 1er septembre 1923, ne suit pas les lignes de démarcation des districts judiciaires tels qu'ils existent dans la province de Québec. L'annexe D, qui concerne le " district de faillite de Québec ", inclut dans une seule division nommée " Montréal ", tout le territoire compris dans les comtés ou districts de Montréal, Iberville, Richelieu, Saint-Hyacinthe, Terrebonne et Beauharnois. Un groupement semblable est fait pour la division de Québec, etc.

Sous la *Loi de faillite*, la délimitation en districts judiciaires tels qu'ils sont compris dans la province de Québec, n'est donc pas reconnue. Cette loi ne méconnaît pas le principe du droit romain: *Actor sequitur forum rei.* Elle en fait une application plus large. Le *forum rei* n'est plus seulement le district judiciaire provincial, c'est toute la province. Il s'agit d'une loi fédérale qui concerne tout le pays, et elle envisage le territoire à ce point de vue. En outre, c'est une loi de faillite et elle se préoccupe davantage de l'intérêt des créanciers que de celui du failli. (In re *J. F. Camirand Limited* (1)). Elle offre d'ailleurs toutes les facilités pour que les audiences soient tenues aux époques et aux lieux que la cour jugera à propos (arts. 64, parag. 2; 71, parag. 3; règle n° 63).

En l'espèce, la pétition de faillite contre l'appelant pouvait donc être produite à Montréal, qui est un des endroits " fixés par l'autorité compétente " pour la tenue des termes

(1) 4 C.B.R. 344.

et séances de la Cour Supérieure (S.R.Q., 1925, c. 145, art. 49) et qui se trouve dans le district de faillite (i.e. la province de Québec), où est située la "localité du débiteur". La pétition a été présentée à l'endroit des séances, à un juge qui, à ce moment-là, siégeait à Montréal, et à qui elle avait été assignée par le juge exerçant les fonctions de juge-en-chef de la Cour Supérieure, à Montréal. (R.S.Q., c. 145, art. 23; *Loi de faillite,* art. 64, parag. 3).

Toutes les exigences de la loi de faillite relatives à l'attribution de compétence nous paraissent avoir été observées et respectées. Il y a lieu au rejet de l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Dorais & Dorais.*

LE SEMINAIRE DE QUEBEC (DEFENDANT)
AND
C. A. CHAUVEAU.....(INTERVENANT) } APPELLANTS;

AND

LA CITE DE LEVIS (PLAINTIFF).....RESPONDENT.

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

Municipal corporation—Taxes—Exemption—Industrial company—Cessation of operations—Immovables remaining in same condition—Right to exemption—Cities and Towns Act, R.S.Q. (1909) s. 5775.

In order to continue to be entitled to the benefit of an exemption from municipal taxes granted under the *Cities and Towns Act* (R.S.Q., 1909, s. 5775), a person must actually carry on the industry, trade or enterprise in respect of which the exemption was granted; and the benefit of such exemption is suspended while the industry, trade or enterprise ceases to operate, although the immovables remain available for the same industry. *La Cie de Jésus v. La Cité de Montréal* ([1925] S.C.R. 120) foll.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 165) aff.

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*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont & Smith JJ.

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LE SÉMINAIRE DE QUÉBEC v. LA CITÉ DE LÉVIS.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Magistrate Court for the district of Quebec, Gagnon J., and maintaining the respondent's action for taxes.

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

Aimé Geoffrion K.C. and *Antoine Rivard* for the appellants.

V. A. de Billy K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—La cité de Lévis réclame deux années d'arrérages de taxes sur des immeubles appartenant au Séminaire de Québec. L'appelant invoque en défense la résolution suivante:

Qu'une exemption de taxes, sauf la taxe d'eau, pour une période de cinq ans, à partir du premier mai mil neuf cent dix-neuf (1919), soit accordée à MM. William H. Hutchison, de Londres, Angleterre, Horace Dussault, de Lévis, entrepreneur et Charles-Auguste Chauveau, de Québec, avocat, faisant affaires à Lévis comme constructeurs de navires et exploitant en la cité de Lévis des chantiers maritimes sur les lots qu'ils occupent comme locataires, et portant les numéros quatre cent vingt-trois (423), trois cent quatre-vingt-quinze (395), trois cent quatre-vingt-seize (396), quatre cent douze (412) et quatre cent treize (413) du cadastre officiel du quartier St-Laurent, en la cité de Lévis, la dite propriété étant connue sous le nom de St. Lawrence Dock. Adoptée sur division, l'échevin Roy votant contre.

Les taxes sont réclamées pour les années 1922-23 et 1923-24. Les immeubles à raison desquels elles ont été imposées sont ceux qui sont mentionnés dans la résolution ci-dessus. MM. Hutchison, Dussault et Chauveau en sont les locataires en vertu d'un bail du 10 février 1919, mais ils avaient commencé à occuper les immeubles l'automne précédent et ils en étaient déjà en possession lorsque la résolution d'exemption fut adoptée. L'un d'eux, M. Chauveau, est intervenu dans les procédures pour appuyer la défense du Séminaire de Québec.

Le bail entre le Séminaire de Québec et MM. Hutchison, Dussault et Chauveau portait une clause par laquelle

les taxes municipales et scolaires dues pour cette propriété seront, pendant toute la durée du présent bail, payées par les locataires.

(1) (1927) Q.R. 44 K.B. 165.

(Le 27 mai 1921, la propriété a été sous-louée à MM. Bishop et Fletcher, avec l'assentiment du Séminaire de Québec; mais les taxes sont restées à la charge de MM. Hutchison, Dussault et Chauveau (ou, si l'on veut, de leur successeur, The St. Lawrence Dock & Shipbuilding Company).

La cité de Lévis a opposé plusieurs moyens à la défense du Séminaire de Québec et à l'intervention de M. Chauveau:

La résolution était *ultra vires.*

L'exemption ne s'appliquait pas aux taxes sur les immeubles, mais seulement aux taxes imposées contre les locataires.

L'exemption était personnelle à MM. Hutchison, Dussault et Chauveau et n'avait pu être valablement transférée à MM. Bishop et Fletcher.

L'exemption était subordonnée à la condition que la propriété continuât d'être exploitée comme chantier maritime. Cette exploitation avait cessé et, par le fait même, l'exemption ne pouvait plus être invoquée.

La plupart de ces moyens avaient déjà été soulevés dans les années précédentes. Deux jugements étaient intervenus, le 22 février et le 18 octobre 1922; et le Séminaire a répondu que ces jugements avaient définitivement décidé, contrairement aux prétentions de la cité,

1° que la résolution d'exemption était valide;

2° que cette exemption s'étendait aux taxes foncières;

3° qu'elle subsistait malgré la sous-location à Bishop et Fletcher.

Suivant le Séminaire, il y avait donc chose jugée entre les parties sur ces différents points.

D'après la façon dont nous envisageons la cause, nous n'aurons pas à nous prononcer sur chacune de ces questions, et nous croyons que le jugement de la Cour du Banc du Roi, qui a infirmé celui du tribunal de première instance et qui a maintenu l'action de la cité de Lévis, doit être confirmé pour la raison suivante:

Comme le dit très bien Monsieur le Juge Dorion,

les deux jugements invoqués laissent intacte la question de savoir si l'exemption est sujette à la condition que les locataires, quels qu'ils soient, devront exploiter des chantiers maritimes.

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LE SÉMINAIRE DE QUÉBEC v. LA CITÉ DE LÉVIS.

Rinfret J.

L'exemption de taxes a été accordée en vertu de l'article 5775 de la *Loi des cités et villes* (S.R.Q. 1909). Cet article se lit comme suit:

> Sujet aux articles 5929 et suivants, le conseil peut, par une résolution, exempter des taxes municipales, pour une période de vingt ans ou plus, toute personne qui exerce une industrie ou un métier ou se livre à une exploitation quelconque, ou convenir avec cette personne d'une somme de deniers payable annuellement pour un temps n'excédant pas vingt ans, en commutation de toute taxe municipale.
>
> Il peut faire remise du paiement des taxes municipales aux personnes pauvres de la municipalité.
>
> Les exemptions ou conventions autorisées par le présent article ne s'étendent pas aux travaux à faire aux cours d'eau, fossés de ligne, clôtures, égouts, trottoirs ou chemins dépendant des biens imposables ainsi exemptés ou commués.

Comme on le voit, le pouvoir qui est conféré au conseil municipal en vertu de cet article est celui d'exempter une personne qui exerce une industrie ou un métier, ou se livre à une exploitation. Le pouvoir du conseil municipal est subordonné à cette condition (*Corporation de Cartierville* v. *Compagnie des Boulevards* (1)). En outre, l'article implique que cette condition doit persister pendant la durée de l'exemption de taxes.

Dans la cause de la *Compagnie de Jésus* v. *La cité de Montréal* (2), il s'agissait surtout de décider si l'appelante était l'ayant-cause de M. Edouard Gohier, en faveur de qui l'exemption de taxes avait été accordée par la ville de Notre-Dame des Neiges à lui-même, " ses successeurs ou ayants-cause "; mais cette cour a alors posé le principe que le statut subordonne la continuation de l'exemption de taxes à la continuation de l'exploitation elle-même. L'exemption est autorisée à persister seulement aussi longtemps que l'industrie, le métier ou l'exploitation persiste. En l'absence de l'exercice de l'industrie, du métier, ou de l'exploitation, la raison d'être de l'exemption cesse d'exister.

Or, durant les années 1922-23 et 1923-24, pour lesquelles la cité réclame des taxes de l'appelante, les chantiers maritimes, à raison desquels l'exemption avait été accordée, avaient cessé d'être exploités par qui que ce soit sur la propriété du Séminaire de Québec. Il n'était pas suffisant que les immeubles fussent restés affectés à la

(1) Q.R. 51 S.C. 170.

(2) [1925] S.C.R. 120.

destination qui avait amené la cité à accorder l'exemption; il fallait que les chantiers fussent en opération. Ils ne l'étaient plus. Il n'y avait pas de commandes et il n'y avait pas d'ouvrage. Les employés avaient été congédiés. Pendant la première partie de cette période, il n'y avait plus sur les chantiers que le gérant, M. Baker; le comptable, M. Odell; et le gardien. M. Baker partit au commencement de l'année 1923, de sorte qu'il ne resta plus que le comptable et le gardien.

A peine, pendant tout ce temps, The Fletcher Ship Repairing Company, qui occupait les chantiers comme sous-locataire de MM. Hutchison, Dussault et Chauveau, entreprit-elle de réparer le vapeur "l'Etoile." Cette tentative d'opération dura tout au plus quinze jours et fut abandonnée

because the company was not in a financial position to carry (on the) work on her,

dit le secrétaire-trésorier de la compagnie. Il nous faut accepter le témoignage de ce dernier, car le comptable Odell était sur les lieux, à Lévis, mais "la finance était faite à Montréal," et Odell est forcé d'admettre qu'il est incapable de dire si "la compagnie avait des fonds."

La situation, à partir de 1922, est décrite par le secrétaire-trésorier dans les termes suivants:

During 1922, there were (sic) a quantity of survey work done on a number of cases, many surveys done after. I say, after the middle of 1922, or, in fact, during the whole of 1922, the company was not in a financial position to undertake any work, but Mr. Odell who was acting in charge of the company here, was naturally very interested in endeavouring to see the company carry on and it was most entirely on his efforts to secure work for the company.

The last case in which, to my knowledge, this occurred was in October, 1922, but this was in connection with the s/s L'Etoile and the company was not in a financial position to carry work on her. As the result, an action was taken against the company, which has been settled out of Court and the Company has paid $300 damages. After that, the only thing that was carried on by the Fletcher Repairing Ship Company was to endeavour to dispose of the plant.

Q. And you disposed of the majority of the plant as fast . . .

A. As fast as we could find a buyer.

Un peu plus loin, il ajoute:

At that time (May, 1922) the reports were not coming in as regularly as they should have been, because the company was practically bankrupt

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LE SÉMINAIRE DE QUÉBEC v. LA CITÉ DE LÉVIS.

Rinfret J.

and there was little or no interest being taken by the principals in the operations of the company. Therefore these reports were not followed through our demand.

Et encore:

The company had no asset, except the lease * * * . The company did not have enough money to pay outstanding accounts.

Cette preuve établit donc non-seulement qu'il n'y a eu aucune opération des chantiers maritimes pendant les années 1922-23 et 1923-24 (sauf l'incident de L'Etoile), mais que la compagnie n'était pas en mesure d'exercer l'exploitation. Le comptable Odell tente bien d'expliquer que, s'il y avait eu de l'ouvrage, MM. Bishop et Fletcher personnellement auraient pu lui procurer l'argent nécessaire; mais cet espoir problématique ne saurait prévaloir à l'encontre des faits positifs dont a témoigné le secrétaire-trésorier.

Il en résulte qu'il n'y a eu, pendant les années 1922-23 et 1923-24, aucune exploitation au sens de l'article 5775 de la loi des cités et villes, et que l'exemption de taxes accordée à raison de cette exploitation ne peut donc être invoquée pour ces années.

Le jugement de la Cour du Banc du Roi, qui a maintenu l'action, doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Chauveau & Rivard.*

Solicitors for the respondent: *Bernier & de Billy.*

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*Feb. 16.
*Mar. 5.

WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

ENGEBRET PAULSON ODEGAARD (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Street railway—Door of moving tramcar, wrongfully opened by passenger, striking and injuring person on station platform—Liability of railway company—Granting of "special leave" to appeal—Supreme Court Act, s. 41.

While defendant's tramcar, which had overshot a station platform, was backing to it, a passenger, without the knowledge of the motorman or conductor, and while the conductor was collecting fares in the front

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

part of the car, opened a rear door by working the handle which was within the conductor's box; the opened door of the moving car struck and injured the plaintiff who was standing on the platform.

Held: Defendant was not liable for the injury. The cause of the accident was the passenger's wrongful act in operating the handle, which he must have known was intended to be operated only by the conductor. There was no evidence to warrant the conclusion that the passenger's act should have been anticipated by the defendant. As to alleged disregard of a rule requiring the conductor to go to the rear of the car when being moved reversely, it was sufficient to say that, if the rule applied at that point, its breach was not the cause of the accident; moreover, the rule was for an entirely different purpose.

Judgment of the Court of Appeal for Manitoba (36 Man. R. 592) reversed.

Newcombe J. dissented, holding that it was the conductor's neglect of his duty to be at his post at the rear when the car was backing, that was the direct cause of the accident; it was a consequence of the lack of the control which he was required to exercise that the passenger opened the door for himself; the passenger's act was natural and should have been foreseen and precautions taken against it.

The court expressed the opinion that the case did not belong to the class of cases in which it was contemplated that "special leave" might be given under s. 41 of the *Supreme Court Act.*

APPEAL by the defendant, by special leave granted by the Court of Appeal for Manitoba, from the judgment of that Court (1), affirming, by a majority, the judgment of Stacpoole, Co. C.J., holding the defendant liable in damages for personal injuries suffered by the plaintiff through being struck, while standing on a station platform, by a door of the defendant's tramcar, the door having been opened by a passenger in the car, while the car, which had overshot the platform, was backing to its stopping place. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was allowed, Newcombe J. dissenting.

E. H. Coleman for the appellant.

H. C. Morrison for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret, Lamont and Smith JJ.) was delivered by

(1) 36 Man. R. 592; [1927] 2 W.W.R. 589.

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ANGLIN C.J.C.—By special leave of the Court of Appeal for Manitoba, the defendant appeals from a judgment of that Court (1), affirming (Fullerton and Trueman, JJ.A., dissenting) the judgment of Stacpoole, Co.J., who awarded the plaintiff $800 damages for personal injuries which he found were sustained through negligence of the defendants. Fullerton, J.A., states the material facts as follows:

> On the day of the accident, the plaintiff was standing on the platform at Ridge Creek Road, on the Selkirk line of the defendant's railway, waiting for a car from Selkirk, upon which he intended to travel to Winnipeg. The car overshot the platform about a car length, when it stopped and backed until the front door of the car was opposite the south end of the platform. While it was backing up, a passenger named Fyffe, without the knowledge of either the motorman or conductor, opened one of the rear doors, which struck the plaintiff, knocking him down and seriously injuring him.
>
> The evidence shows that the crews of defendant's cars change at McBeth Siding, which is north of the platform on which the accident happened. After leaving McBeth Siding, the conductor's duty is to collect the fares of the passengers going to Winnipeg, and it was while he was attending to this duty and away from the handles operating the rear doors that Fyffe opened the door. Until fares have been collected, passengers get on and off by the front door, and the rear doors are not used. The learned trial judge found in favour of the plaintiff, taking the view that it was the duty of the company to have the conductor stationed near the operating levers in order that he might be able to control the opening and shutting of the doors.
>
> It is clear that had it not been for Fyffe's interference the accident would not have happened.

The rear door of the car was admittedly designed to be operated only by the conductor, and its construction and the placing of the handle by which it was operated in the box or enclosure within which the conductor ordinarily stood made this so obvious that any sensible person could not fail to be aware of it. The view which prevailed in the Court of Appeal was that the failure of the conductor to lock the rear door when he went forward to collect fares amounted to actionable negligence. That Court, as well as the trial judge, took the view that the act of Fyffe in opening the door as he did was something that the defendants should have anticipated might occur and to prevent which they should have taken precautions, the omission of the latter in the circumstances amounting to actionable negligence.

(1) 36 Man. R. 592; [1927] 2 W.W.R. 589.

With the utmost respect, we cannot accept that view. The cause of the accident was undoubtedly the act of Fyffe in opening the door. By placing the handles used to operate the doors within the conductor's box the company had given intimation that passengers were not intended to meddle with the opening of the doors quite as effectively as if it had posted a notice forbidding such meddling. At all events, in the absence of any evidence that such interference by a passenger had occurred before and was, therefore, something that might have been expected, such an inference was, in our opinion, unwarranted. Negligence implies a breach of duty. Finding nothing on which to base an inference that the wanton and mischievous act of the passenger in operating the handle, which he must have known it was intended should be operated only by the conductor, was something that the company ought to have anticipated might occur, there is no basis for the implication of a duty to prevent it.

There was, in our opinion, no evidence on which a court could come to the conclusion that such action by a passenger ought to have been anticipated.

Of other negligence suggested, such as the disregard by the motorman and conductor of a rule requiring the latter to go to the rear of the car when it is being moved reversely, it is sufficient to say that, if the rule applied at the point in question, its breach was not the cause of the accident. Moreover, the rule was made for an entirely different purpose. Nor is it material that when the door was opened the car was moving backwards.

For these reasons the appeal must be allowed and the action dismissed. Counsel for the appellants having informed the Court that he was instructed not to ask costs, there will be no order as to costs.

Before parting with this appeal we feel that we should add that this case does not, in our opinion, belong to the class of cases in which it was contemplated that "special leave" might be given under s. 41 of the *Supreme Court Act*. It deals with a very ordinary claim based upon negligence, the disposition of which depends upon the inferences to be drawn from a particular set of facts. There is no matter of public interest involved in it.

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Newcombe J.

NEWCOMBE J. (dissenting).—I am so unfortunate as to differ from the other members of the Court, and, as I have formed a very definite opinion, I think it better to state it. The view which prevails, if I may presume to express it according to my understanding, is that, while there may have been negligence on the defendant's part in backing the car with no lookout, and in thus coming to the station without exercising any competent control of the doors at the rear of the car, the company did no more than to create a dangerous condition, in which the act of the passenger who opened the door was the cause productive of the accident.

To the contrary, in my opinion, which I express with the utmost respect, not only would the accident not have occurred if the conductor of the car had discharged his duties, but neglect of these was the direct cause. Intervening, it is true, was the act of the passenger who opened the door, but, seeing that the conductor was not at his post, that act followed in natural course; it was a consequence of lack of the control which the conductor was required to exercise that the passenger opened the door for himself; and the defendant is liable for consequences which should have been foreseen—such as were so likely to ensue that the defendant's failure to anticipate them and make effective reasonable means of prevention was negligence.

The facts are very plain. On 13th November, 1926, at about half-past six in the evening, the plaintiff and two boys were waiting at Ridgecrest Station on the defendant's railway to take passage into Winnipeg on the incoming car. The accommodation provided for the taking up and discharge of passengers was extremely limited, the platform being only 5 feet long and 2 feet 6 inches wide; it was reached by the sidewalk of Ridgecrest Avenue, from which there were steps leading up. There had been rain and frost during the afternoon, and the platform was icy. When the car came along it passed the platform by a car length or less, then stopped, and, after some hesitation, moved slowly backward, as the motorman says, under "one notch of power, one and a half or two miles an hour probably." Then, as the car came opposite to the platform, the rear door, which swings outward, was opened from within,

projecting over the platform about 1 foot 3 inches, or half the width of the platform, and, in its progress, sweeping off the plaintiff and one of the boys. The plaintiff fell into a ditch or excavation and suffered damages, for the recovery of which the action is brought. The defence is that the defendant company is not responsible for the opening of the door and the consequent overthrow of the plaintiff, because it was one of the passengers in the car, and not a servant of the company, who opened the door. It appears that the defendant, in defining the duties of its employees, had taken care to provide that the doors were not left to the operation of the passengers. On this particular car two men were employed, a motorman and a conductor. The motorman's place was at the head of the car, and he attended to the driving and to the working of the door in front. There was a place provided for the conductor in the rear compartment of the car, in which were also seats for passengers. There was, between the conductor's seat and the space occupied by the passengers, a metal rail or bar to which were affixed handles for opening the doors at the rear.

When the motorman desires to reverse his car he gives a signal of four bells to the conductor, whose duty it is then to see that the way is free of obstruction, and so to inform the motorman by repeating the signal. While the reverse operation is in progress the conductor communicates with the motorman by signals to warn of any danger. On this occasion, although backing into a station, the conductor was not at his post in the vestibule at the rear. He had gone forward to collect fares from passengers who were extending their journey beyond that for which they had paid when entering the car, and he was, in fact, so close to the motorman that signals were useless, and the latter, instead of giving the reverse signal, told the conductor orally that he was going to reverse. The conductor paid no attention; he says he did not hear what the motorman said. The motorman looked at his side vision mirror, which gave him a limited view of the situation outside at the rear of the car, and started, as he says, slowly in the reverse direction, intending to stop at the platform. The conductor ignored these movements, but remained in the front of the car, col-

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lecting his fares. It was then that a passenger who was riding in the rear vestibule opened the door, and in consequence the man and boy were upset. There were means of locking these doors, and, as to a car which is in the sole charge of a motorman, or, as the saying is, "operated as a one-man car," the doors at the rear are locked while the car is in motion, and open automatically, or by the passenger's foot upon a treadle, when the car stops. When there is a conductor, and he is in his place, he controls the handles by which the doors at the rear are opened and closed; but when he is not in his place, no means are substituted or employed to prevent a passenger from opening them, and the handles are conveniently placed for the use of passengers riding in or passing through the vestibule to make their exits. As to what should have been anticipated, such cases are said to be rather of first impression, but, so far as I can perceive, it is just as natural, and just as much to be foreseen, that an outgoing passenger who knows the use of the handles would open the door for himself as if the handles had been knobs or latches affixed to the doors themselves. The company's standing orders were apt enough, if followed, to prevent such accidents; the trouble was that the conductor in this case failed to comply with them, the instructions which the company gave to its servants were thus set at nought, and the accident followed as a natural result. It is common course for a passenger to open a door when he has only to turn the handle and there is no employee exercising any control. Then, if it be natural and probable that a passenger would let himself out, it is surely not unnatural or improbable that he may on occasion open the door somewhat prematurely, or without due regard to the circumstances of the people who are waiting on the platform. All kinds of passengers ride in tramway cars, and, if the doors of these cars open outwards, and there be nothing to prevent the opening of them by any passenger who is so minded, the use of a lock or some device to prevent the doors becoming sources of danger to persons outside would seem to be a matter which should not escape the attention of those responsible for the operation of the tramway.

The defendant relies upon a passage from Lord Dunedin's judgment in *Dominion Natural Gas Co.* v. *Collins, et al* (1), where the law is stated in these words:

> The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (2); *Thomas* v. *Winchester* (3); and *Parry* v. *Smith* (4), are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

And it is argued that here the accident was due to the conscious act of another volition, and that the defendant is not liable. But I am satisfied, and indeed the cases cited in the context show, that the passage does not assist a defendant in cases where there is a duty to take prudent precautions, such as, upon the findings, existed in this case, and where the cause of the accident is to be found in the neglect to take those precautions. It is a question of fact whether the negligent act of a third person is such a natural and probable consequence of the defendant's own neglect in prescribing and enforcing reasonable preventive measures that the defendant is himself guilty of negligence if he fail to anticipate and provide against the negligent *actus interveniens,* and my finding upholds that of the trial judge, and of the majority of the Court of Appeal.

Appeal allowed.

Solicitors for the appellant: *Anderson, Guy, Chappell & Duval.*

Solicitors for the respondent: *Morrison & Booth.*

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(1) [1909] A.C. 640, at p. 646.
(2) (1816) 5 M. & S. 198.
(3) (1852) 6 N.Y.R. 397.
(4) (1879) 4 C.P.D. 325.

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*Mar. 6.

INTERNATIONAL BUSINESS MACHINES CO., LTD. (PLAINTIFF).... } APPELLANT;

AND

THE BOARD OF EDUCATION FOR THE CITY OF GUELPH (DEFENDANT) } RESPONDENT.

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

Conditional sale—Conditional Sales Act, R.S.O. 1914, c. 136, s. 3—Delivery to "a trader or other person for the purpose of resale by him in the course of business" (s. 3 (3))—Resale by such trader, etc., "in the ordinary course of his business" (s. 3 (4)).

G., who was a dealer in electrical and radio supplies, contracted with defendant to install in its school (then under construction) an electric signalling system, including a master clock and secondary clocks. G. had never carried such clocks on his premises as part of his stock in trade, and there was evidence that it was not usual for a dealer in electrical supplies to do so. For the purpose of installing them under his contract with defendant, he bought them from plaintiff under a conditional sale agreement, and they were shipped direct to the school premises. The conditional sale agreement was not filed pursuant to the *Conditional Sales Act* (R.S.O., 1914. c. 136), but the seller's name and address were plainly set out on the clocks. G. failed to pay for them, and plaintiff sued defendant for return of the clocks or for their value.

Held, that the delivery to G. was a delivery to "a trader or other person for the purpose of resale by him in the course of business" within s. 3 (3), and that there was a resale by G. "in the ordinary course of his business" within s. 3 (4), of the *Conditional Sales Act;* that, therefore, under the Act, the property in the goods vested in defendant, and plaintiff could not recover.

Judgment of the Appellate Division of the Supreme Court of Ontario (61 Ont. L.R. 85, reversing judgment of Riddell J.A., *ibid*) affirmed.

APPEAL by the plaintiff (by special leave granted by the Appellate Division of the Supreme Court of Ontario) from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which allowed the defendant's appeal from the judgment of Riddell J.A., in favour of the plaintiff (1).

One Grinyer, who carried on business as the Grinyer Electric Company, dealers in electrical and radio supplies,

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

(1) (1927) 61 Ont. L.R. 85.

contracted with the defendant to install an electric signalling system in the new Guelph Collegiate Institute then in course of construction. The system to be installed included a master clock and secondary clocks, which Grinyer purchased from the plaintiff under an agreement by which the title to the goods was not to pass to Grinyer until the price thereof was paid in full, and until such payment they were to remain the plaintiff's property. The agreement was not filed pursuant to the *Conditional Sales Act* (R.S.O. 1914, c. 136, s. 3 (1*b*)), but the name and address of the seller were plainly set out on the face of the clocks (see the Act, s. 3 (5)). The goods were shipped, on Grinyer's order, direct to the premises of the Guelph Collegiate Institute. There was evidence that Grinyer never had, as part of his stock in trade on his premises, a master clock or secondary clocks such as those in question, and that it is not usual for a dealer or contractor in electrical supplies to have master clocks and secondary clocks on his premises as part of his stock in trade.

The defendant paid Grinyer for the equipment installed, but Grinyer failed to pay the plaintiff, the balance remaining due, as fixed by the judgment at trial, being $1,263.37.

The plaintiff claimed from the defendant the return of the articles, or, in the alternative, their value. Riddell, J.A., held that the plaintiff was entitled to recover the said sum of $1,263.37 (1). His judgment was reversed by the Appellate Division, which held that the action should be dismissed (1).

Subsections 3 and 4 of section 3 of the said Act (as it then stood) read as follows:

(3) Where the delivery is made to a trader or other person for the purpose of resale by him in the course of business such provision [i.e., the provision in the contract that the ownership is to remain in the seller until payment of the purchase money] shall also, as against his creditors, be invalid and he shall be deemed the owner of the goods unless the provisions of this Act have been complied with.

(4) Where such trader or other person resells the goods in the ordinary course of his business the property in and ownership of such goods shall pass to the purchaser notwithstanding that the provisions of this Act have been complied with.

(1) (1927) 61 Ont. L.R. 85.

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The Appellate Division held (1) that the delivery of the clocks at the school was a delivery by the plaintiffs to Grinyer in order that Grinyer in the course of his business might install them in the school, and thus resell and deliver them to the defendants pursuant to his contract already made; also that the agreement to install the clocks was made by Grinyer in the ordinary course of his business as a dealer in electrical supplies, and that in the circumstances the goods were delivered to Grinyer for resale in the course of his business, and were resold by Grinyer to the defendants in the ordinary course of his business, within the meaning of subsec. 4 of sec. 3 of the statute.

H. W. A. Foster for the appellant, contended (*inter alia*) that Grinyer was not a "trader or other person" ("other person" being construed according to the *ejusdem generis* rule) within the said subsections; that there was no evidence to show that Grinyer or other electrical dealers sold such goods as those in question in the ordinary course of business; he bought the goods in question as contractor; they were special articles which he procured to install under his contract with the defendant; he was dealing with both plaintiff and defendant as a contractor; defendant was not misled by any possession or apparent possession by Grinyer, and the design of the Act was to protect purchasers who acquire property on the faith of possession (referring to *Liquid Carbonic Co. Ltd.* v. *Rountree* (2)); that there was not a resale within the meaning of subs. 4, which subsection contemplates a resale subsequent to the delivery to the trader.

R. S. Robertson K.C. and *Nicol Jeffrey K.C.* for the respondent, were not called on.

On the conclusion of the argument of counsel for the appellant, and without calling upon counsel for the respondent, the judgment of the court was orally delivered by

ANGLIN C.J.C.—Notwithstanding the very able presentation of this case by counsel for the appellant, we are all of the opinion that the appeal cannot succeed. To us the reasons given by the learned judge who delivered the judgment of the Appellate Division, Mr. Justice Ferguson, seem convincing. We are satisfied that there was in this

(1) (1927) 61 Ont. L.R. 85, at p. 89.

(2) (1923) 54 Ont. L.R. 75, at p. 78.

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case a sale and a delivery to Grinyer within the meaning of subs. 3, and a resale by him within subs. 4 of s. 3 of the *Conditional Sales Act*. These subsections apply, with the result that the property in the goods vested in the respondents. The appeal accordingly fails, and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ryckman, Denison, Foster & Cody.*

Solicitor for the respondent: *Nicol Jeffrey.*

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*Mar. 6.
*Mar. 27.

KEENAN BROTHERS, LIMITED (DEFENDANT) ..... APPELLANT;

AND

WILLIAM LANGDON (PLAINTIFF) ..... RESPONDENT.

AND

ALEXANDER KING AND ALEXANDER KING & SON (DEFENDANTS).

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

Timber—Lien—Woodman's Lien for Wages Act, R.S.O. 1914, c. 141, s. 6 (2)—Claim of lien by sub-contractor.

Subs. 2 of s. 6 of *The Woodman's Lien for Wages Act*, R.S.O. 1914, c. 141, which, in effect, gives a lien to a "contractor," applies only in favour of a person who has made a contract directly with the owner of the timber, and does not give a lien to a sub-contractor for moneys owing to him under a contract made by him with the person who contracted with the owner.

Judgment of the Appellate Division of the Supreme Court of Ontario (32 O.W.N. 407) reversed.

APPEAL by the defendant Keenan Brothers, Limited, from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which affirmed the judgment of His Honour, Judge Powell, Judge of the District Court of the District of Parry Sound, who held that the

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

(1) (1927) 32 O.W.N. 407.

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respondent (plaintiff) was entitled, under *The Woodman's Lien for Wages Act*, R.S.O. 1914, c. 141, to a lien on certain logs or timber owned by the appellant, for the amount owing to the respondent by the defendants Alexander King and Alexander King & Son for cutting, skidding and hauling logs or timber under a contract made by the respondent with the said Alexander King and Alexander King & Son, who had contracted with the appellant to cut and deliver certain timber for the appellant. The point in question was whether the effect of subs. 2 of s. 6 of the said Act was to give to the respondent the lien claimed. The appeal was allowed with costs.

N. W. Rowell K.C. for the appellant.

R. S. Robertson K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from the First Appellate Divisional Court of Ontario.

In 1925, the appellant, Keenan Brothers, Limited, a company carrying on business as a dealer in and a manufacturer of lumber, was the owner or licensee of a timber berth, and, in September of that year, made a contract with Alex. King & Son to cut and deliver a certain quantity of this timber. Alex. King & Son subsequently entered into an agreement with the respondent to cut, skid and haul a portion of the wood comprised in their contract. The respondent, not having been paid the full amount of his sub-contract, claims against Alex. King & Son payment of the balance due him, and asserts against the appellant, the owner of the timber, a lien on the wood cut by him. His action is based upon *The Woodman's Lien for Wages Act*, R.S.O. 1914, ch. 141, and was tried before Judge Powell of the District Court of Parry Sound. The learned judge found that the respondent's agreement with Alex. King & Son was to take out 25,000 pieces of timber at $14 per thousand feet for logs 8 inches or over, and 1½ cents per lineal foot for logs 6 inches to 8 inches, and that this agreement was made without the knowledge or consent of Keenan Brothers. He gave the plaintiff judgment against Alex. King & Son for a balance of $2,198.76, and also granted him

a lien for this amount upon the logs cut by him, which are the property of Keenan Bros. From this judgment Keenan Bros. alone appealed, and having failed before the Appellate Divisional Court, they now bring the case before this Court, seeking to free their timber from the respondent's alleged lien.

The enactment on which the respondent relies reads as follows:

6. (1) A person performing labour shall have a lien upon the logs or timber in connection with which the labour is performed for the amount due for such labour, and the same shall have precedence over all other claims or liens thereon, except a claim or lien of the Crown for any dues or charges or which a timber slide company or any owner of a slide or boom may have thereon for tolls.

(2) A contractor who has entered into any agreement under the terms of which he himself or by others in his employ has cut, removed, taken out or driven logs or timber, shall be deemed to be a person performing labour upon logs or timber within the meaning of this section, and such cutting, removal, taking out and driving shall be deemed to be the performance of labour within the meaning of this section.

The contention of the appellant in short is that the respondent is a sub-contractor, and that as such he does not come within the intendment of subs. 2 of s. 6 which is restricted to a "contractor," that is to say a person making an agreement to cut timber directly with the owner of the wood.

The woodman's lien in question here is essentially a lien for wages. This is shown by the title of the Act, as well as by subs. 6 of s. 12, which states that the judgment shall declare that "the same is for wages." The lien is granted for labour, and "labour" is defined as meaning and including

cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber, and any work done by cooks, blacksmiths, artisans and others usually employed in connection therewith.

Then subs. 1 of s. 6 gives to "a person performing labour" a lien "upon the logs or timber in connection with which the labour is performed for the amount due for such labour." The object of subs. 2 is to extend the meaning of the words "person performing labour" to "a contractor who has entered into any agreement under the terms of which he himself or by others in his employ has cut, removed, taken out or driven logs or timber." And "such cutting, removal, taking out and driving shall be deemed to be the performance of labour."

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Except in so far as subs. 2 may contain a definition of the word "contractor," that expression is not defined in the Act. The contractor contemplated is a contractor who has entered into any agreement to do this work. An agreement with whom? Obviously with the person for whom the wood is to be cut, that is to say, in my opinion, with the owner of the timber. Thus the firm of Alex. King & Son was a "contractor" within the meaning of subs. 2, and undoubtedly would have had a lien for anything due it for the work it performed. But it is a totally different proposition to say that the "contractor" can give a sub-contract, and that the sub-contractor has the same lien as the contractor. Were that the true construction of the subsection, it would follow that, although the owner had paid the contractor, or discharged any lien belonging to him, he would not be secure against a claim made by a sub-contractor. In effect, this is what has been decided in the present case.

The history of the statute, I think, shows that subs. 2 cannot be so extended. As first enacted in 1891, by 54 Vict., c. 22, *The Woodman's Lien for Wages Act* gave a lien merely for labour performed. In 1896, by 59 Vict., c. 36, s. 4, a provision was added to the Act stating that

> any contractor who has entered into any agreement under the terms of which he has cut, removed, taken out and driven, *for any licensee of the Crown*, by himself or others in his employ, any logs or timber * * * shall be deemed to be a person performing labour * * * .

The agreement mentioned there was obviously an agreement made with the licensee of the Crown, that is to say with the owner of the timber. And although the words I have italicized are no longer in the subsection, I think the agreement must be with the owner of the timber, for it is an agreement entered into by a contractor, and a "contractor" in matters of this kind, and according to the ordinary meaning of the word, is a person who undertakes work for the owner, any other undertaker who deals solely with the contractor, being a "sub-contractor."

As I have already pointed out, the lien granted by this statute—and it is a statute subject to strict construction—is primarily a lien for wages. If the sub-contractor performs himself labour, he has a lien for his wages under subs. 1 of s. 6. But he has not a contractor's lien.

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The construction I place on subs. 2 fully protects the owner, for the agreement contemplated by subs. 2 is an agreement made with himself. Were the subsection extended so as to include sub-contracts and sub-contractors, the owner would be at the mercy of his contractor, for no notice of a sub-contract need be given him, nor has he any control over the price stipulated in the sub-contract. And the owner might have fully settled with his contractor only to find out afterwards that there are unpaid sub-contractors he knew nothing of.

The present case is an illustration of the danger of the construction which has been upheld in the courts below. The appellant paid Alex. King & Son all it owed them under their agreement, with the exception of $1,782 which the appellant stated it was prepared to pay according to the direction of the court. The learned trial judge maintained the lien for $2,198.76 and the costs, while finding as a fact that the contract between Alex. King & Son and the respondent was made without the knowledge or consent of the appellant. As a consequence, the appellant, to obtain the release of his timber, would have to pay several hundred dollars more than it agreed to pay to its contractor. In my opinion, such a result is not authorized by the statute.

It follows that the respondent has not succeeded in bringing himself within the terms of subs. 2 of s. 6, and cannot assert a lien under his sub-contract. In so deciding I would, however, reserve him any right he may have to claim the actual balance due by the appellant to Alex. King & Sons.

The appeal should be allowed with costs here and in the appellate court, and the respondent's action should be dismissed with costs in so far as the appellant is concerned.

Appeal allowed with costs.

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

Solicitor for the respondent: *G. E. Buchanan.*

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*Feb. 15.
*Mar. 5.

ROBERT J. GLENN AND EDGAR E. BABB (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES J. SCHOFIELD (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Animals—Open Wells Act, Sask. (R.S.S. 1920, c. 169, as amended 1924-25, c. 43), s. 4—Obligation not to store threshed grain "accessible to stock" of other persons, lawfully running at large—Extent of responsibility—Horses injured by eating wheat that had run from granary reasonably fit for storing grain.

The words "accessible to stock" in s. 4 of *The Open Wells Act*, Sask., which enacts that "no person shall have or store on his premises * * * any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises when lawfully running at large," construed with due regard to the provisions of the statute as a whole and the mischief it was intended to remedy, have a qualified meaning and call only for such protection of stored grain as is reasonably fit to prevent access to it by stock.

It was held that defendants were not liable for damages for injury to plaintiffs horses (while lawfully running at large) caused by eating wheat which had run from a granary on defendants' premises, in view of the jury's finding that the granary was reasonably fit for storing the wheat as against animals running at large; which finding this Court, having regard to the evidence, refused to reverse.

Judgment of the Court of Appeal for Saskatchewan (21 Sask. L.R. 494) reversed.

APPEAL by the defendants (by leave granted by the Court of Appeal for Saskatchewan (1)) from the judgment of the Court of Appeal for Saskatchewan (2), which reversed the judgment of Brown C.J. (rendered upon answers by the jury to certain questions submitted) dismissing the plaintiff's action, which was brought, under *The Open Wells Act*, Sask. (R.S.S., 1920, c. 169, as amended by c. 43 of the Statutes of 1924-1925), for damages for injuries to plaintiff's horses (while lawfully running at large) through eating grain which had run from a granary on the defendants' premises. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Smith JJ.

(1) (1927) 21 Sask. L.R. 597.

(2) 21 Sask. L.R. 494; [1927] 2 W.W.R. 183.

E. M. Hall for the appellants.

C. E. Gregory K.C. for the respondent.

The judgment of the court was delivered by

SMITH J.—On December 28, 1925, the respondent's horses, while running at large lawfully under the provisions of the statute in that behalf, strayed on lands in Saskatchewan owned by the appellant Babb, of which the appellant Glenn was tenant, and ate a quantity of wheat that had run from a granary on the land, with the result that one died, and others were injured. The grain was stored in a granary attached to a building on the premises, which granary was 6 feet wide, 18 feet long, 6 feet high at the low side and 8 feet high at the high side. It was built on 2 by 6 inch joists, with studding 2 by 4 inches, 3 feet apart, to which was nailed a sheathing of inch tongued and grooved boards 6 inches wide, which, with the roof, enclosed the grain.

The respondent claims damages against both appellants by virtue of the *Open Wells Act,* R.S.S., 1920, c. 169, as amended by c. 43 of the Statutes of 1924-1925, s. 4 of which is as follows:

> No person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises when lawfully running at large.

"Stock," as defined in the Act, includes horses, as well as other domestic animals.

The jury answered questions as follows:

(1) Were the horses damaged as a result of eating wheat from the granary in question? Answered Yes.

(2) Was the granary reasonably fit for the purpose of storing said wheat as against animals running at large? Answered Yes.

(3) Did the horses get the grain because the granary was not reasonably fit for that purpose? Answered No.

On these answers the trial judge dismissed the action. The Court of Appeal set this judgment aside, and directed judgment to be entered for the plaintiff for damages to be assessed with costs in the court below and costs of the appeal.

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Smith J.

The whole question turns on the construction to be placed on the words "accessible to stock" in the section quoted. In the reasons for judgment in the Court of Appeal, the opinion is expressed that it would have been a good defence to the action if it had been shown that the grain became accessible to the horses by the act of God or the King's enemies or by the act of a third party for whom the appellants were not responsible. Respondent's counsel did not combat this view, which to my mind is correct as far as it goes. The section, then, does not impose a duty absolutely to prevent access under all circumstances, so that the words "accessible to stock" must be read with qualifications. The real meaning to be attached to the words must be arrived at by consideration of the mischief that the statute was intended to remedy and the provisions of the statute as a whole, in addition to the particular language of the section in question. An enactment made it lawful for stock to run at large without the owner being liable for trespass to the owners or occupiers of lands on to which the stock might stray. This made it necessary to impose on owners and occupiers of lands to which the stock might stray the obligation of preventing it from being injured or destroyed by the obvious dangers of open wells or excavations or grain exposed to be eatent to excess. S. 3 of the Act provides that no person shall have on his premises any open well or dangerous excavation "accessible to stock," and s. 5 provides that, in proceedings to recover any penalty for the violation of any of the provisions of the Act, it shall be a sufficient defence thereto if it be shown that such well, excavation or grain was kept enclosed by a lawful fence as defined by *The Stray Animals Act,* so that the well, excavation and grain are not to be considered "accessible to stock," if enclosed by such a fence.

A lawful fence is defined as a substantial fence, not less than 3½ feet high, of woven wire secured to posts not more than 33 feet apart, or of four barbed wires on such posts fastened to droppers not more than 7½ feet apart, or of three barbed wires on posts not more than 16½ feet apart, or of rails, boards or slabs not less than five in number, the lowest not more than 12 inches from the ground, securely nailed or fastened to posts not more than 16½ feet apart, and of one barbed wire at or near the top. A fence sur-

rounding growing crops or in process of being harvested is to be at least eight feet from the crop, and a fence surrounding stacks of hay or grain is to be at least twenty feet from the stacks.

No one would seriously argue that such fences would at all times and under all circumstances keep all stock of the kind defined from access to wells, excavations, hay or grain. At most, such fences would ordinarily prevent such access, and are what the Legislature regarded as reasonably fit for the purpose. This indicates the limited sense in which the words "accessible to stock" are used throughout the statute, and there is no reason, in my opinion, for giving them a wider meaning in s. 4 than elsewhere. It could not have been contemplated by the Legislature that such a fence would be the only protection for threshed grain. In s. 4 there is no particular description of the protection required, beyond the provision that the grain is not to be "accessible to stock"; but under s. 5 it will not be deemed accessible if protected by such a fence, which fence, as I have pointed out, would only be reasonably fit to prevent access.

It is, I think, highly unlikely that the Legislature intended to impose on the storer of grain in the ordinary way in a closed building or granary the obligation to insure other people's stock against access to it under all circumstances except where same should arise from the act of God, the King's enemies or of third persons, and at the same time intended to exempt him from liability if his grain were stored in the open, protected only by a fence such as described.

Reading the statute as a whole, I am of opinion that it is clearly indicated that the phrase "accessible to stock" in s. 4, has a qualified meaning, and calls for only such reasonable protection against access by stock to stored grain as men of ordinary sense would judge to be reasonably fit to prevent access to it by stock. In this I am in accord with the views expressed by the learned trial judge in his charge to the jury and expressed by Mr. Justice Elwood in *Hill* v. *Mallach* (1), cited in the appellant's factum.

(1) [1918] 1 W.W.R. 10.

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The respondent urges us to hold that the jury was unreasonable in finding, in answer to the second question, that the granary was fit, and points out that the learned trial judge has intimated that he would probably have come to a different conclusion. The plaintiff endeavoured to prove that the granary was old, rotted and unfit. The defendant offered evidence that he had had it repaired by two men immediately before placing the grain in it, and these men swore that they had put it in good repair and that it was fit. There was also evidence offered that the boards had been battered by the horses' hoofs. On this contradictory evidence, the jury has made a finding that the granary was reasonably fit for the purpose of storing wheat as against animals running at large, and it is clear that this Court would not be warranted in reversing this finding. There is no finding as to the precise cause of the horses obtaining access to the grain. There was no evidence as to holes having been eaten in the boards by vermin. The finding that the granary was reasonably fit negatives the suggestion that the pressure of the grain sprung the boards. In view of the evidence as to hoof marks on the boards, it seems probable that the jury concluded that the horses knocked the boards off with their hoofs, and that, having regard to the condition of the granary and the way in which the boards were nailed on, they would not ordinarily be knocked off in that way. With great deference I am, therefore, of the opinion that the appeal should be allowed with costs of this appeal and of the appeal below, and that the judgment at the trial should be restored.

Appeal allowed with costs.

Solicitors for the appellants: *Hearn & Hall.*

Solicitor for the respondent: *H. L. Cathrea.*

MODERN REALTY COMPANY, LTD.....APPELLANT; 1928

*Mar. 5.
*Mar. 27.

AND

M. B. SHANTZ (VENDOR).....
AND
ELDON D. HALLMAN (PURCHASER).. } RESPONDENTS.

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

Limitation of actions—Mortgage—Default—Possession—Constructive Possession of mortgagor—The Limitations Act, Ont., R.S.O. 1914, c. 75, ss. 5, 24—The Mortgagors' and Purchasers' Relief Acts, Ont.; 1915, c. 22, ss. 2, 3, 4; 1920, c. 38, s. 2.

Land in Ontario was mortgaged to the appellant by deed dated December 18, 1913, for $1,565, payable in instalments of $500, $500, and $565, (with interest at 6 per cent. per annum) on June 18, September 18, and December 18, respectively, 1914. The mortgage was declared to be made in pursuance of *The Short Forms of Mortgages Act* (Ont.); the mortgagors covenanted that in default the mortgagee should have quiet possession; the mortgage provided that "the said mortgagee, on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands," that "in default of the payment of the interest hereby secured, the principal hereby secured shall become payable," and that "until default of payment the mortgagors shall have quiet possession of the said lands." The only payment made was of $156 principal and $1.57 interest, on October 3, 1914, and there was no subsequent acknowledgment in any way of the mortgagee's right or title. The mortgagee never gave notice of entry, or took proceedings to exercise its remedies under the mortgage, or had actual possession or occupation. The question arose, in a proceeding, instituted April 23, 1926, under *The Vendors and Purchasers Act* (R.S.O. 1914, c. 122), whether the mortgage was barred by *The Limitations Act* (R.S.O. 1914, c. 75).

Held: Although the evidence seemed insufficient to establish continuous actual possession by the mortgagors or their successors in title, they always retained constructive possession, of the land, and the mortgagee's right of entry and right to recover out of the land was effectually barred by ss. 5 and 24 of *The Limitations Act*, unless the application of those sections was precluded by the Ontario "Moratorium Acts." Their application was not so precluded; s. 2 of *The Mortgagors' and Purchasers' Relief Act, 1920*, (c. 38), invoked by the mortgagee, by its terms applied only to a mortgage to which ss. 2 and 3 of *The Mortgagors' and Purchasers' Relief Act, 1915*, applied; and, by reason of s. 4 (3) of said Act of 1915, ss. 2 and 3 of that Act never applied to the mortgage in question. The mortgage, therefore, had ceased to bind the land.

Judgment of the Appellate Division of the Supreme Court of Ontario (60 Ont. L.R. 543) affirmed.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

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Mignault and Newcombe JJ. dissented, holding that s. 4 (3) of the Act of 1915 regulated the remedies for the recovery of interest, and did not interfere with the condition for recovery of principal provided by s. 2 of that Act; that the procedure for the recovery of the principal of the mortgage was governed by s. 2, which always applied; hence, s. 2 of the Act of 1920 applied, and it had the effect of postponing payments of principal in respect of which the mortgagors were in default to the date therein prescribed, which became the time when the period of limitation for recovery of the principal began to run; and hence the mortgagee's remedies were not barred.

APPEAL (by leave of the Appellate Division of the Supreme Court of Ontario) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the appeal by the present appellant from the judgment of Wright J. (1) dismissing its appeal from the report of His Honour, E. J. Hearn, Local Judge at Kitchener, Ontario, to whom a motion of the respondent Shantz, instituted by notice dated April 23, 1926, under *The Vendors and Purchasers Act,* R.S.O. 1914, c. 122, had been referred for enquiry and report by order of Fisher J., the said report being to the effect that the objection of the respondent Hallman (purchaser) that a certain mortgage dated 18th December, 1913, registered 12th January, 1914, made by Allan Grauel and E. R. Riener to the present appellant, had not been discharged, had been satisfactorily answered by the respondent Shantz (vendor), and that the said mortgage did not constitute a valid objection to the title, and that a good title had been shown in accordance with the contract of sale between the respondents Shantz and Hallman to certain lands.

The question for decision was whether the said mortgage was barred by *The Limitations Act,* R.S.O. 1914, c. 75.

The material facts of the case are sufficiently stated in the judgments now reported, particularly in the judgment of Newcombe J. (dissenting). The appeal was dismissed with costs, Mignault and Newcombe JJ. dissenting.

W. H. Bouck for the appellant.

G. Grant K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret and Lamont JJ.) was delivered by

(1) (1927) 60 Ont. L.R. 543.

ANGLIN C.J.C.—In a proceeding under *The Vendors and Purchasers Act* (R.S.O., 1914, c. 122), the Appellate Divisional Court, affirming the judgment of Wright J., held a mortgage of the appellant barred by *The Limitations Act* (R.S.O., 1914, c. 75, s. 24) (1). The material facts sufficiently appear in the judgments below and in the opinion of my brother Newcombe, which I have had the advantage of reading. I concur in his statement that it is not intended to express any view as to the regularity of the proceedings in the courts of Ontario.

Two grounds of appeal were urged at bar: (*a*) that the evidence of actual possession by the mortgagors and their successors, relied on by the Divisional Court, is insufficient, and that, upon the whole case, it should be held that the mortgagee was in constructive possession of the mortgaged property before the statutory period of limitation had expired owing to the mortgagor's default in payment; (*b*) that the so-called Moratorium Act of 1920 (10-11 Geo. V, c. 38, s. 2) precluded the application of *The Limitations Act* to the mortgage in question.

(*a*) While inclined to agree with the appellant that the evidence adduced for that purpose was insufficient to establish continuous actual possession by the mortgagors and their successors in title, we are of opinion that they always retained constructive possession of the mortgaged property. The mortgage was made under *The Short Forms of Mortgages Act* (R.S.O., 1914, c. 117) and expressly provided that "until default of payment the mortgagors (should) have quiet possession of the said lands," i.e., should retain possession; and the mortgagors covenanted "that in default the mortgagee (should) have quiet possession of the said lands." Interest and an instalment of principal were overdue and unpaid on the mortgage from the 18th of June, 1914. Under the last mentioned covenant the mortgagee was at any time after that date entitled "peacefully and quietly to enter into, have, hold, use, occupy, possess and enjoy the aforesaid lands, etc."; but there is no evidence that the mortgagee ever exercised its right of entry; on the contrary, it seems certain that it never took any steps in that direction, with the result that

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Anglin C.J.C.

the possession of the mortgagors, actual or constructive, continued undisturbed. There never was, subsequent to the 3rd of October, 1914, any acknowledgment by the mortgagors or their successors in title, by payment on account or otherwise, of the mortgagee's right or title. It follows that the right of entry of the mortgagee and its right to recover the mortgage money out of the land was effectually barred by sections 5 and 24 of *The Limitations Act,* unless their application is precluded by the Moratorium Acts.

(*b*) The application of s. 2 of *The Mortgagors' and Purchasers' Relief Act, 1920,* (c. 38), invoked by the appellant, is by its terms restricted to "a mortgage * * * of real property to which sections 2 and 3 of *The Mortgagors' and Purchasers' Relief Act, 1915,* apply." The first question for determination, therefore, is whether these latter sections apply to the mortgage now before us. Interest was and continued unpaid on this mortgage from the 18th of June, 1914. Subsection 3 of section 4 of the Act of 1915 (c. 22) reads as follows:

(3) Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed, but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representative he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be.

The interest so in arrears was never paid into court nor tendered to the mortgagee. Consequently, in the terms of subs. 3 of s. 4, the mortgagee might from the 18th of June, 1914, have had the same remedies and might have exercised them to the same extent and the consequences of the default were "the same as if this Act (inclusive of sections 2 and 3) had not been passed."

It follows that to the mortgage now before us sections 2 and 3 of the statute of 1915 never were applicable; the default in payment of interest, already existing when that statute was enacted, never having been put an end to. The case at bar accordingly is excluded from the provisions of s. 2 of the Act of 1920 by its terms.

The appeal fails and must be dismissed with costs.

The judgment of Mignault and Newcombe JJ. (dissenting) was delivered by

NEWCOMBE J.—The questions arise under *The Vendors and Purchasers Act* of Ontario, R.S.O., 1914, c. 122, upon an objection stated by the purchaser, Hallman, who had contracted with the vendor, Shantz, for the purchase of some lots of land at Queen's Park, Kitchener, or Berlin, as it was; he objected that a certain mortgage, dated 18th December, 1913, registered 12th January, 1914, made by Allan Grauel and Edward R. Riener to the Modern Realty Company Limited, had not been discharged. The vendor applied for an order declaring that the objection had been satisfactorily answered, and he notified both the purchaser and the Realty Company. The application was heard before Fisher J., who referred the case for inquiry and report to Local Judge Hearn at Kitchener, and, upon the hearing before him, the Realty Company appeared and assumed the carriage of the proceedings in support of the objection. Subsequently a question was raised as to the regularity of this procedure and as to the right of the company to be heard, but none of the parties was desirous of discussing that question, and throughout the case it has not been considered. I mention the point merely to say that it is not one of the questions which comes under consideration upon this appeal, and that it is not the intention of the court to express any opinion about it.

I shall state the facts very briefly.

By deed of 20th March, 1913, Henry M. Schneider conveyed to Allan Grauel and Edward R. Riener a farm consisting of about 125 acres, comprised in which were the lots now in question, and by deed dated four days later, the grantees mortgaged the farm to Schneider to secure the payment of $15,000, part of the purchase money. This mortgage passed through several assignments and was ultimately discharged. The Schneider mortgage is not produced; it is assumed throughout the case that it was a legal mortgage. It was discharged as to lot 435 on 26th September, 1914, but otherwise not until 22nd October, 1924. It is stated in the referee's report that there had been default in payment of this mortgage "down through the years from 1913-24," but I do not see the evidence of this in the

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record. Grauel and Riener's object in purchasing the property was to resell it in building lots, and, shortly after purchasing, they caused a survey to be made which appears by a plan showing the streets and layout of the building lots—more than 600 in all. The plan bears the official number 230, and was dated 11th June, 1913, and registered on 3rd July following. The lots were offered for sale and a number of them were sold. There were some transactions with the Modern Realty Company Limited with regard to which difficulties arose; these seem to have been settled between the vendors and the company, with the result, as far as material to the case, that by deed of 18th December, 1913, Grauel and Riener conveyed by way of mortgage to the company six of the lots, nos. 3, 5, and 7 on Queen's Boulevard, and nos. 431, 432 and 435 on Crescent Road, all in the northern part of the property surveyed, which had received the name of Queen's Park. The consideration of the mortgage was expressed to be the sum of $1,565, to be paid with interest at 6 per cent., $500 in six months, $500 in nine months and $565 in one year from the date of the mortgage.

> The said payments of principal to be made on the 18th days of June, September and December in the year 1914, together with interest at the rate aforesaid and taxes and performance of statute labour.

The mortgage is declared to be made in pursuance of *The Short Forms of Mortgages Act*. The mortgagors covenanted to pay the principal and interest; that they had good title and right to convey, and that in default the mortgagee should have quiet possession. There were also the following provisions:

> Provided that the said mortgagee on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands.
>
> * * * * *
>
> Provided that in default of the payment of the interest hereby secured the principal hereby secured shall become payable.
>
> Provided that until default of payment the mortgagors shall have quiet possession of the said lands.

The mortgagors, on 3rd October, 1914, paid on account of the mortgage debt to the Realty Company $156, principal, and $1.57, interest. These are the only payments. The mortgagors were therefore in default as to payment of principal and interest after 18th June, 1914. They did not pay the $500, principal stipulated for payment on that day;

neither did they pay the interest which fell due at the same time, and so, according to the provisions of the mortgage, the whole principal thereby secured then became payable. The mortgagee never had actual possession or occupation, but alleged that the possession was vacant, and therefore that, after default, it had the right to possession. The local judge found that there had been no abandonment of possession by the mortgagors, or their assigns, at any time; and, in the reasons for his report,

> that their possession has been open, notorious, absolute and continuous all through the years since default was made in the mortgage and that there was never any intention on their part to abandon possession of any of these lots and in addition to that the paper title as registered has been continuous in the mortgagors and their successors by successive conveyances. Streets in front of these lots were made, sidewalks built, stakes put in and replaced, hay and weeds cut on the lots, the lots advertised for sale, earth from the St. Mary's Hospital excavation placed in at least three of these lots to improve them, and although these lots have not been fenced that was because they were a part of a large subdivision which is entirely without fences.

He accordingly found that the mortgage had ceased to bind the lands and did not constitute an encumbrance or cloud upon the title.

There was an appeal to Wright J. (1), who considered that the evidence of possession was not conclusive, although he could not say that the local judge was wrong in his findings. He held that, inasmuch as the legal mortgage, that of Schneider, was not discharged until 22nd October, 1924, and, as the Realty Company therefore did not, in his view, acquire the legal estate in the lots embraced in its mortgage, nor the right of possession, there was nothing to prevent the operation of the Statute of Limitations.

There was a further appeal to the Appellate Division (1). The case was heard by the learned Chief Justice, Magee, Hodgins, Ferguson and Smith, JJ.A. The Court, while rejecting some of the evidence upon which the local judge relied, nevertheless found sufficient proof of possession by the mortgagors or their assigns to uphold his findings. Ferguson, J.A., dissented; he considered that the company was legally entitled to the possession, and was therefore constructively in possession; that there was no sufficient evidence of actual possession by the mortgagors or their assigns, and that the right of foreclosure was not barred.

(1) (1927) 60 Ont. L.R. 543.

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If it were not for the statutes which I shall now consider, I would not, for reasons which I shall have occasion to indicate, differ from the result reached by the majority of the Court; but, in my opinion, the judgments do not give due effect to c. 38 of 1920, the Act providing for the termination of *The Mortgagors' and Purchasers' Relief Act, 1915*, c. 22 of 1915.

The Act of 1915 was a provincial war measure; it was assented to on 8th April, 1915, although directed to take effect as from 4th August, 1914, and it was thereby enacted, among other provisions (s. 2, subs. 1) that, except by leave of a judge,

> No person shall
>
> (*a*) take or continue proceedings by way of foreclosure or sale or otherwise, * * * for the recovery of principal money secured by any mortgage of land or any interest therein made or executed prior to the fourth day of August, 1914;
>
> (*b*) take or continue any proceedings under any power of sale, or levy any distress, or take, resume or enter into possession of any land or interest therein for the recovery of principal money under any power contained in a mortgage of land, or of any interest therein, executed prior to the fourth day of August, 1914.

It was, however, enacted by s. 4, subs. 1, of the Act of 1915, that, subject to the provisions thereinafter contained, s. 2 should not apply to any mortgage or extension or renewal thereof made or entered into after 4th August, 1914, nor to proceedings taken for the recovery of interest or rent or taxes or insurance or other disbursements for which the mortgagor was liable in the first instance, and as to which he was in default, "nor to any proceedings or act done by a mortgagee in possession on the 4th day of August, 1914, with respect to the land or interest in land of which he is the mortgagee." Now, the mortgage to the Realty Company was made previously to 4th August, 1914, and there were no proceedings for the recovery of interest or rent, taxes, insurance or other disbursements for which the mortgagors were liable in the first instance, and as to which they were in default, and unless, therefore, it be found that the Realty Company was mortgagee in possession on 4th August, 1914, s. 2 of the Act of 1915 would apply to its mortgage, and, if s. 2 be applicable, the mortgage would be regulated by *The Mortgagors' and Purchasers' Relief Act, 1920*, c. 38 of 1920, to which I shall presently refer. Upon this point I have no doubt. The company admittedly

never entered upon nor occupied nor had any actual possession of the mortgaged premises, and, even if the mortgagors were not in possession during their default, the legal fiction by which the possession of vacant land is attributed to the legal owner does not operate to confer upon the mortgagee the rights, nor to subject it to the obligations, of a mortgagee in possession. A mortgagee is not by law compelled to take possession; he must assume the management of the estate; *Noyes* v. *Pollock* (1). It was stipulated by the mortgage, as I have already pointed out, that until default of payment, the mortgagors should have quiet possession of the lands, and it was expressly provided that the mortgagee on default of payment for one month, might, on one month's notice, enter on and lease or sell the lands. No such notice was given. Whatever may be said as to the quality or sufficiency of the possession of the mortgagors and their assigns, whether adverse or not, they would appear, after the execution of the mortgage, to have continued in such possession of the whole property, including the lots in question, as it was capable of, or as it might reasonably have been anticipated that the proprietor would exercise, having regard to the purpose for which the land had been laid out, and to which it was devoted, and it was of the nature of the transaction that the mortgagors should remain in possession as they did. *Bagnall* v. *Villar* (2); *Heath* v. *Pugh* (3), affirmed, sub. nom. *Pugh* v. *Heath* (4);

> The law on the subject is clear. The possession of the mortgagor is a lawful possession, and he is entitled to remain in possession until ordered to deliver up possession or until possession is demanded by or on behalf of the mortgagee; and it is also clear that a mortgagee cannot obtain an account of back rents due from the mortgagor in respect of his possession.

per Chitty J. in *Yorkshire Banking Co.* v. *Mullan* (5). Therefore I am satisfied that the Realty Company was never a mortgagee in possession within the meaning of the statutory exception, and that it never, by any act or proceeding, assumed that relationship to the mortgage premises by which it became the holder of them in pledge subject to account and to the infirmities of a mortgagee's title.

(1) (1886) 32 Ch. D. 53.
(2) (1879) 12 Ch. Div. 812.
(3) (1881) 6 Q.B.D. 345, at p. 359.
(4) (1882) 7 App. Cas. 235.
(5) (1887) 35 Ch. D. 125, at pp. 126-127.

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Hence it follows that the Realty Company's mortgage is not excepted from the application of s. 2 of *The Mortgagors' and Purchasers' Relief Act, 1915*.

It was expressly provided by subs. 1 of s. 4 that ss. 2 and 3 should not apply to proceedings taken for the recovery of interest, and subs. 3 provided that:

> Where default is made in payment of interest, rent, taxes, insurance or other disbursements which the mortgagor or purchaser has covenanted or undertaken to pay, the mortgagee or vendor, his assignee, or personal representative shall have the same remedies, and may exercise them to the same extent, and the consequences of such default shall in all respects be the same as if this Act had not been passed, but where such interest, rent, taxes or other disbursements are paid into court or tendered to the mortgagee, vendor, assignee or personal representative he shall not continue any proceedings already commenced by him without the order required by section 2 or by section 3, as the case may be.

This subsection regulates the remedies for the recovery of the interest, which had, by the earlier provision of the same section, been expressly excepted from the application of ss. 2 and 3. The Realty Company's mortgage was, as I have already said, in default for principal before the Act of 1915 was enacted, or became applicable, and the procedure for recovery of the principal was subject to s. 2 of that Act. It was, as stipulated by the mortgage, a consequence of default in payment of interest that the principal became payable, but the procedure for the recovery of principal was still governed by s. 2, and, in my view, that section always applied.

By s. 14 the Lieutenant-Governor in Council was empowered at any time to determine the operation of the Act, or to provide by Order in Council that it should have such limited effect as might be declared, but, subject to the operation of the Order in Council, that the Act should have effect during the continuance of the war, and for a period of nine months thereafter, unless "in the meantime" a session of the Legislature were held, in which case the Act should cease to have effect at the expiry of thirty days after the close of the session.

The Mortgagors' and Purchasers' Relief Act, 1920, assented to 4th June, 1920, provides as follows:

> 2. Where under the terms of a mortgage or agreement for sale of real property to which sections 2 and 3 of *The Mortgagors' and Purchasers' Relief Act, 1915,* apply, any payment of principal money under a mortgage or of the purchase money under an agreement of sale is overdue on the 1st day of October, 1920, such payment shall be deemed to fall due and

be payable on the day upon which the next instalment of interest will be payable after the said date, or on the 1st day of January, 1921, whichever shall be the earlier date, but this shall not apply to or affect any order heretofore made by the court under the provisions of *The Mortgagors' and Purchasers' Relief Act, 1915*, and amendments thereto so as to extend or reduce the period fixed by such order for the making of any payment upon any such mortgage or agreement of sale.

3. Subject to the provisions of section 2 and notwithstanding anything contained in section 14 of *The Mortgagors' and Purchasers' Relief Act, 1915*, or any Act heretofore passed extending the operation of the said Act, all the other provisions of the said Act shall continue in force and have effect until the 1st day of October, 1920, and from and after the said date the said Act shall be deemed to be repealed.

Now, there is no doubt that on 1st October, 1920, the mortgage of the Modern Realty Company constituted a valid charge upon the lots in question, and was overdue, both as to principal and interest, and, therefore, by the express words of the Act of 1920, the principal must be deemed to have fallen due and become payable on the day upon which the next instalment of interest was payable after that date, or on 1st January, 1921, whichever date were the earlier. The effect is to provide a statutory rule for the interpretation of the mortgage, so that, after that rule came into effect, on 4th June, 1920, payments of principal in respect of which the mortgagors were in default were postponed to the prescribed date, which became, by legislative effect, the time when the period of limitation for recovery of the principal money began to run against the mortgagee.

The interpretation is attended with some difficulty, for the mortgage had, according to its provisions, all along been overdue, but I think the enactment must have been based upon the view that the Act of 1915 stayed the operation of the Statute of Limitations as to the principal, and that it was necessary or desirable, by the Act of 1920, to provide a fresh starting point. We know that, when a legislature resorts to a method of expression whereby that is declared to be the fact which is not so, it is the duty of the court to ascertain the purpose of the enactment and the persons who are meant to be concluded. *Ex parte Walton* (1); *Hill* v. *East & West India Dock Co.* (2); *De Vesci* v. *O'Connell* (3). Here the purpose of the Act of 1915

(1) (1881) 17 Ch. D. 746, at p. 756.
(2) (1884) 9 App. Cas. 448, at pp. 455, 456.
(3) [1908] A.C. 298, at pp. 308, 314.

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was a temporary measure for the accommodation of the mortgagor, and to ensure that he should not, except subject to the provisions of the Act, be deprived of his possession, for non-payment of principal, by the exercise of the ordinary remedies of the mortgagee, if, in the opinion of the judge, time should be given by reason of circumstances attributable directly or indirectly to the war. The judge was given absolute discretion to refuse the exercise of any right or remedy, to stay execution, or to postpone any forfeiture, or to extend the time (s. 5, subs. 1, c. 22 of 1915), and the procedure, of course, involved an interference with the liberty of the mortgagee at its own volition to take proceedings for the enforcement of its security, or for obtaining possession of the mortgaged premises for default in payment of principal. In these circumstances it would be manifestly unjust that the mortgagee should, during the interval, and on account of this temporary war measure, be prejudiced by the Statute of Limitations. Consideration was not explicitly given by the Act of 1915 to the relief or protection of the mortgagee, but that seems naturally to have become a subject of attention when the Act of 1920, terminating the special and exceptional provisions of the Act of 1915, was enacted, and therefore it was that, as to overdue mortgages, a date for the payment of the principal money was substituted by the legislature for the date which had been stipulated by the mortgage. Some such provision as this seems to have been thought necessary to meet the justice of the case, and it is not difficult here to see the truth of the maxim *in fictione aequitas*. However that may be, I do not see how the mortgagee's right to foreclose can be barred by the Statute of Limitations in this case, when the principal of the mortgage is legally deemed to have fallen due and become payable not earlier than 1st October, 1920.

In the courts below the learned judges relied on subs. 3 of s. 4 of the Act of 1915, but that subsection did not interfere with the condition for recovery of principal provided by s. 2 of that Act. The mortgage company did not exercise its remedies respecting the interest while the subsection was in force, and the Act of 1915 has now given place to the Act of 1920, passed while the mortgage was a subsisting security, which declares definitely the date when the

principal should be deemed to fall due and be payable, and thus serves to establish the time from which the Statute of Limitations began to run.

In my opinion, therefore, the judgment should be reversed, and the objection raised by the purchaser and maintained by the mortgagee should be upheld as valid.

Appeal dismissed with costs.

Solicitors for the appellant: *Waldron & Bouck.*

Solicitors for the respondent Shantz: *Scellen & Weir.*

Solicitors for the respondent Hallman: *Sims, Bray, McIntosh & Schofield.*

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*Feb. 13.
*Mar. 27.

WILLIAM STEWART HERRON (PLAINTIFF) ..... } APPELLANT;

AND

ALBERT HENRY MAYLAND AND ROYALITE OIL COMPANY, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

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

Contract—Transfer of shares in oil company with option of re-purchase—Nature of transaction—Construction—Alleged loan and mortgage—Admissibility of extrinsic evidence—Right to dividend accruing during option period.

H. (appellant), desiring to pay off a debt of $40,000, asked M. (respondent) for a loan of that sum on the security of 1,600 shares in an oil company. M. refused, but negotiations resulted in M. paying the $40,000, taking a transfer from H. of the shares, and giving an option to H. to re-purchase them within one year for $51,280. This sum had been arrived at by including the said sum of $40,000, the sum of $6,000, being the cash payment on a house which M. had stipulated that H. should buy from him, and interest for one year on $40,000 at 12% and on $6,000 at 8%. The option to re-purchase was in writing, and recited that M. had purchased from H. and was now the holder

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

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of 1,600 shares in the oil company, and had agreed to give an option for re-purchase for the price and on the terms thereinafter set forth, and it provided that M. "in consideration of the sale of the said shares by [H.] to [M.], and other good and valuable considerations him thereunto moving, doth hereby give and grant unto [H.] an opinion, irrevocable within the time for acceptance herein limited, to purchase," etc.; that M. should deposit the share certificates in a certain bank, and they should be left there so long as the option was open for acceptance; that H. might at any time within the year purchase blocks of not less than 100 shares upon paying $100 for each share so purchased, and receive a transfer thereof, all sums so paid to be deducted from the total purchase price. Before the expiry of the year H. paid the re-purchase price and received a re-transfer of the shares, but in the meantime a dividend had been declared by the oil company, and the question in dispute was as to who was entitled to it. The parties had apparently not contemplated the possibility of the payment of a dividend during the option period, and had not alluded to it in their negotiations or agreement. H. sued to recover it.

Held, (*a*) that the transaction intended by the parties was in reality a sale with an option to re-purchase, and not a loan or mortgage; having regard to the form in which it was deliberately put, it would require most convincing evidence to justify a contrary conclusion; and the evidence in fact tended strongly to support the view that the form of the transaction represented its real nature; (*b*) that the evidence of the surrounding circumstances and of the negotiations which resulted in the option being given did not warrant the implication of a provision entitling H. to interim dividends; there may be cases in which a court can say that it is inconceivable that, had the parties adverted to the subject, they would not have agreed to the stipulation contended for, and would then imply it; but this was very far from being such a case. M. was entitled to the dividend as incidental to his ownership of the shares at the date specified in the declaration of dividend, and no right to recover it from him, cognizable in a court of law and equity, had been shewn. In the view taken by the court on the evidence, it was unnecessary to decide as to the objection made by M. to the admissibility of the parol evidence relied on by H. The general rules as to admissibility, and the required strength, of extrinsic evidence to shew the alleged real nature of the transaction in such cases are discussed by Duff J.

Judgment of the Appellate Division of the Supreme Court of Alberta (23 Alta. L.R. 34) affirming, on equal division of the court, judgment of Ford J. (*ibid*), affirmed.

Smith J., dissenting, held that, as the written document did not, nor purported to, contain the whole bargain, parol evidence was admissible to shew what the complete bargain was, and the written document must be construed in the light of it; while not finding that the transaction was intended merely as a loan, he held that the terms of the agreement imported that any incidental advantages accruing to the ownership of the shares during the option period should go with the shares to the party who might ultimately become the absolute owner under the terms of the bargain; and H. was therefore entitled to the dividend.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming, on equal division of the court, the judgment of Ford J. (2) dismissing the plaintiff's action.

The plaintiff was the beneficial owner of 1,600 shares of the stock of the Royalite Oil Company, Limited, which he had assigned to the Royal Bank of Canada as collateral security for an indebtedness of $40,000. Desiring to obtain money to pay off the bank, he approached the defendant Mayland, through one Robinson, asking for a loan on the security of the shares. Mayland refused this, but, after some negotiations, the parties entered into an arrangement by which Mayland paid the sum of $40,000 and took from the plaintiff a transfer of the shares to him, and, by agreement under seal executed by both parties, gave to the plaintiff an option for the re-purchase of the shares within one year for $51,280. As a condition of the arrangement, Mayland had required that the plaintiff should purchase from him a certain house property at the price of $11,500, of which $5,500 should stand secured by a mortgage on that property. The said sum of $51,280 had been arrived at by including the said sum of $40,000, the sum of $6,000 as the cash payment on the house property, and interest for one year on $40,000 at 12% and on $6,000 at 8%.

The said agreement giving the option to re-purchase recited that Mayland had purchased from the plaintiff and was now the holder of 1,600 shares in the capital of the oil company, and had agreed to give an option for re-purchase for the price and on the terms thereinafter set forth, and it provided that Mayland "in consideration of the sale of the said shares by [the plaintiff] to [Mayland,] and other good and valuable considerations him thereunto moving, doth hereby give and grant unto [the plaintiff] an option, irrevocable within the time for acceptance herein limited, to purchase," etc.; that Mayland should deposit the certificate or certificates for the shares with the Stockyards Branch of the Bank of Montreal in the city of Calgary, and that they should be left there so long as the option was open for acceptance; that the plaintiff might at any time

(1) 23 Alta. L.R. 34; [1927] 2 W.W.R. 768.

(2) (1927) 23 Alta. L.R. 34.

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within the year purchase blocks of not less than 100 shares upon paying $100 for each share so purchased, and receive a transfer thereof, all sums so paid to be deducted from the purchase price payable under the option.

The option period expired on November 12, 1926. Before that time, on November 5, 1926, the plaintiff paid the repurchase price and received from Mayland a transfer of the shares. But in the meantime, on October 27, 1926, the Royalite Oil Company, Limited, declared a dividend of $2.50 a share, payable on November 25, 1926, to shareholders of record on November 1, 1926.

The question in dispute was as to who was entitled to this dividend. In entering into the arrangement no allusion was made to the question of the right to dividends, and it would appear that neither party contemplated the likelihood of any dividend being declared during the life of the option. The plaintiff sued, asking for an injunction restraining the company from paying the dividend to Mayland and restraining Mayland from receiving it, and for an order directing its payment to him, and, in the alternative, judgment against Mayland for the amount thereof. The grounds of the plaintiff's claim are set out in the judgment of Anglin C.J.C. now reported. Ford J. gave judgment dismissing the action (1) which was affirmed, on equal division of the court, by the Appellate Division (2), and the plaintiff appealed to this Court. The appeal was dismissed with costs, Smith J. dissenting.

E. Lafleur K.C. for the appellant.

R. B. Bennett K.C. and *H. G. Nolan* for the respondents.

The judgment of Anglin C.J.C. and Newcombe and Rinfret JJ., was delivered by

ANGLIN C.J.C.—Herron, the plaintiff (appellant), being indebted to a bank in the sum of $40,000, for which he had assigned 1,600 shares of the capital stock of the Royalite Oil Company as collateral security, desired to obtain money to pay off the bank. He accordingly approached the de-

(1) (1927) 23 Alta. L.R. 34.

(2) 23 Alta. L.R. 34; [1927] 2 W.W.R. 768.

fendant Mayland, through one Robinson, asking a loan on the security of the Royalite shares. Mayland refused to entertain the idea of a loan, but he suggested his willingness to purchase the shares and to give the plaintiff an option to buy them back within a year if the latter would also purchase from him a house at the price of $11,500. An agreement was eventually arrived at by which Mayland paid $46,000 and conveyed the house to Herron, taking from him a mortgage on the house for $5,500, bearing interest at 8%, and a transfer of the 1,600 shares of Royalite stock. Mayland then gave back to Herron an option to repurchase the Royalite shares for $51,280 at any time before the 12th of November, 1926. The document embodying this option bears date the 12th of November, 1925, and was prepared by the late Mr. Savary, Herron's solicitor, pursuant to his client's instructions. It was partly read over by Herron and was read in its entirety and explained to both Herron and Mayland before its execution by Mr. Bennett, Mayland's solicitor. In this document Mayland undertoook to hold the Royalite shares on deposit in his bank pending the option. The optionee stipulated for the right to make interim payments for not less than 100 shares at a time. Provision was also made for his exercise of the option to repurchase by mailing to a stated address a registered letter containing a marked cheque for the amount of the re-purchase price unpaid.

Herron states that the terms of this instrument were those on which he understood Mayland to insist; and there is no suggestion of any misapprehension of them on his part or of any mistake in their expression. Upon the execution of the option agreement the shares were transferred by Herron to Mayland who had them registered in the books of the company in his own name.

No allusion was made, either in the option itself or in the discussions, to any dividend which might be declared upon the stock, and, none having been theretofore declared, it would appear that neither party contemplated the likelihood of any such dividend becoming payable during the currency of the option. A dividend was, however, declared in October, 1926, payable, on the 1st of November, 1926, to the then registered holders of Royalite Oil Company shares. The dividend on the 1,600 shares

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held by Mayland amounted to $4,000. Learning of this, Herron desired to exercise his option to repurchase before the 1st of November, but, Mayland being out of town, he was unable to procure the money required because the shares standing in Mayland's name could not be assigned or handed over to the bank which had agreed to advance him $50,000 upon them. After Maryland's return to Calgary Herron saw him on the 3rd of November and suggested a renewal or extension of "the loan" and also applied for an order to enable him to collect the $4,000 dividend. Mayland refused to consider this proposition; and Herron, exercising the option, paid Mayland in full on the 5th of November and got back the shares.

Shortly afterwards he brought this action, demanding payment by Mayland to him of the $4,000 of dividends which the latter had collected. He put his claim alternatively on these two grounds: (*a*) The transfer, though in form one of sale and purchase with an option to repurchase, was in reality a loan, the shares being pledged as security for the repayment of the principal and interest, computed at $51,280, on payment of which sum the borrower would be entitled to the re-transfer of the security with all incidental accretions or advantages, the pledgee's rights being strictly confined to the receipt of his principal and interest, and costs, if any. (*b*) If the transfer cannot be so regarded, it should be deemed to be an implied term of the agreement between the parties that Herron on exercising his option to repurchase would be entitled to any interim dividends declared upon the shares while under option.

The learned trial judge (Ford J.), dismissed the action, holding that the transaction intended by the parties was in reality a sale with an option to repurchase and was not a loan, pledge or mortgage, and that the evidence of the surrounding circumstances and of the negotiations which resulted in the option being given did not warrant the implication of the provision entitling him to interim dividends asserted by the plaintiff.

On appeal this judgment was affirmed by a divided court. Harvey, C.J.A., with whom Hyndman, J.A., concurred, agreed with the learned trial judge; while Beck, J.A., would have upheld the plaintiff's claim on both

grounds and Clarke, J.A., without passing upon the first ground of the claim, accepted the plaintiff's alternative contention that the evidence warranted the implication of a term or provision that interim dividends should belong to him.

At bar counsel for the respondent strenuously combatted the admissibility of the parol evidence relied on by the plaintiff. While entertaining little or no doubt upon this question, we find it unnecessary to determine whether the evidence so objected to was in whole or in part improperly received. Assuming its admissibility, a careful study of it has not disclosed such manifest error in the judgment of the learned trial judge (affirmed on appeal), disposing of what is undoubtedly a question of fact, that we would be justified in setting it aside. On the contrary, we think the learned judge's conclusions as to both branches of the plaintiff's case is supported by the facts disclosed before him.

As to the claim that, notwithstanding the inconsistency of the form in which it was deliberately put, the transaction was in reality one of loan or mortgage, it would require most convincing evidence to justify such a conclusion. The uncontradicted testimony that the defendant refused to entertain the idea of making a loan to the plaintiff, and the latter's admissions, that the defendant insisted on the transaction being treated as one of sale and purchase with an option to repurchase and that the document was drawn on the plaintiff's own instructions to evidence a transaction of the latter character, in our opinion preclude any possibility of our holding that the parties in fact intended something so essentially different from what they expressed in a writing the purport of which the plaintiff fully understood.

As to the implication of the term which the plaintiff alternatively suggests in regard to the admittedly unthought of interim dividends, there may be cases in which a court can say that it is inconceivable that, had the parties adverted to the subject, they would not have agreed to the stipulation contended for, and would then imply it. But this is very far indeed from being such a case. We may be satisfied that, had he thought of it at all, the plaintiff would have sought the insertion of such a term—it may even be that, had the defendant declined to assent to its inclusion, the plaintiff would have refused to go on with

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the transaction; but that the defendant would have agreed to such a provision it is clearly impossible to predicate. Nor can it be said that it is so improbable that the defendant would have insisted upon having the right to appropriate to himself the interim dividends, as incidental to his ownership of the shares, that it should be presumed that, had this particular matter been brought to his attention, he must have acceded to the plaintiff's wishes in regard to it. Unless prepared to take that view we cannot give effect to the alternative ground upon which the plaintiff seeks relief.

The obligation of the Royalite Oil Company to pay the dividend in question to the defendant as the registered holder of the shares on the 1st of November, 1926, is unquestionable. Having received the dividend from that company he is entitled to retain it unless a right to recover it from him, cognisable in a court of law and equity, has been shewn. That he has that right the plaintiff, in our opinion, has failed to establish.

The appeal accordingly fails and will be dismissed with costs.

DUFF J.—I concur in the judgment dismissing the appeal, and only desire to add a word as to the point made by counsel for the respondent, touching the admissibility of the parol evidence.

The rule is well established. The principle upon which it rests is stated by that eminent judge, Turner L.J., in *Lincoln* v. *Wright* (1). Where the real agreement is that the transaction shall be a mortgage transaction, "it is, in the eye of this Court, a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud." Such being the principle, the rule excluding extrinsic parol evidence offered to contradict, qualify or supplement a document which the parties have made the record of their transaction, was, in Equity, displaced, in cases in which the principle came into play; and since the Judicature Act, this rule in Equity is, of course, the rule in all the courts. On the other hand, it is quite open to two parties of competent years and under-

(1) (1859) 4 De G. & J. 16, at p. 22

standing, to enter into an agreement for the sale by one to the other of a property, and for the re-purchase within a given nominated period, of the same property at the same price, with or without interest, at the option of the seller. The law recognizes such dealings, and gives effect to them according to their terms, where that is the true description of the dealing into which the parties have deliberately entered. *Williams* v. *Owen* (1). And where, in the documents they have executed, the parties have clearly explained that such is the character of their transaction, it requires powerful collateral evidence to overcome the presumption that the record is a faithful one. *Barton* v. *Bank of New South Wales* (2).

SMITH J. (dissenting).—A general statement of the facts in this case is set out in the reasons for judgment of my Lord the Chief Justice. There was a great deal of discussion as to whether or not the parol evidence given at the trial was admissible. The written document between the parties of the 12th of November, 1925, (Ex. 1), does not purport to contain the whole bargain, and it is clear that it is only part of it. The other portion of the bargain, except the written transfer of the stock in the books of the company and the certificate therefor issued to the defendant, was verbal. In my opinion, therefore, evidence was admissible to show the complete bargain between the parties, and we must construe the written document in the light of that complete bargain.

The stock transferred by the plaintiff to the defendant was selling on the market at the time at $105 per share, so that the 1,600 shares were then worth $168,000. The defendant says that he did know at the time of the transfer what the market price was, but that it was liable to run down to almost nothing. The plaintiff was seeking a loan of $40,000, with which to pay off the Royal Bank his indebtedness for that amount, for which the Bank held the 1,600 shares as security. The plaintiff had applied for this loan to one Robinson, who submitted the application to the defendant, with the result that the parties and Mr. Robinson were brought together at the office of Mr.

(1) (1840) 5 M. & C. 303, at pp. 306 and 307.

(2) (1890) 15 App. Cas. 379, at pp. 380 and 381.

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Savary, the plaintiff's solicitor, who prepared the document which was finally signed by the parties at the office of Mr. Bennett. This document is in part as follows:

WHEREAS the vendor (defendant) has this day purchased from the purchaser (plaintiff), and is now the holder of sixteen hundred (1,600) shares of the capital of Royalite Oil Company, Limited, and has agreed to give to the purchaser an option for the repurchase of the said shares for the price and on the terms hereinafter set forth.

NOW THEREFORE THIS INDENTURE WITNESSETH that the vendor, in consideration of the sale of the said shares by the purchaser to the vendor, and other good and valuable considerations * * * doth hereby give and grant unto the purchaser an option, irrevocable within the time for acceptance herein limited, to purchase from the vendor the said sixteen hundred shares * * * . The option hereby given shall be open for acceptance up to and including, but not after the 12th day of November, A.D. 1926 * * *.

The purchase price of the said shares shall be the sum of fifty-one thousand, two hundred and eighty ($51,280) dollars.

* * * * *

(1) The vendor shall forthwith on the execution of these presents deposit the certificate or certificates for the said shares with the Stockyards Branch of the Bank of Montreal in the city of Calgary, and so long as the option hereby given shall remain open for acceptance, the said shares shall be left with the said Bank at its said Branch.

Then follows a provision by which the plaintiff was to be entitled at any time up to the 12th day of November, 1926, to purchase any part of the shares, in blocks of not less than 100 shares, on depositing to the credit of the defendant in the Stockyards Branch of the Bank of Montreal, Calgary, $100 for each share so purchased. All sums so paid were to be credited on the total purchase price of $51,280. The evidence shows that the transfer of the shares by the plaintiff to the defendant was concurrent with the execution of this document, so that the transfer or sale by the plaintiff to the defendant and the option of repurchase evidenced by the document constituted one transaction. The defendant admits that the $51,280 was made up of the $40,000 to be paid to the Royal Bank in satisfaction of the plaintiff's debt, with interest at 12 per cent. for one year, and $6,000, representing the cash payment on the house, with interest for one year at 8 per cent. He also admits that at the time he did not have in mind any dividend that might be earned on the stock. No dividend, apparently, was being paid on the stock at the time, and neither party seems to have had in mind the possibility of such a dividend.

On behalf of the appellant it was urged before us that, taking these circumstances into consideration, the transaction ought to be declared to be a loan by the defendant of $46,000 at the stipulated interest. The respondent relies on the fact of his having deliberately insisted on the terms set out in the document as written, and of his having refused to go into the transaction on any other terms. I think the evidence establishes this, and that the plaintiff accepted those terms after having had them read to him, and after having understood that they imported something different from the simple loan on the security of the stock that he had first contemplated. He could scarcely have failed to notice the express provision that the option was not to be open to him after the 12th of November, 1926. There would be no question in his mind as to whether or not that provision could be enforced against him, and there is no doubt on his evidence that he quite understood that by this provision he was agreeing that he was to have the right to get his stock back up to the 12th of November, 1926, but not afterwards.

I am of the opinion, therefore, that the document cannot be reformed so as to change its terms, and must be interpreted as it stands, in the light of the whole bargain between the parties, partly verbal and partly written. It follows from the express provision that the plaintiff was to have no right to exercise the option after the 12th of November, 1926; that there was to be no legal liability on the plaintiff to pay the debt. It was an agreement between the parties, so far as the written document goes, that if the plaintiff failed to exercise the option within the stipulated time, he was to lose all interest in the stock, which defendant was in that event to have as his own absolutely, without any right to look to the plaintiff for repayment of his money.

Such were the written terms of the contract; but whether or not the plaintiff would have had a right to redeem after the date fixed, notwithstanding the express provision to the contrary, would depend on whether or not it should be held that the transfer to defendant was merely as security for a loan. That question does not arise, because the option was in fact exercised within the stipulated time. If this question had arisen, a decision that there was a right to re-

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deem after the stipulated time, notwithstanding the express provision to the contrary, would not rest on any change of the terms of the bargain, but on the rule of equity which treats as a nullity any such provision where the transaction is to be construed as a transfer of property to secure a loan.

Considering, then, the whole bargain just as it was made, we have the significant fact that the defendant stipulated for the interest on his money at the rate mentioned during the year within which the plaintiff was to be entitled to exercise the option, and that he agreed to deposit the shares in the bank and to leave them there during the year for which he was to receive this interest in the event of the option being taken up. He was, by virtue of this term of the agreement, debarred from making any use of these shares during the year, and the plaintiff was necessarily under a like disability in reference to them. They were placed in defendant's name on the books of the company merely to ensure to him the absolute ownership of the shares, without more, in the event of the option not being exercised within the time limited. His ownership was not an absolute ownership during the year, but a limited and conditional ownership, only to become absolute in the event of the option not being exercised.

In my opinion, these terms import that the shares and every advantage incident to their ownership were to belong to the party ultimately becoming entitled to the shares under the terms of the agreement. It is, of course, urged that dividends belong to the actual owner, whoever he may be, at the time when the dividend is payable, and therefore in this case belonged to the defendant. It is not, however, disputed that in a transaction such as this the parties were at perfect liberty to provide otherwise, and it becomes a question of construction in the light of the whole bargain, written and verbal, as to whether or not this whole agreement between the parties imports that any incidental advantages accruing to the ownership of the shares during the year should go with the shares to the party who might ultimately become the absolute owner under the terms of the bargain. In my opinion, that is the proper construction to be placed upon the whole bargain between the parties. The

defendant in effect agreed not to make use of the shares during the year, and stipulated for the price that he was to be paid for the use of his money and his risk during the year, and had no intention at the time, as he admits, of stipulating for any further advantage or profit. On payment to him in full of his stipulated profit, he is not, in my opinion, entitled to collect a further profit of $4,000, or about nine per cent., for which he did not bargain or intend to bargain. To interpret the whole agreement as I have indicated requires no alteration of either the verbal or written part of the bargain. There can be no doubt that if it had been provided in express terms that any dividend that might be earned on the stock during the year was to go with the stock to the party who might become absolute owner under the terms of the agreement, the plaintiff would be entitled to recover the dividend in question. If such a term is properly to be inferred from the circumstances and the whole bargain between the parties, the result is the same, although this term is not set out in express language.

I think there is no force in the argument put forward by the learned Chief Justice in the court below, in his reasons for judgment, where he says:

> As well, one might say, that the option to purchase a farm would involve the right to an account of all the profits derived from it after the option was given until the exercise.

I can see no resemblance between such an option and the one in question here. In the case put by the learned Chief Justice there is not as part of the same transaction a transfer of the farm from the party obtaining the option to the party giving it, with an agreement by the latter to put it in possession of a third party during the year within which the option was to run, and to make no use of the property during that year, and a further provision that the latter party was to have interest on the purchase price during the year in case the option should be exercised.

It appears to me that the learned Chief Justice arrived at his conclusions through having failed to take into consideration these very important differences between the case that he states and the one here in question.

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I am of opinion that the appeal should be allowed with costs of this appeal and of the appeal below, and that judgment should be entered for the plaintiff for the amount claimed, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savary, Fenerty & McLaurin.*

Solicitors for the respondents: *Bennett, Hannah & Sanford.*

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*Feb. 7.

LESLIE *v.* CANADIAN CREDIT CORPORATION, LIMITED

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

Appeal—Jurisdiction—Final judgment—Practice and procedure

MOTION by respondent to quash the plaintiff's appeal from the judgment of the Appellate Division of the Supreme Court of Ontario (1).

The plaintiff sued to recover the sum of $3,593.16 alleged to be due him under a written contract whereby the defendants agreed to pay him a bonus on profits. At the opening of the trial before Lennox J., and before any evidence was taken, a discussion by counsel for both parties with the judge took place, and the contract sued upon was handed to and read by the judge, who, without hearing evidence, directed a reference to the Master to take evidence, ascertain and report to the court the amount of the net profits, if any, to which the plaintiff was entitled under the contract referred to in the statement of claim, reserving further directions and the question of costs until after the report.

On appeal by the plaintiff to the Appellate Division, the said judgment of Lennox J. was varied (1), the order as varied directing a reference to the Master to take evidence, and to ascertain and report to the court the amount of the net profits, if any, in respect of which the plaintiff was entitled to any amount under the contract referred to in

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1927) 32 O.W.N. 335.

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the endorsement on the writ of summons, and the amount or amounts the plaintiff was entitled to in respect thereof, reserving further directions and the question of costs until after the report, costs of the appeal to be costs in the cause.

The plaintiff objected to the reference, as ordered by Lennox J., or as varied by the Appellate Division, and appealed to this Court (1).

After argument of counsel for the appellant, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the motion must succeed. There is no jurisdiction in this Court to hear the appeal. The judgment appealed from was not a final judgment. Moreover, it dealt merely with a matter of practice and procedure. The motion is granted with costs.

Motion granted with costs.

W. F. Schroeder for the motion.

J. Jennings K.C. contra.

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*Nov. 9, 10, 11.

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*Feb. 7.

FADA RADIO LIMITED (DEFENDANT)....APPELLANT;

AND

CANADIAN GENERAL ELECTRIC COMPANY, LTD. (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—Anticipation—Radio art

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (2), in which he held that claims 1, 2, 3 and 7 of the Canadian letters patent no. 208,583, issued to the plaintiff as assignee

(1) See judgment of Orde J. (1927) 61 Ont. L.R. 334, allowing the appeal (that is, approving of the security upon the appeal) to the Supreme Court of Canada, under s. 71 of the *Supreme Court Act*, although the same was not brought within the time prescribed, in which he refers (at p. 338) to the suggestion that the question involved was one of procedure merely, and to the question of the jurisdiction of the Supreme Court of Canada.

(2) [1927] Ex. C.R. 134.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

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of one Alexanderson, were valid and had been infringed by the defendant.

The plaintiff's patent had to do with radio art, and covered a device by which it was claimed a higher degree of selective tuning could be obtained in a receiving set than had been previously obtainable, while at the same time the desired signal could be received at its maximum effect.

The appeal was allowed, on the ground that the plaintiff's patent was invalid, having been anticipated by Schloemilch and Von Bronk.

The judgment of the court was delivered by Lamont J. After discussing Alexanderson's device, he said:

"* * *. That this device gave a high degree of selectivity is not denied and if the patent issued for it be valid there would not seem to be much doubt that the appellants infringed the patent.

"The main defences relied upon by the appellants are:

"1. That Alexanderson's device does not constitute invention, and, 2. That if it does, he was anticipated by other inventors, particularly Wilhelm Schloemilch and Otto von Bronk, in Germany."

He then proceeded to deal with the latter of these defences, and, in regard thereto, discussed the devices in question, and the evidence, at length.

In the course of his discussion of the question, he said:

"A comparison [of certain diagrams] shews that the invention of Schloemilch and von Bronk is very similar to that of Alexanderson. It is, however, argued, and it was held by the court below, that the inventions differed in two material respects: (1) That the input circuit of the invention of Schloemilch and von Bronk was not tuned, and that tuning of that circuit was necessary to obtain as high a degree of selectivity as was obtained by Alexanderson, and (2) That their invention was not for the purpose of securing selectivity at all, but simply for securing amplification.

"The first question, therefore, is: Did Schloemilch and von Bronk intend the input circuit of their invention to be tuned?"

As to this point, after discussing the evidence thereon, he found that in the patents of Schloemilch and von Bronk

(no. 293,300 in Germany, and no. 1,087,892 in the United States of America) the input circuit was tuned as well as the others; that "the grid circuit was intended to be, and was in fact, tuned to the same frequency as the other circuits."

He then proceeded:

"It was also contended that the two inventions differed in the objects to be attained; that Alexanderson sought selectivity, while Schloemilch and von Bronk sought amplification only, and that no claim for selectivity is made in any of their patents. That they made no claim for selectivity, the appellants admit, but the reason for that, they say, was because the securing of selectivity by means of tuned circuits arranged in cascade was, to their knowledge, already old in the art and their invention added nothing to the prior art as far as selectivity was concerned."

After dealing with the evidence as to the prior art, and discussing further the inventions of Schloemilch and von Bronk and of Alexanderson, he said:

"That Alexanderson stressed selectivity and made provision for amplification, while Schloemilch and von Bronk stressed amplification only, is, in my opinion, of little moment for although they made no claim that their invention secured selectivity—that having been obtained by prior inventors—the object of both devices was to eliminate undesired signals and secure and strengthen the desired signal and bring it within the compass of the human ear. Had Alexanderson, in February, 1913, possessed their knowledge of the prior art, it seems to me very doubtful if he would have claimed selectivity as he did.

"I am therefore of opinion that during the last months of 1912 and the early months of 1913, Schloemilch and von Bronk, in Germany, and Alexanderson, in America, working independently, produced devices for securing selectivity and sensitivity in a receiving set by precisely the same means."

Dealing next with the question as to which device was prior in time, he found, on the evidence, that Alexanderson's device was anticipated by Schloemilch and von Bronk. He then concluded as follows:

"Having reached this conclusion it is unnecessary to consider whether or not either of the inventions added any-

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thing to the prior art, for Alexanderson's device, having been anticipated by Schloemilch and von Bronk, Patent no. 208,583 cannot be upheld as valid, and the appellants are therefore not liable for infringing it.

"I would allow the appeal with costs, set aside the judgment below and enter judgment for the appellants with costs."

Appeal allowed with costs.

W. D. Herridge for the appellant.

O. M. Biggar K.C., R. S. Smart K.C., and *F. C. Macfarlane* for the respondent.

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*Mar. 5.
*April 24.

IN THE MATTER OF THE CONVEYANCING AND LAW OF PROPERTY ACT, BEING REVISED STATUTES OF ONTARIO, 1914, CHAP. 109,

AND IN THE MATTER OF PASSAVANT FRERES, OF ST. ETIENNE, LOIRE, FRANCE.

THE CUSTODIAN OF ALIEN ENEMY PROPERTY ..... } APPELLANT;

AND

GEORGE CLAUDE PASSAVANT AND E. & S. CURRIE LIMITED..... } RESPONDENTS.

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

Debt of Canadian debtor to alien enemy—Money paid into court—Claims by custodian and enemy creditor—Custodian's right to the money—Treaty of Peace (Germany) Order, 1920, Parts I and II, especially clauses 3, 5, 6, 10, 26, 32, 33, 34, 41—Treaty of Peace of Versailles, Arts. 296, 297, 298.

Before the war, P. F., a German firm, sent to W. Co. in Canada goods on consignment for sale on commission. During the war W. Co. sold the goods and, shortly afterwards, sold its assets to C. Co. which assumed W. Co.'s liabilities, including the liability to P. F. In June, 1920, C. Co., having notice of competing claims by P. F. and its sequestrator in France, for the amount of said liability, applied for and obtained from the Master in Chambers, in the Supreme Court of Ontario, an order for the payment of the amount into court. In November, 1925, P., as attorney for P. F., and the Custodian of Alien Enemy

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

Property each applied for payment to himself of the money in court. Mowat J. (30 O.W.N. 398) ordered payment to the Custodian, but subject to conditions which the Custodian refused to accept, and each party appealed. The Appellate Division (32 O.W.N. 402) ordered payment to P., subject to a right to the Custodian to a further enquiry as to certain facts. The Custodian elected against such an enquiry, and appealed to this Court.

Held: The Custodian was entitled to the money; it represented an enemy "debt" owing by a debtor in Canada and recoverable by the Custodian under the regulations of Part I of the *Treaty of Peace (Germany) Order, 1920.* There was an adequate remedy at law, as for money had and received. It mattered not, for the purposes of the case, whether P. F. looked to C. Co. or to W. Co. as its debtor; and it was none the less a "debt" because, upon the termination of the war, C. Co., being misinformed as to its duty, paid the money into court for the benefit of P. F. or its estate; the money could not by this means be diverted from its legal destination; nor was the Custodian's right of recovery affected by the fact that, at the time of the payment into court, he, not being aware of the enemy character of the obligation, did not assert his right.

The *Treaty of Peace (Germany) Order, 1920,* Parts I and II, especially clauses 3, 5, 6, 10, 26, 32, 33, 34, 41; the *Treaties of Peace Act* of Canada, 1919, (2nd sess.), c. 30, s. 1 (1), (2); the *Treaty of Peace of Versailles,* arts. 296, 297, 298; the *Consolidated Orders Respecting Trading with the Enemy* (P.C. 1023, 2nd May, 1916), ss. 26, 28, considered.

APPEAL by the Custodian of Alien Enemy Property from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which ordered (no amendment being made to s. 33 of the *Treaty of Peace (Germany) Order, 1920,* in accordance with the suggestion and opportunity given in a previous judgment of the Appellate Division (2)) that certain money in court be paid to the present respondent Passavant, and not to the Custodian, such order being made subject to a right to the Custodian to have a further inquiry directed as to certain facts. The Custodian elected against such an inquiry, and appealed to this Court. The material facts of the case, and the history of the proceedings below, are

(1) (1927) 32 O.W.N. 402, upon re-argument subsequent to the judgment of the Appellate Division noted in 32 O.W.N. 230; see also 32 O.W.N. 4. The judgment of the Appellate Division, in its final result, allowed the appeal of the present respondent Passavant, and dismissed the cross-appeal of the Custodian, from the order of Mowat J., 30 O.W.N. 398.

(2) (1927) 32 O.W.N. 230.

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sufficiently stated in the judgment now reported. The Custodian's appeal to this Court was allowed with costs.

T. Mulvey K.C. for the appellant.

R. H. Sankey for the respondent Passavant.

The judgment of the court was delivered by

NEWCOMBE J.—The parties each assert the exclusive right to receive the sum of $12,678.32, which was paid into the Supreme Court of Ontario by E. & S. Currie, Ltd., of Toronto, pursuant to leave granted, upon the application of that company, by order of the Master in Chambers of 2nd June, 1920. The order is expressed to have been made "In the matter of Conveyance and Law of Property Act, being R.S.O., 1914, ch. 109." The facts are shown by the affidavits and exhibits which are produced in the case, and I shall endeavour to submit a brief summary.

Upon the application for payment into court, it was disclosed by the affidavit of George Edward Watson, the Secretary of E. & S. Currie, Ltd., sworn 1st June, 1920, that, before the commencement of the war, Watson & Haig, Ltd., of Toronto, had received certain merchandise, which elsewhere appears to have consisted of silk goods, on consignment from the firm of Passavant Frères for sale in Canada on commission; that on 9th November, 1914, Watson & Haig, Ltd., received notice from Alfonse Bory of St. Etienne, in France, that he had been appointed sequestrator of Passavant Frères, whose business affairs had been suspended until further order; that in consequence Watson & Haig, Ltd., had made no payments "in respect of the said merchandise to Passavant Frères," and that shortly afterwards a letter from Passavant Frères, dated 23rd December, 1914, came to the attention of Watson & Haig, Ltd., whereby it was stated that payments due to Passavant Frères, at St. Etienne, must not be paid to the sequestrator, but to their firm at Zurich, Switzerland, and that payments to the sequestrator would not be recognized. It is stated that subsequently E. & S. Currie, Ltd.,

purchased all the assets and assumed the liabilities of the said Watson & Haig, Ltd., including the liability to Frères Passavant aforesaid, and there

is now due and owing to the said Frères Passavant by E. & S. Currie, Ltd., for and on account of Watson & Haig, Ltd., the sum of $12,678.32.

Mr. Watson deposed further that, from time to time since the year 1914, demands for payment had come from Passavant Frères of New York and Frankfort, and that, on 31st December, 1919, Alfonse Bory, the sequestrator, had demanded payment, submiting at the same time copy of the decree of the Civil Court at St. Etienne, whereby he was appointed; that E. & S. Currie, Ltd., having thus notice of competing claims by Passavant Frères and their sequestrator, had submitted the question of payment to the Custodian, in order to ascertain whether he made any claim, and had received a reply in the negative. Mr. Watson, by the penultimate paragraph of his affidavit, states as follows:

> The said E. & S. Currie, Ltd., is ready and willing at all times to answer all such questions relating to the application of the money in question as this Honourable Court or a Judge thereof may make or direct, and is now desirous of paying such moneys into Court subject to the claims of the said two claimants.

Some additional evidence is furnished by the two affidavits of the respondent Passavant, sworn at the City of New York on 19th November, 1924, and 13th October, 1925, respectively; he shows that:

> Karl Kotzenberg, Hermann von Passavant and Hans von Passavant have carried on business at St. Etienne, Loire, France; Basle, Switzerland; and Frankfort-on-Maine, Germany, under the partnership names "Passavant Frères" sometimes called "Frères Passavant," "Passavant Fils & Cie" and "Gebruder Passavant G.m.b.H." respectively.

He says that, sometime after the outbreak of the war, M. Bory was appointed sequestrator of Passavant Frères at St. Etienne; that, "sometime prior to the year 1920, E. & S. Currie, Ltd., of Toronto owed the sum of $12,678.32 to the firm of Passavant Frères of St. Etienne;" that this sum remains in court to their credit, with accrued interest; that the said Karl Kotzenberg, Hermon von Passavant and Hans von Passavant now carry on business as aforesaid; that they are the only persons entitled by law to receive the money, and that the sequestrator, Alfonse Bory, has no claim thereto. He says that the respondent was appointed general attorney of Passavant Frères by instrument of November, 1924, and he produces a certified copy of a letter from M. Bory, dated 22nd October, 1924, in which he acknowledges that he has for some time

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Newcombe J.

ceased to be sequestrator of the firm of Passavant Frères, and that his position as such has come to an end. The respondent states also, in one of these affidavits, that it was during the war that Watson & Haig, Ltd., sold the goods consigned to that company which realized the sum in question; and moreover that

> Soon after this Messrs. Watson & Haig sold their assets to E. & S. Currie, Limited, and E. & S. Currie Limited assumed the liabilities of Watson & Haig including the liability to Passavant Frères.

The respondent adds, as a statement of fact, that

> The former sequestrator of Passavant Frères has been discharged and I verily believe that no successor has been or will be appointed.

The Custodian, by his affidavit of 11th November, 1925, produces correspondence which he has received from the German Clearing Office and Gebruder Passavant, and the claims filed on their behalf by the German Clearing House, also a letter, dated 6th April, 1920, from Mr. A. Hoffman, who describes himself as a former director of the late firm of Frères Passavant, St. Etienne, to Watson & Haig, Ltd., in which Mr. Hoffman states that he is occupied with arrangements concerning the St. Etienne House, and would like to know what became of the goods, etc., which Messrs. Watson & Haig, Ltd., had on consignment; this letter is written from Frankfort, and Mr. Hoffman says "please send your answer to me, or, if you prefer, direct to the firm here in Frankfort." There is no record of any answer to this letter.

The money still remains in court. Meantime, on 13th November, 1925, George Claude Passavant, the respondent, acting under his power of attorney from Passavant Frères, upon notice to the Custodian, applied for payment of the money out of court, and, on the same date, the Custodian, upon notice to the respondent, applied for payment to himself. These applications were heard together by Mowat J. (1), who held the Custodian entitled, subject to certain conditions which the Custodian was not disposed to accept, and each of the applicants appealed. When the case came before the Appellate Division (2), a question was suggested by the Court as to the jurisdiction of the Master, who had directed, not only that E. & S. Currie, Ltd., should be at liberty to pay the

(1) (1926) 30 O.W.N. 398. (2) (1927) 32 O.W.N. 4.

money into court, but also should, upon such payment, be discharged from all liability. The Court was not satisfied that the Master could discharge the liability, and accordingly ordered that

the said E. & S. Currie, Limited, be and it is hereby added as a party to these proceedings, and that the said E. & S. Currie, Limited, shall be bound by any future order made in these proceedings.

Conformably to this direction, the Currie Company was joined, and the hearing proceeded. Upon this occasion (1), the majority of the court considered that the Custodian's right to payment was not established, because, by clause 33 of The Treaty of Peace (Germany) Order, 1920, the property, rights and interests in Canada, within the meaning of the Order, belonging on 10th January, 1920, to enemies, or theretofore belonging to enemies, were limited to those "in the possession or control of the Custodian" at the date of the Order, and were therefore not vested in or subject to the control of the Custodian, and were therefore excepted from debts to be settled through the Clearing Office. It was suggested, therefore, that an opportunity should be afforded to the Government to amend s. 33, so as to vest the debt in the Custodian. Then the latter applied for and obtained a reargument of the appeal, and the case came before the Appellate Division for the third time (2), but in the result the Custodian fared no better, except for a dissent. The court remained of opinion that his case was not made out, and that some further inquiries were necessary; that it was not shown that the Currie Company was a debtor of Passavant Frères; that the real debtor might be Watson & Haig, Ltd., and that, if there were to be a further inquiry, that firm should also be added as a party. The Custodian was therefore put to his election as to whether he would proceed with the suggested inquiries, and, he having answered in the negative, the court directed that the money should forthwith be paid to the respondent. The dissenting judge (Ferguson J) was of opinion that it was the duty of the court to determine to whom E. & S. Currie, Ltd., should have paid Watson & Haig's debt, and that it was, by s. 10 of the Treaty of Peace (Germany)

(1) (1927) 32 O.W.N. 230. (2) (1927) 32 O.W.N. 402.

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Order, 1920, made payable to the Custodian, and to him only.

The Orders respecting Trading with the Enemy were amended and consolidated on 2nd May, 1916, and, by order 26, subsections 1 and 2, of the Consolidation, it was provided as follows:

26. (1) Any person who holds or manages for or on behalf of an enemy any property real or personal (including any rights, whether legal or equitable, in or arising out of property, real or personal), shall, within one month after the publication in the *Canada Gazette* of these orders and regulations, or, if the property comes into his possession or under his control after the said publication, then within one month after the time when it comes into his possession or under his control, by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may require.

(2) The preceding subsection shall extend and apply to balances and deposits standing to the credit of enemies at any bank, and to debts to the amount of one hundred dollars or upwards, which are due, or which, had a state of war not existed, would have been due to enemies, as if such bank or debtor were a person who held property on behalf of an enemy.

Although these subsections remained in force until repealed and superseded by the Treaty of Peace (Germany) Order of 14th April, 1920, it does not appear that any notice in compliance with them was communicated to the Custodian, either on behalf of Watson & Haig, Ltd., or of E. & S. Currie, Ltd., although it was shown that, on 7th May, 1920, the solicitors of the latter had written a letter to the Custodian making some inquiries. This was after the Treaty of Peace (Germany) Order, 1920, came into effect.

By Order 28 of the Consolidated Orders,

28. (1) Any Superior Court of Record within Canada or any Judge thereof may, on the application of any person who appears to the Court or Judge to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal (including any rights, whether legal or equitable, in or arising out of property real or personal), belonging to or held or managed for or on behalf of an enemy, or on the application of the Custodian or any department of the Government of Canada, by order vest in the Custodian any such real or personal property as aforesaid, if the Court or the Judge is satisfied that such vesting is expedient for the purpose of these orders and regulations, and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with property as to the Court or Judge may seem proper.

The jurisdiction conferred by this clause, although it existed, was not invoked nor exercised with regard to the debt in question.

The Treaty of Peace between the allied and associated powers and Germany was signed at Versailles on 28th June, 1919, and ratified on 10th January, 1920, which was also the date, as declared, of the termination of the war.

By section III, article 296, of the Treaty, entitled "Debts," it was stipulated provisionally that:

> There shall be settled through the intervention of Clearing Offices to be established by each of the High Contracting Parties * * * the following classes of pecuniary obligations:

including

> (1) Debts payable before the war and due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory;
>
> (2) Debts which became payable during the war to nationals of one Contracting Power residing within its territory and arose out of transactions or contracts with the nationals of an Opposing Power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war.

Clearing offices were established pursuant to these provisions; and, by the stipulated regulations governing the clearing offices, admitted debts, and the debt in question is admitted, are at once to be credited by the debtor clearing office.

By section IV, article 297, entitled "Property, Rights and Interests," it is declared that the question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and the provisions of the annex thereto. By clause (b) of this article, the allied and associated powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals, or companies controlled by them, within their territories, and by clause 14 of the annex it is stipulated that the provisions of this article, relating to property, rights and interests in an enemy country, and the proceeds of the liquidation thereof,

> apply to debts, credits and accounts, Section III regulating only the method of payment.

By "An Act for carrying into effect the Treaties of Peace between His Majesty and certain Other Powers," enacted by the Parliament of Canada on 10th November, 1919, c. 30 of the second session, referring in the preamble to the Treaties of Peace with Germany and Austria, it is provided by s. 1, subss. 1 and 2, that

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(1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

(2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

It was pursuant to the powers so conferred that the Treaty of Peace (Germany) Order, 1920, was sanctioned by His Excellency the Administrator in Council on 14th April, 1920. The provisions of this Order, following the preliminary interpretation clauses, are expressed in five Parts. Part I, entitled "Debts and Clearing Office," comprises clauses 3-31 inclusive, and Part II, entitled "Property, Rights and Interests," comprises clauses 32-50 inclusive. The remaining Parts are not material for present purposes. By clause 3 of Part I of this Order "Enemy Debt" is defined to mean:

(*a*) A debt payable before the war and due to or by a British subject residing in Canada by or to a German national residing in Germany;

(*b*) A debt which became payable during the war

(i) to a British subject residing in Canada which arose out of a transaction or contract with a German national residing in Germany, or

(ii) to a German national residing in Germany, which arose out of a transaction or contract with a British subject residing in Canada, of which transaction or contract the total or partial execution was suspended on account of the declaration of war.

And "debtor" means a person from whom, and "creditor" a person by whom, an enemy debt is claimed. Provision follows for the establishment in and for Canada, under the control and management of the Custodian, of a local clearing office to perform the functions of a central clearing office for Canada, and to conduct all transactions with the German clearing office through a central clearing office established in the United Kingdom.

By clause 5 of this Order:

Except in cases where recovery of such debt in a Court of law is allowed as hereinafter provided, no person shall pay, or accept payment of, or have any communication with any German national with respect to any enemy debt, otherwise than through the Clearing Office.

By clause 6:

No person shall bring or take in any Court in Canada any action or other proceeding relating to the payment of an enemy debt, except as hereinafter provided.

The exceptions do not apply to a German creditor in the circumstances of this case.

By clause 10:

Every debtor in Canada who admits the whole or part of the debt shall within three months from the date of this Order, unless he has already done so, pay to the Custodian the amount admitted with the interest and in the currency (i.e., Canadian) and at the rate of exchange provided by sections 23 and 24 of this Order.

In Part II, clause 32, "Enemy" is defined to include a German national who, during the war, resided or carried on business within the territory of a Power at war with His Majesty, and a German national who during the war resided or carried on business within the territory of a Power allied or associated with His Majesty, whose property within such territory has been treated by that Power as enemy property. And, by subs. 2 of the last mentioned clause,

"Property, rights and interests" include debts, credits and accounts to which the provisions of this Part shall apply, subject to the provisions of Part I which regulate the method of payment.

Then follows clause 33, which appears to have led to some confusion in this case. It provides that:

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

By clause 34 all vesting orders purporting to have been made and given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to property, rights and interests of enemies; the sale or management of property, rights or interests; the collection or discharge of debts, etc., "and in general all exceptional war measures, or measures of transfer, or acts done or to be done in the execution of any such measures, are hereby validated and confirmed, and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41." Clause 41 authorizes the Custodian to take any action or proceeding which he may

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think proper to enforce the provisions of the Treaty of Peace (Germany) Order, 1920, and to get in any property, right or interest vested in him.

Part I regulates the method of collection and payment of enemy debts after the war. That is assigned to the clearing offices, subject to the regulations; I have quoted or referred to the governing ones. I have shown that provisions existed during the war for the recovery of enemy debts by the Custodian, and for reducing them into possession. By articles 297 and 298 of the Treaty, and their annex, vesting orders, winding up orders, and other orders, directions and decisions or instructions in pursuance of war legislation with regard to enemy property, rights and interests were confirmed, and the interests of all persons were declared to have been effectively dealt with. Clauses 33 and 34 of the Treaty of Peace (Germany) Order, 1920, refer to property, rights and interests which were at that time in the possession or control of the Custodian. They were declared to be vested by the effect of the Order, and property, rights or interests previously vested were declared to be held on the same terms and with the same powers and duties as the property, rights and interests vested by the Order. The method of payment of the other German enemy pecuniary obligations, which by subs. 2 of s. 32 of the Order are interpreted to include "debts, credits and accounts," is, as that subsection itself states, regulated by Part I of the Order. These payments must go through the clearing office, and, upon my interpretation, the provisions of the Order to which I have referred are compatible only with the Custodian's right of recovery. There was, I have no doubt, a large area of debts, credits and accounts subject to the provisions of Part I of the Order, and to be administered accordingly, which at the conclusion of the Peace had not been vested in or collected by the Custodian, but which are nevertheless intended to reach the clearing office. This, I hold, is made very plain by the terms of the Order; and moreover, by Clause 26, all sums, which under Part I ought to be paid to the Custodian, shall be recoverable by him in the Exchequer Court.

It is said in the respondent's factum that the money in contest is not a debt, although, by the affidavit upon

which E. & S. Currie, Ltd., obtained leave to pay the money into court, it was described as a sum due and owing by that company to Passavant Frères, and it was also so described in the affidavit of the respondent himself upon which he applied to the court for payment out. Apparently it is intended to suggest that, whatever may have been the situation in equity, there was no contract or privity as between E. & S. Currie Co., Ltd., and Passavant Frères. It is not necessary to attribute any special effect or enlarged meaning to the word "debt" in the Treaty or the legislation. There is a debt here upon the ordinary acceptation of the term. It appears that, during the war, Watson & Haig, Ltd., received $12,678.32, proceeds of the goods of Passavant Frères which would have been payable to the latter, if there had been no war, and that when, also during the war, Watson & Haig, Ltd., assigned their assets to E. & S. Currie, Co., Ltd., the latter became bound to discharge this liability to Passavant Frères. There was thus, during the war, a determinate sum of money in the hands of Watson & Haig, Ltd., and subsequently in the hands of E. & S. Currie, Ltd., which would have been at that time payable to Passavant Frères, if the payment had not been suspended by reason of the war. It matters not, for the purposes of this case, whether Passavant Frères looked to the Currie Company as their debtor, which they evidently did, or to Watson & Haig, Ltd., who still remained liable for the debt. The money was in hand awaiting payment, pending the dispositions which were to attend upon the Peace. By these it fell to the Custodian, if it were a debt, and it was none the less a debt because, upon the termination of the war, E. & S. Currie, Ltd., being misinformed as to its duty, paid the money into court for the benefit of Passavant Frères, or their estate; the money could not by this means be diverted from its legal destination. There is proof of an admitted amount or balance, and that is a debt recoverable upon the money counts. The only trust to execute was that of paying over the money, such as is cognizable at law, as in cases of bailment, and for money had and received for another's use, where there is a plain, adequate and complete remedy at law. "A Court of Equity was cautious of entertaining suits upon a single

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transaction where there were not mutual accounts." Story on Equity, 3rd Ed., pp. 33, 40, 191; *Scott* v. *Surman* (1); and there are many later authorities.

At the time of the payment into court the Custodian, not being aware of the enemy character of the obligation, did not assert his right. On the contrary, the Assistant Deputy Custodian, by his letter of 19th May, 1920, expressed his willingness that E. & S. Currie, Ltd., "may pay the official sequestrator at St. Etienne the amount owing by them to Passavant Frères, St. Etienne." The E. & S. Currie, Co., Ltd., did not, however, act upon this consent, and the claim of the French sequestrator was subsequently withdrawn. There are now no claims in competition, except that represented by the respondent and that of the Custodian. The money, the subject of the claim, is in court appropriated to the payment of an enemy debt. There are no questions of account, the amount is specific. No question is raised as to the validity of the regulations, and, having regard to the provisions, the Custodian is, in my opinion, certainly entitled to receive the money for the Clearing Office.

There will be a declaration accordingly, the appeal will be allowed, and the costs throughout will be borne by the respondent, not including, of course, the costs of the payment into court.

Appeal allowed with costs.

Solicitors for the appellant: *Wilkie & Delamere.*

Solicitors for the respondent Passavant: *Worrell, Gwynne & Beatty.*

Solicitors for the respondent E. & S. Currie, Limited: *Osler, Hoskin & Harcourt.*

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(1) (1742-3) Willes' Rpts., 400.

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*Mar. 7.
*April 24.

WALTER L. HACKETT (DEFENDANT).....APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF COLCHESTER SOUTH (PLAINTIFF) ..... } RESPONDENT.

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

Limitation of actions—Action by municipality for possession of land—Municipality's title under Crown grant in trust for public wharf—Statute of Limitations set up as extinguishing municipality's title—Application of statute—Evidence failing to establish dispossession.

Defendant claimed title to land by possession, and that plaintiff municipality's title was extinguished by force of the *Statute of Limitations*. The land was part of a tract granted to the municipality by Crown grant, to hold in trust for a public wharf and public purposes connected therewith.

Held that, on the evidence, the decision of the Appellate Division, Ont. (61 Ont. L.R. 77), that defendant had failed satisfactorily to establish dispossession, should be sustained.

Semble, the land granted to the municipality was by the terms of the grant dedicated to a public use, which was accepted by the public, and this dedication gave rise to rights of enjoyment by the public, which rights were not, nor was the municipality's title which was given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by force of the *Statute of Limitations*.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing the judgment of Ross, Co. C.J., Acting Judge of the County Court of the County of Essex) held that the plaintiff municipality was entitled to possession of the land in question. The land was part of a tract granted to the plaintiff municipality by Crown grant dated 12th January, 1869, to hold in trust for a public wharf and public purposes connected therewith. The defendant claimed that the municipality's title was extinguished by force of the *Statute of Limitations*. The appeal to this Court was dismissed with costs.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1927) 61 Ont. L.R. 77.

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HACKETT v. COLCHESTER SOUTH

S. Denison K.C. and *Bernard Furlong* for the appellant.

F. K. Jasperson for the respondent.

The judgment of the court was delivered by

DUFF J.—I have come to the conclusion that this appeal must be dismissed. The land, the possession of which is in dispute, is part of a tract granted to the respondent municipality by Crown grant, dated the 12th of January, 1869. The habendum is in these words,

> To have and to hold to the said Corporation of the Township of Colchester and their successors in office forever in trust for a Public Wharf and Public purposes connected therewith.

The appellant's case is that he is in possession of this piece of land from which his predecessors dispossessed the respondent municipality more than ten years before the action was brought, during which period, he, or his predecessors in interest, have been in possession, and that the title of the municipality is consequently extinguished by virtue of the *Statute of Limitations*. I have been very much impressed by the force of the reasons given by Mr. Justice Hodgins (1) in support of his suggestion that the lands which were the subject of the grant to the municipality were thereby dedicated to a public use, a dedication which was accepted by the public (of this acceptance there is abundant evidence) and that this dedication gave rise to rights of enjoyment by the public, closely analogous to the rights of the public in respect of a public highway, and that such rights are not, nor is a title such as that of the municipality, given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by the provisions of the *Statute of Limitations* upon which the appellant founds his case. I think there is a great deal to be said for that view. And I venture to add this to what Mr. Justice Hodgins has said in support of it. The appellant can only succeed upon the hypothesis that the municipality has lost its title. If that be so, it follows that, as concerns the piece of land in question, the object of the trust has necessarily failed. It would seem, again, to follow, on ordinary principles, that a resulting trust has arisen in favour of the Crown. The equity of the Crown, of

(1) 61 Ont. L.R. 77.

which the appellant had notice, it might be forcibly argued on the authority of *In re Nisbet and Potts' Contract* (1), is not affected by the *Statute of Limitations*, because, independently of the exceptional position of the Crown, the appellant cannot maintain the position of a purchaser for value without notice. And, once more, it would follow, if this be so, that only the bare legal title is extinguished, and whatever possession the appellant may have, is held by him subject to the equitable estate of the Crown. It is difficult to think of so impotent a conclusion as one contemplated by the statute.

Mr. Denison suggests that all property given for charitable purposes is really trust property, and that the title of the property so held is not exempt from the *Statute of Limitations*. As to this, it should be noticed that here we are only concerned with property which is granted by the Crown to a public body subject to an express trust to permit the public to enjoy in it rights of physical user, as in a highway.

I do not think, however, that it is strictly necessary to express a decided opinion on this point. The Appellate Division (2) has held that, having regard, *inter alia*, to the fact that the land was the property of the municipality, and in the same enclosure and held under the same title as an adjoining area from which the municipality was never dispossessed, the appellant has failed satisfactorily to establish dispossession from the piece in dispute. There is no doubt that, as to the critical years 1915 and 1916, the evidence is vague, and in some respects quite unsatisfactory. On the whole, I am not convinced that the Appellate Division has taken an erroneous view.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Furling, Furlong, Awrey, Whyte & St. Aubin.*

Solicitors for the respondent: *Rodd, Wigle & Whiteside.*

(1) [1906] 1 Ch. 386.

(2) 61 Ont. L.R. 77.

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*Mar. 13.
*April 24.

THE SENTINEL-REVIEW COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

JOHN R. ROBINSON, J. E. CAMERON, IRVING E. ROBERTSON, DOUGLAS S. ROBERTSON, ALFRED T. CHADWICK, TRUSTEES OF THE ESTATE OF THE LATE JOHN ROSS ROBERTSON, AND PROPRIETORS AND PUBLISHERS OF THE EVENING TELEGRAM PUBLISHED AT TORONTO (DEFENDANTS) ..... } RESPONDENTS.

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

Libel—Publication in newspaper—Notice before action—Libel and Slander Act, R.S.O. 1914, c. 71, s. 8—Sufficiency of notice—Pleading—Giving of notice a "condition precedent" within Ontario C.R. 146—Refusal of new trial, claimed on ground of excessive damages.

The giving of the notice required by the *Libel and Slander Act* (R.S.O. 1914, c. 71, s. 8) before an action for damages for a libel published in a newspaper, is a "condition precedent" within the meaning of Ontario C.R. 146, and can only be contested if its non-performance is specifically pleaded by defendant. An allegation by plaintiff in his statement of claim that he gave such notice does not relieve defendant from stating in his pleading his intention to contest it; plaintiff's allegation merely expresses what, in its absence, would be implied.

The notice must indicate the intending plaintiff with reasonable certainty; but that is accomplished when words are used which are calculated to apprise the addressee of the complainant's identity.

The notice in question was held sufficient, although it was signed with the name "The Woodstock Sentinel-Review," and not in the name of the plaintiff, viz., "The Sentinel-Review Co. Ltd," which published a newspaper at Woodstock called "The Daily Sentinel-Review."

Judgment of the Appellate Division of the Supreme Court of Ontario (61 Ont. L.R. 62) setting aside the verdict and judgment recovered by plaintiff for damages for libel published in defendant's newspaper, and dismissing the action, reversed.

The Court refused to allow defendant a new trial, claimed on the ground of excessive damages awarded by the jury.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1)

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Lamont JJ.

(1) (1927) 61 Ont. L.R. 62.

which allowed the defendant's appeal from the judgment of Logie J., who, upon the jury's findings, gave judgment for the plaintiff for the sum of $6,000, as damages for libel published in the defendant's newspaper. The Appellate Division held that the plaintiff's action should be dismissed, on the ground that it had not given sufficient notice before action, under s. 8 of the *Libel and Slander Act*, R.S.O. 1914, c. 71. Two of the judges (Mulock C.J.O. and Hodgins J.A.) also held that, if they were wrong in their conclusion as to the notice, the damages allowed were excessive and there should be a new trial.

The plaintiff is the proprietor and publisher of a newspaper at Woodstock, Ont., called The Daily Sentinel-Review. The defendants are the proprietors and publishers of The Evening Telegram, a newspaper published at Toronto, Ont.

The notice in question, specifying the statements complained of, was addressed to the defendants, and read, in part, as follows:

> Take notice that we complain of a certain editorial published of and concerning us in the issue of The Evening Telegram [specifying date and place of issue] as being libellous, which said editorial is as follows:
>
> * * * * *
>
> [Editorials complained of had references to "Woodstock Sentinel-Review" and "Sentinel-Review."]
>
> And further take notice that this notice is served pursuant to the Libel and Slander Act, being R.S.O. 1914, chapter 71, section 8.
>
> Dated at Toronto, this 1st day of September, A.D. 1926.
>
> "The Woodstock Sentinel-Review" per "W. T. McMullen," Esq., K.C., Barrister, etc., Woodstock, Ont., their solicitor,
>
> By his Toronto Agents, Messrs. McCarthy & McCarthy, Barristers, etc., Room 22, Canada Life Building, 46 King Street West, Toronto, Ont.

The statement of claim alleged:

> 8. That the plaintiff pursuant to the provisions of the Libel and Slander Act duly gave notice in writing specifying the statements complained of in this action, which notice was dated the first day of September, 1926, and duly served pursuant to the provisions of the said Act on the said defendants.

The statement of defence made no reference to the notice, or to any want or insufficiency thereof.

The plaintiff contended that the notice was sufficient, and also that, upon the pleadings, it was not open to the

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defendants to contest its sufficiency. The defendants contended that the notice was not a notice given by or for the plaintiff company, or a notice on which it could rely; and that this question was in issue. They also complained that the trial judge failed adequately to charge the jury, and that the damages awarded were excessive.

D. L. McCarthy K.C. for the appellant.

A. J. Thompson and *James Parker* for the respondent.

The judgment of the court was delivered by

DUFF J.—The verdict and judgment recovered by the appellants against the respondents for damages for libel published in the respondents' newspaper, was set aside by the Appellate Division of the Supreme Court of Ontario (1), and the action dismissed upon the ground that no sufficient notice of action had been given by the appellants under the statute, s. 8, R.S.O. (1914), cap. 71.

The appellants base their appeal upon two contentions. First, they say that the notice was sufficient, and second, they say it was not open to the respondents to object to the sufficiency of the notice because such an objection, by the rules of pleading, ought to have been, and this objection was not, raised by the statement of defence.

First, as to the question of pleading. The pertinent rule is:—

> Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the party relying thereon, and an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

In their statement of claim the appellants allege in paragraph 8,

> That the Plaintiff pursuant to the provisions of the Libel and Slander Act duly gave notice in writing specifying the statements complained of in this action, which Notice was dated the First day of September, 1926, and duly served pursuant to the provisions of the said Act on the said Defendants.

This is the only reference which the pleadings contain, to the notice of action.

The alleged cause of action, if well founded, was complete under the principles of the common law upon the

(1) (1927) 61 Ont. L.R. 62.

publication of the libel. The statute imposes the condition of notice before action against a newspaper, in order that the newspaper may be given an opportunity of retracting or explaining the imputations complained of. If the giving of this notice by the appellants is a condition precedent within the meaning of C.R. 146, then the respondents could only contest it, if, in compliance with the rule, non-performance of the condition was specifically alleged in the statement of defence. The Appellate Division holds that the giving of notice is not a condition precedent within the meaning of the rules of pleading.

There is a sense, of course, in which any fact that a plaintiff must prove is an element in his right of action. Broadly, common lawyers, in speaking of rights, mean rights which the courts will enforce; nevertheless, the distinction runs all through the law, and is a very familiar one, between rights and remedies, enforceable rights and rights of imperfect obligation; and the distinction is an old one, well recognized in the rules of pleading, between the substantive elements of a cause of action, and conditions precedent which a plaintiff must observe in order to entitle him to sue.

Formerly a plaintiff was required to set out in his declaration every condition precedent and to aver with particularity performance of it. Later, by the *Common Law Procedure Act*, it was provided that the plaintiff or defendant might aver performance of conditions precedent generally, and that " the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest." (Harrison, C.L.P. Act, p. 93). After the enactment of this Act, it was usual to allege in the declaration that " all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain the action."

Under the practice established by the Judicature Acts, the necessity of a general averment of the performance of conditions precedent was dispensed with, such an averment being implied; but it is still, as required by C.R. 146, incumbent on a party who intends to contest the performance of any condition precedent to specify it distinctly in his pleading.

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SENTINEL-REVIEW CO., LTD. v. ROBINSON ET AL.

Duff J.

The distinction (between a condition precedent in this sense, and a condition which is one of the constitutive elements of the plaintiff's right), is perhaps not easily capable of statement in abstract form; and differences of opinion will arise as to the category to which a particular fact belongs. But, as Mr. Justice Magee points out, statutory notices of action, which presuppose the existence of a completely constituted cause of action at common law independently of the notice, have commonly been held to be conditions precedent in this sense, as for example, in the case of notice to a magistrate, *Conmee* v. *Bond* (1). Where a departure from the strict rule of pleading is permitted, the statute expressly authorizes the point to be raised under the general issue. The cases referred to by Hodgins, J.A., seem to fall within one of two classes: first, those in which the fact to be pleaded was an essential part of the cause of action at common law, as in proof of a termination favourable to the plaintiff, of the proceedings complained of in an action for malicious prosecution, and the case of notice of dishonour in an action against an endorser; second, those in which the right of action is statutory, and the existence of the fact in question is one of the prescribed statutory conditions, as notice of the assignment, which must be alleged in an action in the assignee's name upon an assignment of a legal debt under the provisions of s. 25 of the *Judicature Act*. With great respect I am unable to agree with the conclusion of the Appellate Division on this point.

Nor are the respondents, by the allegation in paragraph 8 of the statement of claim, relieved from the duty under C.R. 146 to state in their pleading their intention to contest the giving of notice. That allegation merely expresses what, in the absence of it, would be implied.

Nor can I agree that the notice was not sufficient. The statute prescribes no form. The notice is sufficient, if the plaintiff's intention to sue is notified. The communication must, of course, indicate the intending plaintiff with reasonable certainty. But that is accomplished when words are used which are calculated to apprise the addressee of the identity of the complainant. I have no doubt that the

(1) (1890) Cassels' Dig. 511; report below: (1889) 16 Ont. A.R. 398.

notice in question did in fact inform the respondents that the complainants were the proprietors of the Sentinel-Review.

A similar point arose in *Knott* v. *Telegram Printing Co. Ltd.* (1), although there the question concerned the identification of the addressee. The point of view from which such documents should be considered is indicated in the judgment of Anglin J., as he then was, at p. 342, in these words, with which I agree:—

> In the present case the notice was properly served. It reached the defendant company and there is not the slightest room for question or doubt that it knew that it was intended for it. It was given the "opportunity to publish a full apology," which it is the purpose of the statute to secure.

Nor do I think the respondents are entitled to a new trial on the ground that the damages are excessive. Many people, perhaps most, would not be disposed to treat very seriously the publications complained of, especially after the apology to Mr. Taylor. But the jury has found that the reflections in the libellous publications were directed against the appellants; and it was within the power of the jury to take a severer view of those reflections, as calculated to injure the position and prestige of the appellants' papers, and thus to inflict upon them substantial damage in their business as newspaper publishers; and since the jury, as is quite evident, did take that view, there is no ground upon which a court of appeal, acting on the well settled principles governing such matters, can adjudge that the award of damages transgresses the latitude in which the law permits a jury to indulge in actions of libel.

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

Appeal allowed with costs.

Solicitor for the appellant: *W. T. McMullen.*

Solicitors for the respondents: *Parker & Crabtree.*

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(1) [1917] 3 W.W.R. 335 (Supreme Court of Canada).

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*Feb. 15, 16.
*Mar. 27.

RURAL MUNICIPALITY OF VICTORY No. 226 (PLAINTIFF) ..... APPELLANT;

AND

SASKATCHEWAN GUARANTEE AND FIDELITY COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Guarantee—Bond guaranteeing faithful discharge of duties by treasurer of municipality incorporated under Rural Municipality Act, Sask. (R.S.S. 1920, c. 89)—Default by treasurer—Liability of guarantor—Representations by municipality in certificates given to secure renewals of bond—Construction of certificates; contra proferentem rule—Certificate of auditor, whether representation of municipality—Alleged untruth of representations—Jury's findings—Jurisdiction of court of appeal to substitute its findings for those of jury.

Plaintiff was a rural municipality incorporated under *The Rural Municipality Act*, R.S.S. 1920, c. 89. Defendant executed a bond as security for the faithful discharge by P. of his duties as plaintiff's treasurer. The bond was renewed from year to year on a certificate, signed each year by plaintiff's reeve and auditor, in the form forwarded by the defendant, which contained representations, the truth of which, in certificates of March 1, 1922, and March 16, 1923, was challenged by defendant, to the effect that all moneys in P.'s control or custody had been accounted for, and that he had "performed his duties in an acceptable and satisfactory manner." P. being found short in his cash, plaintiff sued on the bond. The jury found that said representations were material and relied on by defendant, but that they were true, and judgment was given at trial against defendant. This was reversed by the Court of Appeal (21 Sask. L.R. 551) which held that the jury's finding that the representations were true was perverse.

Held (1): As the members of the Court of Appeal were of opinion that they had all the facts before them and that no further evidence could be produced which would alter the result, that court had jurisdiction to draw inferences of fact inconsistent with the jury's finding, and to give effect to the same (Sask. Court of Appeal Rule 44; *Calmenson* v. *Merchants' Warehousing Co. Ltd.*, 125 L.T. 129, at p. 131; *Skeate* v. *Slaters Ltd.*, [1914] 2 K.B. 429; *Everett* v. *Griffiths*, [1921] 1 A.C. 631).

(2): Even if, as *The Rural Municipality Act* now reads, the auditor of a municipality can properly be called an officer thereof, he is not an officer or agent to make any representations binding the municipality; nor did the fact that he signed the certificates constitute a holding out by plaintiff that he was authorized to make any representation on its behalf; the information required by defendant by the auditor's signature to the certificates was secured at defendant's own risk from the auditor as an individual and not as a representative of the municipality.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(3): Although the truth of the representations was not the subject of warranty (as in *Dom. of Canada Guaranty & Accident Co. Ltd.* v. *Halifax Housing Commission,* [1927] S.C.R. 492, and other cases referred to), yet, it being found that they were material and were relied upon, defendant was entitled to have the renewal of the bond set aside if it could successfully challenge their truth. (The certificate being framed by defendant, any ambiguity in its language should be construed in plaintiff's favour—*Ont. Metal Products Co.* v. *Mutual Life Ins. Co. of New York,* [1924] S.C.R. 35, at p. 41; *Condogianis* v. *Guardian Ass. Co.* [1921] 2 A.C. 125, at p. 130). As to the certificate of March 1, 1922, in view of the evidence, and having regard to the questions and answers in the application for the bond, from which the jury would be justified in concluding that defendant knew that plaintiff would depend on the auditor's statement, and as the reeve was not obliged to check the auditor's statement or P.'s books, the jury were entitled to affirm, as they did, the truth of the representations. But as to the certificate of March 16, 1923, the members of the council of plaintiff municipality knew at that time of a discrepancy between the surplus shown on the auditor's balance sheet and P.'s cash; the reeve should not have been satisfied with P.'s explanation of this, and should not have certified without notifying defendant of the discrepancy; the representation that all moneys in P.'s custody had been properly accounted for was not true, and, even if innocently made, it induced a renewal of the bond, which renewal defendant was entitled to have declared void. In the result, therefore, the plaintiff's appeal was allowed in part, the defendant being held liable only for the sum (with interest) in which the jury found that P. was in default when the bond was renewed in 1923.

APPEAL by the plaintiff from the judgment of the Court of Appeal of Saskatchewan (1) which reversed the judgment of Embury J. who, after certain findings of fact by the jury, gave judgment for the plaintiff against the present respondent (defendant) for the sum of $10,000 on a claim made by the plaintiff under a bond entered into by the present respondent as security for the faithful discharge by one Paisley of his duties as treasurer of the plaintiff, a rural municipality incorporated under the *Rural Municipality Act* of Saskatchewan. The Court of Appeal set aside the judgment of Embury J. and ordered that the plaintiff's action against the present respondent be dismissed with costs. By the judgment now reported the plaintiff's appeal was allowed in part, with costs in this Court, and judgment directed to be entered for the plaintiff for $3,600 with the costs of the action, the costs in the Court of Appeal to go to the appellant in that court (the

(1) 21 Sask. L.R. 551; [1927] 2 W.W.R. 577.

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present respondent). The material facts of the case are sufficiently stated in the judgment now reported.

G. H. Yule K.C. for the appellant.

E. B. Jonah K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from the decision of the Court of Appeal of Saskatchewan (1), reversing the judgment in favour of the appellant municipality entered by the trial judge upon the findings of the jury. The action was brought by the municipality against J. R. Paisley, its former secretary-treasurer, for moneys misappropriated by him, and against the respondents (hereinafter called the company) on its bond as surety for Paisley's fidelity.

The material facts briefly are: In January, 1920, the municipality was established under the provisions of *The Rural Municipality Act*. J. B. Fitzmaurice was its first reeve, and J. R. Paisley its first secretary-treasurer. Under the Act the secretary-treasurer was required to furnish to the municipality a bond for the faithful discharge by him of his duties as treasurer, and Paisley furnished the bond sued on herein, which was for $10,000.

On December 18, 1920, the respondents sent to Paisley the following communication:

Renewal No..... Regina, Sask., Dec. 18, 1920.

To. JARED R. PAISLEY,
Ardkenneth, Sask.

Dear Sir:

We beg to notify you that Bond No. 8132 for $10,000 issued by this Company on your behalf to Rural Municipality of Victory No. 226 will expire on the 1st day of January next. Issued the 1st day of January, 1920.

The premium $40 should be paid on or before the date of expiration and a RENEWAL CERTIFICATE secured, otherwise the bond will lapse.

Kindly have the certificate below filled in and signed by your employer and forwarded with remittance for premium to McCallum, Hill & Co., Regina, Sask., when the renewal receipt will be sent you.

Yours respectfully,

E. A. McCALLUM,
President.

(1) 21 Sask. L.R. 551; [1927] 2 W.W.R. 577.

To THE SASKATCHEWAN GUARANTEE & FIDELITY COMPANY, LIMITED,

This is to certify, that the books and accounts of Mr. Jared R. Paisley, Secy.-Treas., were examined by us from time to time in the regular course of business and we found them correct in every respect, all moneys or property in his control or custody being accounted for with proper securities and funds on hand to balance his accounts and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Dated at.....this.....day of.....

Signature of Employer,

.....

Official Capacity,

.....Auditor.

On February 5, 1921, Fitzmaurice, as reeve, signed the said certificate and returned it to the company. On March 1st, 1922, he signed a similar certificate. On March 16, 1923, W. J. Swan, who was then reeve, signed a further certificate, couched in the same language. The certificates were also signed by Wm. C. Inkster, who had been appointed auditor. In the fall of 1923 the council appointed Ronald Griggs & Co., chartered accountants, to make an audit of the accounts of the municipality. Their report shewed that Paisley was short in his cash some $15,000. Hence this action. The main defence of the company was that the allegations of fact contained in the certificates of the reeve, of March 1, 1922, and March 16, 1923, were not true, and that, by reason of the representations contained therein, the company had been induced to continue the bond in force from year to year.

The action was tried before Mr. Justice Embury with a jury.

The questions submitted to the jury were as follows:—

1. Did the defendant Paisley misappropriate moneys of the plaintiff municipality? Answer: Yes.

2. If so, to what amount? Answer: $11,518.69.

3. Did plaintiff municipality on March 1, 1922, represent to the company:

(*a*) That books and accounts of defendant Paisley had been examined by the municipality and its officials from time to time and in the regular course of business and found correct in all respects? Answer: Yes.

(*b*) That all moneys in his control and custody were properly accounted for? Answer: Yes.

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(c) That the said Paisley had performed his duties in an acceptable and satisfactory manner? Answer: Yes.

4. Were the said representations true? Answer: Yes.

5. If not, were they made falsely or recklessly? Answer: No answer.

6. Was each of the said representations material? Answer: Yes.

7. Did defendant the Saskatchewan Guarantee and Fidelity Company rely upon the said representations in agreeing to a renewal of the existing bond? Answer: Yes.

* * * * *

Questions and answers 8 to 12, inclusive, were exactly the same as questions and answers 3 to 7, inclusive, except that they referred to the representations made on March 16, 1923, instead of those made March 1, 1922, the answer to question 9 being the same as to question 4.

Questions 13 and 14 were as follows:

13. Was the defendant, Paisley, in default to the plaintiff municipality on March 1, 1922, and if so, what amount? Answer: No.

14. Was the defendant, Paisley, in default to plaintiff municipality on March 16, 1923, and if so what amount? Answer: Yes. $3,600.

The jury having found that the representations made were true, the trial judge entered judgment for the municipality against the company for $10,000, and against Paisley for $11,518.69.

The company appealed, with the result that this judgment was set aside and judgment entered for the company.

The reasons given by the Court of Appeal for setting aside the judgment were:

That the answers of the jury to questions 4 and 9 were perverse and unreasonable and contrary to the evidence; that Paisley's books and accounts had not been kept in any proper or satisfactory manner; that this was known to Inkster and his knowledge should be imputed to the council, and also that Inkster's representation in the certificates that the books and accounts had been correct in every respect, constituted a representation by the municipality. From that judgment the municipality now appeals to this court and asks that the judgment of the trial judge be restored for the following reasons:

1. That the Court of Appeal had no jurisdiction to substitute its own finding of fact for that of the jury.

2. That the auditor, Inkster, was neither an officer nor an agent of the municipality to make any representations

on its behalf, and his signature to the certificate in no way bound the municipality.

3. That there was evidence on which the jury were entitled to find that the representations made in the said certificates were true.

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1. The jurisdiction of the Court of Appeal to set aside the finding of the jury and to substitute therefor its own finding of fact, has its foundation in Rule 44, which declares that " the court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such *further* or *other order* as the case may require * * *." These words are identical with the language of Order 58, R. 4 of the English Rules, which has been under review in a number of cases, and, although there has been some difference of judicial opinion, the weight of authority is in favour of the view expressed by Lord Atkinson in *Calmenson* v. *Merchants' Warehousing Company Limited* (1), in the following words:

> The principle which should guide the Courts of Review in setting aside, as against the weight of evidence, a verdict found by a jury on issues of fact is shortly and neatly laid down by Lord Herschell in *Metropolitan Railway Company* v. *Wright* (2), in these words: " The case was one within the province of a jury, and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole evidence reasonably, could not properly find."
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> * * * * *
>
> Order LVIII, r. 4, enables a Court of Review to give to the defendant in such an action certain relief in addition to, and going much beyond, that of setting aside the verdict of the jury. It enables the court in certain cases to enter judgment for the defendant. But, according to the authorities, this extra relief should only be granted where the members of the court are of opinion (1) That they have all the facts before them; and (2) that, if a new trial were granted, no further evidence could be given which would alter the result (see *Banbury* v. *Bank of Montreal* (3). See also *Skeate* v. *Slaters, Limited* (4); *Everett* v. *Griffiths* (5).

As the members of the Court of Appeal were of opinion that the answers of the jury to questions 4 and 9 were perverse and that they had all the facts before them and that

(1) (1921) 125 L.T. 129, at p. 131.
(2) (1886) 54 L.T.R. 658; 11 App. Cas. 152, at p. 154.
(3) 119 L.T.R. 446; (1918) A.C. 626.
(4) [1914] 2 K.B. 429.
(5) [1921] 1 A.C. 631.

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no further evidence could be produced which would alter the result, the court, in my opinion, had jurisdiction to draw inferences of fact inconsistent with the finding of the jury, and to give effect to the same.

2. As *The Rural Municipality Act* now reads, I am very doubtful if the auditor of a municipality can properly be called an officer of the corporation but, even if he can, he is an officer only to " audit and report upon all books and accounts affecting the municipality " and certify to the same, and to " notify the minister, the reeve and all the councillors of any negligence, irregularity or discrepancy which he finds in the books or accounts." In no other capacity can he be employed by the municipality. S. 156. He is, therefore, not an officer or agent to make any representation on behalf of the municipality so as to bind it thereby. Nor, in my opinion, does the fact that he signed the certificates constitute a holding out by the municipality that he was authorized to make any representation on its behalf. The company requested Inkster's signature to the certificates because *prima facie* he was the person who had the most accurate knowledge of the state of the books and accounts. The obtaining of his certificate would ordinarily afford the company the most reliable information obtainable as to the performance by Paisley of his duties. That information, however, the company, in my opinion, secures at its own risk from the auditor as an individual and not as a representative of the municipality.

3. Was there evidence upon which the jury as reasonable men could find that the representations contained in the certificates were true?

Before referring to the evidence it may not be inadvisable to point out that the bond in question in this action was not a contract of warranty. There was no express agreement in this case that the truth of any representation made should be a condition precedent to the validity of the bond as in the cases referred to in the respondents' factum, of *Town of Arnprior* v. *U. S. Fidelity & Guaranty Co.* (1); *Railway Passengers' Assurance Co.* v. *Standard Life Assurance Co.* (2); *Dominion of Canada Guaranty & Accident Co.* v. *Housing Commission of Halifax* (3).

(1) (1915) 51 Can. S.C.R. 94. (2) (1921) 63 Can. S.C.R. 79.
(3) [1927] S.C.R. 492.

When the truth of a particular statement has been made the subject of warranty, it is no defence to say that the declaration was made in good faith and with a firm conviction of its accuracy. Neither is it a defence to shew that the representation was immaterial or not relied upon. Where the parties have agreed that the truth of the representation shall form the basis of the contract, the contract is voidable unless the representation is true in fact. Where the truth of the representation is not warranted, its materiality and the reliance placed upon it may be inquired into. Where, however, the truth of the representation is not warranted, but the jury have found that the representation was material and was relied upon, the contract is likewise voidable unless the representation is true, for a material misrepresentation which induces a contract, though innocently made, entitles the other contracting party to have the contract set aside. In the case before us, the jury having found that the representations made in the certificates of March 1, 1922, and March 16, 1923, were material and were relied upon, the company is entitled to have the bond set aside if it can successfully challenge the truth of the statements made. Their truth has been challenged by the company in their notice of appeal to the court below in respect of four representations—two contained in each certificate. The representations challenged in each certificate are: (*a*) That all moneys in the control and custody of the defendant Paisley had been accounted for, and (*b*) that the said Paisley had performed his duties in an acceptable and satisfactory manner.

Dealing first with the challenged representations contained in the certificate of March 1, 1922: What evidence had the jury before them as to their truth or falsity?

In the first place, they had the questions and answers furnished by the municipality when the bond was applied for, and which it was agreed should be taken as the basis of the bond and any subsequent renewal.

Question 12 reads as follows:

(*a*) What means will you use to ascertain whether his accounts are correct? Answer: Auditors.

(*b*) How frequently will they be examined? Answer: Has to be decided by council.

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In view of these questions and answers the jury, in my opinion, would be amply justified in concluding that the company knew and understood that the municipality would depend upon the auditors, and the auditors alone, to ascertain the correctness of Paisley's accounts. As to the correctness of these accounts they had the certificate of Inkster that he had examined the books and accounts for the year 1921, and that he found the same to be correct. They also had his evidence in court that when he finished the final audit for 1921, which was in the month of February, 1922, he checked up the cash and found that Paisley had on hand the amount of money which the audit shewed he should have. Inkster, although not a chartered accountant, had a certificate from the Government of Saskatchewan as an official auditor. As against Inkster's evidence the jury had the testimony of W. T. Scott of the firm of Griggs & Co., chartered accountant, who made the special audit, and whose testimony was to the effect that Paisley had not accounted for all the moneys coming to his hands in 1921. As between these two the jury were at liberty to accept the testimony of one and reject the other.

As to the proper performance by Paisley of his duties, it was contended before us, and held in the court below, that the books were not kept in an acceptable and satisfactory manner; that the test must be: Were they kept in a manner which would be satisfactory to a reasonable man? The fault attributed to Paisley was that he did not keep the books posted up to date. When money was paid to him he would give a receipt therefor, and the stub of the receipt would shew the amount which had been paid, and by whom. But when the auditor came to make his audit he found that all the amounts on the stubs had not been posted in the books, and he himself made the entries in the books which Paisley should have made. This was admitted by Paisley. Notwithstanding that Inkster swore that in making the entries he had written them up as well as he knew how, W. T. Scott, in his evidence, stated that the books had never been properly kept from the first.

Now it is important to note the information the company was seeking to obtain from the municipality by means of the certificate. Although put in the form of an allegation the company was really asking the question: Has he

performed his duties in an acceptable and satisfactory manner? Counsel for the appellant contended that the reeve by that question would understand that the company was asking him if Paisley had performed his duties in a manner satisfactory to him and his fellow councillors, and not if he had performed them in a manner which would be satisfactory to a reasonable man. It is not, in my opinion, material in this case to determine the construction which the reeve should put upon the question, because, applying the test adopted by the Court of Appeal, any man occupying the position of reeve and having before him the auditor's report for the preceding year, might very reasonably answer the question in the affirmative.

Furthermore the certificate, being in the language of the company, is to be construed in favour of the municipality, if it is ambiguous. In *Ontario Metal Products Co.* v. *Mutual Life Ins. Co. of New York* (1), Anglin J. (now Chief Justice) said:

> The insurers put such questions and in such form as they please, but they "are bound so to express them as to leave no room for ambiguity." To such a case the rule *contra proferentem* is eminently applicable.

In *Condogianis* v. *Guardian Assurance Co.* (2), Lord Shaw, in giving the judgment of the Privy Council, said:—

> The more serious proposition arose on the construction of the question and answer. In a contract of insurance it is a weighty fact that the questions are framed by the insurer, and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question.

That the reeve did consider Paisley's work satisfactory is clear. Both he and the other members of the council were abundantly satisfied, not only as to Paisley's integrity, but also with the manner in which he performed his duty.

It was further contended that if any reasonable man had looked into the books he would have known that they had not been kept posted up. I fail to see how he would have known that, unless he also checked over the stubs of receipts for money received. But in any event the reeve testified that he looked at the books generally at each monthly

(1) [1924] S.C.R. 35 at p. 41. (2) [1921] 2 A.C. 125 at p. 130.

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meeting of the council and that as far as his knowledge went the books were kept in good shape. He further says that up to the time he signed the certificate, on March 1, 1922, the auditor had never made a suggestion that there was anything wrong with Paisley's performance of his duties. In his testimony at trial Inkster said that on one occasion he had addressed the council and drawn attention to the fact that Paisley was not keeping his books up to date. At first, he said that this was at the meeting in March, 1922, afterwards, he said it was in 1921. If the jury accepted his first statement they could readily find on the evidence of the reeve that up to March 1, 1922, Inkster had not informed the council of any failure on Paisley's part to keep his books posted to date. The duty of the reeve was

> to be vigilant and active in causing the laws governing the municipality to be duly executed, to inspect the conduct of all municipal officers and so far as in his power to cause all negligence, carelessness and violation of duty to be duly prosecuted and punished. (s. 42).

He was, however, under no obligation to re-audit the auditor's statement, nor was he required to have such a knowledge of book-keeping as would enable him to know whether or not the books were being properly kept. It is clear from his testimony that he did not have that knowledge and I have no doubt that in the western provinces, particularly in those districts which were settled by people from southern or central Europe, there are hundreds of reeves who, if they looked through the books of their respective municipalities from cover to cover, would be unable to tell if they were being properly written up.

As the reeve was not called upon to check either the auditor's statement or the secretary's books, and as the company knew he would rely upon the auditor's statement, the jury, in my opinion, were entitled to affirm the truth of the representations made by the municipality on March 1, 1922: (*a*) that all the money in Paisley's control and custody had been accounted for, and (*b*) that he had performed his duties in an acceptable and satisfactory manner.

There was another contention to which I refer merely to shew that it has not been overlooked. That contention was that the knowledge of the auditor that the books were not written up was the knowledge of the municipality and,

therefore, the certificate of March 1, 1922, could not be true. The answer to this, in my opinion, is two-fold. First, where the parties contract on the understanding that the means which the municipality will take to ascertain the correctness of the accounts contained in the books will be the auditor, and the auditor certifies that he has examined the books and accounts and found them correct, the company cannot be heard to say that any knowledge as to the want of correctness of the books possessed by the auditor, but not communicated to the council, is the knowledge of the municipality. And secondly, that the jury found (3*a*) that the representation that the books had been examined and found correct was true, and no appeal was taken from the finding.

Now we come to the representations contained in the certificate of March 16, 1923. In addition to the matters already referred to we have here additional evidence to consider. That evidence is, that when the representations of March 16, 1923, were made, the reeve and the other members of the council had in their hands the auditor's balance sheet for the year 1922, which shewed a surplus on hand of over $23,000, and they knew that the money representing that surplus was not on hand. To their knowledge they owed the bank over $4,000, and they knew that the school districts were clamouring for payments due which the municipality had no funds to meet. Being convinced that the municipality did not have the money which the balance sheet shewed should have been on hand, Swan asked Paisley for an explanation. His evidence as to the explanation received, is as follows:—

> he explained that that was redemption account, cross-entries, some of it, and some of it was bank loans. Cross-entries and bank loans anyway, I am sure of that. And he seemed to give a fairly good explanation of the matter.

Swan testified that he was satisfied with this explanation. In my opinion he should not have been. However plausible the explanation might appear to Swan to be, he, knowing that the surplus shewn was not on hand, should not have certified to the company that Paisley's accounts were correct, without calling attention to the fact that there was a discrepancy between the auditor's surplus and the treasurer's cash. On this point I need say no more

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than that I agree with the Court of Appeal. The representation of March 16, 1923, that all moneys in Paisley's custody had been properly accounted for was not true, and, even if innocently made, it induced a renewal of the bond for that year. This renewal the company is entitled to have declared void.

In the result, therefore, the finding of the jury that the representations contained in the certificate of March 1, 1922, were true, should be restored. The jury found that when the bond was renewed in 1923, Paisley was already in default to the municipality in the sum of $3,600. For that sum the company, in my opinion, is liable.

I would, therefore, allow the appeal in part and enter judgment for the municipality for $3,600, with interest, the costs of this appeal and the costs of the action, but not the costs of appeal in the court below which go to the appellant in that court.

Appeal allowed in part, with costs.

Solicitor for the appellant: *G. H. Yule.*

Solicitors for the respondent: *Cross, Jonah, Hugg & Forbes.*

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*March 14.
*April 24.

IN THE MATTER OF A REFERENCE AS TO THE MEANING OF THE WORD " PERSONS " IN SECTION 24 OF THE BRITISH NORTH AMERICA ACT, 1867.

Constitutional law—Statute—Senate—Eligibility of women—" Qualified persons "—Meaning—B.N.A. Act, 1867, ss. 23, 24.

Women are not " qualified persons " within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Senate of Canada.

Per Anglin C.J.C. and Mignault, Lamont and Smith JJ.—The authority of *Chorlton* v. *Lings* (L.R. 4 C.P. 374) is conclusive alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of " qualified persons " within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched, so that (if otherwise applicable) Lord Broughams' Act (which enacts that " words importing the masculine gender shall be deemed and taken to include females) cannot be invoked to extend the term " qualified persons " to bring " women " within its purview.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

Per Anglin C.J.C. and Lamont and Smith JJ.—The various provisions of the B.N.A. Act passed in the year 1867 bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were enacted. If the phrase "qualified persons" in section 24 includes women to-day, it has so included them since 1867. But it must be inferred that the Imperial Parliament, in enacting sections 23, 24, 25, 26 and 32 of the B.N.A. Act, when read in the light of other provisions of the statute and of relevant circumstances proper to be considered, did not give to women the power to exercise the public functions of a senator, at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House.

Per Duff J.—It seems to be a legitimate inference that the B.N.A. Act, in enacting the sections relating to the "Senate," contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same, though, necessarily, in detail, not identical, with that of the Legislative Councils established by the earlier statutes of 1791 and 1840; and, under those statutes, it is hardly susceptible of dispute that women were not eligible for appointment.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act* of certain question for hearing and consideration as to the meaning of the word "persons" in section 24 of the British North America Act, 1867.

The Order in Council providing for the reference was dated 19th October, 1927 and reads as follows:

"The Committee of the Privy Council have had before "them a Report, dated 18th October, 1927, from the Min- "ister of Justice, submitting that he has had under con- "sideration a petition to Your Excellency in Council dated "the 27th August, 1927 (P.C. 1835), signed by Henrietta "Muir Edwards, Nellie L. McClung, Louise C. McKinney, "Emily F. Murphy and Irene Parlby, as persons interested "in the admission of women to the Senate of Canada, "whereby Your Excellency in Council is requested to refer "to the Supreme Court of Canada for hearing and consid- "eration certain questions touching the power of the Gov- "ernor General to summon female persons to the Senate of "Canada.

"The Minister observes that by section 24 of the British "North America Act, 1867, it is provided that:—

'The Governor General shall from Time to Time, 'in the Queen's Name, by Instrument under the Great

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'Seal of Canada, summon qualified Persons to the 'Senate; and, subject to the Provisions of this Act, 'every Person so summoned shall become and be a 'Member of the Senate and a Senator.'

"In the opinion of the Minister the question whether "the word 'Persons' in said section 24 includes female "persons is one of great public importance.

"The Minister states that the law officers of the Crown "who have considered this question on more than one oc- "casion have expressed the view that male persons only "may be summoned to the Senate under the provisions of "the British North America Act in that behalf.

"The Minister, however, while not disposed to question "that view, considers that it would be an Act of justice to "the women of Canada to obtain the opinion of the "Supreme Court of Canada upon the point.

"The Committee therefore, on the recommendation of "the Minister of Justice, advise that Your Excellency may "be pleased to refer to the Supreme Court of Canada for "hearing and consideration the following question:—

"Does the word 'Persons' in section 24 of the British "North America Act, 1867, include female persons?"

Pursuant to an order of the court, notification of the hearing of the reference was sent to the Attorneys General of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan and to the above petitioners. The Attorneys General of the provinces of Quebec and Alberta were represented by counsel at the hearing.

Hon. Lucien Cannon K.C., Solicitor-General, *Eug. Lafleur K.C.* and *C. P. Plaxton K.C.* for the Attorney General of Canada.

N. W. Rowell K.C. and *G. C. Lindsay* for the petitioners.

Chas. Lanctot K.C. for the Attorney General for Quebec.

N. W. Rowell K.C. for the Attorney General for Alberta.

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ANGLIN C.J.C.—By Order of the 19th of October, 1927, made on a petition of five ladies, His Excellency the Governor in Council was pleased to refer to this court "for hearing and consideration" the question:

"Does the word 'Persons' in section 24 of the *British North America Act,* 1867, include female persons?"

Notice of this reference was published in the *Canada Gazette* and notice of the hearing was duly given to the petitioners and to each of the Attorneys General of the several provinces of Canada. Argument took place on the 14th of March last when counsel were heard representing the Attorney General of Canada, the Attorneys General of the provinces of Quebec and Alberta and the petitioners.

Section 24 is one of a group, or fasciculus of sections in the *British North America Act,* 1867, numbered 21 to 36, which provides for the constitution of the Senate of Canada. This group of sections (omitting three which are irrelevant to the question before us) reads as follows:

THE SENATE

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

* * * *

23. The Qualification of a Senator shall be as follows:

(2) He shall be of the full age of Thirty Years;

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Francalleu or in Roture, within the Province for which he is appointed, of the value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four Thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified

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Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

28. The Number of Senators shall not at any Time exceed Seventy-eight.

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

31. The Place of a Senator shall become vacant in any of the following Cases:—

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate.

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or any Infamous Crime;

(5) If he ceases to be qualified in respect of Property or of Residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by summons to a fit and qualified Person fill the Vacancy.

33. If any question arises respecting the qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

* * *

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

* * *

The *British North America Act*, 1867, does not contain provisions in regard to the Senate corresponding to its sections 41 and 52, which, respectively, empower the Parliament of Canada from time to time to alter the qualifications or disqualifications of persons to be elected to the House of Commons and to determine the number of members of which that House shall consist. Except in regard to the number of Senators required to constitute a quorum (s. 35), the provisions affecting the constitution of the Senate are subject to alteration only by the Imperial Parliament.

Section 33 which empowers the Senate to hear and determine any question that may arise respecting the qualification of a Senator, applies only after the person whose qualification is challenged has been appointed or summoned to the Senate. That section is probably no more than declaratory of a right inherent in every parliamentary body. (*Vide* clause 1 of the preamble to the B.N.A. Act and the quotation of Lord Lyndhurst's language made from MacQueen's Debates on The Life Peerage Question, at p. 300, by Viscount Haldane in Viscountess Rhondda's Claim (1).

It should be observed that, while the question now submitted by His Excellency to the court deals with the word "Persons," section 24 of the B.N.A. Act speaks only of "qualified Persons"; and the other sections empowering the Governor General to make appointments to the Senate (26 and 32) speak, respectively, of "qualified Persons" and of "fit and qualified Persons." The question which we have to consider, therefore, is whether "female persons" are qualified to be summoned to the Senate by the Governor General; or, in other words—Are women eligible for appointment to the Senate of Canada? That question it is the duty of the court to "answer" and to "certify to the Governor in Council for his information * * * its opinion * * * with the reasons for * * * such answer." *Supreme Court Act*, R.S.C. [1927] c. 35, s. 55, subs. 2.

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to

(1) [1922] 2 A.C. 339, at pp. 384-5.

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construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.

Passed in the year 1867, the various provisions of the B.N.A. Act (as is the case with other statutes, *Bank of Toronto* v. *Lambe*) (1) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

In a passage from *Stradling* v. *Morgan* (2), often quoted, the Barons of the Exchequer pointed out that:

> The Sages of the Law heretofore have construed Statutes quite contrary to the Letter in some appearance, and those Statutes which comprehend all things in the Letter they have expounded to extend but to some Things, and those which generally prohibit all people from doing such an Act they have interpreted to permit some People to do it and those which include every Person in the Letter they have adjudged to reach to some Persons only, which Expositions have always been founded upon the Intent of the Legislature, which they have collected sometimes by considering the cause and Necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign Circumstances. So that they have been guided by the Intent of the Legislature, which they have always taken according to the Necessity of the Matter, and according to that which is consonant with Reason and good Discretion.

"In deciding the question before us", said Turner L. J., in *Hawkins* v. *Gathercole* (3),

> we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.

Two well-known rules in the construction of statutes are that, where a statute is susceptible of more than one meaning, in the absence of express language an intention to abrogate the ordinary rules of law is not to be imputed to Parliament (*Wear Commissioners* v. *Adamson* (4)); and,

> as they are framed for the guidance of the people, their language is to be considered in its ordinary and popular sense, per Byles J., in *Chorlton* v. *Lings* (5).

Two outstanding facts or circumstances of importance bearing upon the present reference appear to be

(1) [1887] 12 A.C. 575, at p. 579.
(2) 1 Plowd. 203, at p. 205.
(3) 6 DeG. M. & G., 1, at p. 21.
(4) (1876) 1 Q.B.D. 546 at p. 554.
(5) (1868) L.R. 4 C.P. 374, at p. 398.

(*a*) that the office of Senator was a *new* office first created by the B.N.A. Act.

It is an office, therefore, which no one apart from the enactments of the statute has an inherent or common law right of holding, and the right of any one to hold the office must be found within the four corners of of the statute which creates the office, and enacts the conditions upon which it is to be held, and the persons who are entitled to hold it; (*Beresford-Hope* v. *Sandhurst* (1), per Lord Coleridge, C.J.);

(*b*) that by the common law of England (as also, speaking generally, by the civil and the canon law: *foeminae ab omnibus officiis civilibus vel publicis remotae sunt*) women were under a legal incapacity to hold public office, referable to the fact (as Willes J., said in *Chorlton* v. *Lings* (2), that in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

The same very learned judge had said, at p. 388:

Women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would be quite inconsistent with one of the glories of our civilization, the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in Selden, de Synedriis Veterum Ebraeorum, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex (*honestatis privilegium*): Selden's Works, vol. 1, pp. 1083-1085. Selden refers to many systems of law in which this exclusion prevailed, including the civil law and the canon law, which latter, as we know, excluded women from public functions in some remarkable instances. With respect to the civil law, I may add a reference to the learned and original work of Sir Patrick Colquhon (*sic*) on the Roman Law, vol. 1, c. 580, where he compares the Roman system with ours, and states that a woman "cannot vote for members of parliament, or sit in either the House of Lords or Commons."

As put by Lord Esher, M. R. (who, however, says he had "a stronger view than some of (his) brethern") in *Beresford-Hope* v. *Sandhurst* (3)

I take the first proposition to be that laid down by Willes J., in the case of *Chorlton* v. *Lings* (4). I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public functions. Willes J., stated so in that case, and a more learned judge never lived.

(1) (1889) 23 Q.B.D. 79, at p. 91.
(2) L.R. 4 C.P. 374, at p. 392.
(3) 23 Q.B.D. 79, at p. 95.
(4) L.R. 4 C.P. 374.

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While Willes, J., had spoken of "judicial and like public functions" at p. 388, the tenor of his judgment indicates unmistakably that it was his view that to the legal incapacity of women for public office there were few, if any, exceptions. See *De Sousa* v. *Cobden* (1).

The same idea is expressed by Viscount Birkenhead L.C., in rejecting The Viscountess Rhondda's Claim to a Writ of Summons to the House of Lords (2).

> By her sex she is not—except in a wholly loose and colloquial sense—disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi termini* cannot include this right

Viscount Haldane, who dissented in the *Rhondda Case* (2), said, at p. 386:

> The reason why peeresses were not entitled to it (the writ of summons) was simply that as women they could not exercise the public function. That appears to have been the considered conclusion of James Shaw Willes J., one of the most learned and accurate exponents of the law of England who ever sat on the Bench. He says in *Chorlton* v. *Lings* (3) that the absence of all rights of this kind is referable to the fact that by the common law women have been excused from taking any part in public affairs.

Reference may also be had to *Brown* v. *Ingram* (4); *Hall* v. *Incorporated Society of Law Agents* (5); *Rex* v. *Crossthwaite* (6), and to the judgment of Gray C.J., in *Robinson's Case* (7), and also to Pollock & Maitland's History of English Law, vol. 1, pp. 465-8.

Prior to 1867 the common law legal incapacity of women to sit in Parliament had been fully recognized in the three provinces—Canada (Upper and Lower), Nova Scotia and New Brunswick, which were then confederated as the Dominion of Canada.

Moreover, paraphrasing an observation of Lord Coleridge C.J., in *Beresford-Hope* v. *Sandhurst* (7), it is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges

(1) [1891] 1 Q.B. 687, at p. 691.
(2) [1922] 2 A.C. 389, at p. 362.
(3) L.R. 4 C.P. 374
(4) (1868) 7 Court of Sess. Cases, 3rd Series, 281.
(5) (1901) 38 Scottish Law Reporter, 776.
(6) (1864) 17 Ir. C.L.R. 157, 463, 479.
(7) (1881) 131 Mass., 371, at p. 379.
(8) 23 Q.B.D. 79, at pp. 91, 92.

of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to women. That has been going on, and surely it is a significant fact, that never from 1867 to the present time has any woman ever sat in the Senate of Canada, nor has any suggestion of women's eligibility for appointment to that House until quite recently been publicly made.

Has the Imperial Parliament, in sections 23, 24, 25, 26 and 32 of the B.N.A. Act, read in the light of other provisions of the statute and of relevant circumstances proper to be considered, given to women the capacity to exercise the public functions of a Senator? Has it made clear its intent to effect, so far as the personnel of the Senate of Canada is concerned, the striking constitutional departure from the common law for which the petitioners contend, which would have rendered women eligible for appointment to the Senate at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House? Has it not rather by clear implication, if not expressly, excluded them from membership in the Senate? Such an extraordinary privilege is not conferred furtively, nor is the purpose to grant it to be gathered from remote conjectures deduced from a skilful piecing together of expressions in a statute which are more or less precisely accurate. (*Nairn* v. *University of St. Andrews* (1). When Parliament contemplates such a decided innovation it is never at a loss for language to make its intention unmistakable. "A judgment", said Lord Robertson in the case last mentioned, at pp. 165-6

> is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

There can be no doubt that the word "persons" when standing alone *prima facie* includes women. (Per Loreburn L.C., *Nairn* v. *University of St. Andrews* (1)). It connotes human beings—the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult. Hence the propriety of the restriction placed upon it by the immediately preceding word "qualified" in ss. 24 and 26 and the words "fit and qualified" in

(1) [1909] A.C. 147, at p. 161.

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s. 32, which exclude the criminal and the lunatic or imbecile as well as the minor, who is explicitly disqualified by s. 23 (1). Does this requirement of qualification also exclude women?

Ex facie, and apart from their designation as "Senators" (s. 21), the terms in which the qualifications of members of the Senate are specified in s. 23 (and it is to those terms that reference is made by the word "qualified" in s. 24) import that men only are eligible for appointment. In every clause of s. 23 the Senator is referred to by the masculine pronoun—"he" and "his"; and the like observation applies to ss. 29 and 31. *Frost* v. *The King* (1). Moreover, clause 2 of section 23 includes only "natural-born" subjects and those "naturalized" under statutory authority and not those who become subjects by marriage—a provision which one would have looked for had it been intended to include women as eligible.

Counsel for the petitioners sought to overcome the difficulty thus presented in two ways:

(*a*) by a comparison of s. 24 with other sections in the B.N.A. Act, in which, he contended, the word "persons" is obviously used in its more general signification as including women as well as men, notably ss. 11, 14 and 41.

(*b*) by invoking the aid of the statutory interpretation provision in force in England in 1867—13-14 Vict., c. 21, s. 4, known as Lord Brougham's Act—which reads as follows:

> Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided.

(*a*) A short but conclusive answer to the argument based on a comparison of s. 24 with other sections of the B.N.A. Act in which the word "persons" appears is that in none of them is its connotation restricted, as it is in s. 24, by the adjective "qualified." "Persons" is a word of equivocal signification, sometimes synonymous with human beings, sometimes including only men.

> It is an ambiguous word, says Lord Ashbourne, and must be examined and construed in the light of surrounding circumstances and constitutional law *Nairn* v. *University of St. Andrews* (2).

(1) [1919] Ir. R. 1 Ch. 81, at p. 91. (2) [1909] A.C. 147, at p. 162.

In section 41 of the B.N.A. Act, which deals with the qualifications for membership of the House of Commons and of the voters at elections of such members, "persons" would seem to be used in its wider signification, since, while in both these matters the legislation affecting the former Provincial Houses of Assembly, or Legislative Assemblies, is thereby made applicable to the new House of Commons, it remains so only "until the Parliament of Canada otherwise provides." It seems reasonably clear that it was intended to confer on the Parliament of Canada an untrammelled discretion as to the personnel of the membership of the House of Commons and as to the conditions of and qualifications for the franchise of its electorate; and so the Canadian Parliament has assumed, as witness the *Dominion Elections Act,* R.S.C., 1927, c. 53, ss. 29 and 38. It would, therefore, seem necessary to give to the word "persons" in s. 41 of the B.N.A. Act the wider signification of which it is susceptible in the absence of adjectival restriction.

But, in s. 11, which provides for the constitution of the new Privy Council for Canada, the word "persons", though unqualified, is probably used in the more restricted sense of "male persons." For the public offices thereby created women were, by the common law, ineligible and it would be dangerous to assume that by the use of the ambiguous term "persons" the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women, as would be involved in making them eligible for selection as Privy Councillors. A similar comment may be made upon s. 14, which enables the Governor General to appoint a Deputy or Deputies.

As put by Lord Loreburn in *Nairn* v. *University of St. Andrews* (1):

> It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.

With Lord Robertson (*ibid.* at pp. 165-6), to mere "verbal possibilities" we prefer "subject-matter and fundamental constitutional law as guides of construction." When Parliament intends to overcome a fundamental constitutional incapacity it does not employ such an equivocal expression as is the word " persons " when used in regard to eligibility

(1) [1909] A.C. 147, at p. 161.

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for a newly created public office. Neither from s. 11 or s. 14 nor from s. 41, therefore, can the petitioners derive support for their contention as to the construction of the phrase "qualified persons" in s. 24.

Section 63 of the B.N.A. Act, the only other section to which Mr. Rowell referred, deals with the constitution of the Executive Councils of the provinces of Ontario and Quebec. But, since, by s. 92 (1), each provincial legislature is empowered to amend the constitution of the province except as regards the office of Lieutenant-Governor, the presence of women as members of some provincial executive councils has no significance in regard to the scope of the phrase "qualified persons" in s. 24 of the B.N.A. Act.

(*b*) "Persons" is not a "word importing the masculine gender." Therefore, *ex facie,* Lord Brougham's Act has no application to it. It is urged, however, that that statute so affects the word "Senator" and the pronouns "he" and "his" in s. 23 that they must be "deemed and taken to include Females", "the contrary" not being "expressly provided."

The application and purview of Lord Brougham's Act came up for consideration in *Chorlton* v. *Lings* (1), where the Court of Common Pleas was required to construe a statute (passed, like the *British North America Act,* in 1867) which conferred the parliamentary franchise on "every man" possessing certain qualifications and registered as a voter. The chief question discussed was whether, by virtue of Lord Brougham's Act, "every man" included "women". Holding that "women" were "subject to a legal incapacity from voting at the election of members of Parliament", the court unanimously decided that the word "man" in the statute did not include a "woman". Having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, Bovill C.J., declined to accept the view that Parliament had made that change by using the term "man" and held that

this word was intentionally used expressly to designate the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have

(1) (1868) L.R. 4 C.P. 374.

the franchise. In that view, Lord Brougham's Act does not apply to the present case, and does not extend the meaning of the word "man" so as to include "women." (386-7).

Willes J., said, at p. 387:

I am of the same opinion. The application of the Act, 13-14 Vict., c. 21, (Lord Brougham's Act) contended for by the appellant is a strained one. It is not easy to conceive that the framer of the Act, when he used the word "expressly," meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies, is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammer and law, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing.

Byles J., said, at p. 393:

The difficulty, if any, is created by the use of the word "*expressly.*" But that word does not necessarily mean "expressly excluded by words" . . . The word "expressly" often means no more than plainly, clearly, or the like; as will appear on reference to any English dictionary.

And he concluded:

I trust * * * our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance.

Keating J., said, at pp. 394-5:

Considering that there is no evidence of women ever having voted for members of parliament in cities or boroughs, and that they have been deemed for centuries to be legally incapable of so doing, one would have expected that the legislature, if desirous of making an alteration so important and extensive as to admit them to the franchise, would have said so plainly and distinctly: whereas, in the present case, they have used expressions never before supposed to include women when found in previous Acts of Parliament of a similar character. * * * But it is said that the word "man" in the present Act must be construed to include "woman" because by 13-14 Vict., c. 21, s. 4, it is enacted that "In all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided." Now all that s. 4 of 13 and 14 Vict., c. 21 could have meant by the enactment referred to was, that, in future Acts, words importing the masculine gender should be taken to include females, where a contrary intention should not appear. To do more would be exceeding the competency of Parliament with reference to future legislation.

The later *Interpretation Act* of 1889 (52-53 Vict., c. 63), which (s. 41) repealed Lord Brougham's Act, substituted by s. 1, under the heading "Re-enactment of Existing Rules" for its words "unless the contrary as to Gender and Number is expressly provided" their equivalent, suggested by Mr. Justice Keating, "unless the contrary intention appears". *Frost* v. *The King* (1).

(1) [1919] Ir. R. 1 Ch. 81, at pp. 89, 95.

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Anglin C.J.C.

Keating J. concluded his judgment by saying (p. 396):

Mr. Coleridge, who ably argued the case for the appellant, made an eloquent appeal as to the injustice of excluding females from the exercise of the franchise. This, however, is not a matter within our province. It is for the legislature to consider whether the existing incapacity ought to be removed. But, should Parliament in its wisdom determine to do so, doubtless it will be done by the use of language very different from anything that is to be found in the present Act of Parliament.

Similar views prevailed in *The Queen* v. *Harrald* (1), and *Bebb* v. *The Law Society* (2).

The decision in *Chorlton* v. *Lings* (3) is of the highest authority, as was recognized in the House of Lords by Earl Loreburn, L.C., in *Nairn* v. *University of St. Andrews* (4), and again by Viscount Birkenhead, L.C., in rejecting the claim of Viscountess Rhondda to sit in the House of Lords, with the concurrence of Viscount Cave, and Lords Atkinson, Phillimore, Buckmaster, Sumner and Carson, as well as by Viscount Haldane, who dissented (5).

In his speech, at p. 375, the Lord Chancellor said:—

It is sufficient to say that the Legislature in dealing with this matter cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House. And I am content to base my judgment on this alone.

In our opinion *Chorlton* v. *Lings* (3) is conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of "qualified persons" within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched (*New South Wales Taxation Commissioners* v. *Palmer*) (6), so that Lord Brougham's Act cannot be invoked to extend those terms to bring "women" within their purview.

We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not "qualified persons" within the meaning of that section. The question submitted, understood as above indicated, will, accordingly, be answered in the negative.

(1) (1872) L.R. 7 Q.B. 361.
(2) [1914] 1 Ch. 286.
(3) L.R. 4 C.P. 374.
(4) [1909] A.C. 147.
(5) [1922] 2 A.C. 339.
(6) [1907] A.C. 179, at p. 184.

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DUFF J.—The interrogatory submitted is, in effect, this: Is the word "persons" in section 24 of the B.N.A. Act the equivalent of male persons? "Persons" in the ordinary sense of the word includes, of course, natural persons of both sexes. But the sense of words is often radically affected by the context in which they are found, as well as by the occasion on which they are used; and in construing a legislative enactment, considerations arising not only from the context, but from the nature of the subject matter and object of the legislation, may require us to ascribe to general words a scope more restricted than their usual import, in order loyally to effectuate the intention of the legislature. And for this purpose, it is sometimes the duty of a court of law to resort, not only to other provisions of the enactment itself, but to the state of the law at the time the enactment was passed, and to the history, especially the legislative history, of the subjects with which the enactment deals. The view advanced by the Crown is that following this mode of approach, and employing the legitimate aids to interpretation thus indicated, we are constrained in construing section 24, to read the word "persons" in the restricted sense above mentioned, and to construe the section as authorizing the summoning of male persons only.

The question for decision is whether this is the right interpretation of that section.

It is convenient first to recall the general character and purpose of the B.N.A. Act. The object of the Act was to create for British North America, a system of parliamentary government under the British Crown, the executive authority being vested in the Queen of the United Kingdom. While the system was to be a federal or quasi federal one, the constitution was, nevertheless, to be "similar in principle" to that of the United Kingdom; a canon involving the acceptance of the doctrine of parliamentary supremacy in two senses, first that Parliament and the Legislatures, unlike the legislatures and Congress in the U.S., were, subject to the limitations necessarily imposed by the division of powers between the local and central authorities, to possess, within their several spheres, full jurisdiction, free from control by the courts; and second, in the sense of parliamentary control over the executive, or

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executive responsibility to Parliament. In pursuance of this design, Parliament and the local legislatures were severally invested with legislative jurisdiction over defined subjects which, with limited exceptions, embrace the whole field of legislative activity.

More specifically, the legislative authority of Parliament extends over all matters concerning the peace, order and good government of Canada; and it may with confidence be affirmed that, excepting such matters as are assigned to the provinces, and such as are definitely dealt with by the Act itself, and subject, moreover, to an exception of undefined scope having relation to the sovereign, legislative authority throughout its whole range is committed to Parliament. As regards the executive, the declaration in the preamble already referred to, involves, as I have said, as a principle of the system, the responsibility of the executive to Parliament.

The argument advanced before us in favour of the limited construction is this: Women, it is said, at the time of the passing of the B.N.A. Act, were, under the common law, as well as under the civil law, relieved from the duties of public office or place, by a general rule of law, which affected them (except in certain ascertained or ascertainable cases) with a personal incapacity to accept or perform such duties; and, in particular, women were excluded by the law and practice of parliamentary institutions, both in England and in Canada, and indeed in the English speaking world, from holding a place in any legislative or deliberative body, and from voting for the election of a member of any such body. It must be assumed, it is said, that if the authors of the B.N.A. Act had intended, in the system established by the Act, to depart from this law or practice sanctioned by inveterate policy, the intention would have been expressed in unmistakeable and explicit words. The word "persons," it is said, when employed in a statute, dealing with the constitution of a legislative body, and with cognate matters, does not necessarily include female persons, and in an enactment on such a subject passed in the year 1867 *prima facie* excludes them.

In support of this view, a series of decisions and judgments, from 1868 to 1922, delivered by English judges

of the highest authority, are adduced, in which it was held that such general words were not in themselves adequate evidence of an intention to reverse the inveterate usage and policy in respect of the exclusion of women from the parliamentary franchise, from the legal professions, from a university Senate, from the House of Lords; and in particular, two judgments of Lord Loreburn and Lord Birkenhead, which, pronounced with convincing force, against reading a modern statute in such a manner as to effect momentous changes in the political constitution of the country, by, in the one case, admitting women to the parliamentary franchise, and in the other, to the House of Lords, in the absence of words plainly and explicitly declaring that such was the intention of Parliament.

Section 24, of course, in applying this principle, must not be treated as an independent enactment. The Senate is part of a parliamentary system; and, in order to test the contention, based upon this principle, that women are excluded from participating in working the Senate or any of the other institutions set up by the Act, one is bound to consider the Act as a whole, in its bearing on this subject of the exclusion of women from public office and place. Obviously, there are three general lines or policy which the authors of the statute might have pursued in relation to that subject. First, they might by a constitutional rule embodied in the statute, have perpetuated the legal rule affecting women with a personal incapacity for undertaking public duties, thus placing this subject among the limited number of subjects that are withdrawn from the authority of Parliament and the legislatures; second, they might, by a constitutional rule, in the opposite sense, embodied in the Act, have made women eligible for all public places or offices, or any of them, and thus, or to that extent, also, have withdrawn the subject from the legislative jurisdiction created by the act. They might, on the other hand, with respect to all public employments, or with respect to one or more of them, have recognized the existence of the legal incapacity, but left it to Parliament and the legislatures to remove that incapacity, or to perpetuate it as they might see fit. For example, they might have restricted the Governor in Council, in summoning persons to the Senate under section 24, by requiring him to address his sum-

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mons to persons only who are under no such legal incapacity, which would have made women ineligible, but only so long as such incapacity remained, and at the same time have left it within the power of the Parliament to obliterate the cause of the disability. The generality of the word "persons" in section 24 is, in point of law, susceptible of any qualification necessary to bring it into harmony with any of those three possible modes of treating the subject.

I have been unable to accept the argument in support of the limited construction, in so far as it rests upon the view that in construing the legislative and executive powers granted by the B.N.A. Act, we must proceed upon a general presumption against the eligibility of women for public office. I have come to the conclusion that there is a special ground, which I will state later, upon which the restricted construction of section 24 must be maintained but before stating that, I think it is right to explain why it is I think the general presumption contended for, has not been established.

And first, one must consider the provisions of the Act themselves, apart from the "extraneous circumstances", except for such references as may be necessary to make the enactments of the Act intelligible.

It would, I think, hardly be disputed that, as a general rule, the legislative authority of Parliament, and of legislatures enables them, each in their several fields, to deal fully with this subject of the incapacity of women. You could not hold otherwise without refusing effect to the language of secs. 91 and 92; and indeed, one feels constrained to say, without ignoring the fact that the authors of the Act were engaged in creating a system of representative government for the people of half a continent. Counsel did, in the course of argument, suggest the possibility that Parliament, in extending the Parliamentary franchise to women, had exceeded its powers, but I do not think that was seriously pressed.

There can be no doubt that the Act does, in two sections, recognize the authority of Parliament and of the legislatures, to deal with the disqualification of women to be elected, or sit or vote as members of the representative body, or to vote in an election of such members. These sections are 41 and 84.

I quote section 41 in full,

Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

To appreciate the purport of this section, it is necessary to note that in all the confederated provinces, women were disqualified as voters, that in one of the provinces, they were excluded, *co nomine,* from places in the Legislative Assembly, and that in another, they were expressly excluded, but referentially, by the disqualification of all persons not qualified to vote; the right to vote having been confined explicitly to males. The phrase therefore "disqualification of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the various provinces", denotes disqualifications, which include *inter alia* disqualifications of women, while at the same time, the section recognizes the authority of the Dominion to legislate upon that subject. Mr. Rowell seemed to suggest that the legislative authority of Parliament, on the subject of qualification of members and voters, is derived from this section. I do not think so. It is given, it seems to me, under the general language of section 91, which obviously in its terms embraces it; but that does not affect the substance of the argument founded upon the section, which recognizes in the clearest manner, and by express reference, the authority of Parliament to deal with the subject of the disqualification of women in those aspects, women being demonstrably comprehended under the *nomen generale* "persons". This section 41 is taken almost *verbatim* from section 26 of the Quebec Resolutions, upon which the B.N.A. Act was mainly founded. It is difficult

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to suppose that the members of the Conference, who agreed upon these Resolutions, were unaware that, in that section, they were dealing with the subject. Section 84 is expressed in the same terms, and there can, I think, be no warrant for attributing to the phrase quoted (or to the word "persons" which is part of it), diverse effects in the two sections. Indeed, there can be no doubt, that the province of Canada had enjoyed full authority under the Act of Union (and probably the Maritime provinces as well) to legislate upon the constitution of the Legislative Assembly, and the right to vote in the election of members to that body. Nor is it, I think, doubtful that, under section 1 of the *Union Act Amendment Act*, 1854, the legislature of Canada had full power to deal with the subject of qualifications of members of the Legislative Council, and to determine (subject it is true, to any bill upon the subject being reserved for Her Majesty's pleasure), whether or not women (here again comprehended in that section under the generic word "persons") should be eligible for places therein.

The subject of the qualification and disqualification of women as members of the House of Commons, being thus recognized as within the jurisdiction of Parliament, is it quite clear that the construction of the general words of section 11 dealing with the constitution of the Privy Council, is governed by the general presumption suggested? Inferentially, in laying down the "principle" of the British Constitution as the foundation of the new policy, the preamble recognizes, as stated above, the responsibility of the Executive to Parliament, or rather to the elective branch of the legislature, and the right of Parliament to insist that the advisers of the Crown shall be persons possessing its "confidence", as the phrase is.

The subject of "responsible government," as the phrase went, had been for many years the field of a bitter controversy, especially in the province of Canada. The Colonial office had encountered great difficulties in reconciling, in practice, the full adoption of this principle with proper recognization of the position of the Governor as the representative of the Imperial Government. It was only a few years before 1867 that Sir John Macdonald's suggestion had been accepted, by which "Governor-in-Council" in Commissions, Instructions and Statutes was read as the

Governor acting on the advice of his Council, which was thus enabled to transact business in the Governor's absence. There can be no doubt that this inter-relation between the executive and the representative branches of the government was, in the view of the framers of the Act, a most important element in the constitutional principles which they intended to be the foundation of the new structure.

It might be suggested, I cannot help thinking, with some plausibility, that there would be something incongruous in a parliamentary system professedly conceived and fashioned on this principle, if persons fully qualified to be members of the House of Commons were by an iron rule of the constitution, a rule beyond the reach of Parliament, excluded from the Cabinet or the Government; if a class of persons who might reach any position of political influence, power or leadership in the House of Commons, were permanently, by an organic rule, excluded from the Government. In view of the intimate relation between the House of Commons and the Cabinet, and the rights of initiation and control, which the Government possesses in relation to legislation and parliamentary business generally, and which, it cannot be doubted, the authors of the Act intended and expected would continue, that would not, I think, be a wholly baseless suggestion.

The word "persons" is employed in a number of sections of the Act (secs. 41, 83, 84 and 133) as designating members of the House of Commons, and though the word appears without an adjective, indubitably it is used in the unrestricted sense as embracing persons of both sexes; while in secs. 41 and 84, where males only are intended, that intention is expressed in appropriate specific words.

Such general inferences therefore as may arise from the language of the Act as a whole cannot be said to support a presumption in favour of the restricted interpretation.

Nor am I convinced that the reasoning based upon the "extraneous circumstances" we are asked to consider—the disabilities of women under the common law, and the law and practice of Parliament in respect of appointment to public place or office—establishes a rule of interpretation for the *British North America Act*, by which the construction of powers, legislative and executive, bestowed in gen-

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eral terms is controlled by a presumptive exclusion of women from participation in the working of the institutions set up by the Act.

When a statutory enactment expressed in general terms is relied upon as creating or sanctioning a fundamental legal or political change, the nature of the supposed change may, in itself, be such as to leave no doubt that it could have been effected, or authorized, if at all, only after full deliberation, and that the intention to do so would have been evidenced in apt or unmistakable enactments. In *Cox* v. *Hakes* (1), Lord Halsbury was content to rest his judgment on his conviction that, in a matter affecting vitally the legal securities for personal freedom, the "policy of centuries" would not be reversed by Parliament, by the use of a single general phrase; and in the decisions concerning the disabilities of women, from 1868 to 1922, a similar line of reasoning played no insignificant part, as we have seen. Such reasoning has also been considered to give support to the view that the prerogative of Her Majesty, in relation to appeals, was left untouched by the *British North America Act; Nadon* v. *The King* (2); and by the (Australian) *Commonwealth Constitution Act, Webb* v. *Outrim* (3); and was applied by the Supreme Court of the United States in reaching the conclusion that the 14th Amendment of the United States Constitution did not compel the States to admit women to the exercise of the legislative franchise. *Minor* v. *Happissett* (4).

But this mode of approach, though recognized by the courts as legitimate, must obviously be employed with caution. The "extraneous facts" upon which the underlying assumption is founded, must be demonstrative. It will not do to act upon the general resemblances between the questions presented here, and that presented in the cases cited. Those cases were concerned with the effect of statutes which might at any time be repealed or amended by a majority. They had nothing to do with the jurisdiction of Parliament or with that of His Majesty in Council executing the highest and constitutional functions under

(1) 15 App. Cas. 506.
(2) [1926] A.C. 482 at pp. 494, 495.
(3) [1907] A.C. 81 at pp. 91, 92.
(4) 22 L.C.P. 627 at p. 630.

his responsibility to Parliament; and were not intended to lay down binding rules, for an indefinite future, in the working of a Constitution. And, above all, they were not concerned with broad provisions establishing new parliamentary institutions, and defining the spheres and powers of legislatures and executives, in a system of representative government. Passages in the judgments, of seemingly general import, must be read *secundum subjectam materiam.*

Let me illustrate this by reference to the Canadian Privy Council and the Provincial Executives. In 1867, it would have been a revolutionary step to appoint a woman to the Privy Council or to an Executive Council in Canada —nobody would have thought of it. But it would also have been a radical departure to make women eligible for election to the House of Commons, or to confer the electoral franchise upon them; to make them eligible as members of a provincial legislature, or for appointment to a provincial legislative council. And yet it is quite plain that, with respect to all these last-mentioned matters, the fullest authority was given and given in general terms to Parliament and the legislatures within their several spheres; the "policy of centuries" being left in the keeping of the representative bodies, which with the consent of the people of Canada, were to exercise legislative authority over them.

In view of this, I do not think the "extraneous facts" relied upon are really of decisive importance, especially when the phraseology of the particular sections already mentioned is considered; and their value becomes inconsiderable when compared with reasons deriving their force from the presumption that the Constitution in its executive branch was intended to be capable of adaptation to whatever changes (permissible under the Act) in the law and practice relating to the election branch might be progressively required by changes in public opinion.

Then, assuming that the considerations relied upon are potent enough to enforce some degree of restrictive qualification, what should be the extent of that qualification? Should it go farther than limiting the classes of persons to be appointed, or summoned, to those not affected for the time being by a personal incapacity under some general rule

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of law, leaving it to Parliament or the legislatures to deal with the rule or rules entailing such disabilities?

For these reasons I cannot say that I am convinced of the existence of any such general resumption as that contended for. On the other hand, there are considerations which I think specially affect, and very profoundly affect, the question of the construction of sec. 24. It should be observed, in the first place, that in the economy of the *British North America Act,* the Senate bears no such intimate relation to the House of Commons, or to the Executive, as each of these bears to the other. There is no consideration, as touching the policy of the Act in relation to the Senate, having the force of that already discussed, arising from the control vested in Parliament in respect of the Constitution of the House of Commons, and affecting the question of the Constitution of the Privy Council. On the other hand, there is much to point to an intention that the constitution of the Senate should follow the lines of the Constitution of the old Legislative Councils under the Acts of 1791 and 1840.

In 1854, in response to an agitation in the province of Canada, the Imperial Parliament passed an Act amending the Act of Union, (17 and 18 Vic., Cap. 118 already mentioned) which fundamentally altered the status of the Legislative Council. Before the enactment of this Act, the Constitution of the Legislative Council had been fixed (by secs. 4 to 10 of the Act of Union) beyond the power of the legislature of Canada to modify it. By the Statute of 1854, that constitution was placed within the category of matters with which the Canadian Legislature had plenary authority to deal. Now, when the *British North America Act* was framed, this feature of the parliamentary constitution of the province of Canada, the power of the legislature of the province to determine the constitution of the second Chamber, was entirely abandoned. The authors of the Confederation scheme, in the Quebec Resolutions, reverted in this matter (the Constitution of the Legislative Council, as it was therein called) to the plan of the Acts of 1791 (save in one respect not presently relevant) and of 1840. And the clauses in these resolutions on the subject of the Council, follow generally in structure and phraseology the enactments of the earlier statutes.

It seems to me to be a legitimate inference, that the *British North America Act* contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same, though, necessarily, in detail, not identical, with that of the second Chambers established by the earlier statutes. That under those statutes, women were not eligible for appointment, is hardly susceptible of controversy.

In this connection, the language of sections 23 and 31 of the *British North America Act* deserves some attention. I attach no importance (in view of the phraseology of secs. 83 and 128) to the use of the masculine personal pronoun in section 23, and, indeed, very little importance to the provision in section 23 with regard to nationality. But it is worthy of notice that subsection 3 of section 23 points to the exclusion of married women, and subsection 2 of section 31 would probably have been expressed in a different way if the presence of married women in the Senate had been contemplated; and the provisions dealing with the Senate are not easily susceptible of a construction proceeding upon a distinction between married and unmarried women in respect of eligibility for appointment to the Senate. These features of the provisions specially relating to the constitution of the Senate, in my opinion, lend support to the view that in this, as in other respects, the authors of the Act directed their attention to the Legislative Councils of the Acts of 1791 and 1840 for the model on which the Senate was to be formed.

I have not overlooked Mr. Rowell's point based upon section 33 of the *British North America Act*. Sec. 33 must be supplemented by sec. 1 of the *Confederation Act Amendment Act* of 1875, and by section 4 of c. 10, R.S.C., the combined effect of which is that the Senate enjoys the privileges and powers, which at the time of the passing of the *British North America Act* were enjoyed by the Commons House of Parliament of the United Kingdom. In particular, by virtue of these enactments, the Senate possesses sole and exclusive jurisdiction to pass upon the claims of any person to sit and vote as a member thereof, except in so far as that jurisdiction is affected by statute. That, I think, is clearly the result of sec. 33, combined with the

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Imperial Act of 1875, and the subsequent Canadian legislation. And the jurisdiction of the Senate is not confined to the right to pass upon questions arising as to qualification under sec. 33; it extends, I think, also to the question whether a person summoned is a person capable of being summoned under sec. 24. In other words, when the jurisdiction attaches, it embraces the construction of sec. 24, and if the Governor General were professing, under that section, to summon a woman to the Senate, the question whether the instrument was a valid instrument would fall within the scope of that jurisdiction. I do not think it can be assumed that the Senate, by assenting to the Statute, authorizing the submission of questions to this Court for advisory opinions, can be deemed thereby to have consented to any curtailment of its exclusive jurisdiction in respect of such questions. And therefore I have had some doubt whether such a question as that now submitted falls within the Statute by which we are governed. It is true that an affirmative answer to the question might give rise to a conflict between our opinion and a decision of the Senate in exercise of its jurisdiction; but strictly that is a matter affecting the advisability of submitting such questions, and therefore within the province of the Governor in Council. As yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion.

The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law.

MIGNAULT J.—The real question involved under this reference is whether, on the proper construction of the *British North America Act*, 1867, women may be summoned to the Senate. It is not apparent why we are asked merely if the word "persons" in section 24 of that Act includes "female persons". The expression "persons" does not stand alone in section 24, nor is that section the only one to be considered. It is "qualified persons" whom the Governor General shall from time to time summon to the Senate (sec. 24), and when a vacancy happens in the Sen-

ate, it is a "fit and qualified person" whom the Governor General shall summon to fill the vacancy (sec. 32). On the proper construction of these words depends the answer we have to give. It would be idle to enquire whether women are included within the meaning of an expression which, in the question as framed, is divorced from its context. The real controversy, however, is apparent from the statement in the Order in Council that the petitioners are "interested in the admission of women to the Senate of Canada," and that His Excellency in Council is requested to refer to this court "certain questions touching the power of the Governor General to summon female persons to the Senate of Canada." It is with that question that we have to deal.

The contentions which the petitoners advanced at the hearing are not new. They have been conclusively rejected several times, and by decisions by which we are bound. Much was said of the interpretation clause contained in Lord Brougham's Act, but the answer was given sixty years ago in *Chorlton* v. *Lings* (1). It appears hopeless to contend against the authority of these decisions.

The word "persons" is obviously a word of uncertain import. Sometimes it includes corporations as well as natural persons; sometimes it is restricted to the latter; and sometimes again it comprises merely certain natural persons determined by sex or otherwise. The grave constitutional change which is involved in the contention submitted on behalf of the petitioners is not to be brought about by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement of the intention of the Imperial Parliament, since that Parliament alone can change the provisions of the *British North America Act* in relation to the "qualified persons" who may be summoned to the Senate.

While concurring generally in the reasoning of my Lord the Chief Justice, I have ventured to state the grounds on which I base my reply to the question submitted, as I construe it. This question should be answered in the negative.

LAMONT J.—I concur with the Chief Justice.

(1) (1868) L.R. 4 C.P. 374.

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SMITH J.—I concur with the Chief Justice.

The formal judgment of the court was as follows:—

"Understood to mean 'Are women eligible for appointment to the Senate of Canada,' the question is answered in the negative."

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*Feb. 17.
*April 24.

THE RURAL MUNICIPALITY OF BIFROST (DEFENDANT) ..... } APPELLANT;

AND

ANNIE STADNICK (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Construction of roads and ditches by municipality—Alleged negligence in construction, causing flooding of plaintiff's lands—Plaintiff's right of action for damages—The Good Roads Act (Man.) 1914, c. 42—The Municipal Act, R.S.M. 1913, c. 133, ss. 634, 684.

Plaintiff claimed damages from defendant (a rural municipality) for the flooding of her land, which, she alleged, was in consequence of negligent construction by defendant of certain roads and ditches. It was found in the courts below that defendant had negligently failed to provide an adequate outlet for the waters collected, and that to this negligence the damages were due. These findings this Court refused to disturb, as defendant had failed to point to any specific error vitiating them. But defendant contended (1) that as the works were constructed under the authority, and in accordance with the provisions, of the *Good Roads Act,* Man., 1914, c. 42, it was not responsible for injury arising from the execution of the works; and (2) that by virtue of ss. 634 and 684 of the *Municipal Act,* R.S.M. 1913, c. 133, the plaintiff's only remedy, if any, was by way of arbitration.

Held (1): Defendant's first contention failed, as, on the evidence, it had not shewn that the injury caused by the works executed by it was caused by a work authorized and executed according to plans approved under the provisions of the *Good Roads Act;* as defendant thus failed on the evidence, it was not necessary to consider what, otherwise, would have been the effect as to plaintiff's right of action.

(2): Defendant's second contention failed, as the provision for compensation in s. 634 of the *Municipal Act* applies only to damages suffered by reason of diversion of "water from its original course"; that section has no application to flooding by surface water; it contemplates only a diversion of water flowing in a defined water course; s. 684, which deals generally with the right to compensation for damages caused by municipal works, and accords compensation for "damages necessarily resulting" from such works, had no application.

Judgment of the Court of Appeal for Manitoba (37 Man. R. 26) affirmed.

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*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

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APPEAL by the defendant (a rural municipality under the laws of Manitoba) from the judgment of the Court of Appeal for Manitoba (1) affirming, with a variation disallowing damages for the year 1919, the judgment of Macdonald J. (2), who held the plaintiff entitled to recover against the defendant for damage to the plaintiff's crops in the years 1919, 1921, 1922 and 1923, caused, as alleged, from flooding by reason of negligence in the construction by the defendant of certain roads and ditches. The main points dealt with in the judgment now reported (the court refusing, for reasons given in the judgment, to disturb the findings of fact in the courts below bearing on the question of negligent construction) were with regard to the application and effect, as to the plaintiff's right of recovery in this action, of the *Good Roads Act* of Manitoba, 1914, c. 42, and of ss. 634 and 684 of the *Municipal Act,* R.S.M. 1913, c. 133. The defendant's appeal to this Court was dismissed with costs.

H. A. Bergman K.C. for the appellant.

J. C. Collinson for the respondent.

The judgment of the court was delivered by

DUFF J.—The appeal concerns the right of the respondent to recover damages due to the flooding of her lands in 1921, 1922 and 1923. She is the owner of the S.E. quarter section of sec. 26-22-2 within the municipality of Bifrost. Past the east boundary of the respondent's land runs a road known as the Jacobson Road, extending southward to the Icelandic River and north for a distance of about ten miles from the river.

In 1920, the appellants applied under the *Good Roads Act* of Manitoba for approval of an extensive scheme of road construction, including the Jacobson Road, and a branch road extending eastwardly for two miles from the Jacobson Road along the town line between townships 22 and 23. The scheme was approved and the Order in Council was passed on 1st April, 1920, which required that the roads be improved (*inter alia*) by draining, and the Jacob-

(1) 37 Man. R. 26; [1927] 3 W.W.R. 49.

(2) [1926] 2 W.W.R. 324.

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son Road and the branch road were constructed, in the years 1920 and 1921, with appurtenant ditches, on the routes prescribed in the Order in Council.

The respondent alleges that the flooding of her property was the consequence of the negligent construction of these roads and ditches. The learned trial judge, and the majority of the Court of Appeal, agreed in the view that the appellants had negligently failed to provide an adequate outlet for the waters collected by the roads and ditches, and that to this negligence the damages complained of were due.

These findings of fact could only be successfully impugned in this court by pointing to some specific error in the courts below, vitiating the findings, and this counsel for the municipality has quite failed to do. It would serve no good purpose to discuss the evidence in detail. The appeal must be considered on the footing that the respondent's loss, owing to the flooding of her land, was due to the failure to make reasonable provision for the discharge of the surplus water collected in the roads and ditches constructed by the appellants.

On behalf of the appellants, the grounds of appeal now to be considered are, first: that the works mentioned were constructed under the authority of the *Good Roads Act, 1914,* and in accordance with the provisions of that Act, and, such being the case, the municipality is not responsible for any injury arising from the execution of the works, and, second: that by virtue of the provisions of the Municipal law of Manitoba, the only remedy of the respondent, if she has any, even for negligence, is to proceed to arbitration under those provisions.

As to the first of these contentions, the difficulty in the appellants' way appears to be this. In order to establish the defence based upon the allegation that the work was constructed under the authority of the *Good Roads Act,* it was necessary to identify the work authorized under that statute. The Order in Council, approving the decision of the Good Roads Board, in respect to certain works in the municipality, is produced, and these works include what has been referred to above as the Jacobson road and the branch road to the east. The Order in Council provided for the improvement of the roads by draining, grading and

gravelling the same. But the report of the engineer, the maps, plans, drawings, profiles and specifications of the works which should have accompanied the report of the engineer, and which would shew in detail the character of the work authorized under the statute, including the measures for dealing with waters collected by the works contemplated by the scheme, which it was the duty of the Board to transmit to the Clerk of the Municipality, were not produced. In the absence of these documents, which would have afforded authentic information as to the precise nature of the work authorized, with the concomitant protective measures, if any, the learned trial judge, and the judges of the Court of Appeal, were obliged to determine as best they could, whether the flooding of the respondent's land was in truth due to works executed pursuant to the plan and approved by the Good Roads Board, and so under the authority of the statute. Facts were adduced in evidence, of more or less cogency, pointing to the conclusion, that as a part of the statutory plan, the municipality had contemplated the construction of an outlet leading from the eastern terminus of the eastern branch into a lake called Crooked Lake, and thence into Icelandic River, at a point much below the outlet actually provided. Such an outlet would have given the most natural and effective method of freeing the roads actually constructed, and the adjacent lands from the menace of flooding. It was in point of fact in 1923, actually put into execution. In addition to that, certain ditching constructed in the year 1923, considerably added to the accumulation of surplus water, and there is no pretence for suggesting that this ditching formed any part of the statutory scheme. The evidence seems to indicate that the government engineer visited the works only occasionally, and that the works were really under the control of the municipality.

The learned trial judge, as well as the majority of the Court of Appeal, were convinced that the works, as actually executed, did not make reasonable provision for the escape of the water collected, and, on general principles, the appellants can only escape responsibility by shewing that the very thing which they did was that which the statute authorized. There is no satisfactory ground for differing from the view of the courts below, that the appel-

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lants have failed to shew that their works were executed according to the plans approved.

The decision on this point, it will be observed, turns entirely upon the issue of fact. The appellants fail because they have not shewn that the injury caused by the works executed by them was caused by a work authorized and executed according to plans approved under the provisions of the *Good Roads Act*. Had this been established, it would have been necessary to consider the appellants' contention that, in such circumstances, they are not answerable in an action by a plaintiff, who alleges that in consequence of the works he has suffered damage, and that his remedy, if any, must be found in some statutory provision for compensation, if there be any.

I now turn to the defence advanced by the appellants, based upon sections 634 and 684 of the *Municipal Act*. I have no hesitation in holding that the provision for compensation in s. 634 applies only to damages suffered by reason of diversion of "water from its original course." I agree with the majority of the court below that this section has no application to flooding by surface water, and that it contemplates only a diversion of water flowing in a defined water course.

Sec. 684, which is the enactment dealing generally with the right to compensation for damages caused by municipal works, accords compensation for "damages necessarily resulting" from such works, and has no application here.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Anderson & Seeman.*

Solicitor for the respondent: *W. W. Coleman.*

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JOHN PRENTICE AND SARAH PRENTICE (PLAINTIFFS) ..... } APPELLANTS;

*May 21.
*June 12.

AND

THE CORPORATION OF THE CITY OF SAULT STE. MARIE (DEFENDANT) } RESPONDENT.

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

Municipal corporations—Highways—Nuisance—Negligent creation of nuisance on highway by city's servants, causing special damage—Flushing of private sewer undertaken by city in exercise of statutory powers—Nuisance created consisting of dangerous ice on plaintiffs' houseway leading from street sidewalk, resulting in personal injury to plaintiff—Liability of city—Misfeasance—Liability at common law—Consolidated Municipal Act (Ont.) 1922, c. 72, s. 460—Place of accident not a "sidewalk" within s. 460 (3)—Notice of claim and injury not given under s. 460 (4)—Right of action—Construction and application of s. 460—Breach of private right.

The servants of defendant, a city corporation, in the course of flushing a private sewer of a neighbour of the plaintiffs, undertaken by the city, in the exercise of its statutory powers, by contract in its capacity as owner and operator of a public water service, negligently created (according to findings sustained by this Court) a nuisance consisting of a patch of dangerous ice on a private houseway, lawfully constructed, leading from the street sidewalk to plaintiffs' residence; the part of the houseway on which such nuisance was created being on the highway and immediately adjoining the sidewalk; and, as a result, one of the plaintiffs (wife of the other plaintiff) fell on such part of the houseway and was injured. Plaintiffs claimed damages from the city.

Held, that the place of the accident was not a "sidewalk" within s. 460 (3) of the *Consolidated Municipal Act, 1922* (c. 72), Ont., and, therefore, the question whether the city's servants' negligence amounted to "gross negligence" did not arise.

Held, further, that the plaintiffs' cause of action, being special damages sustained by reason of a nuisance on a highway, negligently created by the city's servants under the circumstances above mentioned, did not fall within s. 460 (1) of said Act, and, consequently, failure to give the notice prescribed by s. 460 (4) for claims based on default within s. 460 (1) was not available as a defence.

The introduction in 1913 of the phrase "whether the want of repair was the result of nonfeasance or misfeasance" into s. 460 (2) (which bars actions based on s. 460 (1) begun after three months from the time when the damages were sustained) did not have the effect that all the provisions of s. 460 should thereafter apply to every liability of a

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

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municipal corporation for disrepair on a highway caused by its servants' misfeasance. There existed in Ontario, before the 1913 amendment, a common law right of action against a municipality for a nuisance on a highway caused by its servants' negligence amounting to misfeasance, and which had caused special damage, apart from and in addition to any statutory liability for non-repair; and the abrogation of a well established common law right should not be inferred from a change of doubtful import, such as that made in 1913 by the introduction of the provision as to misfeasance into a subordinate clause of the section imposing the liability—a clause *ex facie* dealing only with a limitation of the time for bringing action where the claim rests on the statute. Moreover, if the amending words should be imported into s. 460 (1), their operation would still be confined to the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway.

History of the legislation in question discussed. *Glynn* v. *City of Niagara Falls* (29 Ont. L.R. 517, at 521); *Biggar* v. *Crowland* (13 Ont. L.R. 164, at pp. 165-6); *Keech* v. *Smith's Falls* (15 Ont. L.R. 300); *Weston* v. *Middlesex* (30 Ont. L.R. 21; 31 Ont. L.R. 148); *Halifax* v. *Tobin* (50 Can. S.C.R. 404); and *Patterson* v. *Victoria* (5 B.C.R. 628, at p. 645; affd. [1899] A.C. 615, at p. 620) referred to.

Per Duff J. (concurring in the result): The exercise of the plaintiff husband's right of access was wrongfully made dangerous by a nuisance for which the city was responsible. The right to complain of such a wrong is not limited to the owner, but inheres also in his wife and other members of his family residing with him. This *injuria* is an invasion of a private right incidental to the ownership and occupation of property—*Lyon v. Fishmongers' Company* (1 A.C. 662). S. 460 has no application.

Judgment of the Appellate Division, Ont. (61 Ont. L.R. 246) reversed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which reversed the judgment of Rose J. at the trial.

The action was brought by the plaintiffs, husband and wife, against the defendant, a city corporation, for damages by reason of personal injuries suffered by the female plaintiff through slipping and falling on a patch of ice, existing, as was alleged, as the result of negligence of the city's servants, in the course of flushing a private sewer of a neighbour of the plaintiffs, undertaken by the city, in the exercise of its statutory powers, by contract in its capacity as owner and operator of a public water service. The ice in question was on a part of a private houseway, lawfully

(1) (1927) 61 Ont. L.R. 246.

constructed, leading from the street sidewalk to the plaintiff's residence; such part of the houseway being on the highway and immediately adjoining the sidewalk.

Notice of the claim and injury was not served in accordance with subs. 4 of s. 460 of the *Consolidated Municipal Act, 1922*, 12-13 Geo. V (Ont.), c. 72. Apart from the issues of fact (as to which this Court sustained the findings at trial in favour of the plaintiffs) the questions involved had to do with the construction and aplication of s. 460 of the said Act, and are indicated in the above headnote.

ROSE J. gave judgment for the female plaintiff for $2,500, and for the male plaintiff for $100 (cutting in two, by reason of his contributory negligence, the damages of $200 assessed to him). The Appellate Division reversed this judgment, and dismissed the action, basing its decision upon the non-compliance with said subs. 4 of s. 460, which it held to be aplicable (1). The plaintiffs appealed to this Court. By the judgment now reported the appeal was allowed, with costs in this Court and in the Appellate Division, and the judgment of Rose J. was restored.

Sir William Hearst K.C. for the appellants.

W. N. Tilley K.C. for the respondent.

The judgment of Anglin C.J.C. and Mignault, Rinfret and Lamont JJ. was delivered by

ANGLIN C.J.C.—An experienced trial judge found that the servants of the defendant municipal corporation, in the course of flushing a private sewer of a neighbour with water drawn through a leaky hose from a city hydrant adjacent to the plaintiffs' premises, had negligently created a nusiance (consisting of a patch of dangerous ice) on a portion of a private houseway, lawfully constructed and leading from the sidewalk of Church street in the city of Sault Ste. Marie to the residence of the plaintiffs; that the portion of such houseway on which the nusiance existed was on the highway and immediately adjoined the city sidewalk; and that the female plantiff was severely injured, without any contributory negligence attributable to her, by slipping and

(1) (1927) 61 Ont. L.R. 246.

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falling on such portion of the houseway as a result of the nusiance so created; but that the male plaintiff had been guilty of contributory negligence, as great as that of the defendant's servants, in having failed to take some steps to obviate the danger they had created, of the existence of which he was aware from the 22nd of February to the 7th of March, when the accident to his wife occurred. While he accordingly allowed the female plaintiff the full amount of damages which she had sustained, assessed by himself at $2,500, the learned judge cut in two the damages assessed to the male plaintiff at $200, and restricted his recovery to $100.

The learned judge held that the place where the female plaintiff fell was not a sidewalk within s. 460 (3) of the Ontario *Consolidated Municipal Act, 1922,* 12-13, Geo. V., c. 72, and, consequently, that the question whether the negligence of the defendant's servants had amounted to "gross negligence" did not arise. He further held that the plaintiffs' cause of action, being special damages sustained by reason of a nusiance on a highway negligently created by the defendant's servants, did not fall within s. 460 (1) of the *Consolidated Municipal Act, 1922,* and, consequently, that failure to give the notice prescribed by subs. 4 for claims based on defaults within subs. 1 was not available as a defence.

The defendant municipality appealed. There was no appeal by the male plantiff against the judgment reducing the damages recoverable by him to $100.

Fully accepting the findings of fact of the trial judge, the Appellate Divisional Court (1) reversed his judgment and dismissed the action solely because, in its opinion, s. 460 (1) of the *Consolidated Municipal Act, 1922,* applies to a claim for damages based on negligent misfeasance of a municipal corporation occasioning disrepair, amounting to a nusiance, on a public highway, in consequence of the introduction, in 1913, of the phrase: "whether the want of repair was the result of nonfeasance or misfeasance" into subs. 2, which bars actions based on subs. 1 unless begun within three months from the date on which the damages were sustained.

(1) (1927) 61 Ont. L.R. 246.

Both plaintiffs appeal to this court and ask the restoration of the judgment of the trial court. Special leave to appeal was obtained by John Prentice from the Appellate Division.

A perusal of the judgment delivered by Riddell J., in the Appellate Division, concurred in by Latchford C.J., and Masten J.A., (Middleton and Orde JJ.A., agreeing in the result), leaves the impression that the Appellate Court agreed with the opinion expressed by the trial judge as to the purview of subs. 3, which also commends itself to our judgment. On the issues of fact a careful perusal of all the testimony has satisfied us that there is evidence which, if believed, supports the findings of fact made in the trial court and that we cannot, especially in view of their having been affirmed without dissent by the Appellate Divisional Court, say that error in any of such findings has been demonstrated. They must, therefore, stand and will form the basis on which we dispose of the present appeal.

The sole question requiring further consideration is whether, on the proper construction of s. 460 (1), as was held in the Appellate Division, the cause of action against the defendant municipality, based on misfeasance of its servants which created a nusiance in the highway whereby special damage was caused to the plaintiffs, falls within that subsection and must accordingly fail, because the notice of the claim and injury provided for by subs. 4 was not given, or whether, as the trial judge held, such a claim is not within s. 460.

Section 460 of the *Consolidated Municipal Act, 1922,* 12-13 George V. (Ontario), Chapter 72, so far as material, reads as follows:

460 (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default, the corporation shall be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(3) Except in case of gross negligence a corporation shall not be liable for a personal injury caused by snow or ice upon a sidewalk. 3-4 Geo. V, c. 43, s. 463 (1-3).

(4) No action shall be brought for the recovery of the damages mentioned in subsection 1 unless notice in writing of the claim and of the in-

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jury complained of has been served upon or sent by registered post to the head, or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days after the happening of the injury, nor unless where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time. 3-4 Geo. V, c. 43, s. 460 (4); 11 Geo. V, c. 63, s. 22.

(5) In case of the death of the person injured, failure to give the notice shall not be a bar to the action, and, except where the injury was caused by snow or ice upon a sidewalk, failure to give or insufficiency of the notice shall not be a bar to the action if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that the corporation was not thereby prejudiced in its defence.

Two grounds were urged by counsel for the appellants why subsections 1 and 4 do not apply to this case:

(*a*) A claim based on negligent misfeasance by servants of the municipality creating a nuisance in a highway which caused special damage is not within subss. 1 and 4 of s. 460;

(*b*) Although a claim based on negligent misfeasance in the doing of work in the construction or repair of a highway, or occurring in the course of work done in the discharge of the municipal duty of keeping the highways in repair, should be within subs. 1 of s. 460, a claim based on a misfeasance of municipal servants, in doing an act or in carrying on work in no wise connected with the discharge of municipal duty in regard to the condition of highways and bridges, whereby a nuisance was negligently created in a highway which became the cause of special damage to the plaintiff, is not within the purview of s. 460 (1) of the *Consolidated Municipal Act, 1922,* but gives him a cause of action against the municipality at common law independently of any liability which might arise under s. 460 (1) by reason of failure to abate such nuisance amounting to default in keeping the highway in repair as required by the statute.

Although the distinction between grounds (*a*) and (*b*) may, perhaps, be of importance for other purposes (*Brown* v. *City of Toronto* (1)), in the present case they do not seem to call for separate discussion.

Section 460 (1) of the *Consolidated Municipal Act, 1922,* is identical in substance with its predecessor in the

(1) (1910) 21 Ont. L.R. 230, at pp. 238-9.

Consolidated Municipal Act, 1903 (3 Edw. VII, c. 19, s. 606 (1)), except that the latter subsection also contained, as its last member, but differently phrased, the three months' limitation provision now found in subsection 2. This latter clause was detached from subsection 1 in the consolidation of 1913 (3-4 Geo. V, c. 43), and was enacted as subsection 2 in its present form. The words: " whether the want of repair was the result of nonfeasance or misfeasance " were then first inserted.

Section 606 (1) of the *Consolidated Municipal Act, 1903,* and its antecedents, alluded to by Riddell J., were dealt with in Ontario in a " line of decisions," which, as the late Chancellor Boyd observed in *Glynn* v. *City of Niagara Falls* (1),

> restricted (their application) to cases wherein the default is attributable to nonfeasance. Cases of misfeasance were held to lie beyond the statute and untouched by its preliminaries as to notice and time of suing. True it is that, owing perhaps to the many subtle distinctions which have been drawn between nonfeasance and misfeasance, the Legislature has by the *Municipal Act, 1913,* 3-4 George V, c. 43, sec. 460 (2), limited the time for bringing actions occasioned by municipal default, whether the want of repair was the result of misfeasance or nonfeasance.

A list of the decisions referred to will be found in Meredith & Wilkinson's Municipal Manual, at pp. 620-1. Of these special reference may be made to *Biggar* v. *Township of Crowland* (2); *Keech* v. *Town of Smith's Falls* (3); and *Weston* v. *County of Middlesex* (4).

As put by Rose J., in the case now before us:

> A municipality, like everyone else, may be liable, apart from statute, for creating a nuisance in a highway, and if a person sustains damages—that is, special damage, different from the damage suffered by others—by reason of the nuisance so created, the person, whether a municipality or anyone else, who created it is liable for those damages; that rule being subject, however, in the case of a person or corporation exercising a statutory authority, to the qualification that if the nuisance is created in the exercise of that statutory authority, liability does not result unless the nuisance was created negligently. The case, therefore, * * * raises, as I think, only the question, did these defendants, exercising their statutory powers as a sewer authority, create a nuisance negligently, and if so did the nuisance so created cause the damage of which the plaintiffs complain.

(1) (1913) 29 Ont. L.R. 517, at p. 521.
(2) (1906) 13 Ont. L.R. 164, at pp. 165-6.
(3) (1907) 15 Ont. L.R. 300.
(4) (1913) 30 Ont. L.R. 21; 31 Ont. L.R. 148.

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The common law right of action against a municipal corporation for a nuisance on a highway caused by negligence of its servants amounting to misfeasance and which has caused special damage, apart from and in addition to any statutory liability for non-repair, admits of no doubt. *City of Halifax* v. *Tobin* (1). Its existence in Ontario up to 1913 is not seriously contested. The provisions of s. 606 of the *Consolidated Municipal Act, 1903,* including that requiring notice of claim to the municipality within thirty days (as it then was), were held in many cases not to apply to such common law actions. The abrogation of a well-established common law right should not be inferred from a change of doubtful import, such as that made in 1913 by the introduction of the provision as to misfeasance into a subordinate clause of the section imposing the liability—a clause *ex facie* dealing only with a limitation of the time for bringing action where the claim rests on the statute. In order that this amendment should affect subs. 4 and extend its requirement of notice to additional claims (if any) to which the limitation provision was thus made applicable, it is necessary to import the amendment of subs. 2 into subs. 1 and to read subs. 1 as if the Legislature had amended it instead of, or as well as, subs. 2. Indeed, if the intent had been that all the provisions of s. 460 should thereafter apply to every liability of a municipal corporation for disrepair on a highway or bridge caused by misfeasance of its servants, the only logical place for the amending words inserted in 1913 (if otherwise sufficient) would have been after the word "default" where it first occurs in subs. 1. It seems reasonably clear that the Legislature can have intended to affect only the limitation provision by the amendment made to it.

Moreover, if the amending words should be imported into subs. 1 as suggested, their operation would still be confined to the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway. *Patter-*

(1) (1914) 50 Can. S.C.R. 404.

son v. *City of Victoria* (1). It is noteworthy that the phrase inserted in subs. 2 is not restricted to misfeasance by a municipal corporation: it includes as well cases where disrepair of a bridge or highway has been caused by the misfeasance of others. The misfeasance of servants of the municipal corporation in the presence instance may be assimilated to an act of a third party creating a nuisance on a highway. Assuming notice to the municipality of a nuisance so created sufficient to entail its statutory liability for non-repair to a person sustaining special damage, there can be no doubt that the common law liability of the third party could also be invoked by him. Here the municipal servants were carrying out an obligation for which the municipality had contracted with a private citizen, not *qua* guardian of the highways but in its capacity as owner and operator of a public water service, which might have been in the hands of a private body. There would seem to be no reason for doing away with the common law liability of a municipal corporation in such a case.

But the words " whether the want of repair was the result of nonfeasance or misfeasance," if imported into subs. 1, would still apply only to a default in the statutory duty of keeping the highway in repair imposed by that subsection. They would merely declare that the statutory liability of the municipality for failure to discharge that duty would be the same whether the original cause of disrepair had been misfeasance or nonfeasance. The amendment was, perhaps, futile, as such liability might well exist under subs. 1 without it. But that is not a sufficient ground for giving to it an effect which it is most improbable the Legislature meant it to have, namely, the extinction of the well-known common law right of action against a municipality for a nuisance created by it on a highway which has caused special damage, and the substitution therefor of the greatly restricted statutory remedy conferred by s. 460.

We would require a declaration in express terms, or at least language leaving no doubt as to the necessity of the implication as a basis for imputing such an intention to the Legislature.

(1) (1897) 5 B.C.R. 628, at p. 645; affd. [1899] A.C. 615, at p. 620.

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For these reasons the appeal, in our opinion, should be allowed with costs here and in the Appellate Division, and the judgment of the learned trial judge restored.

DUFF J.—I concur in the result. The legal effect of the findings of the learned trial judge, which apparently were accepted by the Appellate Division, appears to be this. The exercise of the husband's right of access was wrongfully made dangerous by a nuisance for which the municipality is responsible. The right to complain of such a wrong is not limited to the owner, but inheres also in his wife and other members of his family residing with him. This *injuria* is an invasion of a private right incidental to the ownership and occupation of property. *Lyon* v. *Fishmongers' Company* (1). Section 460 of the *Consolidated Municipal Act, 1922,* has no application to it.

Appeal allowed with costs.

Solicitors for the appellants: *MacInnis & Brien.*

Solicitors for the respondents: *Hamilton & Carmichael.*

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*Feb. 20, 21.

MILLER *v.* HIS MAJESTY THE KING

APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Expropriation—Injurious affection—Acquiescence—Equitable rights—Building restrictions—Restrictive covenant—Statutory limitations

APPEAL by the suppliants from the judgment of the Exchequer Court of Canada, sitting at Halifax, Maclean J. (2), dismissing the appellants' petition of right to recover from the Crown, for injurious affection to certain lands of the suppliants by reason of the operation of a railway on lands adjoining thereto, and which were expropriated by the Crown, and obtained from suppliants for this purpose.

After hearing counsel as well for the respondent as for the appellants, the Chief Justice of the Supreme Court of

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

(1) (1876) 1 A.C. 662.

(2) [1927] Ex. C.R. 52.

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Canada gave judgment orally, dismissing the appeal with costs.

The judgment of the court said in part, as follows:

"* * *, the appellants must establish that they had an interest in the property taken by the respondent in order to give them a status to maintain this action for injurious affection of nearby property retained by them. We are unable to find that there was any such interest. * * *.

"It would, therefore, appear that the appellants have failed to establish anything in the nature of a real right in any part of the property taken by the respondent such as is admittedly necessary to enable them to maintain an action for injurious affection of neighbouring property.

"Upon the other grounds on which the learned trial judge rested his conclusion, we find it unnecessary to express any opinion; and we desire it understood that neither approval or disapproval of them is to be inferred from this judgment."

Appeal dismissed with costs.

W. G. Ernst for the appellants.

C. J. Burchell K.C. and *J. E. Rutledge* for the respondent.

1928

*Feb. 20.
*Feb. 21.

SCOTIA FLOUR AND FEED COMPANY (DEFENDANT) ..... } APPELLANT;

AND

L. P. STRONG AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, EN BANC

Sale—Payment—Right to inspection—Condition—The Sale of Goods Act, R.S.N.S.c. 206, s. 35, subs. 2

The plaintiffs were grain merchants at Calgary, Alberta, and the defendant company was doing business at Truro, Nova Scotia. The action is brought to recover $4,400 damages. The plaintiffs alleged that the

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

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defendant company by telegrams and letters agreed to buy, and plaintiffs agreed to sell, a quantity of oats, approximately 10,000 bushels, at $1.15 per bushel; that defendant company wrongfully repudiated the contract and refused to accept the oats; and that the plaintiffs were obliged to sell and did sell them at 47 cents per bushel. The defendant company alleged that if there was a contract it was terminated by the wrongful refusal of the plaintiffs to ship the oats and to deliver them at Truro as required by the contract, except upon condition that payment was guaranteed by the bank of the defendant company. On the trial a further ground was raised and discussed as to the plaintiffs' refusal to ship the goods with permission to defendant company to inspect them before payment.

Held, reversing the judgment of the Supreme Court of Nova Scotia en banc (59 N.S.R. 339), that the right of the purchaser to inspection, in the absence of a term in the contract inconsistent therewith, is determined by section 35 (2) of *The Sale of Goods Act* and that nothing in the terms of the contract in this case was so inconsistent as to preclude the appellant company from inspecting the oats before payment.

Held, also, that the provision for payment to the Bank of Nova Scotia at Truro by the appellant company on arrival of the car at Truro does not preclude the right of inspection by the purchaser before such payment is made.

Held, further, that, in view of the insistence by the respondents in their letter of the 26th of February, 1925, upon the appellants' obtaining a bank guarantee of the payments of their drafts, not withdrawn so far as the correspondence shews, it cannot be said that they were always ready and willing to make delivery according to the terms of their contract, which is essential to their right to recover upon an anticipatory breach by the appellant company.

APPEAL from the decision of the Supreme Court of Nova Scotia en banc (1), reversing the judgment of Harris C.J. (1) and maintaining the respondents' action.

In addition to the statement of facts contained in the above head-note, the letters and telegrams exchanged between the parties and forming the contract are as follows:

Truro, N.S., Jan. 14, 1925.

STRONG & DOWLER,
Calgary, Alta.

Would book six cars each five hundred and sixty sacks number one government inspected banner seed oats at one dollar twenty-five cents bushel delivered Truro, March shipment sight draft payable on arrival car to Nova Scotia Truro wire reply.

SCOTIA FLOUR & FEED CO., LTD.

(1) (1927) 59 N.S. Rep. 539

The reply to this was as follows:

SCOTIA FLOUR & FEED CO., LTD.,
Truro, N.S.

Have booked six cars five hundred sixty sacks each number one government inspected banner seed oats at one dollar twenty-five cents bushel delivered Truro March shipment.

STRONG & DOWLER.

In a letter dated January 17, 1925, from the appellant company to the respondents they, after referring to these telegrams, said:

"Kindly have all drafts for seed oats made through Bank of Nova Scotia, Truro."

On February 11, 1925, the appellant company sent a telegram to the respondents asking if they could re-sell the oats ordered at one cent profit, or if not whether they would exchange or substitute six cars of double recleaned two Canadian Western oats and what the difference in price would be.

To this the respondents replied as follows:

February 12, 1925.

SCOTIA FLOUR & FEED CO., LTD.,
Truro, N.S.

Cannot resell, but will exchange for six cars double recleaned two Canadian Western new sacks at discount of ten cents per bushel.

STRONG & DOWLER.

And the appellant company accepted this by the following telegram:

Truro, N.S., Feb. 13/25.

STRONG & DOWLER,
Calgary, Alta.

We accept your exchange to two Canadian Western double recleaned new sacks ten cents bushel discount.

SCOTIA FLOUR & FEED CO., LTD.

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On the 14th February the respondents wired the appellant company about further business and asked apparently with reference to the contract already made: "Can you arrange bank guarantees of our drafts."

The following communications then passed between the parties:

SCOTIA FLOUR & FEED CO., LTD.
Truro, N.S., Feb. 20, 1925.

Messrs. STRONG & DOWLER,
Calgary, Alta.

Dear sirs,

In reference to oats on order, we must ask that you put on bills of lading for all cars to "Allow inspection" before paying draft; otherwise we cannot pay drafts.

We are in receipt of your wire quoting us on 1 feed and 3 C. W. oats. You quoted us 90 cents per bushel for 1 feeds when other firms were quoting these at 82½ cents delivered Truro. Kindly wire us on receipt of this letter stating that you will allow inspection and advising if you can supply 1 feeds sacked at 82½ cents delivered Truro, in new sacks.

Yours very truly,
SCOTIA FLOUR & FEED CO., LTD.,
Per E. F. Smith.

The reply was:

February 26, 1925.

SCOTIA FLOUR & FEED CO., LTD.,
Truro, N.S.

Regarding oats on order. We cannot ship oats three thousand miles and allow inspection. Must have payment drafts guaranteed against documents. We will attach to each draft 2 CW government grade certificate and declaration signed by supt. government elevator that he has double cleaned the oats in each car. If this is not satisfactory then we must fill contract as originally ordered. Sorry we cannot meet your price on one feed. Selling here higher than your offer. Eighty-seven Truro new sacks lowest we can quote to-day.

STRONG & DOWLER.

And the appellant company wired:

Halifax, N.S., Feb. 27.

STRONG & DOWLER,
Calgary, Alta.

Wire received we will not have bank guarantee drafts nor will we lift drafts until each car is inspected on arrival it matters not whether they are true named or double recleaned have been patiently waiting for large sample of double recleaned but as yet have not received any.

SCOTIA FLOUR & FEED CO., LTD.

In a letter dated March 2, 1925, the respondents say:

SCOTIA FLOUR & FEED CO., LTD.,
Truro, N.S.

Gentlemen,—

We have received your wire under date February 27th and have carefully noted contents. We of course were very much surprised at your statement that you expected oats to be shipped to Truro, N.S., for inspection before guaranteeing payment. This is the first time that we have ever been asked for anything of the kind during our experience in the grain business. Grain is always delivered on basis of government documents and it was on basis of government documents that we made the original sale to you. In changing from the original sale to double re-cleaned no. 2 C W oats we expected you of course to demand proof that the oats had been double re-cleaned and this we expected to furnish by affidavit from the manager of the government elevator at Calgary. If this affidavit is not satisfactory we suggest that you have some disinterested person here in Calgary examine the oats at time of making shipment. It is our desire to give you best class double re-cleaned no. 2 C W oats, but we cannot ship these oats 3,000 miles away to be accepted or declined by a purchaser who may be influenced by the rise or fall of the market. We are very sure that you would not do anything of the kind if conditions were reversed. We are sending you to-day under separate cover samples of the oats that we are shipping to you. These samples have been delayed until we could get the oats double re-cleaned.

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SCOTIA FLOUR AND FEED CO. v. STRONG.

If these oats are not satisfactory when accompanied with government no. 2 C W grade certificate and affidavit from manager of the government elevator that they have been double re-cleaned then we must insist upon filling the original contract which is based strictly on payment against documents.

We wish to be absolutely fair in every particular and wish to have you protected in every way possible and intend to give you just what you have purchased and hope it will be even better than you expected, but you can well understand that we cannot leave the acceptance to you without any protection for ourselves. We are very sure that you wish also to be fair in the matter and that you will provide some one here to examine the oats for you at time of making shipment.

Very truly yours,

STRONG & DOWLER.

The appellant company wired in reply:

Halifax, N.S., March 11.

STRONG & DOWLER,
Calgary, Alta.

Letter received as you refuse allow inspection please cancel cannot handle now under any conditions.

SCOTIA FLOUR & FEED CO., LTD.
Truro, N.S.

And the respondents' answer to this was a telegram reading:

March 11, 1925.

SCOTIA FLOUR & FEED CO., LTD.,
Truro, N.S.

Holding oats ready to fill order in accordance with terms of sale. Unless we receive shipping instructions promptly will sell for your account and charge you with loss.

STRONG & DOWLER.

L. A. Forsyth for the appellant.

T. R. Robertson K.C. for the respondents.

At the conclusion of the argument by counsel for the appellant and for the respondents, the judgment of the court was orally delivered by the Chief Justice.

ANGLIN C.J.C.—We have had an opportunity, during the argument of this appeal, of fully considering this case and we are convinced that the construction placed by the learned Chief Justice who tried the action upon the terms of the contract between the parties was correct. The right of the purchaser to inspection, in the absence of a term in the contract inconsistent therewith, is determined by sec. 35 (2) *The Sale of Goods Act.* The learned Chief Justice was of the opinion that nothing in the terms of the contract was so inconsistent. The court en banc was of the contrary view. We are satisfied that the provision for payment to the Bank of Nova Scotia at Truro by the defendant on arrival of the car at Truro, relied on by the respondent, does not preclude the right of inspection by the purchaser before such payment is made.

Moreover, we incline to think that the insistence by the respondents in their letter of the 26th of February, 1925, upon the appellants' obtaining a bank guarantee of the payment of their drafts, not withdrawn so far as the correspondence shews, precludes a holding that they were always ready and willing to make delivery according to the terms of their contract, which is essential to their right to recover upon an anticipatory breach by the defendants.

The contract certainly contained nothing warranting their insistence on such a guarantee.

We are for these reasons of opinion that the appeal must be allowed with costs here and in the court en banc and that the judgment of the trial judge should be restored.

Appeal allowed with costs.

Solicitor for the appellant: *J. M. Davidson.*

Solicitor for the respondents: *H. O. MacLatchy.*

1928
*Feb. 21.

EMILE PERRON AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

LA CORPORATION DU VILLAGE DU SACRE-COEUR DE JESUS (DEFENDANT) ..... RESPONDENT.

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

Municipal corporation—Mandamus—Refusal by a municipality to accept payment of money—Debt claimed not to be due—Art. 1141 C.C.

The appellants seek a mandamus to compel the respondent municipality to accept payment by a third party of an alleged debt of its secretary-treasurer.

Held that the appellants cannot succeed, as they have failed to bring their case within the terms of article 1141 C.C. or to establish agency of such third party in making the payment for the alleged debtor.—On the first point, the debt of the secretary-treasurer was not admitted by the respondent and was even contested by the former: it cannot then be said that the payment was "for the advantage of the debtor." On the second point, the evidence shows that the payment by the third party was not made by him as agent of the debtor but on his own behalf.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 400) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Letellier J., and dismissing the appellants' action.

On the 3rd of July, 1925, one Bouffard, a ratepayer of the municipality respondent, took action against its former secretary Lafrance who, he claimed, was short in his accounts as such; and he wanted to force him to reimburse to the respondent the sum of $2,980.85. On the day the action was to be returned, the secretary's brother, Father Lafrance, former parish priest of the respondent, without his brother's knowledge, so as to stop the action and allow a full settlement at a more opportune moment, came to see Bouffard's lawyer, Mr. Morin, and deposited with him the sum of $3,000. The matter remained thus until the month

PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1928) Q.R. 44 K.B. 400

of April, 1926. Then Bouffard's lawyer remitted to the corporation respondent his cheque to the amount of $2,544.49, having deducted his costs. This cheque was returned to the lawyer by the corporation, with a letter saying that the corporation had no such claim against the former secretary Lafrance. Then Mr. Morin remitted another cheque to the amount of $2,980.85, said cheque remaining in the respondent's secretary Delisle's possession without being cashed. Former secretary Lafrance being present at the meeting of the counsel when the first cheque of $2,544.49 was refused, protested against the acceptance of the cheque, saying he owed nothing to the corporation. The matter remained thus and the second cheque was not accepted. On the 7th of April, 1927, therefore a year after, the appellants, of whom Bouffard was the agent, took the present mandamus as ratepayers, in order to force the corporation to receive, cash and collect the cheque of $2,980.85.

Louis Morin K.C. for the appellants.

P. H. Bouffard K.C. for the respondent.

The judgment of the court was delivered orally by the Chief Justice, after hearing counsel as well for the respondent as for the appellants.

ANGLIN C.J.C.—The plaintiffs appellants seek a mandamus to compel the defendant municipality to accept payment by a third party of an alleged debt of its secretary-treasurer. In order to succeed they must make out a case within article 1141 C.C., or establish agency of such third party in making the payment for the alleged debtor.

Two essential elements appear to be lacking in the proof necessary to bring the case within article 1141 C.C. The debt of the secretary-treasurer is not admitted by the defendant and it is contested by himself. Unless such debt is established it cannot be said that the payment is for the benefit of the alleged debtor.

The payment by the third party was not made by him as representative or as agent of the debtor. He had no authority to represent the debtor. This is clearly established by the evidence. And the only possible inference from the proof before us is that the third party did not pro-

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PERRON v. CORPORATION DU VILLAGE DU SACRÉ-CŒUR DE JÉSUS.

Anglin C.J.C.

fess to act in the capacity of agent for the alleged debtor but, on the contrary, made the payment avowedly on his own behalf, whether intending it to be taken in satisfaction of any claim against the debtor or, as seems more probable, to be held as a deposit, or guarantee, for the eventual settlement of any such claim by the debtor himself. It is urged that this payment was subsequently ratified by the debtor and, therefore, is as binding upon him and the respondent as if made by his authority. The alleged act of ratification, however, is quite consistent with the debtor's position denying the existence of the debt and with the payment itself having been made not on his behalf but by the third party for his own account. Moreover, it is trite law that liability by virtue of ratification can arise only when in doing the act to be ratified the agent purported to act as such and on behalf of the principal.

Upon these grounds we think it quite clear that neither under article 1141 C.C., nor by virtue of the alleged agency of the third party for the debtor, is any liability established.

The appeal fails and is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Louis Morin.*

Solicitors for the respondent: *Bouffard & Bouffard.*

1928

*Feb. 21.
*Feb. 22.

SIMARD *v.* ROY

Sale—Quantity not determined—Indication of the place where it is situated—Deficit—Obligation of seller—Breach of contract—Damages—Arts. 1065, 1073, 1074, 1544 C.C.

APPEAL by the plaintiff appellant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), varying the judgment of the Superior Court, Tessier J., and maintaining the appellant's action for $574.69.

The appellant took an action in damages for breach of contract and claimed from the respondent the sum of $37,557.40. He alleged that the respondent had sold him

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) (1927) Q.R. 43 K.B. 538

1928

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4,500 cords of birchwood, 1,500 cords to be delivered for three consecutive years, such wood to be suitable for the making of spools; and that the respondent was able to deliver 200 cords only. The respondent pleaded that the wood was to be taken from certain lots of land specified in the contract and that he had delivered all the wood that was there.

The Superior Court maintained the action for $6,179.69. Both parties appealed to the Court of King's Bench, the respondent to claim the dismissal of the action *in toto* and the appellant to ask for an increase in damages; and the appellate court reduced the amount of damages from $6,174.69 to $574.69. The plaintiff alone appealed to the Supreme Court of Canada.

The Supreme Court of Canada, after hearing counsel, dismissed the appeal with costs.

Appeal dismissed with costs.

L. G. Belley K.C. and *Jules Gobeil* for the appellant.

Louis Morin K.C. for the respondent.

1928

*Feb. 7, 8.
*Apr. 24.

IN THE MATTER OF THE TRUSTEES ACT

AND

IN THE MATTER OF THE ESTATE OF R. H. SIMPSON

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

*Will—Devise—Construction—"Children"—"Sons and daughters * * * per stirpes"—Rule in Shelley's case (1 Rep. 93b).*

A testator devised his estate to trustees and made, amongst others, the following dispositions: "To my niece * * * I give and devise a life estate in the * * * and after her death to her children in equal shares *per stirpes*"; and also "* * * I direct that * * * the proceeds derived from such sale be divided among the sons and daughters of my brother * * * in equal shares *per stirpes.*"

Held, that the words "to her children in equal shares *per stirpes*" are words of designation and denote persons of the first degree of descent only; and that the presence of the words "*per stirpes*" does not

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

1928

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impart to the phrase "sons and daughters" a meaning embracing the whole line of descendants capable of inheriting.

No opinion is expressed as to whether or not the rule in *Shelley's case* ((1581) 1 Rep. 93*b*) is in force in the province of Alberta, as, assuming it to be in force, it does not apply to the above provisions.

Judgment of the Appellate Division ([1927] 3 W.W.R. 534) aff.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Clarke J.A. (2) upon an application by a trustee for an order interpreting certain clauses of a will.

The deceased, a bachelor, possessed of a considerable estate, made his will on the 21st of September, 1926, disposing of almost the entire estate to his nephews and nieces and their children. He having subsequently died and the executor, the Imperial Canadian Trust Company, being in doubt as to the legal effect of certain of the dispositions, it applied to the court for an interpretation of the terms of the will in question.

The dispositions in question to the nephews and nieces, of whom there are seven mentioned, are with one slight exception all in the following terms: "To my niece * * * I give and devise a life estate in the * * * and after her death to her children in equal shares *per stirpes.*" The one exception is the gift of a life estate to two nephews "as tenants in common" and after their deaths to their children "in equal shares *per stirpes.*"

After the specific devises appears the following provision: "In the event of any of the persons to whom I have devised a life estate in the land herein, dying without issue, I direct that my trustee sell the land so devised to such person and the proceeds derived from such sale be divided among the sons and daughters of my brother Frank Simpson in equal shares *per stirpes.*"

H. S. Patterson, for five nephews, nieces, devisees.

L. E. Ormond, for two nieces, licensees.

A. Macleod Sinclair K.C. for the official guardian and for a daughter of F. Simpson.

John W. Moyer for the executor.

(1) [1927] 3 W.W.R. 534. (2) [1927] 2 W.W.R. 107.

The judgment of the court was delivered by

DUFF J.—The questions in controversy on this appeal concern the construction of the will of the late Robert H. Simpson, and, admittedly, the decision of them turns upon the application or non-application of the rule in *Shelley's Case* (1) to the provisions in dispute.

The following paragraph is typical of the clauses to be construed:—

> To my niece Fern McDaniels, wife of Chester McDaniels, of Carmangay, in the province of Alberta, I give and devise a life estate in the east ½ sec. 3-13-24-W 4 and after her death to her children in equal shares *per stirpes*.

There is also a gift over to be considered in these words:—

> In the event of any of the persons to whom I have devised a life estate in land herein, dying without issue, I direct that my Trustee sell the land so devised to such person and the proceeds derived from such sale be divided among the sons and daughters of my brother Frank Simpson in equal shares *per stirpes*.

If the rule in *Shelley's Case* (1) governs, Fern McDaniels takes an estate tail, which, by statute, is in effect an estate in fee: if not, she takes a life interest only. The Appellate Division in Alberta has held that the rule in *Shelley's Case* (1) has not the force of law in Alberta. The learned judge of first instance, Clarke J., held that the rule applies. It is unnecessary, in my view, to consider whether or not the rule is in force in Alberta. I have come to the conclusion that, assuming it to be in force, it does not apply.

The precise question is this: Are the words "to her children in equal shares *per stirpes*," words of designation or words of limitation; do these words, "include the whole line of succession capable of inheriting"? (*Foxwell* v. *Van Grutton* (2).) *Prima facie*, the word "children," in such a context, denotes persons of the first degree of descent, and therefore is a word of designation. There is another proposition, which I will state in the words of Lord Cairns in *Bowen* v. *Lewis* (3):

> I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death

(1) (1581) 1 Rep. 93*b*. (2) [1897] A.C. 658, at p. 677.
(3) (1884) 9 A.C. 890, at p. 905.

1928

In re SIMPSON ESTATE.

Duff J.

without issue, those words pointing to death without issue are to be construed referentially, and to have the explanation from the gift to the particular individuals that you have had before.

This proposition, which Lord Cairns gives as the result of the authorities, and about which he says there was no dispute in the House of Lords, would suffice at once for the determination of the dispute before us but for the presence of the phrase *per stirpes* in the clause in question, upon which the appellant's counsel largely builds his argument.

The argument is that the phrase *per stirpes* is insensible as applied to a division among children in the restricted *prima facie* sense, and, therefore, that "children" should be read in such a sense as to conform to the terminology of the gift over, that is to say as "issue." In examining that argument, you must look at the whole of the will. (*Per* Lord Cairns) (1).

The words in which the gift over is expressed are significant. On the death of the life tenant without issue, the trustee is to sell the land, and the proceeds are to be divided among "the sons and daughters of my brother Frank Simpson in equal shares *per stirpes.*" Whatever may be said about the word "children," it would require a very demonstrative context—a context having the force and value of an interpretation clause—to impart to the phrase "sons and daughters" a meaning embracing the whole line of descendants capable of inheriting; especially so when employed in describing the destination of a gift of money. Here there is no such demonstrative context. "Sons and daughters" must be read, I think, according to the primary import of the words. It follows that, whatever be the effect he ascribed to them, the testator did not regard the words "*per stirpes*" as meaningless when applied to a direction for distribution among descendants of the first degree—among children in the primary sense of the word. So read, moreover, the terms of the gift over, the nominated beneficiaries being of the first generation only, seem to give evidence of an intention that it was to take effect not on an indefinite failure of issue, but on the death of the life tenant, without having had a child in whom an interest could vest under the terms of the devise to the child-

(1) 9 A.C. 890, at p. 906.

ren. I cannot therefore agree that the phrase *per stirpes* has the effect contended for, and it follows that the gift to the life tenant takes effect according to the intention declared.

The appeal should be dismissed. In view of the differences of judicial opinion, it seems to be a case for directing that the costs be paid out of the estate as between solicitor and client.

Appeal dismissed.

Solicitor for certain appellants: *H. S. Patterson.*

Solicitors for certain appellants: *Ormond & Millard.*

Solicitor for the executor: *John W. Moyer.*

Solicitors for the official guardian: *Adams, Fitch & Arnold.*

Solicitor for Mrs. F. A. Olmstead: *A. Macleod Sinclair.*

R. O. GILBERT (DEFENDANT).....APPELLANT;

AND

R. E. LEFAIVRE (PLAINTIFF).....RESPONDENT.

1928
*Feb. 23.
*Apr. 24.

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

Hypothecary action—Payment by president of company with the latter's funds of an hypothecary claim against the company with transfer of the claim to the president on behalf of the company—Company insolvent—Claim of the president against the company—Transfer occurring three months before insolvency—Insolvency of the president—Transfer to president set up by president's trustee against the insolvent company—Bankruptcy Act, R.S.C. 1927, c. 11, s. 64—Arts. 1212, 1716 C.C.

Vaillancourt & Co., Limited, had purchased an immovable hypothecated in favour of two creditors, Mercier and Grégoire, to whom different instalments of the original purchase price had been assigned. Payment of these instalments was further secured by a right of cancellation of the sale, stipulated by the original vendor, the assignor of these instalments. One Dubé was president and a large shareholder of Vaillancourt & Co. Limited. Two of the instalments payable to Mercier were in arrears in October, 1924, and an instalment assigned to Grégoire was to fall due on November 1 of that year. The company had enough of funds to pay Mercier, but was not in position to meet the instalment payable to Grégoire, who threatened proceed-

*PRESENT:—Duff, Mignault, Rinfret, Lamont and Smith JJ.

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ings to enforce payment. Under these circumstances, it was agreed between the company and Dubé that the latter would pay Mercier with the company's moneys and would take from him a transfer of his hypothecary claim, which he would hold for the benefit of the company, this being done with the hope that Dubé would thus be in a better position to negotiate for delay with Grégoire. This transfer of Mercier's claim to Dubé was made on October 29, 1924. Less than three months afterwards both Dubé and the company made an authorized assignment for the benefit of their creditors under the *Bankruptcy Act*. The evidence was that the company was insolvent at the date of the transfer by Mercier to Dubé to the knowledge of the latter. After the assignment of the company and of Dubé under the *Bankruptcy Act*, Dubé's trustee, the respondent, brought an hypothecary action against the company's trustee, the appellant, with the usual conclusions. On this action the Superior Court and the Court of King's Bench came to the conclusion that the transfer from Mercier to Dubé was a simulated transaction, and that in view of this simulation the rule applicable was that laid down by art. 1212 C.C., with respect to the effect of *contre-lettres*, so that, the creditors of Dubé being third parties, the appellant, trustee of the company, could not set up against the respondent the fact that Dubé had acquired and held Mercier's claim for the benefit of the company, and not for himself.

Held (without deciding whether or not simulation had been established, or whether or not the mandate between the company and Dubé could be set up against the latter's creditors), that Dubé, being the president of the company, and having moreover acquired Mercier's claim with the company's moneys, could not obtain for himself any benefit, or acquire any right of action against the company, out of the transfer to him of Mercier's claim, and that Dubé's trustee, even as representing the latter's creditors, had no right of action against the insolvent company's estate, to enforce payment of the claim acquired by Dubé from Mercier.

Held, also, that these transactions having taken place less than three months before the authorized assignment of the company, the transfer against the company obtained by Dubé from Mercier, could not be set up by Dubé's trustee against the insolvent estate of the company (*Bankruptcy Act*, R.S.C., 1927, c. 11, s. 64).

Judgment of the Court of King's Bench (Q.R. 43 K.B. 557) rev.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Stein J., and maintaining the respondent's action.

The material facts of the case and the question at issue are fully stated in the above head-note and in the judgment now reported.

(1) (1927) Q.R. 43 K.B. 557.

Geo. A. Campbell K.C. and *P. E. Gagnon K.C.* for the appellant.

R. Taschereau and *P. Audet* for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Ce litige s'est engagé entre deux syndics autorisés sous la *Loi de Faillite,* et de part et d'autre on invoque les droits des créanciers des faillis qui, le même jour, le 28 janvier 1925, ont fait cession de leurs biens pour le bénéfice de leurs créanciers respectifs. L'appelant est syndic à la faillite de Vaillancourt et Compagnie, Limitée, et l'intimé est syndic à la faillite de Duncan Napoléon Dubé, le président et l'un des principaux actionnaires de cette compagnie. Voici, aussi brièvement que possible, les faits qui ont donné lieu au procès.

Le 12 mai 1920, François Vaillancourt, fils, a vendu à Joseph Vaillancourt plusieurs lots de cadastre avec les bâtisses y érigées, ainsi que des pouvoirs d'eau, chevaux, voitures, animaux de ferme, etc., et les droits du vendeur en vertu d'un grand nombre de contrats, le tout pour le prix de $25,000, payable comme suit: $3,000 le 1er novembre 1920, et $3,000 le 1er novembre de chacune des années suivantes jusqu'à parfait paiement, avec intérêt à six pour cent. Le vendeur a réservé son privilège pour le paiement du prix et a stipulé la résolution de plein droit de la vente à défaut par l'acheteur de payer à l'échéance deux versements consécutifs du prix.

Quelques jours plus tard, le 19 mai 1920, Joseph Vaillancourt vendit à Duncan Napoléon Dubé les deux tiers indivis de ce qu'il avait acquis de François Vaillancourt, pour les deux tiers du même prix, payable aux mêmes échéances, et Joseph Vaillancourt et Dubé convinrent d'exploiter ensemble ces propriétés, leur part dans leur société étant d'un tiers pour Joseph Vaillancourt et de deux tiers pour Dubé. Cette société fut subséquemment changée en une compagnie à fonds social, Vaillancourt et Compagnie, Limitée, à qui Dubé et Joseph Vaillancourt vendirent les mêmes propriétés pour un prix déclaré avoir été payé comptant. Cette vente fut faite avec garantie, mais l'appelant n'a pas opposé, à l'action hypothécaire que l'intimé exerce du chef de Dubé, l'exception de garantie de l'article 2068 du Code Civil. Il n'y a donc pas lieu de se demander

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si le syndic de Dubé pouvait, à raison de cette promesse de garantie, évincer Vaillancourt et Compagnie, Limitée.

Par l'effet de la vente entre Joseph et François Vaillancourt, celui-ci était créancier de huit versements de $3,000, payables le 1er novembre des années 1920, 1921, 1922, 1923, 1924, 1925, 1926 et 1927, et d'un versement de $1,000 devant échoir le 1er novembre 1928. Le premier versement fut payé. François Vaillancourt transporta à Alfred Mercier, avec garantie de fournir et faire valoir et bénéfice de la condition résolutoire, les trois versements échéant en 1921, 1922 et 1923. Plus tard, il céda à Napoléon Grégoire, également avec garantie de fournir et faire valoir et bénéfice de la condition résolutoire, les trois versements de $3,000 qui étaient payables en 1925, 1926 et 1927, et le dernier versement de $1,000 échéant le 1er novembre 1928. Il garda pour lui le versement du 1er novembre 1924, mais il le céda ultérieurement à Napoléon Grégoire. Le premier versement de $3,000 transporté à Alfred Mercier, celui du 1er novembre 1921, lui fut payé par Joseph Vaillancourt. Les deux autres versements de la créance de Mercier ne furent pas rencontrés à leur échéance.

En octobre 1924, la Compagnie Vaillancourt se trouvait dans une situation embarrassante. Mercier n'avait pas été payé des versements échus en 1922 et 1923, et il pouvait se prévaloir de la clause résolutoire. Le 1er novembre 1924, le premier des versements dont Grégoire était créancier devenait exigible. La Compagnie Vaillancourt avait suffisamment de fonds pour payer Mercier, mais ne pouvait rencontrer le versement qui allait devenir dû à Grégoire. Si elle éteignait la dette de Mercier, la créance de Grégoire, qui déjà commençait à faire des menaces, aurait été la première réclamation contre sa propriété. Dans ces circonstances, Dubé, le président de la compagnie, et Joseph Vaillancourt, son gérant, s'avisèrent, sur le conseil d'un avocat, de satisfaire à la réclamation de Mercier, tout en laissant subsister sa créance contre l'immeuble. Dubé reçut $6,600 de la compagnie et paya à Mercier $6,992, se faisant transporter la créance de celui-ci. La date du transport et du paiement des $6,600 est le 29 octobre 1924. Dubé dit qu'il voulait protéger la compagnie et ses créanciers. Il ajoute qu'en devenant titulaire de la créance de Mercier, il pensait être en meilleure posture pour négocier avec Grégoire

et obtenir de lui un sursis afin de permettre à Vaillancourt et Compagnie, Limitée, de faire assez de profits pour payer la créance de Grégoire.

Ceci se passait moins de trois mois avant la mise en faillite de Dubé et de la compagnie, car leurs cessions de biens ont été faites le 28 janvier suivant. Il est d'ailleurs certain que la compagnie Vaillancourt était insolvable, à la connaissance de Dubé, à la date du paiement des $6,600 et du transport consenti par Mercier. Il est également établi que Dubé se faisait faire ce transport pour le compte de la compagnie et comme mandataire de cette dernière. Il détenait donc la créance hypothécaire de Mercier pour Vaillancourt et Compagnie.

L'intimé s'empare maintenant de ce transport de Mercier à Dubé, et, en sa qualité de syndic à la faillite de celui-ci, intente contre la faillite Vaillancourt et Compagnie, Limitée (qui n'avait pas assumé l'obligation personnelle de payer le prix de vente stipulé par François Vaillancourt), une action hypothécaire avec les conclusions usuelles de délaisser l'immeuble hypothéqué, si mieux n'aime la défenderesse, c'est-à-dire l'appelant ès qualité, payer la dette en capital, intérêts et frais.

Si la faillite Vaillancourt et Compagnie, Limitée, paye cette dette, elle l'aura payée une seconde fois. Et si la faillite Dubé reçoit ce paiement—ou si, ce qui revient au même, elle l'obtient par la vente en justice de l'immeuble hypothéqué—elle recevra de nouveau ce que Dubé a déjà reçu de Vaillancourt et Compagnie, Limitée, précisément pour obtenir pour cette dernière le transport de la créance de Mercier. Cette créance, disons-le encore, aura été payée deux fois, une fois à Mercier, et l'autre fois au cessionnaire de Mercier, mais chaque fois à même les deniers de Vaillancourt et Compagnie, Limitée.

On ne peut s'empêcher de trouver choquant ce résultat qui enrichirait les créanciers de Dubé aux dépens des créanciers de la faillite Vaillancourt. Et on peut bien se demander si les principes de droit que la cour supérieure et la cour du Banc du Roi invoquent justifient le jugement qu'elles ont rendu en faveur de l'intimé.

Les deux cours ont appliqué dans l'espèce les règles de la simulation, ce qui est beaucoup la faute de l'appelant qui, à l'audition en cour de première instance, et pour ouvrir la

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porte à la preuve testimoniale, a prétendu qu'il s'agissait d'un contrat simulé. Et se plaçant dans l'hypothèse de la simulation, les deux cours ont jugé que la règle à suivre est celle de l'article 1212 du Code Civil, qui dit que

> les contre-lettres n'ont leur effet qu'entre les parties contractantes; elles ne font point preuve contre les tiers.

Or, ajoutent-elles, les créanciers de Dubé sont des tiers, et on ne peut leur opposer ce qu'on appelle la contre-lettre, c'est-à-dire le fait que Dubé agissait comme mandataire et non pas pour lui-même et pour son bénéfice personnel.

Il ne paraît pas nécessaire de déterminer s'il y a eu ou non simulation dans l'espèce. Même en supposant qu'on ne saurait opposer aux tiers, ou aux créanciers de Dubé, le mandat qui est intervenu entre Dubé et la Compagnie Vaillancourt, il reste acquis que c'est avec les deniers de celle-ci que Dubé, le président de la compagnie, a payé la créance de Mercier. Dans ces circonstances, Dubé n'aurait pu, sans fraude tant à l'égard de Vaillancourt et Compagnie, Limitée, que de ses créanciers, garder pour lui-même le bénéfice de la créance qu'il a payée. Et comment son syndic peut-il invoquer le transport Mercier à l'encontre de la faillite Vaillancourt sans se rendre lui-même coupable de fraude à l'égard de cette dernière?

Dans ces circonstances, il est clair que Dubé n'aurait pas pu poursuivre Vaillancourt et Compagnie, Limitée, sur le transport qu'il a obtenu de Mercier, et je suis d'avis que son syndic, même comme représentant ses créanciers, ne peut faire valoir, du chef de Dubé, une réclamation que Dubé n'a jamais eue. Ce syndic dérive son titre de la cession de biens que Dubé lui a faite sous l'empire de la *Loi de Faillite,* et l'action qu'il prétend exercer en cette cause ne faisait pas légalement partie du patrimoine cédé. Elle ne rentre pas, non plus, dans le cadre des actions que la *Loi de Faillite* permet au syndic de faire valoir au nom des créanciers.

Je n'ai donc pas besoin d'exprimer une opinion sur les principes de droit que les jugements invoquent, ni sur les autorités que les savants juges citent. Ces principes et ces autorités sont sans application dans cette cause, et certaines solutions de la jurisprudence française moderne, dont on fait état, me paraissent assez discutables. Il y a, surtout en matière de mandat, des différences notables entre le

Code Civil de la province de Québec et le Code Napoléon. Ainsi nos articles 1716 et 1727, pour ne parler que de ceux-là, n'existent pas dans le code français. En France, les tiers qui traitent avec un prête-nom, ou avec un mandataire qui parle en son propre nom, n'ont pas d'action directe contre le mandant (Planiol, 8e éd., t. 2, n° 2271; Dalloz, Répertoire pratique, vo. *Mandat,* n° 301). Il en est autrement sous notre code (art. 1716 C.C.) qui s'inspire de la doctrine de Pothier (Mandat, n° 88). La situation apparente, en France, semble avoir une importance, en regard de la situation réelle, qu'elle n'a peut-être pas dans notre droit où nous n'avons pas la règle, si importante en matière mobilière, *possession vaut titre* (art. 2279 C.N. et art. 2268 Code civil, Québec). Sur tout cela je crois devoir faire des réserves, car la question peut se présenter de nouveau d'une manière concrète, mais pour le moment je n'ai pas à trancher le débat.

Il y a du reste une raison additionnelle dans cette cause pour rejeter l'action de l'intimé. Les transactions en question sont intervenues dans les trois mois qui ont précédé la mise en faillite de Dubé et de Vaillancourt et Compagnie, Limitée. Ce serait contraire aux dispositions formelles de la *Loi de Faillite* que de permettre à Dubé ou à son syndic de garder une partie importante de l'actif de Vaillancourt et Compagnie, Limitée, qui était insolvable à la connaissance de Dubé lors de la remise des $6,600, soit à titre de paiement d'une dette, ce qui serait un paiement préférentiel, soit à tout autre titre (art. 64 *Loi de Faillite,* chapitre 11, S.R.C., 1927). Et les principes fondamentaux de cette loi s'opposent également à ce que le syndic à la faillite Dubé puisse réclamer de Vaillancourt et Compagnie, Limitée, également en faillite, une dette qu'elle a déjà payée. A tous égards l'action de l'intimé ne peut réussir.

Il y a eu une objection à la preuve du mandat intervenu entre Dubé et Vaillancourt et Compagnie, Limitée, dans le but d'obtenir le transport, pour cette dernière, de la créance Mercier. L'intimé n'a pas insisté sur cette objection devant nous, et je crois que la preuve du mandat était admissible en vue des aveux de Dubé, la partie adverse (art. 1233 Code civil).

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Avec beaucoup de respect, ma conclusion est que l'appel doit être maintenu et que l'action doit être renvoyée, avec les frais de toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Gagnon & Simard.*

Solicitors for the respondent: *Shink & Audet.*

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*Oct. 24.

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*Mar. 27.

CANADA AND GULF TERMINAL RAILWAY COMPANY (DEFENDANT) } APPELLANT;

AND

DAME E. LEVESQUE (PLAINTIFF).... RESPONDENT.

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

Negligence—Accident—Electric current—Interior installation—Electric power furnished by another person—Electric storm—Transformer out of order—Current of 2,200 volts getting into the interior circuit—Liability—Articles 1053, 1054 C.C.

The respondent's husband, one Leon Claveau, an experienced mechanic, while employed as foreman in charge of the machine shop of the appellant company, was instantly killed by an electric shock as he was holding in his hands a portable electric lamp fixed to an extension cord. In the machine shop the interior installation for electricity was the property of the appellant and was used solely for lighting purposes. The wiring was extremely simple and consisted of two wires running on insulators with, here and there, what is known as rosettes from which lamps were hung. Some of these lamps were furnished with wire sufficiently long to permit of their being used within a certain radius. These extension lamps were attached to insulated wire, had wooden handles, and the globe itself was protected by a sort of wire basket attached to the wooden handle. At the entrance to the shop there was a cut out with fuses generally known as block switch with fuses, and of the kind generally used in such installations. The current contracted for and furnished for the lighting system was 110 volts. Outside the shop, the secondary wires passed through the block switch mentioned, and from there lead to a post situated about fifty feet away, and on which was installed a transformer for the purpose of reducing the high tension current of 2,200 volts to the voltage of 110 required and used for lighting. This transformer was the property of La Compagnie de Pouvoir du Bas St. Laurent, which supplied the current and under whose care and control it was. Beyond such trans-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

former were the primary wires which carried the high tension current to the transformer where it was reduced to 110 volts and delivered to the appellant at the entrance to its shops. At the time of the accident a very intensive electric storm was raging and had been for some time. The accident occurred in this way: Claveau was overlooking some repairs to an engine and as it was dark, he picked up a portable lamp. The persons in the shop heard a cry and saw a flash of light, and Claveau fell holding the portable lamp in his hands. Apparently he was holding it by the wire screen used to protect the globe. Death was practically instantaneous. The expert evidence showed that the end of one of the primary wires stretching from one of the insulators on the post which held the transformer was broken and burnt, permitting the high tension current to enter the secondary system within the building belonging to the appellant, without passing through the transformer, the breaking and burning of this wire having been caused by a stroke of lightning or some similar occurrence. The respondent sued as well personally as in her quality of tutrix to her four minor children and claimed damages from the appellant company in an amount of $20,000. The respondent's action, having been dismissed by the trial court, was maintained by the appellate court for an amount of $6,000.

Held that the appellant company was not liable, Duff and Lamont JJ. dissenting.

Held, also, Duff and Lamont JJ. dissenting, that it was not the lamp, or at least it was not shown to have been the lamp, which caused the accident.

Held also, Duff and Lamont JJ. dissenting, that the burden of proof that the damage was caused by a thing which the appellant had under its care was upon the respondent. Assuming that Claveau's death was caused by an electric shock emanating from the wires by which the lamp was connected with the source of the electric supply, and seeing that the source of supply and the transmission were under the care and operation of the power company, and not under the care of the appellant, it follows that the burden of proof that the lamp caused the damage is not satisfied, and cannot be discharged, without evidence that the electric current which caused the death of Claveau did not exist apart from the lamp, and this has not been established.

Per Anglin C.J.C. and Rinfret J.—In the eyes of the law and under the present conditions of modern life electricity is an industrial product, which is carried from one place to another. In practice, it has a material existence independent of the metallic wires or conduits through which it is supplied. It is legislatively recognized as susceptible of being measured, bought and sold, distributed and stolen.

Per Anglin C.J.C. and Rinfret J.—Companies supplying electricity for lighting purposes have under their care the electrical current which they supply; and the responsibility under art. 1054 C.C. for a death caused by an excessive electrical current which has escaped from their primary wires and has found its way in the interior installation of the house of one of their clients rests with such companies and not with the consumer, even if the interior installation through which the excessive electrical current is carried is under the care of such consumer.

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Per Anglin C.J.C. and Rinfret J.—The interior installation, comprising the electric current of 110 voltage, being the only "thing" which the appellant had under its care, was not the cause of the accident; the "thing" which caused the death of the respondent's husband,, i.e., the excessive electric current of 2,200 volts, was entirely under the care of the power company.

Per Newcombe J.—There was evidence in the case upon which the trial judge might reasonably find as he did, and therefore his judgment should be restored (*Supreme Court Act*, s. 51).

Per Newcombe J.—If the lamp and the mysterious death-dealing agency, or force, or energy known as the electric current, can be considered as separate entities, it was the latter which was the direct operative cause—the fatal instrument, if it may be so described—and the lamp was no more than a *sine qua non*.

Per Newcombe J.—The burden of proof that the damage was caused by a thing which the appellant company had under its care was upon the respondent. Assuming that Claveau's death was caused by electric shock emanating from the wires by which the lamp was connected with the source of the electric supply, and seeing that the source of supply and the transmission were under the care and operation of the power company, and not under the care of the appellant, it follows that the burden of proof that the lamp caused the damage is not satisfied, and cannot be discharged, without evidence that the electric current which caused the death of Claveau did not exist apart from the lamp, and this has not been established.

Per Duff and Lamont JJ. dissenting.—The appellant company is responsible under art. 1053 C.C. in not having taken all the precautions which a reasonable and competent regard for the safety of its employees would require. The appellant company must be presumed to have known that, unless the transformer was grounded, the employees in the shop were exposed to serious risk of an invasion of the interior circuit by the high-tension current. That risk was created by the connection of the company's installation with the secondary coil of the transformer, and thereby, through the primary coil, with the high-tension current as the source of energy. It was a risk arising from the tapping of that source of energy, and the connection of it with the shop, for the benefit and by the consent and direction of the appellant company. Having regard to the gravity of the risk, the appellant incurred an obligation to exercise the highest degree of care; and this obligation was not performed by simply assuming that the power company had not been negligent. The appellant ought to have ascertained that the proper precautions had been taken before connecting their interior circuit with the transformer.

Per Duff and Lamont JJ. dissenting. The death of the respondent's husband was "caused" by a thing under the care of the appellant, in the sense of article 1054 C.C.; and the appellant has failed to bring itself within the clause of that article, which, upon certain conditions being satisfied, exonerates it from responsibility. The wires and other appliances of the interior circuit, constituted, in their totality, a thing in the care, and under the control, of the appellant. Its function was that of a conductor of electricity. The service it performed

was to receive energy from the primary circuit, and to distribute that energy to the various points at which it was utilized in the production of electric light. It was by the act of the appellant and solely by its act, that the connection was maintained, through which alone, electrical energy was, or could be transferred, from the high-tension circuit of the power company to the interior circuit. It was from this circuit that Claveau received the discharge. Whatever other causes may have co-operated, the interior circuit, as the instrument by which the diversion was effected and by which the energy diverted, was directed and conveyed into Claveau's body and was one of the factors which directly co-operated in bringing about the plaintiff's loss.

Per Duff and Lamont JJ. dissenting: A statutory enactment, assigning responsibility, for damage "caused" by a given act or thing, would not, in the absence of a controlling context, naturally be read as limited in its application to damage exclusively so caused; but would ordinary be considered to apply to damage caused by the designated person or thing functioning in conjunction with other co-operating causes. *Charing Cross* v. *Hydraulic Power Co.* ([1914] 3 K.B. 772 at p. 782. There seems to be no good reason for limiting the application of article 1054 C.C., in such a way as to exclude from its scope all damages except such as are exclusively caused by the thing under the care of the person alleged to be responsible.

Per Duff and Lamont JJ. dissenting. Whatever difficulties may be encountered in determining, for the purpose of applying it to other circumstances, the precise limits of the conception denoted by the word "caused" in the first paragraph of article 1054 C.C., there is no doubt that, where the damages are of such a character as to fall within the purview of risks which a person ought to recognize as arising from his maintenance of the thing which is in debate, then that paragraph comes into operation.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 562) reversed, Duff and Lamont JJ. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec (1) reversing the judgment of the trial judge, Pouliot J., and maintaining the respondent's action in damages resulting from the death of her husband.

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

A. C. M. Thomson K.C. and *P. E. Gagnon* for the appellant.

L. G. Belley K.C. for the respondent.

(1) (1927) Q.R. 43 K.B. 562.

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ANGLIN C.J.C.—I concur with Mr. Justice Rinfret.

DUFF J. (dissenting).—The pertinent facts are stated from the point of view of the appellants for the purpose of supporting the appeal, in the following extracts from the appellants' factum.

In the machine shop * * * there was an interior installation for electric lighting, which was the property of the defendant-appellant, and used solely for lighting purposes. This wiring was extremely simple and consisted of two wires running on insulators and with here and there what is known as rosettes from which lamps were hung. * * * Some of these lamps were furnished with wire sufficiently long to permit of their being used within a certain radius. These extension lamps were attached to insulated wire, had wooden handles, and the globe itself was protected by a sort of wire basket attached to a wooden handle * * *. At the entrance to the shop there was a cut out with fuses generally known as block switch with fuses, and was of the kind generally used in such installations. The current contracted for and furnished for the lighting system was 110 volts * * *.

Outside the shop, the secondary or interior wires passed through the block switch mentioned, and from there lead to a post situated about forty feet away, and on which was installed a transformer for the purpose of reducing the high tension current of 2,200 volts to the voltage of 110 required and habitually used for lighting. This transformer was the property of La Compagnie de Pouvoir du Bas St. Laurent, who furnished the current, and whose property and under whose charge and control it was * * *. Beyond such transformer were the primary wires which carried the high tension current to the transformer where it was reduced to 110 volts and delivered to the defendant at the entrance to its shops. * * *

The accident occurred in this way: Claveau, the foreman of the machine shop was overlooking some repairs to an engine. The work was being done by Messrs. Lachance, father and son. They told Claveau that the portable lamp which they were using was too short and Claveau replied that he would lengthen it. He did not do this, however, but went to another part of the shop, where he picked up another portable lamp. The witnesses heard a cry and saw a flash of light, and Claveau fell holding the portable lamp in his hands. * * * Apparently he was holding it by the wire screen used to protect the globe. Death was practically instantaneous. * * *

The expert evidence shows * * * and there is no contradictory evidence, that the end of one of the primary wires stretching from one of the insulators on the post which held the transformer, had broken and burnt, permitting the high tension current to enter the secondary system within the building belonging to the defendant-appellant, without passing through the transformer. The breaking and burning of this wire was caused by a stroke of lightning or some similar occurrence. * * *

The essential facts which have a considerable bearing on the present case may be resumed as follows:

1. A very heavy electric storm was in progress at the time of the accident;

2. The storm had resulted in the primary system of wires carrying the high tension current being struck in such a way that either the high

tension current or the current from the lightning itself entered the appellant's building and ran along its secondary system intended for 110 volts only;

3. That the high tension current and the system upon which it was carried, including the transformer, were things belonging to and in charge of, not the appellant but a third party.

This statement requires only one word of comment, for the purpose of putting aside (and thereby simplifying the consideration of the case) the suggestion in the last paragraph not very seriously made that Claveau's injury was due to a stroke of lightning passing from the line of the power company through the interior circuit. The substantive view put forward in the factum is that, the rupture of the main line having been caused by a stroke of lightning, the high potential of that line was applied to the secondary circuit by direct contact of the broken end of the primary wire with the metal supports of the transformer, and that a current or electrostatic charge of abnormally high potential was thus communicated to the secondary circuit. This was the view advanced by Walsh, the only independent expert called by the appellants who negatived explicitly the suggestion that Claveau was killed in consequence of receiving a stroke of lightning. The other witnesss, Méthé, who maintained the opposite, was the engineer of the power company, and was obviously concerned to protect his own company from responsibility for its negligence in failing to take the necessary measures to prevent an escape of current from the main line into the secondary circuit. Under pressure of cross examination, he affirmed he was not an electrician, and not competent to give expert evidence upon subjects within the domain of an electrician. His evidence upon this point, should for these reasons, be disregarded.

It should further be observed that the fair deduction from the evidence of the appellants themselves is that in order to protect the interior circuit from risk of invasion by the high pressure current in the main line, it is usual to ground the transformer, and furthermore that this precaution is as a rule effective, and would have been effective in the circumstances in evidence, if it had been, as it was not, observed.

I have been unable to convince myself that the appellants are not responsible under article 1053 C.C. No-

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body would dispute the obligation of an employer to take reasonable measures for the safety of his employees, and for that purpose to take all the precautions which a reasonable and competent regard for such safety would require. Particularly, if the employees in the course of their duties are brought into contact with or proximity to dangerous things, or things that may become dangerous in the absence of proper precautions, it is his duty to take all reasonable measures, for their protection. The employees are entitled to assume that they are not exposed to risks which do not present themselves to their observation, and which can be avoided, and are commonly and usually avoided by well-known precautions.

The appellant company must be presumed to have known that unless the transformer was grounded, the employees in the shop were exposed to serious risk of an invasion of the interior circuit by the high-tension current. That risk was created by the connection of the company's installation with the secondary coil of the transformer, and thereby, through the primary coil, with the high-tension current as the source of energy. It was a risk arising from the tapping of that source of energy, and the connection of it with the shop, for the benefit and by the consent and direction of the appellant company. It is quite true that the transformer was apparently not situated on the appellant company's premises, and it seems to have been the property of the power company; but the transformer could only function in relation to a circuit connected with its secondary coil, and existed only for the purpose of providing, by the permission of the appellant company, and under contract with it, a current for that circuit. The connection between the high-tension current and the wires and other appliances constituting the appellant company's installation, was, and could only be effected, by the act of the appellants. It was the appellant company's own act, therefore, which in part directly, in part through the instrumentality of the power company, established this potentially dangerous thing in its own shop.

It was held by the Privy Council in *Toronto Power Co.* v. *Paskwan* (1), that the duty of an employer to take

(1) 15 A.C. 734.

reasonable care to provide a safe place for his work people, and a proper plant, is a duty which cannot be delegated. It is unnecessary for the purposes of this appeal to decide whether the performance of that duty in the circumstances before us could have been delegated to an independent contractor or an expert employee. Proper precautions were not in fact taken, and that under the circumstances of this case is sufficient *prima facie* to establish that the employer's duty was not performed, and there is not the slightest evidence to show that the duty was by the appellants delegated to anybody, either contractor or servant. Assuming that the appellants could have performed their duty by employing a competent expert to report upon the proper measures to be taken for the protection of their servants, with authority to take such measures, or by entering into a contract with an independent contractor undertaking to do the same thing, there is no evidence to show that anything of the kind was done by them. It is no answer to say that the power company in failing to take the necessary precautions was guilty of fault, or that it was the duty of the power company to take such precautions. Having regard to the gravity of the risk, the appellants incurred an obligation to exercise the highest degree of care; and I cannot agree that this obligation was performed by simply assuming that the power company had not been negligent. The appellants ought to have ascertained that the proper precautions had been taken before connecting their interior circuit with the transformer.

I now come to the consideration of article 1054 C.C. The wires and other appliances of the interior circuit, constituted, in their totality, a thing in the care, and under the control, of the appellants. Its function was that of a conductor of electricity. The service it performed was to receive energy from the primary circuit, and to distribute that energy to the various points at which it was utilized in the production of electric light. It was by the act of the appellants and solely by their act, that the connection was maintained, through which alone, electrical energy, was, or could be transferred from the high-tension circuit of the power company to the interior circuit. It was from this circuit that Claveau received the dis-

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charge. Whatever other causes may have been involved, the interior circuit, as the instrument by which the diversion was effected, and by which the energy diverted, was directed and conveyed into Claveau's body, was one of the factors which directly co-operated in bringing about the plaintiff's loss. That seems to me to be only another way of saying that Claveau's death was "caused" by a thing under the care of the appellants in the sense of article 1054 C.C.; and, as we shall see presently, the appellants have failed to bring themselves within the clause of that article, which, upon certain conditions being fulfilled, exonerates them from responsibility.

To this, the appellants' principal answer is that the true cause, that is to say, the only cause within the meaning of article 1054 C.C., was the escape of a high-tension electric current into Claveau's body, and that this high-tension electric current was a thing, not in the "care" of the appellants in the sense of article 1054 C.C. This contention of course involves the proposition that the circuit which was in the care and under the control of the appellants, and played the part just indicated in producing Claveau's death, was not a cause of it, in that sense.

Now, neither in common language, nor in law, has the word "cause" a fixed meaning, which can be formulated in a strict definition. Out of the numberless antecedents of a given effect, we are in the habit of selecting those which attract our attention from a particular point of view, and ascribing to those antecedents the character of cause.

Lawyers, concerned only with assigning juridical responsibility, address themselves primarily to human acts or omissions and their consequences; and as a given effect may result from the co-operation of several such acts or omissions, each of them may serve as the foundation of legal responsibility, as the legal cause from one point of view.

A statutory enactment, assigning responsibility, for damage "caused" by given act or thing, would not, in the absence of a controlling context, naturally be read, as limited in its application to damage exclusively so caused; but would ordinarily be considered to apply to damage caused by the designated person or thing functioning in conjunction with other co-operating causes. *Charing Cross*

v. *Hydraulic Power Co.* (1). There seems to be no good reason for limiting the application of article 1054 C.C., in such a way as to exclude from its scope all damages except such as are exclusively caused by the thing under the care of the person alleged to be responsible. And indeed, this is not permissible in view of the decision in *City of Montreal* v. *Watt* (2).

Article 1054 C.C., envisages the "things" *to which it applies,* as objects of care, and as potential instruments of harm, and interpreting the article in that light, we can without difficulty, arrive at at least one conclusion as to the scope of the word "caused." Responsibility is displaced if the damage dealing act or event is shown to be something that the person having care of the thing, could not prevent by any exertions that might reasonably be required of him. There can be no doubt, that if the thing which is the subject of care, does, in the circumstances in which it is placed, give rise to a risk of harm, recognizable by a reasonably competent forethought, then any harm which actually supervenes from the realization of that risk, is damage "caused" by the thing within the contemplation of article 1054 C.C., and the person having the care of the thing, must, in order to escape responsibility, show that he could not by anything he could reasonably be called upon to do, have averted it. The scope of the word "caused" may be much wider, but for the present it is sufficient that it is broad enough to embrace all such cases. In the legal sense, you would be emptying the word "cause" of all meaning by holding that such cases are not within the intendment of article 1054 C.C.

The occurrence which led to Claveau's death was, as I have pointed out above, one which ought to have been anticipated by the appellants as within the risk created by the maintenance of the interior circuit in connection with the power company's transformer.

It is a little important in this connection not to be misled by descriptive epithets commonly found in legal treatises and even in judgments, which while they have their value for descriptive purposes, cannot, without grave risk of error, be treated as furnishing, even approximately, a

(1) [1914] 3 K.B. 772 at 782. (2) [1922] 2 A.C. 555.

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criterium for differentiating the kinds of casual connection which the law does or does not recognize as entailing responsibility. In *Weld-Blundell* v. *Stephens* (1), Lord Sumner refers to some of these. Effective cause, he observes, is simply that which causes. Proximate cause has acquired a special connotation through its employment in insurance law. He suggests that direct cause is the least objectionable of all phrases because it is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result, and he refers to *Burrows* v. *March, Gas & Coke Co.* (2) and *Hill* v. *New River Co.* (3), which are not without a noticeable resemblance to the present case. In *British Columbia Electric Ry.* v. *Loach* (4), Lord Sumner, speaking for the Judicial Committee, which included Lord Haldane and Lord Parker, as well as himself, said: observed as to inquiries into responsibility for torts:

> The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and event of acts of responsible human beings, between the damage done and the conduct which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "causa causans," on the one hand as against, on the other, "causa sine qua non," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

I repeat, however, that whatever difficulties may be encountered, in determining, for the purpose of applying it to other circumstances, the precise limits of the conception

(1) [1920] A.C. 956, at p. 983.
(2) (1872) L.R. 7 Ex. 96.
(3) (1868) 9 B. & S. 303.
(4) [1916] 1 A.C. 719, at pp. 727 and 728.

denoted by the word "caused" in the first paragraph of article 1054 C.C., of this there seems at least to be no room for doubt, that where the damages are of such a character as to fall within the purview of those risks which the defendant ought to recognize as arising from his maintenance of the thing which is in debate, then that paragraph comes into operation. This seems to be involved in *City of Montreal* v. *Watt & Scott* (1).

We may now examine a little more closely from this point of view, the facts with which we have to deal. The immediate agency in Claveau's death was the discharge of electrical energy into his body. The immediate cause of that discharge, so far as we know, was Claveau's own act in grasping the electric lamp. From the point of view of responsibility, that is of no consequence, because Claveau seems to have had no reason to suspect the risk he was encountering, and there is no suggestion of fault on his part; but Claveau's act took effect in co-operation with two other things, first, the presence in the wire of an electrostatic charge of high potential, or an electrical current of high pressure, and moreover, as an equally essential thing, which such a state of the wire and its appurtenances as permitted the discharge. As concerns Claveau, or Claveau's representatives, either of these things might equally, that is to say, with no distinction from the juridical point of view, be the cause of the discharge. If the presence of the electric charge or electric current was due to the negligence of A, and the state of the appliances which made the discharge possible, was due to the negligence of B, then, from the point of view of A's responsibility, under article 1053 C.C. the first was the cause, in the legal sense, while in the same sense, the second was the cause from the point of view of B's responsibility. Neither A nor B could escape responsibility by attempting to cast it exclusively upon the other.

Then the transfer of electricity, under inordinate pressure, from the high voltage lines of the power company, to the interior circuit of the appellants, involved, first, a condition of the power company's wires, permitting its escape, then a condition of the interior circuit and of the

(1) [1922] 2 A.C. 555.

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appliances for tapping the high-tension current of the power company which permitted the application of a dangerously high potential to the circuit, and if the condition of the circuit which permitted this, or the condition of the transformer which permitted it, or the condition of the power company's lines, which permitted it, was due to the negligence of the persons severally responsible for each of these things, then each of them was, in its turn, from the point of view of responsibility, under article 1053 C.C., a cause of the respondent's damage. If the absence of grounding for the transformer, was due to the negligence of the appellants, as well as to the negligence of the power company, then they were jointly responsible, under that article, for that state of affairs, and if grounding would have prevented the accident, the absence of grounding is, from the point of view of both of them, a cause.

It seems equally clear that from the point of view of the first paragraph of article 1054 C.C., any one of these things —the state of the interior circuit, and of the lamp attached to it, as conductors of electricity, in other words, the interior circuit and the lamp, in the state in which they were, permitted the discharge into Claveau's body; the condition of the circuit which permitted the high tension current to pass into the interior of the shop from the transformer; the condition of the power company's main line and the transformer, which permitted the escape of the current from the main line of the transformer's support, and thence to the interior circuit—any one of these things, it seems clear, was in the sense of that paragraph, a co-operating cause of the damage.

I will not dwell upon the effect of this conclusion as touching the responsibility of the appellants. The appellants could only exonerate themselves by showing that no reasonable precautions within their power, would, if taken, have prevented the damage. In this, they failed in three respects. First, apart altogether from the matter of the grounding of the transformer, they failed to show—the evidence is silent upon it—that there was no available means by which they could have protected their interior circuit from such an invasion as that which occurred. Second, the testimony adduced on behalf of the appellants themselves, shows that the lamp was not of the type commonly

in use, and there was no evidence justifying the conclusion that, by a proper insulation, persons using the lamp could not have been made secure against the risk of such a discharge as that which Claveau received. And lastly, there is the matter of the grounding of the transformer, which has been sufficiently discussed already. The appeal should be dismissed with costs.

NEWCOMBE J.—The trial judge found that the defendant company was not guilty of any fault, and that it had not under its care the excessive electric current, found to be the thing which caused the death of the plaintiff's husband. Upon appeal, the majority of the learned judges considered, as I interpret the judgment of the court, that the fatal occurrence was due to the fact that, accidentally, during a violent thunder storm, the portable extension lamp became charged with a current of 2,200 volts, which it was not intended to carry, and that death was caused by the shock communicated to the man's body when he grasped the lamp so charged; that although this electric current was not under the care of the defendant, the lamp was; that, while it was not shown that the defendant was negligent, there was room for the application of article 1054 of the Civil Code of Quebec, and that the defendant should have established that it could not have prevented the accident, which, in the view of the court, it had failed to do, because it was not shown that by the use of a better or safer lamp, or one more qualified to afford protection against the perils which were encountered, the accident could not possibly or probably (fort possible, sinon fort probable) have been avoided. The ground of obligation found by the Court of King's Bench is thus the said article in its relation to the lamp, and the absence of proof of defeasance of the liability held to be thereby imposed, namely, proof of inability to prevent the act (le fait) which caused the damage.

I would interpret article 1054 C.C. in its application to this case as providing that every person capable of discerning right from wrong is responsible for the damage caused by things which he has under his care, but only if he fail to establish (ne peut prouver) that he was unable to prevent the act (le fait) which caused the damage, and I shall as-

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sume for the purposes of what I am going to say that the word "person" in this context includes a corporation such as the defendant company.

I would have upheld the judgment of the learned trial judge, and, therefore, in the discharge of what I conceive to be the duty of the court under s. 51 of the *Supreme Court Act,* the appeal should, I think, be allowed. In my judgment there was evidence in the case upon which the trial judge might reasonably find as he did. I am not prepared to replace his finding by one of negligence against the defendant; neither apparently was the Court of King's Bench. Moreover, as to the thing which caused the accident, if it were a thing, I am persuaded that it was not the lamp, or at least it is not shown to have been the lamp. If the lamp and the mysterious death-dealing agency, or force, or energy, known as the electric current, can be considered as separate entities, it was the latter which was the direct operative cause—the fatal instrument, if it may be so described, and the lamp was no more than a *sine qua non.* There are many English cases which illustrate the principle of this conclusion; see for example *Wilson* v. *Xantho* (1); and *Hamilton* vs. *Pandorf* (2), which, though relating to very different conditions of fact, exemplify the application of a rule of causality which is common to both systems.

It is not necessary to go further, but, if it were, I should wish to consider whether the defendant would not escape liability under article 1054 for the reason that it was unable to prevent the occurrence which caused the damage. This means "unable by reasonable means"; *City of Montreal* vs. *Watt and Scott* (3). If there had been negligence on the defendant's part it would have been liable under article 1053, but negligence is excluded by the findings; there was therefore, in that sense, no failure to adopt reasonable means, and I am in a frame of mind to question whether it does not appear to be unreasonable that the defendant should have anticipated what happened and provided extraordinary means of safety against such a combination of unforeseen occurrences, and the intrusion of a

(1) (1887) 12 App. Cas. 503. (2) (1887) 12 App. Cas. 518.
(3) [1922] 2 A.C. 555, at p. 563.

resulting current twenty times greater than that for which its works were constructed and equipped, if indeed it were possible to do so.

As to the burden of proof that the damage was caused by a thing which the defendant company had under its care, it was upon the plaintiff. Although the lamp may have afforded a passage for the electric current which caused the shock, it seems to be clear, upon the case as it stands, that La Compagnie du Pouvoir de Bas St. Laurent, the power company which supplied the electricity to the premises of the defendant company, produced the current and had the care of the apparatus and the exterior wires by which the current was transmitted, and would have been responsible for the damages upon an allegation of fault or negligence on the part of that company. Assuming that the man's death was caused by electric shock emanating from the wires by which the lamp was connected with the source of the electric supply, and, seeing that the source of supply and the transmission were under the care and operation of the power company, and not under the care of the defendant, it follows that the burden of proof that the lamp caused the damage is not satisfied, and, I should think, cannot be discharged, without evidence that the electric current which caused the death of Claveau did not exist apart from the lamp. No attempt was of course made to establish this, but, to the contrary, the proof proceeds upon the assumption that the lamp and its attachments served only as the conductor of something foreign to the lamp—a source of power, not the lamp, possessing that inherent or latent capacity to produce the fatal result which was excited to action by contact with the man's hand. It is consistent with the absence of liability on defendant's part that electricity is not more intimately known to science than as a name applied to the source of its well recognized phenomena, while its material existence cannot be denied if, as in practice and legislatively recognized, it can be measured, bought and sold, exported, distributed and stolen. (See *Electricity and Fluid Exportation Act*, c. 16 of 1907; Criminal Code, s. 351; *Electric Lighting Act*, 1909, 9 Edw. VII, c. 34, Imp., etc.) Moreover in the judicial authorities to which my brother Rinfret refers the electric current is treated as an independent causative agent. It has the qual-

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ity and habit of travelling by wire, but for the damage which it causes in transit, expressing my opinion with some diffidence and with the utmost respect, the Civil Code does not, in the circumstances of this case, attach liability to a person who has the care only of the wire, or of the lamp in which the wire terminates, when the damage is not caused by his fault, even though he have failed to prove that he was unable, within the meaning of the article, to prevent the act which caused the damage.

RINFRET J.—L'appelante, Canada and Gulf Terminal Railway Company, possédait à Mont-Joli une usine de réparation. L'éclairage s'y faisait au moyen de l'électricité fournie par La compagnie de Pouvoir du Bas St-Laurent. A cette fin, le réseau de cette compagnie, composé de fils primaires chargés d'un courant de 2200 volts, se rendait jusqu'à une distance d'environ cinquante pieds de l'usine. Là, le courant était transformé à 110 volts et, ainsi réduit, suivait des fils secondaires jusqu'à l'usine où il rejoignait l'installation intérieure.

Le réseau et le transformateur étaient la propriété de la compagnie d'éclairage, qui en avait la garde, le contrôle et la direction. Les fils secondaires et l'installation électrique intérieure étaient sous la garde de la compagnie de chemin de fer Canada and Gulf Terminal.

Léon Claveau, l'époux de la demanderesse et le père des autres demandeurs, était contremaître à l'emploi de la compagnie de chemin de fer. Le 9 juin 1925, dans l'usine, il surveillait la réparation d'une locomotive. C'était au cours d'un orage très violent, accompagné d'éclairs et de tonnerre. Les ouvriers eurent besoin d'éclairer l'intérieur de la locomotive. Il y avait à proximité une lampe électrique portative, attachée à un long fil, et que l'on pouvait ainsi transporter d'un endroit à un autre. La lampe consistait en une ampoule dans un socle en cuivre, entourée d'un grillage métallique, et fixée à une poignée en bois.

Claveau traversa la salle de l'usine pour aller chercher cette lampe. On entendit un cri et, en même temps dans la direction d'où venait le cri, on vit une grosse lueur, "comme un éclair". Claveau était tombé foudroyé. On le trouva avec la lampe portative dans la main gauche.

Il avait (dit l'un des témoins) les doigts crispés dans la broche. Il était brûlé sur les doigts. Il la tenait serrée, j'ai été obligé de lui ouvrir la main.

Le médecin, Docteur J. A. Ross, aussitôt appelé, constata une brûlure pouvant s'étendre sur toute la longueur du poignet, très profonde. Même les chairs étaient carbonisées.

Il attribua la mort à un choc électrique et à la brûlure.

L'épouse et les enfants de Claveau ont voulu faire déclarer la Compagnie Canada and Gulf Terminal Railway responsable de sa mort pour n'avoir pas tenu

en bon ordre l'installation extérieure et intérieure de la lumière électrique et (avoir laissé) pénétrer dans la lampe un courant meurtrier.

Ils ont fait ainsi reposer leur demande sur une allégation de faute et de négligence. Mais ils ont ajouté que l'accident fut causé par la lampe et le courant électrique dont, suivant eux, la compagnie Canada & Gulf Terminal avait le contrôle et la garde, et ils tentèrent par là d'appuyer leur réclamation sur l'article 1054 du Code civil.

La Cour Supérieure a jugé:

la demanderesse n'a rapporté la preuve d'aucune faute résultant du fait personnel de la défenderesse.

Quant à l'application de l'article 1054 C.C., la cour a décidé, en fait, que la défenderesse n'avait sous sa garde que l'installation d'éclairage électrique à l'intérieur de l'usine; qu'il

n'a pas été prouvé que la mort de Claveau soit la conséquence de cette installation;

que la cause prochaine de cet accident fut une décharge électrique excessive et imprévue occasionnée par le fait que la foudre est tombée sur un fil primaire de l'installation extérieure et l'a rompu. Comme résultat: le fluide électrique ainsi développé, ou le courant de plus de 2000 volts dont les fils primaires étaient chargés, s'est communiqué aux fils secondaires et a pénétré dans l'usine, où il a provoqué la mort de Claveau. Cette mort a donc été le fait ou des forces de la nature ou d'un courant électrique dont la Compagnie de Pouvoir du Bas St-Laurent avait seule la garde. Les fils secondaires et la lampe ne furent que les agents occasionnels du dommage. En première instance, l'action fut donc rejetée.

La Cour du Banc du Roi ne fut pas d'avis différent sur la façon dont l'accident était survenu. Elle dit, dans son jugement:

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L'accident est arrivé parce que, *anormalement et contrairement à toute attente,* le panier protecteur (de la lampe) se trouvait chargé d'un fort courant électrique, lorsque ledit Léon Claveau a pris ladite lampe pour s'en servir. Il est prouvé que l'accident s'est produit pendant un violent orage électrique. Par le fait de l'orage, ou autrement peu importe, un fil reliant le transformateur à un des fils primaires du réseau étant venu à se rompre, le courant de 2,200 volts du fil primaire se communiqua à la caisse métallique du transformateur et, de là, au fil secondaire conduisant à l'usine, sans passer par les bobines destinées à le réduire, etc.

Le majorité de la Cour du Banc du Roi, comme la Cour Supérieure, rejeta les allégations de faute contre la défenderesse. La preuve avait établi que le transformateur n'était pas "terré" (i.e. en communication avec le sol par un fil conducteur ou "grounded"), ce qui aurait probablement empêché l'accident. Mais la cour décida que la compagnie de chemin de fer n'était pas sujette à reproche sur ce point. Elle n'était pas propriétaire du transformateur. Elle n'en avait pas la garde. Il n'est pas prouvé qu'elle connaissait cette défectuosité.

Ce serait trop exiger d'un simple consommateur d'énergie électrique et, pour employer le langage du Conseil Privé: ce ne serait pas raisonnable (de) dire qu'elle a manqué, en ne se donnant pas la peine d'aller vérifier si le transformateur était installé suivant les règles de l'art.

Cependant la cour fut d'avis que la mort de Claveau avait été causée par la lampe électrique portative, alors qu'elle était sous la garde de la défenderesse. La majorité des juges décida, en conséquence, que la compagnie Canada and Gulf Terminal était légalement responsable de cette mort parce qu'elle n'avait pas établi qu'elle n'aurait "pu empêcher le fait qui a causé le dommage". Pour monsieur le juge Greenshields, au contraire, la preuve que l'accident avait été causé par la faute de la Compagnie de Pouvoir du Bas St-Laurent, qui avait omis de "terrer" son transformateur, était suffisante pour faire bénéficier la défenderesse de la clause "disculpatoire" de l'article 1054 C.C.

C'est dans ces conditions que la cause nous est maintenant soumise. Et, comme on le voit, le conflit entre la Cour Supérieure et la majorité de la Cour du Banc du Roi ne porte que sur l'application de l'article 1054 C.C. Les deux cours se sont accordées pour absoudre la défenderesse de toute responsabilité en vertu de l'article 1053 C.C. Le jugement de la Cour du Banc du Roi signale que la lampe portative n'était pas irréprochable, mais ce n'est que pour accentuer, dans son raisonnement, le défaut de la défenderesse de se disculper.

L'emploi d'une lampe différente (avec socle en porcelaine, poignée recouverte de caoutchouc, etc.), de préférence à la lampe avec socle en cuivre qu'il y avait ici, est la seule précaution raisonnable que l'on a suggérée comme pouvant être adoptée pour empêcher l'accident, par application du principe: "unable by reasonable means to prevent the damage complained of" posé par le Conseil Privé dans la cause de *City of Montreal* v. *Watt and Scott Ltd.*(1). Mais il est prouvé que la lampe dont on a fait usage en l'espèce était suffisante ("correcte") pour le voltage qu'elle devait normalement recevoir; et il n'est nullement établi que, par l'emploi d'une lampe différente, telle que décrite, l'appelante eût "pu empêcher le fait qui a causé le dommage" (art. 1054 C.C.).

L'appelante, pour prévenir un fait de ce genre, avait d'ailleurs, comme la preuve le démontre, employé un moyen plus efficace. Elle avait fait installer dans l'usine un appareil qui fait déclancher le coupe-circuit et (qui) ouvre automatiquement s'il arrivait des décharges ou un courant très fort. Ce sont des précautions dans l'usine qui sont réglées de façon à laisser passer la charge normale de la ligne sans travailler, mais s'il passe un courant double ou triple de la charge normale, il y a un piston-plongeur qui se soulève et qui occasionne un déclanchement, et le courant, le circuit se trouve interrompu par le fait même.

Lors de l'accident qui nous occupe, le coupe-circuit n'a pas fonctionné automatiquement. L'inspection qui a suivi n'y a cependant rien démontré de défectueux; et la présomption de l'expert a porté sur les éclairs.

Le fait que le primaire avait été coupé en avant du transformateur, près de l'usine du Canada & Gulf Terminal, ne devait pas nécessairement faire tomber la "switch" automatique, parce qu'étant donné que les fils qu'il y avait là, les fils nº 10, étaient très faibles, ils auraient brûlé sous l'intensité de l'arc et puis le coupe-circuit de l'usine n'aurait pas eu le temps de sauter.

L'accident s'est donc produit malgré la protection du coupe-circuit; et il fut instantané, puisque le coupe-circuit n'a "pas eu le temps de sauter", ce qui favorise davantage la théorie qu'il fut causé par l'éclair.

Aucune précaution additionnelle n'a été indiquée pour éviter cet accident. Personne n'a signalé un autre "moyen raisonnable" par lequel l'appelante aurait pu "empêcher le fait qui a causé le dommage". Nous serions donc d'accord avec monsieur le juge Greenshields pour dire que

(1) [1922] 2 A.C. 555, at p. 563.

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l'appelante, en assumant que ce fût sa chose qui a causé la mort de Claveau, a réussi à se disculper au sens de l'article 1054 du Code civil.

Mais le débat se rétrécit encore davantage. Nous ne pouvons admettre que la mort de Claveau a été causée par la chose de l'appelante.

Cette mort, comme nous l'avons vu,—les deux cours qui ont eu jusqu'ici à se prononcer se sont accordées pour le décider et il est impossible d'arriver à une autre conclusion d'après la preuve—fut le résultat direct du choc électrique.

Comment s'est produit ce choc électrique?

Voici l'explication de M. Philippe Méthé, ingénieur civil, diplômé de l'école polytechnique de Montréal, au service de la Shawinigan Water & Power Company pendant cinq ans, et, au moment où il rendait son témoignage, au service de la compagnie du Pouvoir du Bas St-Laurent, de Rimouski, depuis cinq ans.

Dès le soir de l'accident, il s'est rendu sur les lieux et a examiné l'installation près du transformateur. Il a constaté que l'un des fils primaires était coupé. On lui demande:

Q. D'après vous, qu'est-ce qui a pu couper ce fil?

R. C'est un arc qui s'est produit entre le fil et la caisse du transformateur, le support du transformateur, sur lequel le transformateur est boulonné.

Q. Qu'est-ce qui pouvait provoquer cet arc-là?

R. Une décharge électrique. Un éclair pouvait parfaitement provoquer cet arc-là, dans les conditions où c'était installé.

Il n'a pu constater d'autre cause et n'a vu rien "autre chose qui aurait pu provoquer ce coupement de fil".

On lui pose alors la question:

D'après ces constatations-là que vous avez faites, par quoi croyez-vous que Claveau a pu être tué?

R. Par un éclair.

Q. Par un éclair. Est-ce que l'éclair pouvait le tuer directement?

R. Oui. En frappant à l'endroit où le primaire est coupé, et passant par le support du transformateur et la caisse du transformateur, et de là se transmettant sur le secondaire et en entrant directement dans l'usine.

Q. Est-ce que, sans que le courant fasse ce trajet-là, il pouvait être tué directement par l'éclair?

R. L'éclair pouvait frapper aussi directement sur les secondaires.

Q. Vous avez entendu les témoins décrire la lueur, le feu causé, et à la switch d'entrée, et à la lampe, vis-à-vis de la lampe que tenait Claveau dans ses mains, lorsqu'il s'est fait tuer?

R. Oui.

Q. Voulez-vous dire si cette lueur-là, d'après votre expérience, pouvait être causée par le courant de 110 volts?

R. Non.

Q. Cette lueur semblait-elle dénoter du 2200, ou plutôt un éclair, un courant produit par le tonnerre?

R. C'est plutôt un coup de tonnerre.

Q. Normalement, le 2200 ferait-il une démonstration de flamme aussi considérable?

R. Je ne crois pas.

Q. Dites-vous, monsieur Méthé, que la mort pouvait être causée par un coup de tonnerre, ou si elle a été réellement causée par un coup de tonnerre?

R. Je dis que c'est mon opinion qu'elle a été causée par un coup de tonnerre.

Monsieur N. S. Walsh, examinateur électricien à l'emploi du gouvernement provincial, témoigne comme suit:

Q. Vous avez entendu les témoins qui ont décrit la flamme, le rideau de flamme à l'entrée de l'usine et également dans la figure de Claveau lorsqu'il a été tué?

R. Oui, monsieur.

Q. D'après votre expérience, cette flamme-là pouvait-elle dénoter un courant de 110 volts?

R. Non, pas du tout.

Q. 2,200 volts?

R. Ça prendrait au moins 2,200 volts.

Q. Est-ce que l'éclair pouvait faire le même travail?

R. Non. L'éclair ne ferait pas le même travail que ça.

Q. L'éclair ne ferait pas le même travail?

R. Il me semble pas toujours.

Q. Maintenant, vous avez entendu et vu la description qu'on a faite du fil qui raccordait du primaire, qui raccordait au poteau, de l'isolateur sur le poteau au transformateur. Il y avait une quinzaine de pouces de distance. Est-ce qu'un fil de cette longueur-là peut se couper sans raison?

R. Bien, dans ce bout-là, je ne pense pas. Ça doit être fait par quelque chose à l'extérieur, comme un éclair comme ça été mentionné.

Q. Est-ce que ça pourrait avoir été fait par d'autres causes que le coupage du fil?

R. Bien, je ne pense pas que ça pourrait être fait par autre chose qu'un éclair.

A la demande de la cour, il réitère qu'il attribue au choc extérieur de l'éclair le fait que le 2,200 volts qu'il y avait dans les primaires serait passé dans les secondaires et serait entré dans l'usine.

Méthé et Walsh sont les deux seuls hommes de l'art qui ont été appelés dans la cause à fournir une explication scientifique de ce qui s'était passé. Il résulterait de leurs témoignages que l'accident a été plutôt provoqué par l'éclair. Mais la seule autre conclusion que l'on puisse en tirer est que l'éclair, en rompant le fil primaire, a fait échapper le courant de 2200 volts qui a d'abord "passé sur les 'braces' du transformateur" et de là "s'est connecté avec les secondaires", puis "est venu dans l'usine même".

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Sous l'article 1054 C.C., c'est sur le demandeur que retombe indubitablement le fardeau de prouver que le dommage a été causé par une chose que le défendeur avait sous sa garde. Si l'enquête nous laisse dans l'incertitude à ce sujet, le défendeur doit en bénéficier.

Dans la présente cause, si nous admettons l'hypothèse que l'accident a été causé par l'éclair, il est évident que, dans ce cas, nous devons dire qu'il n'en résulte pour l'appelante aucune responsabilité. Si nous acceptons, au contraire, l'explication la plus favorable à l'intimée, à savoir: que la mort de Claveau aurait été causée par le courant de 2200 volts échappé du fil primaire, l'appelante est encore soustraite à toute responsabilité en vertu de l'article 1054 C.C.. parce que la cause du dommage ne peut dès lors être attribuée à une chose qu'elle avait sous sa garde.

Personne ne prétend que la lampe seule, indépendamment de l'électricité dont elle s'est trouvée chargée, a causé la mort de Claveau. Tous les faits positifs qui ont été relatés s'accordent directement avec l'hypothèse d'une mort par électrocution. La lampe par elle-même n'a rien fait et n'aurait pu rien faire. Défectueuse ou non, sans l'électricité à laquelle elle a servi de véhicule, cette lampe était inoffensive. La déclaration qui sert de base à l'action, les constatations faites lors du décès, l'avis donné par les experts sont d'accord pour établir que cette mort a été causée par le "courant électrique". Il s'agit donc de déterminer, à l'aide, bien entendu, des données qui se trouvent au dossier, la personne qui avait ce courant sous sa garde au moment de l'accident.

Quelles que puissent être les discussions de la science au sujet des phénomènes électriques, nous n'avons pas ici à en rechercher l'explication mécanique, ni à nous inquiéter de leur nature physique. Aux yeux de la loi, et dans les conditions de la vie moderne, l'électricité est un produit industriel, qui se transporte d'un lieu à un autre. Elle a une existence objective indépendante des corps ou fils métalliques employés pour la transmettre à distance, puisque son producteur peut à son gré y provoquer ou en soustraire ce qu'on est convenu d'appeler la circulation du courant; puisqu'il n'est pas nécessaire d'ailleurs que le producteur soit en même temps le propriétaire des fils et qu'il pourra tout

aussi bien fournir son énergie électrique au moyen d'un système de distribution appartenant à un autre, ou allumer une lampe chez son abonné en se servant de fils et d'appareils qui sont la propriété de ce dernier.

Une société d'éclairage est propriétaire de l'énergie électrique produite par ses machines génératrices de la même façon qu'elle l'est du gaz qui circule dans ses conduites et tout autant que la compagnie d'aqueduc a la propriété de l'eau qui est dans ses tuyaux. Chacune de ces choses, du moment qu'elle est captée et rendue utilisable, devient une marchandise que la compagnie exploite commercialement et qu'elle fournit, en lui mesurant le courant au moyen d'un compteur, au consommateur qui en prend livraison. Les fils, les conduites, les tuyaux ne sont que les moyens de livraison. Ils sont susceptibles de possession et de propriété distinctes. Leur propriétaire n'a pas nécessairement sous sa garde l'électricité, le gaz ou l'eau qu'ils contiennent.

Nous trouvons dans le dossier de cette cause tous les éléments des données générales que nous venons d'énoncer. Nous savons que la Compagnie de Pouvoir du Bas Saint-Laurent produisait l'énergie électrique pour fournir l'éclairage, entre autres à l'usine de la défenderesse. En l'espèce, l'électricité dont il s'agit faisait donc l'objet d'un contrat de fourniture. Le contrat n'a pas été versé au dossier, mais il est constant que, dans le but de l'exécuter, la Compagnie de Pouvoir transportait son produit à un voltage de 2,200 jusqu'à un transformateur posé à 50 pieds de l'usine. A cet endroit, elle livrait à la défenderesse un courant de 110 volts, dont cette dernière prenait possession au moyen de ses propres fils,—que nous avons désignés plus haut sous le nom de fils secondaires. Ces fils et ce courant de 110 volts sont tout ce dont la défenderesse pouvait avoir le contrôle et la garde. Ce courant de 110 volts est le seul pour lequel la défenderesse avait passé contrat avec la compagnie d'éclairage, le seul qu'elle pouvait s'attendre à recevoir dans son usine. Mais la preuve est indiscutable qu'il n'a existé aucun lien causal entre ce courant de 110 volts et la mort de Claveau. Comme nous l'avons constaté plus haut, la conclusion la plus probable est que cette mort fut provoquée par l'éclair qui a rompu le fil primaire. La seule autre hypothèse est qu'elle fut causée par le courant de 2,200 volts échappé du fil primaire. Dans l'un comme dans

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l'autre cas, la cause du dommage ne peut être attribuée à une chose que la défenderesse avait sous sa garde.

Dans les circonstances, le fil secondaire et la lampe n'ont été que la voie accidentelle par laquelle le courant s'est échappé. Il aurait pu suivre tout autre conducteur métallique, comme, par exemple, le fil d'un paratonnerre. Va-t-on dire que, dans ce cas, il se fût identifié avec le paratonnerre au point de devenir légalement la chose du propriétaire de l'usine? C'est par hasard que, déclanché dans les conditions imprévues que l'on sait, il a suivi d'abord les fils secondaires puis le treillis de la lampe. La " chose " meurtrière, si ce n'était pas l'éclair, fut ce courant de 2,200 volts et non la lampe ou son treillis protecteur.

Or, ce courant de 2,200 volts était sous la garde de la Compagnie de Pouvoir du Bas Saint-Laurent. Ce n'est pas ici le procès de cette compagnie; il se peut que, appelée à le faire, elle eût démontré qu'elle n'eût " pu empêcher le fait qui a causé le dommage ". Mais c'est elle qui avait le devoir de garder ce courant de 2,200 volts et d'empêcher qu'il ne dépassât la barrière du transformateur. Cette barrière ou ce transformateur étaient également sous sa garde. " Si ", comme le dit Demogue (Traité des Obligations, vol. 5, n° 1128), " il y a devoir de garder, la responsabilité subsiste si on cesse de garder ". Il ajoute (n° 1129):

Pour les installations électriques, la compagnie d'électricité répond de la chute des poteaux ou des fils le long de ses lignes. Elle est considérée comme en ayant la garde (Toulouse, 9 fév. 1910, S. 1910, 2, 275—Bordeaux, 17 juin 1907. Droit, 23 nov. 1907—Lyon, 25 avril 1899, Gaz. Pal., 1899, 2, 149—Trib. Vire, 22 juin 1922. Gaz. Pal. 1922, 2, 395), car elle en avait la surveillance et le profit. De même, si les câbles passant à proximité d'un toit provoquent un incendie, sa responsabilité est engagée, bien que, pour surveiller les fils au-dessus du toit de l'abonné et son branchement spécial, elle ait dû stipuler le droit de pénétrer chez lui. Cette circonstance ne fait pas disparaître son pouvoir de garde (Toulouse, 11 juin 1912, D. 1914, 2, 174. Rappr. trib. Tours, 9 déc. 1920, Gaz. Trib. 1921, 2, 454). La compagnie a même la garde de cette force spéciale, l'électricité qui circule dans ses câbles, comme dans le cas ci-dessus, ou dans le cas où un courant trop fort va tuer l'abonné dans sa maison (Grenoble, 6 nov. 1906, D. 1909, 2, 20, Paris, 15 mars 1919, Gaz. Trib. 1919, 2, 122. Rev. dr. civil, 1919, p. 504. Rappr. Trib. com. Marseilles, 11 mai 1920. Gaz. Pal. 1920, 2, 436).

Déjà, dans un article publié dans la Revue Trimestrielle de Droit Civil (année 1919, p. 499, à la page 504), le même auteur avait écrit:

Pour les compagnies électriques, on admet qu'elles ont la garde des appareils et du courant, et cela non seulement chez elle ou sur la voie

publique où passent les fils (Toulouse, 9 févr. 1910, S. 1910, 2, 275 et 13 juin 1914, D. 1914, 2, 174), mais même chez les abonnés. Cette dernière solution a été donnée soit si celui-ci est tué chez lui par l'arrivée d'un courant trop fort (Grenoble, 6 nov. 1906, D. 1909, 2, 30, Revue. 1907, p. 100), soit s'il est électrocuté en s'approchant à la suite d'un arrêt d'électricité d'un transformateur électrique que la compagnie devait fournir, poser et entretenir (Paris, 15 mars 1919, Gaz. Trib. 1919, 2, 123). La notion de garde est donc très large.

Cette idée que la compagnie d'éclairage est responsable de l'électricité qui s'échappe est conforme à la jurisprudence. Il y a analogie sur ce point avec la situation du gardien d'un barrage d'eau qui se brise et cause un dommage matériel à autrui (Voir la cause de *The National Telephone Company* v. *Baker* (1), et aussi ce que dit notre collègue, Monsieur le Juge Duff, dans la cause de *Vandry* v. *The Quebec Railway, Light, Heat & Power Company* (2). Il est intéressant, à ce sujet, de lire le jugement du Conseil Privé (composé de Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson et Lord Lindley) dans la cause de *Eastern & South African Telephone Company* v. *Cape Town Tramways Limited* (3). Notre intention, en y référant, n'est pas d'en faire l'une des bases de notre jugement, car il est toujours dangereux de chercher un appui dans des arrêts prononcés sous l'empire de lois différentes; mais l'intérêt pour nous réside dans la façon dont Lord Robertson, parlant au nom de la cour, traite cette question "of the escaped current" et y réfère constamment comme "this electricity having escaped and being at large" * * * "the mode of escape of the electricity." * * * "Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control.

Une partie du jugé en cette cause fut:

The principle of *Rylands* v. *Fletcher* (4) is not inconsistent with the Roman law. It applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or (interferes with) the ordinary use of property.

Il convient d'insister cependant sur deux arrêts qui ont fait l'application de la loi telle qu'elle est contenue dans l'article 1054 du Code civil de Québec. L'un est de la cour d'appel de Grenoble, France, et l'autre est le jugement du

(1) [1893] 2 Ch. 186.
(2) 53 Can. S.C.R., 72, at p. 100.
(3) [1902] A.C. 38.
(4) [1868] L.R. 3 H.L. 330.

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Conseil Privé dans la cause de *Quebec R. L. H. and P. Co.* v. *Vandry* (1).

La cause de Grenoble est celle de la *Société des forces motrices du Haut Grésivaudan* v. *Veuve Richard* (2). Le sieur Richard avait été foudroyé par un choc électrique au moment où il appréhendait, dans sa cuisine, pour en constater l'état, une lampe électrique mobile qui ne donnait qu'une faible clarté. Sa veuve, agissant tant en son nom personnel que comme tutrice légale de ses quatre enfants, avait poursuivi la Société qui fournissait et distribuait l'éclairage électrique dans la maison de la victime.

Là, comme dans la présente cause, les constatations faites à la suite du décès par les médecins qui avaient examiné le cadavre de Richard et par les experts entendus à l'enquête établissaient irréfutablement que la victime avait été foudroyée (nous citons le jugement)

par un courant d'une tension excessive, supérieur de plusieurs milliers de volts à celui que le transformateur, qui reçoit le courant primaire, doit distribuer aux abonnés, et qu'ainsi cet accident est le résultat direct de l'installation électrique de la Société et du fonctionnement de son transformateur.

La cour, en rendant jugement, rappelle d'abord le principle de l'article 1384 C.N., d'après lequel on est responsable non-seulement du dommage que l'on cause par sa propre faute, mais encore de celui qui est causé par le fait des choses que l'on a sous sa garde. Elle procède ensuite à dire:

La Société des forces motrices a la garde de l'installation qui est son œuvre, à l'aide de laquelle elle distribue de la lumière électrique, et il est constant que l'accident mortel survenu à Richard, dans son habitation, au moment où il saisissait de la main gauche une lampe mobile a été causé par la chose même de la Société, puisque Richard a été foudroyé par le courant qui circulait sur la ligne extérieure et qui a été transmis presque intégralement au fil qui desservait son installation intérieure.

Après avoir insisté de cette façon sur le fait que la "chose" qui a causé le dommage fut

le courant qui circulait sur la ligne extérieure et qui a été transmis presque intégralement au fil qui desservait son installation intérieure,

la cour rend bien claire son idée que ce courant doit être envisagé comme une "chose" distincte de l'installation électrique, des fils conducteurs et de la lampe mobile, car elle ajoute:

Il est ainsi sans intérêt de rechercher si Richard avait la charge de l'entretien et de la réparation de son installation intérieure qu'il avait

(1) [1920] A.C. 662. (2) D. 1909-2-30.

payée, au dire de la Société. Il suffit de considérer, pour la solution du litige, que sa mort a été déterminée par l'afflux sur le fil qui transporte la force électrique d'un courant extrêmement fort qui est arrivé presque intégralement sur le fil de Richard alors qu'il ne devait normalement lui être transmis par le transformateur que très diminué et à l'état de courant secondaire.

Indépendamment de la question de faute personnelle de la Société des forces motrices ou de la faute des préposés au fonctionnement du transformateur ou à la distribution du courant, la conclusion de la cour de Grenoble fut que la Société était responsable envers la veuve Richard, à raison du fait que le courant électrique était sous sa garde. Pour employer les termes du jugement, la cour a tenu

ladite Société responsable envers la veuve Richard ès qualité, du fait dommageable de la chose dont elle a la garde, et de la mort du sieur Richard, etc.

Mais la cause de *Québec Railway, Light, Heat & Power Company* v. *Vandry* (1) mérite ici une attention spéciale. Il s'agissait là aussi "of the escape of the electric current". Nous empruntons des Law Reports ce court résumé des faits:

The appellant company, acting under statutory powers, had erected along a road in Quebec two overhead cables for the distribution of electric current at tensions of 2,200 volts and 108 volts respectively, and they supplied current at 108 volts to the respendents' premises. A violent wind (not amounting to force majeure) tore a branch from a tree growing about 28 feet away from the cables, and drove it against them. In consequence the cables were broken down, and the high tension current found its way along the low tension cable into the respondents' premises, and caused a fire. The respondents brought an action for damages against the appellants:—

Comme on s'en souvient, la compagnie Quebec Railway, Light, Heat & Power fut déclarée responsable par le Conseil Privé. Et l'on voit la similitude des faits entre cette cause et le cas qui nous occupe. Là, le fil primaire avait été rompu par une branche d'arbre transportée par un vent violent. Ici, le fil primaire a été rompu par un éclair. Dans les deux cas, comme conséquence de cet accident, le courant de 2200 volts s'est communiqué du fil primaire au fil secondaire. A la maison Vandry, le courant électrique était fourni à 108 volts; à l'usine de la compagnie Canada & Gulf Terminal Railway, il était fourni à 110 volts. Chose digne de remarque, dans la cause de Vandry comme dans la présente, on avait trouvé

(1) [1920] A.C. 662.

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that the electric wiring in the premises in question, though old-fashioned, was not defective and was capable of carrying a current of 108 volts (ici de 110 volts). Et ce n'est pas parce qu'elle fut trouvée coupable de faute ou de quasi-délit que la compagnie Quebec Railway, Light, Heat & Power fut condamnée. La base du jugement du Conseil Privé fut le principe de la garde de la chose. Le point sur lequel nous devons insister dans cette décision et dans celle de la cour d'appel de Grenoble est le suivant: Ces tribunaux ont considéré que le courant électrique excessif, supérieur à celui que le transformateur devait distribuer aux abonnés, était la chose qui avait causé le dommage; et bien qu'il fût, dans le premier cas, dans la lampe mobile qui appartenait à Richard, et, dans le second cas, dans l'installation intérieure de la maison de Vandry, nonobstant cela, ce courant électrique continuait aux yeux de la loi, d'être sous la garde de la compagnie d'éclairage.

Il suffit d'ajouter que si, dans chacun de ces deux cas, le tribunal de Grenoble et le Conseil Privé avaient envisagé le courant électrique comme faisant partie de l'installation intérieure ou de la lampe mobile, le résultat eût été différent. Comme la lampe mobile était sous la garde de Richard, et comme l'installation intérieure était sous la garde de Vandry, par application du principe de la garde de la chose, le résultat inéluctable eût été que la veuve Richard ou Vandry eussent été déboutés de leur action.

Nous devons donc ici appliquer de la même façon la règle de l'article 1054 C.C. en concluant que la chose qui a causé la mort de Claveau (à savoir le courant électrique de 2,200 volts) était sous la garde de la Compagnie de Pouvoir du Bas Saint-Laurent, et non pas sous la garde de la défenderesse. Comme conséquence, suivant nous, l'action qui a été intentée contre cette dernière devait être rejetée.

L'appel doit donc être maintenu et le jugement de première instance rétabli, avec dépens tant devant cette cour que devant la Cour du Banc du Roi, si la compagnie appelante juge à propos de les réclamer des intimés.

LAMONT J. (dissenting).—I concur with Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appelant: *Sasseville & Gagnon.*
Solicitor for the respondent: *L. G. Belley.*

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FREDERICK J. FAIRHALL (DEFENDANT) ..... } APPELLANT; *May 16. *May 28.

AND

WILLIAM V. BUTLER, ON BEHALF OF THE WHITE STAR REFINING COMPANY, (PLAINTIFF) ..... } RESPONDENT.

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

Company—Sale of common shares—Statement of company's assets and liabilities—Undeclared dividends on preference shares as constituting a liability of the company.

F. gave an option to purchase a block of common shares of a company, which purchase would give the purchaser control of the company. The optionee required that F. furnish an accountant's statement showing the company's assets and liabilities and profit and loss to August 31, 1926, and an affidavit that the company's liabilities would not exceed the amount shown by such statement. A statement and affidavit were furnished, and the acceptance of the option was expressed to be based on said statement. Preference shares had been issued by the company, non-participating and non-assessable, entitling the holders thereof to a first, fixed, cumulative dividend of 8 per cent. per annum.

Held, that cumulative dividends on preference shares, to August 31, 1926, undeclared and unpaid, constituted a liability of the company within the meaning of the contract, and should have been included as such in the said statement; and that, therefore, upon a certain stated issue, the decision of which, on its proper construction, was held to depend on the determination of said question of law, the said liability should be borne by F.

Judgment of the Appellate Division, Ont., (61 Ont. L.R. 305, reversing judgment of Grant J., *ibid*) affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing the judgment of Grant J. (1), held that a certain issue, directed to be tried between the parties, should be determined in favour of the plantiff. The issue arose out of a dispute as to whether or not cumulative dividends on preference shares in a company, which had not been declared (and, therefore, had not been paid) should be taken

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) (1927) 61 Ont. L.R. 305.

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into account in the adjustments in the carrying out of a certain contract for the sale, by the defendant to a purchaser represented in these proceedings by the plaintiff, of certain common shares in the company. The material facts of the case, and the issue to be determined, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

W. P. Harvie for the appellant.

Bernard Furlong for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—This is an appeal from the Second Appellate Division of Ontario (1) setting aside (Latchford, C.J., and Masten, J.A., dissenting) the judgment of Mr. Justice Grant (1) on an issue which Mr. Justice Logie had directed to be tried between the parties.

The facts giving rise to the controversy are not in dispute and may be briefly stated.

By a writing dated the 28th of August, 1926, the appellant gave White Star Refining Company (represented in these proceedings by the respondent) an option to purchase 1,352 shares of the common stock of Western Motor Corporation, Limited, the purpose of the optionee being, if it purchased, to secure the control of that corporation. White Star Company, on the 7th of September, 1926, accepted this option upon the following conditions (agreed to by the appellant): viz. that the appellant would furnish that company "certified public accountant's statement showing the assets and liabilities and profit and loss of Western Motor Corporation, Ltd., to and including August 31st, 1926," and that the appellant would "attach to certified public accountant's statement of assets and liabilities as above affidavit sworn to by yourself before a notary public to the effect that the liabilities of the company will not exceed the amount shown by said accountant's statement." There were further conditions which it will suffice to mention summarily, such as the right of the optionee to examine the confidential records of the corporation, and its right to withdraw if after investigation it was deemed imprudent or unwise to proceed further.

(1) (1927) 61 Ont. L.R. 305.

In pursuance of the condition above quoted, the appellant furnished White Star Refining Company the report and balance sheet prepared by Riddell, Stead, Graham and Hutchison, chartered accountants. This balance sheet shows certain liabilities of the Motor Corporation, and there is no criticism of this statement of liabilities as far as it goes. The point is that what is alleged to constitute a liability within the meaning of the contract was not disclosed.

The appellant also furnished the White Star Company his affidavit in which he said:

> That I have examined Auditors' Report and financial statements prepared by Riddell, Stead, Graham and Hutchison, Certified Accountants of Windsor, Ontario, attached, and that said statement correctly sets forth assets and liabilities of Western Motor Corporation Limited as of August 31, 1926. And I do further make oath and state that Western Motor Corporation Limited has no liabilities other than those shown in said Auditors' statement attached.

The Motor Corporation had a share capital of $100,000, divided into 10,000 shares of $10 each, of which 7,500 shares were to be preference shares, non-participating and non-assessable, entitling the holders thereof to a first, fixed, cumulative dividend of 8 p.c. per annum. The financial statement of Riddell & Co. shows that 2,981 preference shares, representing $29,810, fully paid, had been issued. It also states that the sum of $1,028.56 had been paid for dividends, which admittedly refers to dividends on preference shares. The White Star Company subsequently obtained a financial statement from its own auditors to which a note was appended stating that "at October 6, 1926, cumulative preferred stock dividends amounting to $2,518.33 for the period from June 30, 1925, to September 30, 1926, had not been declared." It is therefore clear that the $1,028.56 paid for dividends on preference shares were for dividends declared for some period anterior to June 30th, 1925.

What ensued between the parties after the receipt of the financial statement and affidavit may be briefly stated.

On October 6th, 1926, the White Star Company wrote to the appellant stating that it accepted the option and that its acceptance was based upon the statement of assets and liabilities as set forth in the statement of Riddell & Co. which he had furnished the Company. When the time

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for settlement arrived (all other conditions for placing the White Star Company in control and having its nominees elected as directors of the Motor Corporation having been fulfilled), a difficulty was encountered with regard to the undeclared and unpaid dividends on preference shares mentioned in the audit of the White Star Company's auditor. The appellant at the trial frankly admitted that the dispute arose as a result of the fact that Riddell and Co. did not show cumulative dividends outstanding against the preferred stock, while the White Star Company's auditors showed these dividends as being charges against the Motor Corporation. The amount in dispute was $3,158.12 (it does not appear how it was made up), and the appellant admits that the money was paid into the Canadian Bank of Commerce in a trust account, with a letter stating that it was to be paid out on the determination of this question.

An application was then made to the court for judgment to declare and determine to whom the $3,158.12 paid into the bank should be paid. On this application, Mr. Justice Logie directed that an issue should be tried between the applicant, Butler, plaintiff, and Fairhall, defendant, this issue to be as follows:

> The plaintiff affirms and the defendant denies: That the cumulative dividends on the outstanding preferred stock of the Western Motor Corporation, Limited, from January 1, 1925, to August 31, 1926, undeclared and unpaid as of August 31, 1926, constitute a liability under the contract that is not disclosed in Riddell, Stead, Graham & Hutchison's report of the said company as of that date, and that this liability, in pursuance of the contract, is to be borne by the Respondent Fairhall.

It is clear that anything outside this issue is irrelevant, and therefore the appellant cannot be heard to contend, as he did in the courts below as well as on this appeal, that he had given notice to the officers of the White Star Company, before they finally accepted the option on October 6th, 1926, that these preference dividends had not been declared and that the acceptance was made with full knowledge of this fact. The only question with which we are concerned is that stated in the issue on which the parties proceeded to trial.

The learned trial judge (1) considered that the undeclared dividends were not a liability of the Motor Corpora-

(1) (1927) 61 Ont. L.R. 305.

tion and therefore did not require to be disclosed in the auditors' report furnished by the appellant. He also relied on the fact that the White Star Company had accepted the option with full knowledge that these dividends had not been declared.

This judgment was reversed by the Second Appellate Divisional Court of Ontario, Latchford, C.J. and Masten, J.A. dissenting (1).

The majority of the learned judges were of the opinion that within the meaning of the option and its acceptance the undeclared dividends on preference shares were a liability of the Motor Corporation which the appellant should have disclosed in the report furnished by his auditors, and consequently that the issue should be determined in favour of the respondent.

The dissenting judges agreed with the trial judge that the undeclared dividends were not such a liability. But they also took another ground, fully explained by Mr. Justice Masten, and which, with all deference, appears to me to be based on a misconstruction of the issue. This ground, Mr. Justice Masten observes, was not presented by counsel for the respondent (the appellant here), and is that " the issue is as to whether the dividends in question 'constitute a liability *under the contract*' " (the italics are those of the learned judge). Mr. Justice Masten says that the real issue " is the liability of the plaintiff (Butler; possibly the learned judge meant the defendant Fairhall), not the liabilities of the Company (the Motor Corporation) ". He adds:—

> The form of the issue might at first sight suggest that the question is, " What is the meaning of the term 'liability'?" But the real question is, does the contract by its terms entitle the purchaser to a reduction of $3,158.12 in the price which it had agreed to pay for the defendant's shares? I find no such term or condition anywhere in the agreement.

The conclusion of the learned judge on this question is that:

> if the plaintiff has any claim it is not a claim in pursuance of the contract, but must be founded in tort on false and fraudulent misrepresentations anterior to the contract.

With respect, the issue states a proposition of law which the plaintiff (the respondent) affirms and the defendant (the appellant) denies. This proposition is that the un-

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declared dividends constitute a liability under the contract (i.e. the option and its acceptance under conditions agreed to by the appellant) not disclosed in the report of Riddell & Co. on the Motor Corporation, and that this liability, in pursuance of the contract, is to be borne by the appellant Fairhall.

I think it is unquestionable, as shewn by the admissions of Fairhall at the trial above referred to, that the intention of the parties was that if the court came to the conclusion that these undeclared dividends were a liability within the meaning of the contract, which should have been disclosed in the financial statement, this liability should be borne by Fairhall, and that, if the court so decided, the sum of $3,158.12 paid into the bank to await the decision on the issue should go to the respondent.

This being the only point in the case, my opinion is that within the meaning of the contract, as understood by the parties, the undeclared dividends on preference shares were a liability which should have been diclosed in the report of the appellant's auditors.

It is *nihil ad rem* that until a dividend is declared no action on behalf of a shareholder lies to enforce its payment, and from that point of view it can no doubt be said that a company incurs no liability until a dividend is declared by it. But it was not in that sense that the White Star Company employed the word " liabilities " in its letter of October 7th. The purchase was of a block of common shares giving the control of the company to the purchaser. It was an essential condition of the respondent's acceptance that the assets and liabilities of the company should be truly shewn in the financial statement of a certified public accountant which the vendor undertook to furnish the purchaser. And for the additional protection of the latter, and so that it could determine whether it was imprudent or unwise to proceed further, the appellant was required to make an affidavit " to the effect that the liabilities of the company will not exceed the amount shown by said accountant's statement." For a purchaser of common stock of the Motor Corporation, undeclared but overdue dividends on its preference shares were certainly a liability of the company, in the sense that he could obtain no dividend on his common shares before the payment of all accrued

dividends on preference shares, whether in fact a dividend had or had not been declared. I would therefore, on this issue, say that these dividends constituted a liability under the contract that was not disclosed by the auditors' report. It follows that this liability must be borne by the appellant in pursuance of the contract.

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The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. P. Harvie.*

Solicitors for the respondent: *Furlong, Furlong, Awrey, Whyte & St. Aubin.*

MICHEL BRUNET.. .. ..APPELLANT;

AND

HIS MAJESTY THE KING.. .. ..RESPONDENT.

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*Mar. 19.
*Apr. 24.

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

Criminal law—Evidence—Accomplice—Corroboration—Warning to jury—Duty of Judge—Dissenting opinion

The appellant was convicted on an indictment for manslaughter by performance of an illegal operation on one Alice Couture, causing a miscarriage that resulted in her death and he was sentenced to imprisonment for life. The appellant's appeal to the Court of King's Bench was dismissed, but one judge dissented on the question of law as to whether or not there was error on the part of the trial judge in not having warned the jury as to the danger of convicting on the uncorroborated evidence of the girl Couture, an accomplice.

Held that the appellant was entitled to have a new trial.

Per Duff, Mignault, Rinfret and Smith JJ.—Although there is no case in which it has been explicitly laid down that the warning must be given where there is some corroborative evidence to go to the jury, it necessarily follows from the principle laid down in the cases referred to in the judgment now reported, where the evidence of the accomplice is necessary to sustain the conviction and the corroborative evidence may or may not be accepted as sufficient by the jury. In this case, there was in fact no admissible corroborative evidence to be submitted to the jury, and it was the duty of the trial judge to have given the warning. It is not, however, to be taken that the warning would have been unnecessary, had there been some corroborative evi-

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dence proper to be submitted to the jury. It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so. On that ground and also in view of other improper evidence having been introduced at the trial, it cannot be said that the appellant has suffered no substantial wrong.

Per Newcombe J.—The evidence upon which the Crown relied for corroboration of the woman's testimony did not corroborate in the essential particulars; and there was no warning to the jury, such as required by the Court of Criminal Appeal in the well-known case of *Rex* vs. *Baskerville* ([1916] 2 K.B. 658).

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, which had found the appellant guilty of manslaughter upon the verdict of a jury.

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

Alleyn Taschereau K.C. and *J. M. Guérard* for the appellant.

Valmore Bienvenue for the respondent.

The judgment of the majority of the court (Duff, Mignault, Rinfret and Smith J.J.) was declared by

SMITH J.—The accused was convicted on an indictment for manslaughter by performance of an illegal operation on one Alice Couture, causing a miscarriage that resulted in her death on 29th June, 1927. The trial took place on the 3rd day of November, 1927, and the accused was sentenced on the 8th of that month to imprisonment for life. The fact of an illegal operation having been performed causing the miscarriage that resulted in the young woman's death was clearly established, and the further question remaining for the jury was as to whether or not the evidence established that the accused was the person who performed the illegal operation.

On May 16th, 1927, the accused was arrested on a charge, under section 303 of the Criminal Code, of using means to procure an abortion on Alice Couture. On the same day

the magistrate, Judge Lachance of the Court of Sessions of the Peace, the clerk of the court and the crown solicitor attended at the hospital to proceed with the preliminary enquête by taking the evidence of Alice Couture, then lying there very ill. She testified that the accused had performed the operation in question, giving details of what had happened. The accused, then under arrest, was present at this hearing with his solicitor, who cross-examined the witness on his behalf.

Alice Couture having died in the meantime, these depositions were read at the trial to the jury as evidence against the accused, after objection taken by his counsel to their admissibility had been over-ruled by the trial judge.

The accused appealed from the conviction to the Court of King's Bench (in appeal), and the appeal was dismissed by a majority judgment of that court, Justice Letourneau, with the permission of the court, writing a dissenting judgment on the question of law raised as to whether or not the learned trial judge had erred in not having warned the jury that it was dangerous to convict on the uncorroborated testimony of Alice Couture, an accomplice.

By special leave (1) the accused was allowed to also appeal on the question of whether the depositions of Alice Couture, mentioned above, should have been admitted as evidence against the accused on his trial for manslaughter.

Dealing first with the latter ground, it was argued that, it having been shewn that Alice Couture was at the time dangerously ill and, in the opinion of Dr. Marois, not likely to recover, the method of taking her evidence under these circumstances is by commission, as expressly laid down by sections 995 and 996 of the Criminal Code, and that it could not be taken otherwise. If this argument were sound, the strong ground of objection would seem to me to be that there was no commission, but what was specially urged was that accused was not served with a written notice of the intended taking of evidence as had been held by English courts to be necessary under the corresponding sections of the English Act, citing *Reg.* v. *Shurmer* (2); *Rex* v. *Harris* (3); *Rex* v. *Quigley* (4). As there was no written notice in this case, it is urged that there is conflict on a

(1) [1928] S.C.R. 161.
(2) 17 Q.B.D. 323.
(3) 26 Cox, C.L.C. 143.
(4) 18 L.T.R., N.S. 211.

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question of law between the judgment of the court below and the judgments in the English cases cited.

The Criminal Code, by section 999, expressly provides for reading the depositions of a witness taken at a preliminary investigation against the accused at his trial for the same cause where the witness has died in the meantime, and section 1000 provides that these depositions may also be read under the same circumstances on his trial on any other charge. The depositions in question were read as evidence under these sections and not as having been taken under sections 995 and 996, which have clearly no application. The appeal, therefore, on this ground must be dismissed. We are not, however, passing on the question of whether or not this is an appealable matter, even with leave.

Proceeding, then, to the other ground of appeal, involving the question of law as to whether or not there was error on the part of the learned trial judge in not having warned the jury as to the danger of convicting on the uncorroborated evidence of Alice Couture, an accomplice, it is urged on behalf of the Crown that there was in fact corroborative evidence, and that therefore such warning was not necessary.

The practice to be followed by a trial judge in reference to the uncorroborated evidence of an accomplice was carefully considered and authoritatively laid down in the case of *Rex* v. *Baskerville* (1).

In the subsequent case of *Rex* v. *Beebe* (2), Lord Hewart, C.J., gives in a few words the rule as laid down in the Baskerville case. He says the jury should be told

> that it is within their legal province to convict; they are to be warned in all such cases that it is dangerous to convict; and they may be advised not to convict.

He points out that there is no reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict, and further on states that such a direction would not be according to the law laid down in the *Baskerville Case* (1).

Following what Lord Hewart had thus laid down, this court, in *Rex* v. *Gouin* (3), set aside a conviction, although there was corroborative evidence where the learned trial

(1) [1916] 2 K.B. 658. (2) 19 Cr. App. 22.
(3) [1926] S.C.R. 539.

judge had told the jury that if they were quite certain that the girl (an accomplice) was telling the truth, though uncorroborated, they ought to act on it.

These cases, however, do not expressly lay down what is necessary where there is some corroborative evidence. It is urged on behalf of the accused that in this case there was in fact no corroborative evidence proper to be submitted to the jury. Alice Couture had stated, in her depositions read to the jury, that the accused had performed on her in the previous year (1926) an illegal operation to procure a miscarriage, which resulted at her sister's house, and that she took the foetus to the accused. The fact of the miscarriage, and of the placing of the foetus in a box furnished by her "cavalier," Adrien Letourneau, was testified to by the sister Madame Turgeon. Blanche Pouliot testified to having been shewn the foetus in this box at the house of Madame Turgeon, to having gone for a walk with Alice Couture and to having seen the latter, after they had separated on the street, go into the office of the accused, having with her this box. The question is: Was this evidence of a previous crime committed by accused admissible

The leading case on this subject is *Makin* v. *The King*. L.R. 1894 A. C., 57. The headnote gives the effect of the decision in the following words:

> Evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

This case and many others are reviewed in *The King* v. *Bond*, (1), where the charge was using instruments on Ethel Anne Jones on October 25th, 1905. It was not disputed that accused had used instruments, the defence being that they were used for a lawful purpose. Evidence was given by one Gertrude Taylor that the accused had in January, 1905, used similar instruments on her to procure a miscarriage. It was held by five of the judges that the evidence was admissible as proof of intent, Alberstone, C.J., and Ridley, J., dissenting.

The subject is again discussed in the House of Lords in *Thompson* v. *The King* (2), which deals mainly with the

(1) [1906] 2 K.B. 389. (2) [1918] A.C. 221.

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application of the rule laid down in the previous cases to the circumstances of the particular case under consideration. In the present case there was no question of proving the intent of the accused in performing an operation, the sole question being as to whether he was the party who did perform it. All the evidence, therefore, offered to shew that accused had performed an illegal operation on Alice Couture in 1926 was inadmissible, and it need hardly be said that the evidence of J. Juneau, a discharged servant who had been fined for an assault on the accused, of having found the body of an infant behind a door on the accused's premises about 1918, was also inadmissible.

There remains the evidence of Adrien Letourneau, described by Madame Turgeon as the "cavalier" of the deceased Alice Couture. He says he regarded her as a girl of light morals, and that he was in the habit of seeing her two or three times a week. He is the party who went with her to Madame Turgeon's when she had the miscarriage there in 1926, and he supplied the box spoken of. His evidence, relied on as corroborative, is that in the month of April, some short time before Alice Couture had the miscarriage in question, in 1927, he went with her on two occasions, and parted with her not far from the office of the accused, and saw her, on each occasion after parting from him, enter the accused's office. The accused testified that he had no recollection of ever having seen Alice Couture, and that if he had seen her, she was one of many who called in the course of a day, and had not impressed herself on his memory. He, of course, denied all her statements about having operated on her. He also testified about having been out of the city during part of the month of April.

In the first place, the jury might on the evidence before them have found that Letourneau was an accomplice, and if the evidence was admissible, it should have been left to the jury to determine if he was an accomplice, with a warning as to the danger of convicting on the uncorroborated evidence of two accomplices. *Rex* v. *Malouf* (1). Letourneau's evidence was offered in chief as proof of the crime, and was not corroborative because it did not tend to implicate the accused in the commission of the crime. If it

(1) [1918] N.S. Wales St. B. 143, at p. 148.

were true that the girl entered the office of the accused as he stated, the evidence did not establish that she saw him or implicate him in the commission of the crime.

A Morris chair, such as Alice Couture in her depositions said had been used for the operation, and three instruments such as doctors usually have in their office, with which an abortion might be brought about, but with which, apparently, it would not be possible to cut up the foetus as was done in this case, were found in the office of the accused. This again would not be evidence tending to implicate the accused. It seems clear, therefore, that there was in fact no admissible corroborative evidence to be submitted to the jury, and that it was the undoubted duty of the learned judge to have given the warning. It is not, however, to be taken that the warning would have been unnecessary had there been some corroborative evidence proper to be submitted to the jury. It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so. As stated, there seems to be no case in which it is explicitly laid down that the warning must be given where there is some corroborative evidence to go to the jury, but I think it necessarily follows from the principle laid down in the cases referred to, where the evidence of the accomplice is necessary to sustain the conviction and the corroborative evidence may or may not be accepted as sufficient by the jury. This seems to be assumed by the Court of Criminal Appeal in *The King* v. *Feighenbaum* (1). The appellant was convicted of inciting boys to steal, the boys, accomplices, having given evidence against him. The corroborative evidence was that of a police officer as to the conduct of the accused when he interviewed him before proceedings and stated to him the names of the boys and what they had related. Darling J. delivering the judgment of the court, says:

> In this case the deputy chairman rightly directed the jury as to the danger of believing the uncorroborated evidence of the accomplices, and as to what was, or might be, corroboration; and in our opinion, it would

(1) [1919] 1 K.B. 431.

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in the circumstances of this case have been wrong for him to say that in his opinion there was no corroboration of the boys' evidence.

Here there was corroboration, and it is stated that the jury were rightly warned.

In *Baker* v. *The King* (1), it seems also to have been assumed that the warning should have been given, although there was the corroboration of uncontroverted facts;

facts established by the admissions of the appellants or by independent and unchallenged evidence.

The trial judge warned the jury that though they might convict on the evidence of an accomplice, it would be dangerous to do so, and warned them that one of the witnesses, Sowash, must be treated as an accomplice, but failed to give the same warning as to the other witness, Stromkins. One of the grounds of appeal was that the warning was not sufficient, but there was in addition the objection that the learned trial judge did not explain that corroboration means

corroboration not only in respect of some fact tending to shew that the crime was committed, but also in respect of some evidence implicating or tending to implicate the accused.

These objections were disposed of on the ground that the accused suffered no substantial wrong. The failure to warn as to the evidence of the accomplice Stromkins is commented on, but there is no suggestion that the objection on that ground was untenable because there was corroboration, doing away with the necessity of giving the warning.

Here the learned trial judge in substance said to the jury: You have the evidence of Alice Couture, categorically relating that the accused performed the illegal operation; you have confirmative evidence of her story; and, on the other hand, you have the evidence of the accused denying that he performed the operation. He has admitted that he was convicted previously for a similar offence, which is a strong circumstance to be taken into consideration in deciding whether you are to believe him or not. It is a question, then, of which story you believe. If you believe the accused, he is not guilty; if you don't believe him, but believe Alice Couture, he is guilty.

In addition to the defects of the charge, there was the improper admission of evidence to which I have referred, and

(1) [1926] S.C.R. 92.

many other irregularities. The accused was put in the box and testified as to his previous conviction and as to a long list of subscriptions that he had since made for charitable and religious objects. Presumably this was intended as evidence of good character, and was clearly inadmissible as such or otherwise. It was made the basis for a cross-examination of the accused on all the details of the previous offence and on his subsequent conduct. A few sample questions will shew the character of this cross-examination:—

Q. You remember that Miss Vachon said in court in her evidence that you had worked in the same manner as in this case? (Miss Vachon was the girl operated on in the former case.)

Counsel goes on in this way to repeat a great part of the evidence given in the former trial.

The following are further samples:—

Q. Is it not true that at the time of your condemnation in 1917 you were recognized as a public abortioner?

Q. Is it not true that you are recognized as such at present by the public?

If the evidence of accused referred to had been rejected, as it should have been, the cross-examination as to character would have been limited to what was relevant on the question of his credibility. In any case, the questions referred to should not have been allowed. The latter two were, in effect, a declaration of fact by the Crown prosecutor to the jury. The impropriety of introducing the evidence given by a witness on a previous occasion by stating it to the accused and asking him if he remembers hearing it, is pointed out in *Allen* v. *The King* (1).

It cannot be said that the accused suffered no substantial wrong. The appeal is therefore allowed, and a new trial ordered.

NEWCOMBE J.—I agree that there must be a new trial, because, in my view, the evidence upon which the Crown relied for corroboration of the woman's testimony did not corroborate in the essential particulars; and there was no warning to the jury, such as required by the Court of Criminal Appeal in the well-known case of *Rex* v. *Baskerville* (2).

Appeal allowed.

(1) 44 Can. S.C.R. 331.

(2) [1916] 2 K.B. 658.

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*Feb. 24.
*Apr. 24.

LA CITE DE MONTREAL (DEFENDANT)...APPELLANT;

AND

J. A. MAUCOTEL AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Municipal corporation—Expropriation—Lane—Value—Fixing of indemnity—Right of the city to take possession—Res judicata—(Q.) 3 Geo. V, c. 54, s. 43—Art. 407 C.C.

Section 43 of 3 Geo. V, c. 54 (Charter of the City of Montreal), which enacts that "the city is authorized to perform in and on any private street or lane any municipal works whatsoever without being held to pay any * * * compensation for the use and possession of such private street or lane * * *" does not entitle the city to turn a private street or lane into a public street without paying to the owner its fair value.

The value to be ascertained by a court in fixing the indemnity to be paid by a municipality for a lot set aside to serve as a lane for the benefit of the owners of the adjoining lots is the value to the owner of the lane excluding any advantage derived from the fact that the municipality must acquire that land in order to carry out its scheme of creating there a public street; and such value is affected by the fact that there is only one possible buyer, i.e., the municipality, and for only one purpose, i.e., opening of a street.

Judgment of the Court of King's Bench (Q.R. 43 K.B. 213) varied.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Cousineau J., and maintaining the respondent's action.

The Estate Boyer, owner of a plot of land known as cadastral number 328, subdivided it into building lots with streets and lanes. By deed of partition, December 24, 1880, a certain number of lots, among which was lot no. 279, were allotted to L. A. Boyer. It is provided in that deed of partition that lots nos. 328-278, 279 and 308 shall be used in perpetuity as lanes for the benefit of the proprietors of the lots as subdivided. In 1892, February 3, L. A. Boyer sold to P. A. Larivière some 160 of the lots allotted to him, including lot no. 279 with "toutes servitudes actives et

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

(1) (1927) Q.R. 43 K.B. 213.

passives." On the 12th of April of the same year, P. A. Larivière sold to J. A. Stevenson a certain number of those lots with the use in common of the lane no. 279. In 1904, November 11, the estate Boyer ceded, by error, to the appellant that same lot 279. On the 15th of November, 1913, P. A. Larivière gave in payment to his sister Eulalie Larivière that same lot 279, with another lot bearing no. 352. On the 10th of November, 1914, Eulalie Larivière brought an action against the appellant in which she alleges that she is the owner of lot 279, that the deed of cession of the 11th of November, 1904, by the estate Boyer to the appellant did not confer to the city any title to said lot no. 279 and is illegal and without effect, that the appellant is illegally in possession of said lot which was converted into a public street, and by the conclusions of her declaration, she asked that the sale by L. A. Boyer to P. A. Larivière be declared valid; that she was entitled to the possession of the lot and that the city be ordered to cease to use that lot as a public street. That action was contested by the appellant. During the pendency of the suit, Eulalie Larivière and her successor P. A. Larivière died and the respondents, in their quality of testamentary executors of P. A. Larivière, were authorized to continue the suit. By judgment rendered by Mr. Justice Surveyer on the 6th of February, 1925, the action was maintained in part and dismissed in part, the sale by L. A. Boyer to P. A. Larivière was declared valid, the respondents were declared owners of the lot, reserving to the city all its rights deriving from its charter and specially from section 43 of 3 Geo. V, c. 54. No appeal was taken from that judgment. On the 3rd of February, 1926, the respondents brought the present action whereby they claim the sum of $21,000 as being in their opinion the value of the lot no. 279. By the conclusions of their declaration they give to the appellant the option to proceed by expropriation of the lot instead of paying the said sum of $21,000, said option to be exercised within 30 days from the date of the judgment to be rendered. The appellant contested that action on many grounds and especially on the grounds that there was *chose jugée* between the parties, that the works done on lot 279 were authorized by the law and especially by the statute 3

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Geo. V, c. 54, s. 43, and that in any event the lot 279 had no real or commercial value and the amount claimed was excessive.

Chs. Laurendeau K.C. and *Honoré Parent K.C.* for the appellant.

Oscar P. Dorais K.C. for the respondent.

The judgment of the court was delivered by

RINFRET, J.—Les intimés sont les exécuteurs testamentaires de Pierre-Alexandre Larivière, en son vivant industriel de Montréal. Ils allèguent que, le 3 février 1892, Larivière fit l'acquisition d'un grand nombre de lots de terre parmi lesquels se trouvait le numéro 279 de la subdivision du lot de cadastre numéro 328 du village incorporé de la Côte Saint-Louis, qui fait maintenant partie de la cité de Montréal.

Les dimensions de ce lot sont de vingt pieds de largeur par sept cents pieds de profondeur. Il fut vendu à Larivière par M. L.-A. Boyer, à qui il échut en vertu d'un partage des biens dépendant de la succession de feu Louis Boyer; et, dans l'acte de partage, il est décrit comme une ruelle privée

servant de passage à l'usage et entretien commun des lots qui y touchent, pour communiquer desdits lots à la rue Boyer.

Les intimés, prétendant que la cité de Montréal s'était emparée de cette ruelle et en avait fait une rue publique, se sont déclarés prêts à transporter tous leurs droits et à passer titre en faveur de la cité sur le paiement d'une somme de $21,000 "ou de toute autre somme juste et raisonnable qui sera adjugée" comme représentant la valeur de cette lisière de terrain, à moins que la cité ne préfère "procéder par voie d'expropriation pour fins d'utilité publique, suivant la loi."

La cité a plaidé qu'elle s'était contentée de faire sur ces lots les travaux municipaux autorisés par la loi 3 Geo. V, c. 54, art. 43, en vertu de laquelle elle est dispensée, en pareil cas, de payer aucun dommage ou aucune indemnité pour l'usage et la possession des ruelles privées.

Elle a invoqué, en outre, un jugement, rendu le 6 février 1925, dans une cause mue entre les mêmes parties, où les intimés revendiquaient à titre de propriétaires la possession du lot numéro 279 et où, tout en reconnaissant leur

droit de propriété, le jugement leur aurait refusé la possession à l'encontre de la cité de Montréal. Il y aurait donc chose jugée, et les intimés ne tenteraient que de recommencer un procès qui a déjà été décidé contre eux.

Enfin la cité prétend que, si elle est tenue de payer une indemnité, le montant réclamé est considérablement exagéré, parce que la valeur de cette ruelle, pour les intimés, est pratiquement nulle à raison des servitudes conventionnelles et statutaires auxquelles elle est assujettie.

La Cour Supérieure a été d'avis que le jugement du 6 février 1925 avait réglé tout le litige. Elle a trouvé bien fondé le plaidoyer de chose jugée et elle a débouté les intimés de leur action.

Ce jugement a trouvé faveur auprès de l'un des juges de la Cour du Banc du Roi; mais la majorité de cette cour exprima, au contraire, l'opinion que, le jugement de 1925 ayant reconnu le droit de propriété des intimés sur la ruelle, leur réclamation actuelle était la conséquence logique de ce jugement et devenait la justification même de leur action pour paiement de la valeur de la ruelle, au lieu de constituer une fin de non recevoir.

Quant au statut 3 Geo. V, l'opinion de la majorité fut qu'il ne saurait être interprété de façon à autoriser la cité de Montréal à s'emparer des ruelles privées et à confisquer effectivement le droit de propriété.

L'action fut donc maintenue pour un montant de $7,000 auquel la valeur du terrain fut fixée. Sur cette question d'indemnité, Monsieur le juge Dorion enregistra cependant sa dissidence, déclarant qu'il n'accorderait qu'un " montant nominal déterminé par l'utilité bien problématique que peut avoir ce qui reste de la propriété " (aux intimés).

Le litige soulève donc trois questions principales sur lesquelles nous avons à nous prononcer.

La loi 3 Geo. V, c. 54, art. 43, se lit comme suit:

> La cité est autorisée à faire dans et sur toutes les rues ou ruelles privées tous travaux municipaux quelconques sans être tenue de payer aucun dommage ou indemnité pour l'usage et la possession de telle rue ou ruelle privée, et à charger le coût de ces travaux suivant les dispositions de la charte ou des règlements.

La lisière de terrain dont il s'agit s'étend à l'extrémité est (approximativement) des lots 280 à 307g de la subdivision du lot numéro 328; et, dans l'intention de l'auteur de la subdivision, elle était destinée à servir de ruelle pour

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l'utilité de ces lots qui viennent y aboutir à angle droit. La cité de Montréal y a construit des égouts et un trottoir et elle y a fait les pavages, comme sur toutes les autres rues publiques. En plus, parallèlement à cette ruelle, elle a ouvert la rue Mentana; puis elle a traité la ruelle comme faisant partie de cette rue Mentana, de façon à ce que ruelle et rue forment un seul tout et soient livrées indifféremment à la circulation publique. A toutes fins, la ruelle a été incorporée à la rue; et, lors de l'argument devant cette cour, l'avocat de la cité admit qu'elle en avait fait une rue publique qui figurait au registre des rues et voies publiques et au plan de la cité de Montréal.

Nous n'avons aucune hésitation à dire que la loi 3 Geo. V n'a pas autorisé la cité de Montréal à en agir ainsi. Elle pouvait faire tous travaux municipaux dans et sur la ruelle privée des intimés; elle pouvait prendre possession de cette ruelle pour y faire ces travaux; elle en avait l'usage pendant le temps requis pour les faire; elle en conservait l'usage et la possession dans le sens que les travaux devaient subsister dans et sur la ruelle sans aucune indemnité au propriétaire; mais ce dernier conservait sur la ruelle tous ses droits, sujets aux servitudes de passage qu'il avait concédées pour l'utilité des lots riverains. Malgré la loi 3 Geo. V, le fonds de la ruelle était subordonné seulement à cette servitude restreinte. La cité y a superposé une servitude d'utilité publique qui constitue, en réalité, une prise de possession complète du terrain. En en faisant une rue publique, elle a dépouillé les intimés de leur propriété. C'est certainement aller au delà des pouvoirs qui lui sont conférés par l'article 43 de la loi 3 Geo. V, c. 54. Cette loi n'a pas la portée que la cité de Montréal a voulu lui donner en l'espèce. Elle ne justifie pas la cité, qui persiste dans sa confiscation, de refuser aux propriétaires la juste indemnité qui leur est due en vertu de la loi.

Nous ajouterons que cette question n'a pas été tranchée par le jugement du 9 avril 1925. Ce jugement a plutôt défini les droits des intimés et de l'appelante sur la ruelle privée dont il s'agit. Les intimés avaient alors affirmé leur titre à la propriété à l'encontre d'un autre titre que leur opposait la cité. Ils demandaient que leur titre fût reconnu, que celui de la cité fût invalidé, et

qu'ordre soit donné à la cité de Montréal de délaisser ledit lot à titre de rue publique et d'en donner possession

aux intimés pour qu'ils puissent y exercer leur droit de propriétaires. Le jugement reconnut bon et valable le titre des intimés et les déclara propriétaires du lot numéro 279, mais

sujet à la servitude créée en faveur des lots adjacents par l'acte de partage du 24 novembre 1880 et sujet aux droits conférés à la (cité de Montréal) par sa charte et, en particulier, par la loi 3 Geo. V, c. 54, s. 43, de faire des travaux dans, sur et sous ledit lot.

Il rejeta les défenses et les autres conclusions de la demande.

La cité veut en tirer la conséquence que la Cour Supérieure, en refusant dans ce jugement d'ordonner son déguerpissement, l'a *ipso facto* confirmée dans la possession de la ruelle et a reconnu son droit d'utiliser le lot en litige comme une rue publique ouverte à la circulation générale.

Nous sommes d'avis, au contraire, que ce jugement a réparti entre les intéressés les droits qu'ils pouvaient, de part et d'autre, exercer sur le lot numéro 279. La propriété du fonds fut définitivement attribuée aux intimés; la servitude restreinte créée en faveur des lots riverains fut confirmée; et les droits statutaires de la cité furent simplement admis sans toutefois y être définis. Mais il ne fut pas jugé, en fait, que la cité avait transformé la ruelle en rue publique. Encore moins fut-il décidé, en droit, que la cité avait le pouvoir d'opérer cette transformation. La cité fut maintenue dans l'usage et la possession qu'elle faisait de la ruelle pour ses égouts, son trottoir et son pavage conformément à la loi 3 Geo. V. Pour cette raison, la dépossession fut refusée; mais la confirmation du droit de propriété des intimés repousse absolument l'idée que le jugement de 1925 ait voulu reconnaître la prise de possession municipale complète et absolue, à titre de propriétaire, qui, de l'aveu même de ses avocats, existe à l'heure actuelle.

Les intimés, dans leur première action, n'avaient fait aucune réclamation d'indemnité. Bien loin de penser que le jugement qui fut rendu en cette première instance constitue une fin de non recevoir à l'encontre de leur demande actuelle, nous sommes d'avis que cette demande est plutôt le résultat nécessaire de ce premier jugement et qu'une indemnité est la seule ressource qui reste ouverte aux intimés.

Mais, d'accord avec la Cour du Banc du Roi, nous croyons que le montant de l'indemnité est la difficulté la plus sérieuse à envisager dans cette cause. Sur cette question

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nous n'avons pas l'avantage de l'opinion du juge du procès parce que, ayant été d'avis que l'action devait être rejetée, il ne s'est pas prononcé sur la valeur pécuniaire des droits des intimés dans la ruelle.

La preuve qui a été faite ne peut guère nous aider. L'un des intimés a expliqué que la somme de $21,000 qu'il demandait est basée sur les indemnités qui ont été accordées à la suite d'expropriations de certains terrains voisins. Mais l'enquête n'a pas dévoilé les circonstances particulières qui ont pu induire les commissaires ou les arbitres à fixer ces indemnités. Dans l'ignorance où la preuve nous laisse à cet égard, nous manquons absolument de points de comparaison; et nous ne pouvons donc nous appuyer sur ces sentences arbitrales. Une indemnité, en matière d'expropriation, est principalement une question de fait où chaque cas doit être examiné suivant son aspect individuel. Aucun des juges n'a cru, pour les fins dela présente cause, pouvoir accepter comme base ces sentences rendues en d'autres instances; et, à notre tour, nous pensons que cette suggestion des intimés doit être écartée.

Il reste au dossier le témoignage de quatre courtiers d'immeubles, dont deux furent appelés par les intimés et les deux autres par l'appelante.

L'un d'eux nous a donné " la valeur des terrains vacants dans cette localité-là " comme variant entre $1.50 et $1.70 du pied, suivant la position des lots. Mais il parle " de la moyenne générale "; il admet qu'il n'a " pas parlé de lisières de terrain "; qu'il n'a " pas examiné précisément (le) numéro ici sur le plan "; et qu'il ne lui est jamais " arrivé de vendre des terrains sur une servitude comme cela ". Il finit par déclarer n'être " pas en mesure, à tout événement, d'établir une valeur * * * pour ce morceau-là ".

Un autre fixe à peu près au même montant la valeur des lots à bâtir (*building lots*) avoisinants; mais, lorsqu'on lui fait remarquer que " the whole lot is taken by the right of way ", il est forcé d'admettre que l'unique valeur du lot numéro 279 est que " it is useful for a street ".

Les deux autres courtiers d'immeubles considèrent que cette ruelle privée, en tenant compte des servitudes auxquelles elle est subordonnée,

n'a pas de valeur commerciale (puisque) les lots qu'elle est censée desservir sont déjà vendus. Le propriétaire ne pourrait pas en disposer pour les fins ordinaires des agents d'immeubles, soit pour constructions ou autres choses. Il ne trouverait pas preneur; et encore: " Une ruelle où les lots ont été vendus avec droit de passage n'a aucune valeur commerciale."

Ils ajoutent, tous deux, qu'il est de coutume, à Montréal, lorsqu'un propriétaire subdivise son terrain en lots, d'inclure dans le coût de ces lots " un montant pour couvrir la superficie des ruelles et des rues ". Et cela est inévitable. Pour faire une opération profitable, l'auteur d'une subdivision doit se rembourser sur le prix des lots de la valeur des rues et ruelles qu'il met à part et qu'il abandonne pour l'utilité de ces lots. Les intimés, qui en avaient l'opportunité, n'ont pas prétendu que cela n'avait pas été fait dans le cas qui nous occupe.

Nous avons là le résumé de toute la preuve qui peut nous guider pour fixer l'indemnité que les intimés doivent recevoir. Comme on le voit, et comme l'a déclaré la Cour du Banc du Roi, cette preuve est fort " peu satisfaisante ". Aussi n'en a-t-elle pas tenu compte; et, pour accorder un montant de $7,000, s'est-elle appuyée sur une règle en vertu de laquelle le terrain d'une rue ou d'une ruelle vaudrait les deux cinquièmes du terrain en bordure de cette rue ou ruelle. En l'espèce, les deux cinquièmes représenteraient 50c. du pied, soit pour les 14,000 pieds une somme de $7,000.

La Cour Suprême du Canada évite, autant que possible, de modifier la quotité des dommages ou de l'indemnité qui est accordée par les tribunaux de première instance. Ces tribunaux sont généralement en meilleure posture qu'elle pour en peser tous les éléments d'appréciation. Mais ici, comme nous l'avons vu, la Cour Supérieure n'a pas fixé le montant, et la Cour du Banc du Roi était dans la même situation que les juges de cette cour.

En outre, les tribunaux d'appel ont toujours reconnu la nécessité d'intervenir dans la fixation du montant d'une indemnité lorsqu'elle paraît avoir été calculée en vertu d'un principe erroné. La seule justification de la base adoptée par la majorité de la Cour du Banc du Roi en cette cause-ci est l'allusion faite incidemment par l'un des témoins à

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la pratique de la Commission des Utilités Publiques. Au cours de son témoignage, et sans que la question lui fût posée, ce témoin dit inopinément, en parlant de cas semblables:

> Si vous me demandez quelle est la coutume, je crois que la Commission des Utilités Publiques accorde les deux cinquièmes,
>
> * * *
>
> Q. D'après l'expérience que vous avez avec la Commission des Utilités Publiques, vous dites que la pratique a été, à votre connaissance, de demander les deux cinquièmes de la valeur des lots en bordure?
>
> R. Assez souvent.

C'est là tout ce qu'on trouve sur ce point. C'est une mention passagère dont personne n'a paru faire état à l'enquête. Elle n'était pas admissible en preuve; on ne pouvait établir ainsi verbalement la teneur ou la portée de certaines sentences arbitrales de la Commission des Utilités Publiques de Québec, maintenant connue sous le nom de Commission des Services Publics de Québec.

Si toutefois l'on écarte la question d'admissibilité de cette preuve, l'on peut concevoir qu'il se soit rencontré des cas où cette Commission a cru que les circonstances particulières, dans certaines causes qu'elle avait à juger, lui permettaient d'adopter la méthode de calcul que l'on vient d'indiquer. Mais on n'en saurait faire une règle en matière d'expropriation et, à notre humble avis, les faits qui ont été prouvés ici n'en justifient pas l'application à la cause actuelle.

Nous sommes en présence d'un cas où le droit de propriété est véritablement réduit à sa plus simple expression. Tous les lots qui bordent la ruelle sont vendus. La ruelle a été " créée et (n'est) conservée (que) pour l'utilité de ces lots ". La servitude de passage couvre toute la superficie de la ruelle et elle est perpétuelle. A part les lots qui jouissent de la servitude, tout le terrain qui entoure la ruelle est compris dans la rue Mentana. Cela élimine la possibilité de constructions voisines qui auraient besoin d'acquérir du propriétaire de la ruelle des droits de vue, d'égouts, ou de passage. Les intimés ont un titre de propriété pratiquement dépouillé de tous ses attributs. Ils n'ont le *jus utendi, jus fruendi* et *jus abutendi* ni sur la surface, ni sur le dessus. Il leur reste des droits sur le dessous (art. 414 C.C.); mais ils n'y auront accès qu'à condition de faire l'acquisition d'un droit de passage souterrain " à la charge d'une indemnité proportionnée au dommage qu'il peut causer " (arts.

540 C.C. et suiv.).

En outre, la valeur de la ruelle est présumée avoir été incluse dans le prix des lots qu'elle dessert; et les intimés ou leur auteur sont donc supposés en avoir été déjà remboursés.

Il faut tout de même accorder une indemnité quelconque. Cette indemnité doit être évaluée de la même façon que s'il s'agissait d'une expropriation. La cité de Montréal s'est emparée du terrain et en a fait une rue publique. Elle a omis les formalités que la loi lui imposait pour en faire régulièrement l'acquisition. Elle n'a pas payé d'indemnité préalable (art. 407 C.C.). Les intimés ont procédé en revendication, et un premier jugement leur a été défavorable. Il ne leur restait plus que le recours qu'ils exercent maintenant (*Cité de Montréal* vs *Villeneuve* (1). Ce sont les principes de l'expropriation qui doivent être appliqués, quoique les formalités n'en aient pas été suivies (*Cité de Montréal* vs *Léveillé* (2); *Cité de Montréal* vs *Hogan* (3).

Sous la charte de la cité de Montréal (art. 421),

l'indemnité, en cas d'expropriation, comprendra la valeur réelle de l'immeuble, partie d'immeuble ou servitude expropriés, et les dommages resultant de l'expropriation.

L'estimation de cette valeur réelle doit être faite du point de vue du propriétaire et non du point de vue de l'acquéreur, " the value to be paid for is the value to the owner * * * not to the taker " (*dictum* de Lord Dunedin in *Cedar Rapids* vs *Lacoste* (4). De prime abord, cela répondrait à l'expert qui a fait remarquer: " It is useful for a street ". L'envisager ainsi serait se placer du point de vue de la cité de Montréal et non pas de celui du propriétaire de la ruelle.

Lord Buckmaster (*Fraser* vs *Fraserville* (5) est encore plus précis. Il dit:

The value to be ascertained is the value to the seller of the property.

Il ajoute qu'il faut tenir compte de tous les avantages et de toutes les possibilités

excluding any advantage due to the carrying out of the scheme for which the property it compulsorily acquired.

Ici la seule possibilité qui pouvait être raisonnablement envisagée était celle où la municipalité aurait besoin de la ruelle pour en faire une rue. S'il en existait d'autres, il

(1) Q.R. 41 K.B. 218.

(2) Q.R. 4 K.B. 216, at pp. 216 *et seq.*

(3) Q.R. 8 K.B. 534, at pp. 544 *et seq.*

(4) [1914] A.C. 569, at p. 576.

(5) [1917] A.C. 187, at p. 194.

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incombait aux intimés de les faire voir à l'enquête. Ce sont eux qui réclamaient l'indemnité et sur eux retombait le fardeau de la preuve. Ils n'auront qu'eux-mêmes à blâmer si d'autres usages auxquels la propriété pouvait s'adapter n'ont pas été signalés. D'ailleurs il est difficile, pour ne pas dire impossible, d'en envisager d'autres. Il n'existait donc qu'un acheteur possible: la cité de Montréal; et pour une seule fin: utiliser la ruelle comme rue publique. Cette situation écartait toute concurrence et, par conséquent, tout marché. Pour cette raison, l'élément de "special adaptability", s'il existe ici, qui entre en ligne de compte dans le calcul des indemnités en matière d'expropriation, n'a aucun poids dans l'espèce actuelle. Apprécier l'indemnité sur la base que la ruelle a une certaine valeur pour la cité de Montréal parce qu'elle est spécialement adaptée à l'usage que la cité veut en faire, ce serait aller à l'encontre du principe posé dans la cause de *Fraser* v. *Fraserville* (1) et accorder une indemnité pour

> any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

Il n'y a plus lieu de discuter les raisons qui ont conduit à l'adoption de ce principe. Elles sont clairement exposées dans le jugement du juge Rowlatt dans la cause de *Sydney* v. *North Eastern Rly. Co.* (2).

Nous partageons l'opinion de Monsieur le Juge Dorion, de la Cour du Banc du Roi, que le jugement de la majorité de cette cour a fixé l'indemnité à un montant trop élevé (Dillon, Municipal Corporations, 5e éd., vol. 3, n° 1143). En plus, nous avous dit pourquoi nous sommes respectueusement d'avis que ce montant a été calculé en vertu d'un principe erroné. Nous croyons donc que le jugement de la Cour du Banc du Roi doit être modifié sur ce point. "La valeur réelle de l'immeuble" (suivant l'expression de l'article 421 de la charte de Montréal que nous avons reproduit plus haut) c'est, dans le cas qui nous occupe:

> la valeur du fonds
>
> (*a*) appréciée en tenant compte des droits conférés sur ce fonds à la cité de Montréal par sa charte et, en particulier, par la loi 3 Geo. V, c. 54, s. 43;

(1) [1917] A.C. 187, at p. 194. (2) [1914] K.B. 629, at pp. 636, 637.

(*b*) diminuée de toute la dépréciation qui résulte de la servitude de passage imposée sur ce fonds par l'auteur des intimés.

Ce que les intimés perdent par la transformation de leur ruelle en rue publique peut être insignifiant du point de vue pécuniaire; mais l'enquête devant la Cour Supérieure ne nous fournit aucune donnée pour en établir la valeur, comprise comme nous venons de l'indiquer. Dans les circonstances, toute somme que nous fixerions serait arbitraire.

La Cour du Banc du Roi cependant n'a prononcé contre la cité de Montréal aucune condamnation définitive. L'appelante n'était pas tenue de payer la somme de $7,000 qui a été indiquée. Elle pouvait, en vertu du jugement, omettre ce paiement et tenter d'en faire modifier le montant en s'adressant à la Commission des Services Publics de Québec qui, ainsi qu'il fut admis devant nous, est le corps compétent en matière d'expropriations de ce genre. Elle n'a pas cru devoir profiter de ce choix qui lui fut laissé. Elle a préféré se pourvoir en appel devant nous. Elle peut faire valoir, en faveur de la voie qu'elle a suivie, l'argument que si le montant fixé par la Cour du Banc du Roi est excessif, l'effet du jugement est, comme seule alternative, de la forcer à payer une somme injuste, pour éviter d'avoir recours à l'expropriation; et le résultat, du point de vue pratique, est de la priver virtuellement de son option.

D'autre part, nous n'avons pas juridiction pour contraindre les parties à aller devant la Commission des Services Publics de Québec; nous pouvons seulement retourner le dossier à la Cour Supérieure pour y faire déterminer la "somme juste et raisonnable", que réclament les intimés par leur action et qu'ils ont consenti d'accepter en échange de leur propriété, dont la cité s'est emparée.

Il faut éviter cependant la multiplicité des enquêtes à laquelle les parties seraient exposées si nous laissions à la cité de Montréal, après que la Cour Supérieure aura fixé le montant de l'indemnité, la faculté de recourir à l'option de procéder par voie d'expropriation.

Nous pourrions dire qu'en inscrivant devant la Cour suprême du Canada, sans réserve ni restriction, la cité de Montréal peut être tenue pour avoir abandonné son droit à cette option. A tout événement, en nous rendant à sa

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Rinfret J.

demande de modifier le jugement de la Cour du Banc du Roi, nous pouvons certainement y mettre comme condition qu'elle renonce à ce droit.

Nous ordonnons donc, à la condition que la cité de Montréal renonce à l'option de procéder par voie d'expropriation, que le dossier soit retourné à la Cour Supérieure pour y faire déterminer le montant de l'indemnité qui devra être payé aux intimés. A défaut par la cité d'abandonner expressément cette option en en donnant avis aux intimés dans les trente jours de la signification du présent jugement, le jugement de la Cour du Banc du Roi sera maintenu purement et simplement. Sous tous autres rapports, ce jugement est confirmé.

Quant aux frais, nous croyons que l'objet principal du litige était de déterminer si la cité de Montréal avait eu raison de s'emparer de la ruelle et d'en faire une rue publique sans payer d'indemnité aux intimés. Tout ce litige doit être traité comme une cause d'expropriation et les frais de l'appel à cette cour doivent être mis à la charge de l'appelante.

Judgment of appellate court varied.

Solicitors for the appellant: *Damphousse, Butler & St-Pierre.*

Solicitors for the respondents: *Dorais & Dorais.*

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*Mar. 5.

DOMINION CARTAGE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

OSCAR CLOUTIER (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction—Amount in controversy—Inclusion of interest in computing amount—Supreme Court Act, ss. 39, 40

When the judgment of a court of first instance for recovery of a sum of money is affirmed by an appellate court (in this case the judgment was varied by reducing the plaintiff's recovery from $3,008.75 to $2,000), the interest running on the judgment of the court of first in-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont J.

stance up to the date of the judgment of the appellate court must be included in computing the amount in controversy in the appeal to this court, because the judgment appealed from is necessarily the judgment of the appellate court. *Hamilton* v. *Evans* ([1923] S.C.R. 1) ref.

MOTION to quash appeal for want of jurisdiction.

The action was to recover the sum of $7,600.74 for damages resulting from an automobile accident. The Superior Court maintained the action for a sum of $3,008.75 with interest and costs.

Upon appeal to the Court of King's Bench, this amount was reduced to $2,000.

Louis Côté for the motion.

G. Coote contra.

After hearing argument by counsel for the motion the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that this motion must fail, because what the Court of King's Bench did was in effect to reduce the plaintiff's recovery from $3,008.75 to $2,000. Properly construed, the judgment of that court awards the plaintiff interest from the date of the judgment of the Superior Court. Otherwise the words in the judgment of the Court of King's Bench "with interest" are meaningless and without effect.

The motion is dismissed with costs.

Perhaps I should add, for the purpose of making the matter clear, that the court is of the opinion that, when interest runs from the date of the judgment of the court of first instance to the date of the judgment of the court of appeal, that interest must be included in computing the amount in controversy in the appeal to this court, because the judgment appealed from is necessarily the judgment of the court of appeal. We so determined in *Briggs* v. *Eggett* (1), a decision which would seem to be inconsistent with *Hamilton* v. *Evans* (2).

Motion refused with costs.

(1) [1928] S.C.R. 154. (2) [1923] S.C.R. 1.

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*Feb. 23.
*Apr. 24.

MUNN & SHEA LIMITED (INTERVENANT) .APPELLANT;

AND

HOGUE LIMITEE (PLAINTIFF).....RESPONDENT;

AND

H. DAVIS .....(DEFENDANT)

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

Privilege—Lien—Claim—Supplier of materials—When constituted—Registration—Arts. 2013e, 2103 C.C.

The privilege of the supplier of materials is effectively constituted without registration at the date when the obligation of the owner or the contractor arises; but it can only be preserved by registration of the statutory memorial within the statutory period, i.e., by registration of it before the expiration of thirty days after the completion of the work.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 198) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., which had dismissed the appellant's intervention and maintained the respondent's action.

An action was instituted by the respondent against the defendant to have it declared that it had, as supplier of materials, a privilege for a sum of $3,643 affecting lots belonging to and being in possession of the defendant. The respondent also prayed that the defendant be condemned to pay the said sum of $3,643. The respondent, having sold and delivered to the defendant Davis materials for the construction of a series of thirteen contiguous houses, erected on twelve lots, and having received payments on account after the delivery of the materials, had still a claim amounting to $3,643 and registered against certain of the lots on which the aforesaid constructions had been erected a declaration of privilege in the sum of $3,643. By the conclusions of its action, the respondent prayed that Davis be personally condemned to pay

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1927) Q.R. 44 K.B. 198.

this sum and that the immovables on which the constructions were erected be declared affected by privilege for the payment of the said sum. Davis filed a defence but did not appear when the case came before the Superior Court. Before the hearing, the appellant intervened in this cause and prayed for the complete dismissal of the action, pretending that it had become owner of the immovables, against which the declaration of privilege had been registered, before the registration had been effected of this declaration, and that, consequently, the registration had been made *super non domino*.

By a second intervention, the appellant pretended that the materials furnished by the respondent on the lots of land affected by privilege, were not worth the sum claimed, but in all at the most were not worth more than $1,506.20, and the appellant tendered this sum with a further amount for the costs, in all $1,700, which the appellant deposited with its intervention and prayed for the dismissal of the action inasmuch as the ratification of the privilege was concerned and asked that this privilege be radiated. The judgment of the Superior Court condemned Davis to pay the total amount claimed and maintained the privilege against the immovables thereby affected for the full sum.

C. Laurendeau K.C. and *A. E. J. Bissonnet K.C.* for the appellant.

J. L. St.-Jacques K.C. for the respondent.

The judgment of this court was delivered by

DUFF J.—I have come to the conclusion that this appeal should be dismissed. The only question requiring discussion is that which arises upon the contention of Mr. Laurendeau as to the effect of article 2103 C.C. as enacted by 7 George V (1916) c. 52. The other contentions advanced by him in support of the appeal were fully discussed on the argument, and concerning them, it is now sufficient to say that there appears to be no ground for disagreeing with the views of the Court of King's Bench.

Mr. Laurendeau's contention is that by force of the enactment just mentioned, of 1916, the lien claimant in respect of materials has a privilege which does not come into

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Duff J.

existence until the registration of a memorial pursuant to that enactment. If this is the law, admittedly the appellants must succeed, because they acquired their title prior to the registration of any memorial by the respondent. On behalf of the respondent, while it is not disputed that the lien of a furnisher of materials can only be preserved by registration of the statutory memorial within the statutory period, that is to say, by registration of it before the expiration of thirty days after the completion of the work, it is maintained that the privilege may nevertheless be effectively constituted at an earlier date, at the date when the obligation of the owner or the contractor arises; and it was then, it is said, that the privilege now asserted came into being, and if the respondent is right in this, the appeal must fail.

It is necessary to consider article 2013*e* C.C. as enacted by 7 Geo. V (1916), c. 52, and in its amended form, as enacted by 14 Geo. V (1924), c. 73. First then, article 2013*e* as enacted in 1916 is one of a series of articles which by that enactment were inserted in the Civil Code as articles 2013, and 2013*a*, 2013*b*, 2013*c*, 2013*d*, 2013*e*, 2013*f*; and by the same statute, article 2103 of the Civil Code was repealed as to its first paragraph which was replaced by a new paragraph.

Article 2013 C.C. as enacted in that year provides generally for the privilege of the workman, the supplier of materials and the builder and the architect, while the subarticles contain special provisions dealing severally with these kinds of privilege. Article 2103 (1) C.C. is as follows:

> The privilege of every person, except the workman, mentioned in article 2013, is created and preserved by registration within the proper delay at the registry office of the division in which the immovable is situated, of a notice or memorial, drawn up in the form of an affidavit of the creditor or his representative, sworn to before a justice of the peace, a commissioner of the Superior Court, or a notary, setting forth the name, occupation and residence of the creditor, the nature and amount of his claim, and the cadastral number of the immovable so affected.

This, it is said, is in effect a declaration that the privilege, in any case but that of the workman, does not arise until the registration of the notice or memorial there provided for. It may be, however, that in the case of the supplier of materials, the notice mentioned in article 2103 (1)

C.C. is intended to be the same notice as that prescribed for in the second paragraph of article 2013*e* C.C. (as enacted in the same statute), which I copy:—

Such privilege, however, shall take effect only upon the registration of a notice, given to the proprietor or his representative, informing him of the nature and cost of the materials to be supplied, as well as the cadastral number of the immovable property affected, and shall apply only to those furnished, or those specially prepared and not delivered, for the immovable in question, after the receipt of such notice by the proprietor, and its registration.

Article 2013*e* C.C. provides only for this notice, article 2013*f* C.C., on the contrary, which relates to the lien of the architect and the builder, provides only for a memorial. It may be possible to read the adjectival clause in article 2103 (1) C.C. beginning "drawn up in the form of an affidavit," as relating only to the immediate antecedent, that is to say to the word "memorial," and not to "notice"; and to treat the words "notice or memorial" distributively, one referring to the "notice" provided for in article 2013*e* C.C., and the other to the "memorial" prescribed in article 2013*f* C.C. In support of this it might be urged that the contents of the "notice" are fully set forth in article 2013*e* C.C., while those of the memorial are not stated in article 2013*f* C.C.

No doubt, if the Act of 1916 stood alone, this view might present rather serious difficulties, but article 2013*e* C.C., as amended by the statute of 1924, seems to remove these difficulties. It is in these words:—

Article 2013*e* of the Civil Code, as enacted by the Act 7 Geo. V, Chapter 52, section 3, is amended:

(*a*) By replacing the second paragraph thereof by the following:

"However, in the case where the supplier of materials contracts with the proprietor himself, such privilege is conserved only by registration, before the expiration of thirty days after the end of the work, of a memorial containing:

1. The names, surname and domicile of the creditor and of the debtor;

2. The description of the immovable affected by the privilege;

3. A statement of the claim specifying the nature and price of the materials supplied to the proprietor or specially prepared to be supplied to him.

In the case where the supplier of materials contracts with the builder, he must notify the proprietor of the immovable in writing that he has made a contract with the builder for the delivery of materials. His privilege is conserved for all the materials supplied after such notice provided he registers, within thirty days after the end of the work, a memorial similar to that mentioned in the preceding paragraph.

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Duff J.

This enactment manifests quite umistakably an intention to provide fully for the procedure in connection with the lien of the furnisher, to the exclusion of article 2103 (1) C.C.; and by its terms it plainly imports, in conformity with the general principles of law, that the special office of the registration therein prescribed is not to give birth to the right, but to protect and conserve a right otherwise constituted. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. E. J. Bissonnet.*

Solicitors for the respondent: *St-Jacques & Filion.*

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*Apr. 20.

STINSON-REEB BUILDERS SUPPLY COMPANY .....
AND
W. & F. P. CURRIE AND COMPANY...
AND
ONTARIO GYPSUM COMPANY..... } APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Conviction for conspiracy in restraint of trade—Unanimous judgment—Motion for leave to appeal—Alleged conflict with other decisions of appellate court—Sections 498, 1025 Cr. C.

The appellants seek leave to appeal from an unanimous judgment of the appellate court in Quebec dismissing their appeal from their conviction on an indictment laid against them under section 498 Cr. C., which deals with conspiracies in restraint of trade; and the question at issue in this appeal is whether that section is within the legislative jurisdiction of the Parliament of Canada.

Held that leave to appeal cannot be granted as the judgment appealed from does not conflict with the judgment of any other appellate court in a like case. (S. 1025 Cr. C.).

Attorney-General for Ontario v. *Canadian Wholesale Grocers Association* (53 Ont. L.R. 627); *Attorney-General of Canada* v. *Attorney-General of Alberta* ([1922] 1 A.C. 191), and *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co.* ([1923] A.C. 695) disc.

*PRESENT:—Mignault J. in chambers.

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STINSON-REEB BUILDERS SUPPLY CO. v. THE KING.

MOTION for leave to appeal to the Supreme Court of Canada, under section 1025 of the Criminal Code, from the judgment of the Court of King's Bench, appeal side, province of Quebec upholding the conviction of the appellants on an indictment laid against them under section 498 of the Criminal Code.

Forsyth for the motion.

Bertrand K.C. contra.

MIGNAULT J.—This is a petition by the appellants for leave to appeal, under section 1025 of the Criminal Code (R.S.C., 1927, c. 36), from a judgment of the Court of King's Bench (Quebec) dismissing their appeal from their conviction on an indictment laid against them under section 498 of the Criminal Code, which deals with conspiracies in restraint of trade.

Following their conviction, the appellants brought two appeals to the Court of King's Bench, one on questions of law alone, and the other on questions stated to be of mixed law and fact. On the latter appeal one of the learned judges dissented, and a further appeal has been brought to this Court and is now pending. The appeal on questions of law alone was unanimously rejected, and the object of this application is to seek leave to appeal on the question whether section 498 of the Criminal Code is within the legislative jurisdiction of the Parliament of Canada.

Such leave cannot be granted unless the judgment to be appealed from conflicts with the judgment of any other court of appeal in a like case (s. 1025 Cr. C.). The petitioners rely on three cases which they say are in conflict with the decision of the Court of King's Bench: *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* (1); *Attorney-General of Canada* v. *Attorney-General of Alberta* (2); *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co.* (3).

The first case was a decision of the Appellate Division of Ontario, Meredith C.J.O. and Magee, Hodgins and Ferguson JJ.A. Subject to a further reference to this decision,

(1) 53 Ont. L.R. 627. (2) [1922] 1 A.C. 191.
(3) [1923] A.C. 695.

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STINSON-REEB BUILDERS SUPPLY CO. v. THE KING.

Mignault J.

I may say that, on the point in question, the constitutionality of section 498, one only of the learned judges, the Chief Justice, was of the opinion that section 498 was *ultra vires*. Magee J.A., concurred in the result; Hodgins J.A., expressed the view that section 498 was not *ultra vires*, and Ferguson J.A., found it unnecessary to consider the constitutionality of that section, inasmuch as, in his judgment, the appeal failed on the merits. There was therefor no pronouncement of the appellate court on this question, and therefore there is no conflict.

Attorney-General of Canada v. *Attorney-General of Alberta* (1), which I will call the Board of Commerce Case, is the well known decision of the Judicial Committee whereby two statutes of the Dominion Parliament, *The Board of Commerce Act* (9 and 10 Geo. V, c. 37), and *The Combines and Fair Prices Act* (9 and 10 Geo. V, c. 45) were held to be *ultra vires*.

That this judgment of the Judicial Committee may conceivably lend support to the contention that section 498 of the Criminal Code transcends the legislative jurisdiction of the Dominion, is shewn by the judgment of Chief Justice Meredith in *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* (2). Nevertheless, upon full consideration, I do not think I can say that the Board of Commerce Case is a like case within the meaning of section 1025 Cr. C. The question there arose on a case stated by the Board of Commerce, under section 32 of *The Board of Commerce Act*, for the opinion of the Supreme Court of Canada. The Judicial Committee, on appeal from this court, answered in the negative the question submitted by the Board, which was whether the Board had lawful authority to make a certain order prohibiting retail dealers in clothing in Ottawa from charging as profits more than a certain percentage on cost. Section 498 of the Criminal Code was not involved in the question submitted. I do not think therefore that the petitioners can rely on the Board of Commerce Case.

In my opinion, the third case referred to by the petitioners, *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press*

(1) [1922] 1 A.C. 191. (2) 53 Ont. L.R. 627.

Co. (1), is not in any way a like case, nor has it any bearing on the validity of section 498.

The petition therefore fails and should be dismissed.

Leave to appeal refused.

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STINSON-REEB BUILDERS SUPPLY CO. *v.* THE KING.

Mignault J.

THE COSGRAVE EXPORT BREWERY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

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

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Apr. 24.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Plea—Paragraph alleging a set off—Judgment striking it out—Final judgment—Substantial right—Supreme Court Act, s. 2.

An appeal lies to the Supreme Court of Canada from a judgment striking off from a plea a paragraph alleging a set off or counterclaim.

MOTION by way of appeal from a decision of the Acting Registrar of the Supreme Court of Canada, dismissing the respondent's motion to have the security refused and granting the appellant's motion for an order approving security.

The material facts of the case and the questions at issue are fully stated in the judgment of the Acting Registrar now reported.

The ACTING REGISTRAR.—The respondent sued the appellant before the Exchequer Court of Canada, claiming the sum of $120,129.20 for taxes due under the *Special War Revenue Act*, 1925. The appellant, by its plea, first denied any liability and further alleged:—

During the periods mentioned in the information filed herein the defendant has overpaid for taxes under the said *Special War Revenue Act*, 1915, the sum of $134,423.03 and if it should be found that the defendant is liable for any sums of money in respect of any of the claims made by reason of the facts specified in the said information, the defendant craves leave to set off against such sum the said sum of $134,423.03 so overpaid by the defendant.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1923] A.C. 695.

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COSGRAVE EXPORT BREWERY CO. v. THE KING.

At the opening of the trial before Mr. Justice Audette, counsel for the respondent made an application to strike out this paragraph.

After argument by counsel for the respondent and for the appellant, the Honourable Mr. Justice Audette granted the motion to strike out the paragraph, with costs in favour of the respondent, on the ground that a set off or counter-claim cannot be urged against the Crown without a "fiat."

The defendant seeks to appeal to this court from that judgment.

The appellant moves before me for an order approving the security offered by it, and the respondent served a notice of motion upon the appellant to the effect that, upon the hearing of the appellant's motion, he would move to have the security refused on the ground that this court has no jurisdiction to hear the appeal.

Both motions were made returnable before me on the same day and the respondent's motion was first argued.

Appeals from the Exchequer Court of Canada are regulated by section 82 of the *Exchequer Court Act* which says:—

> 82. Any party * * * who is dissatisfied with any final judgment or with any judgment upon any demurrer * * * given therein by the Exchequer Court * * * and who is desirous of appealing against such judgment may * * * deposit with the Registrar of the Supreme Court the sum of $50 by way of security for costs.

Counsel for the appellant and for the respondent having intimated that there would be an appeal from my decision in any case, expressed their desire to have my decision at an early date. I did not have time therefore to consider the merits of this case as much as I would have otherwise owing to the importance of the question raised by the motion.

The counsel for the respondent, in support of his motion, urged the following grounds:—

1. That the judgment appealed from is not a "final judgment" within the meaning of section 2 of the *Supreme Court Act.*

2. That the judgment appealed from is not a judgment upon a demurrer;

3. That the judgment appealed from is a "judgment or order made in the exercise of judicial discretion." (Section 38, *Supreme Court Act*).

4. That the judgment appealed from deals with a question of practice and procedure.

I think the respondent cannot succeed on the third point.

Owing to the conclusion that I have reached on the first point, it is not necessary for me to decide the second one.

As to the fourth point, I am of the opinion that this appeal is not one upon a question of practice and procedure: the question in controversy is whether a person can allege a set off against the Crown without a fiat. Even if this was a question of practice and procedure, I presume this court will be inclined to take it into consideration as it "involved substantial rights or (the) decision appealed from may cause grave injustice." *Lambe* v. *Armstrong* (1).

Upon the first point, I have come to the conclusion that the judgment appealed from determines a substantial right of the appellant within the meaning of section 2 of the *Supreme Court Act* and is therefore a final judgment appealable to this court. *Bulger* v. *Home Insurance Co.* (2).

Counsel for the respondent argued that the judgment appealed from is not a "final judgment" because the appellant does not lose his rights to the amount claimed by the set off as the appellant's right to sue the respondent by direct action still remains.

I have been unable to follow this argument as the appellant cannot be denied the right to proceed by way of a set off, if he chooses to do so; and by the judgment appealed from, he is deprived of such right.

I have not found any decision precisely upon the point raised by this motion.

But this court has already held, in *McLennan* v. *McLennan* (3) that

the Supreme Court of Canada (can entertain) an appeal from a judgment confirming an order, by a judge in chambers, to strike out a scandalous and irrelevant paragraph of the plaintiff's reply to the defence pleaded.

The decision in *Dominion Textile Co.* v. *Skaife* (4) also held that this court has jurisdiction to entertain an

(1) 27 Can. S.C.R. 309.
(2) [1927] S.C.R. 451, at p. 453.
(3) [1925] S.C.R. 279.
(4) [1926] S.C.R. 310.

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appeal from a judgment which had maintained an inscription in law asking that certain allegations be struck off from the plea.

On the whole I am of the opinion that the respondent's motion to have the security refused should be dismissed with costs and that the appellant's motion for an order approving security should be granted with costs to follow the event. ARMAND GRENIER, *Acting Registrar.*

The Supreme Court of Canada after hearing counsel for the motion and without calling the appellant's counsel, dismissed the motion with costs and affirmed its jurisdiction to entertain the appeal. The oral judgment delivered by the Chief Justice held that the judgment appealed from had determined a substantial right of the appellant and was therefore a "final judgment" within the meaning of par. *e* of s. 2 of the *Supreme Court Act.*

Motion dismissed with costs.

F. Varcoe for motion.

D. L. McCarthy K.C. contra.

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*Apr. 25.

ELLIOTT *v.* JOHNSON

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Negligence—Motor car hitting pedestrian while running for street car—Duty of motor driver at crossing—Contributory Negligence Act.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of Hunter C.J. and maintaining the respondent's action for damages for personal injuries.

The plaintiff respondent while running across a street to board a street car which was about to stop at an intersection was struck by the appellant's automobile which had come up behind him and had made the turn into the inter-

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1928] 1 W.W.R. 390.

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secting street. The appellant saw the respondent running and admitted that he knew his objective. Just before being struck, the respondent, on hearing the horn, had turned around. There was no jury and the trial judge dismissed the action.

The Court of Appeal held that the accident was due solely to the negligence of the defendant.

After hearing counsel on behalf of the appellant and the respondent, the Court delivered an oral judgment dismissing the appeal with costs.

Appeal dismissed with costs.

H. R. Bray for the appellant.

E. Lafleur K.C. for the respondent.

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*May 10.

DAME M. J. LACOMBE (PLAINTIFF).....APPELLANT;

AND

W. P. POWER AND OTHERS (DEFENDANTS).RESPONDENTS.

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

Negligence—Automobile—Injury to mechanic working on upper floor, when car fell down an elevator shaft—Cause of the accident—Liability of owner of the garage—Presumption of fault—Arts. 1053, 1054 C.C.

The appellant's son, a mechanic and an electrician, was working for the respondents on the third floor of their garage, repairing an automobile, when suddenly the automobile started in the direction of the open shaft of an elevator. The car fell to the bottom of the shaft and the appellant's son received bodily injuries which caused his death the same day.

Held, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 198), that the respondents were not liable.

Held also that, upon the evidence, it could be found that the appellant's son was "the author of his own injury." As a skilled workman he should have realized the risk to which he was exposed in working upon the unbraked car while in gear, situated as it was and he must have known that the means of avoiding such risk were entirely in his own hands. But, at least, it must be *held* that the appellant had

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*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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failed to prove that her son's death was caused by actionable fault of the respondents necessary to entail their liability under article 1053 C.C.

Held, further, that before a plaintiff can invoke a presumption of fault against a defendant under art. 1054 C.C., he is obliged to establish (*a*) that the damage was in fact caused by the thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it and it became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C., invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed. Upon the evidence, the most likely cause of the movement of the automobile was the act of the deceased workman in pressing down the self-starter, probably inadvertently, as the car was in gear and unbraked in a place where it was dangerous to start it, and the workman must have known that fact unless he were utterly careless or indifferent as to his own safety.

Quaere whether, upon the facts in this case, the automobile was not, for the purposes of art. 1054 C.C., at the time of the accident under the care of the deceased who was an expert workman, rather than under the care of the respondents.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Désaulniers J., and dismissing the appellant's action.

The appellant brought action to recover damages occasioned by the death of Lionel Tremblay, her son, who was killed on the 11th of May, 1925, while in the employ of the respondents. The respondents, at the time of the accident, were carrying on business as vendors of motor cars, and they maintained a garage or work shop for repairs and service. It was a rented building of four stories (counting the ground floor), and in that garage was a platform elevator or hoist at the back which was used to bring cars and materials to the various floors. On the day of the accident,

(1) (1927) Q.R. 43 K.B. 198.

Lionel Tremblay was working on the third floor. About one o'clock in the afternoon he brought up on the elevator from the main floor an automobile sent in for repair. The hoist stopped at the third floor and the deceased ran it off and stopped it opposite to, a few feet from and facing the elevator. The elevator continued to the fourth floor, where another employee got off and the operator lowered the hoist to the main floor where it was usually kept. The deceased then worked for over an hour upon the car; at the time of the accident he was standing with one knee on the running-board and his body inside the car, and, while he was so employed the car suddenly started, crashed through the wooden barrier, and fell down the elevator shaft to the bottom, carrying with it the appellant's son, who was so injured in falling that he died the same day. The appellant brought an action for $4,999.99, alleging fault on the part of the respondents in the following particulars:

(*a*) In allowing the deceased to work on the car near the elevator; (*b*) In lowering the elevator to the ground floor without warning the deceased; (*c*) In failing to provide any barrier (garde-corps) around the elevator shaft.

J. E. Cadotte for the appellant.

F. J. Laverty K.C. for the respondents.

After hearing argument for the appellant, and after hearing for a short time counsel for the respondent, the court gave judgment dismissing the appeal with costs. The judgment of the court was orally delivered by

ANGLIN C.J.C.—In her declaration the appellant undoubtedly confined her claim to a cause of action based on art. 1053 C.C., alleging fault in three respects attributable to the respondents. Here her counsel sought also to invoke the provision of art. 1054 C.C., which renders every person responsible for all damage caused "by things which he has under his care." It is not clear whether this position was taken in the Court of King's Bench, but two of the learned judges in that court base their dissent largely upon an application of art. 1054 C.C.

Before the plaintiff can invoke a presumption of fault against the defendants under art. 1054, she is obliged to establish (*a*) that the damage was in fact caused by the

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thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it on the third floor of the defendants' garage. It became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C., invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed.

On the evidence before us, the most likely cause of the movement of the automobile was the act of the deceased workman in pressing down the self-starter—probably inadvertently, as the car was in gear and unbraked in a place where it was dangerous to start it, and the workman must have known that fact unless he were utterly careless or indifferent as to his own safety. That the car was started in any other way would seem highly improbable and may not be assumed in the absence of any evidence of facts which would warrant such an inference.

Moreover, as was pointed out during the argument, we should have to consider very carefully whether, upon the facts before us, the automobile was not, for the purposes of art. 1054 C.C., at the time of the accident under the care of the deceased, Tremblay himself, who was an expert workman, rather than under the care of the defendants. The action cannot, in our opinion, be maintained under that article.

Nor has the plaintiff established fault of the defendant which was the cause of the death of Tremblay so as to render them liable therefor under art. 1053 C.C. Assuming that the deceased was obliged to work upon the car where

it was, he might have averted any danger by turning the front wheels sideways or by throwing the transmission out of gear and setting the brakes. As a skilled workman he should have realized the risk to which he was exposed in working upon the unbraked car while in gear, situated as it was, and he must have known that the means of avoiding such risk were entirely in his own hands. Under such circumstances the maxim *volenti non fit injuria* would seem to be much in point. The place was in fact dangerous only because the deceased neglected obvious precautions which would have made it quite safe.

Tremblay probably actually knew, at all events he should have seen, that the elevator was not stationed at the third floor, and that the elevator shaft was open, save for the light railing which served as a guard to prevent persons passing accidentally falling into it. There was no duty incumbent on the defendants to guard against such an occurrence as that which actually happened. We are not prepared to impose on the proprietor of every garage such as that operated by the defendants, the duty of maintaining at each opening of an elevator shaft a barrier of sufficient strength to withstand the impact of any automobile which may be allowed to run against it. There may be circumstances under which such a duty would arise, but there is no evidence of their existence in the present case. The defendants owed no such duty to the deceased Tremblay. Had he taken the precaution either of turning the front wheels of the car away from the direction of the elevator shaft or of throwing the transmission out of gear and setting the brakes before attempting to do work upon the automobile which involved danger of his accidentally pressing the self-starter, the unfortunate occurrence which cost him his life would not have happened. If he was not "the author of his own injury," at least the plaintiff has failed to prove that his death was caused by actionable fault of the defendants necessary to entail their liability under art. 1053 C.C.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godin, Dussault & Cadotte.*
Solicitors for the respondents: *Laverty, Hale & Dixon.*

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*Apr. 27.
*May 2.

J. R. WATKINS COMPANY v. MINKE

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Guarantee—Deeds and documents—Illiterate party—Misrepresentation as to contents—Separate obligations—Only one explained—Whether guarantee void in part.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Taylor J. and dismissing the appellant's action on a guarantee.

The appellant on May 29, 1922, entered into a written contract with one Jansen, whereby *inter alia* it agreed to sell to Jansen such goods as Jansen might reasonably require for sale within a prescribed area in the province of Saskatchewan. Jansen by that contract agreed to pay for such goods, and to pay carriage, freight, etc., thereon. The appellant claimed that under this contract Jansen became indebted to it in the sum of $1,545.18, and on November 25, 1922, the appellant forwarded to Jansen a new contract similar to the previous one, dated November 25, 1922, signed by it, and asking him to execute the same and obtain the signatures of two sureties thereto. This is the contract sued on by the appellant. In this contract Jansen's indebtedness to the appellant is mutually agreed between him and the appellant to be $1,545.18. The contract is in two parts: (1) a contract with the principal Jansen; and (2) an underwritten contract with the sureties. It bore the signature of Jansen, and provided that it would expire on March 1, 1924. Some time in May, 1923, Jansen obtained the signatures of the respondents Minke and Bort to the under written contract, which, after reciting the consideration therefor, among which is the sale and delivery by the appellant to Jansen of goods and other articles, and the extension of the time of payment of the indebtedness then due from Jansen to the appellant proceeds as follows:—

We, the undersigned sureties, do hereby waive notice of the acceptance of this agreement and diligence in bringing action against said second party, and jointly, severally and unconditionally promise, agree and guarantee the full and complete payment of said indebtedness the amount of which is now written in said agreement or if not, we hereby

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) [1928] 1 W.W.R. 199.

expressly authorize the amount of said indebtedness to be written therein, and jointly, severally and unconditionally promise to pay for said goods and other articles, and the prepaid freight, cartage, postal, or express charges thereon, at the time and place, and in the manner in said agreement provided.

The effect of this was to divide the guarantee into two parts, one a guarantee for the payment of a past due debt, the other a guarantee for the payment of future advances. On the termination of this second contract the appellant claimed that Jansen still owed them $1,129.54 on the old indebtedness of $1,545.18, and brought this action against Jansen as the principal debtor and Minke and Bort as sureties, to recover the said $1,129.54. In other words, the action is brought on the guarantee for the payment of the past due debt.

The action was dismissed by the trial judge, Taylor J., and his judgment was affirmed by the Court of Appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and the respondents, reserved judgment, and, on a later date, dismissed the appeal with costs.

The judgment of the court was delivered by

RINFRET J.—This is a plea of *non est factum.*

The learned trial judge, in his reasons for judgment, says:—

> I am very clear that in signing the documents these two defendants were not aware and had not called to their attention in any way the covenant under which it is suggested that they assumed liability for the past indebtedness of Jansen, and that Jansen deceived them as to the contents of the document which he asked them to sign. These two defendants could then neither read nor write anything beyond their names. Bort has since, through the assistance of his children now growing up and at school, acquired a little proficiency. But they are both men of very limited understanding, limited vocabulary, slow of perception and without education. Even could they have read or had they had the document read to them, they could not without explanation have understood its meaning or effect.

These findings were not disturbed by the Court of Appeal, although, in view of one paragraph of the defence, that court thought the respondents must be held to have known they were signing a guarantee for future advances.

On these findings, the case stands as one where a document was falsely explained to illiterate persons, and they signed it believing it to contain only what was represented to them. Under these circumstances, they were not bound

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Rinfret J.

by that portion of the document containing a liability never explained to them and indeed entirely different from that which they were told they were assuming. As to that part of it, the document cannot be taken to be their act and deed.

It follows that the respondents could not be held for the past due indebtedness of Jansen, which they never intended to—and in fact never did—guarantee. The action seeking to hold them responsible for such indebtedness was therefore rightly dismissed.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

F. H. McLorg for the appellant.

H. Fisher K.C. and *S. M. Clark* for the respondents.

1928

*May 10.

RAOUL PERUSSE (PLAINTIFF).....APPELLANT;

AND

DAME J. E. STAFFORD (DEFENDANT)...RESPONDENT.

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

Negligence—Automobile accident—Injury to passenger—Presumption of fault—Motor Vehicles Act (R.S.Q. [1925] c. 35, s. 53 (2)—Liability of owner under Arts. 1053 and 1054 C.C.

The appellant claimed damages resulting from an automobile accident and alleged that, while at the invitation of respondent's chauffeur he was a passenger on respondent's truck, he was injured through fault of the chauffeur by being caught between the car and the pavement, when the truck struck the curb and broke a wheel.

Held, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 251), that the respondent was not liable.

Held, also, that section 53 (2) (*a*) of the *Motor Vehicles Act* (R.S.Q. [1925] c. 35), which creates a presumption of fault against the owner of a motor vehicle which he must rebut, applies only in the case of a person injured while travelling upon a highway and does not apply in favour of a passenger in an automobile which is driven by the owner's servant.

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*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ

(*a*) 53 (2) Quand un véhicule automobile cause une perte ou un dommage à quelque personne dans un chemin public, le fardeau de la preuve que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule automobile, incombe au propriétaire ou à la personne qui conduit le véhicule automobile.

(*a*) 53 (2) Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

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Held, also, that a presumption of fault cannot be urged against the defendant under article 1054 C.C. on the ground that the injury was caused by a thing under her care. That provision has no application to a case where, as in this case, the real cause of the accident is the intervention of some human agency; the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the care of the owner within the meaning of Art. 1054 C.C., where it is really due to some fault in the operation or handling of the thing by the person in control of it.

Held, further, that the defendant is not liable under Art. 1053 C.C. as in the circumstances of this case this court would not interfere with the concurrent findings of the courts below that fault of the driver, a person under the defendant's control, had not been proved.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Philippe Demers J., and dismissing the appellant's action in damages.

The respondent is a funeral director and occasionally employed the appellant. On the 26th of April, 1926, the appellant, after having completed the services for which he had been retained, was about to leave the respondent's premises, when the driver of a truck owned by the respondent asked the appellant to help him to carry some furniture to its destination. On the way back, the chauffeur drove the respondent's car onto the sidewalk, broke a front wheel, upsetting the car, and the appellant, being caught between the car and the pavement was seriously injured. The appellant claimed $5,000 damages.

Ernest Lafontaine for the appellant.

H. J. Trihey K.C. for the respondent.

At the close of the argument for the appellant, and without calling on counsel for the respondent, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that this appeal must be dismissed.

Three distinct grounds of claim are presented.

First, it is said that, on the interpretation of section 53 (2) of the *Motor Vehicles Act* (R.S.Q., 1925, c. 35) there is a presumption of fault against the owner of the motor

(1) (1927) Q.R. 43 K.B. 251.

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vehicle in which the plaintiff was injured, which he must rebut; that that presumption applies equally in favour of a passenger in the car and of a person travelling on the highway. We are entirely against that view of the construction of the article. In our opinion, the article applies only in the case of a person travelling upon the highway; it does not apply in favour of the plaintiff who was a passenger in the automobile which was owned by the defendant and driven by his servant. The French version of the statute removes any possible doubt on this point.

In the second place, it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused by a thing under her care. Our view is that that provision has no application to a case where, as here, the real cause of the accident is the intervention of some human agency—the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of art. 1054 C.C. where it is really due to some fault in the operation or handling of the thing by the person in control of it.

The third ground is that there was fault of the driver, a person under the defendant's control. In that case such fault must be proved just as under art. 1053 C.C. fault of the defendant himself, where he is in personal control, must be established. There are concurrent findings against the appellant in this respect. These findings would be very difficult in any case to overcome. But they are particularly so, in this case, where there is only one witness who gives evidence relating the facts, and that witness is believed, such belief being expressed by the trial judge and by the Court of Appeal. In these circumstances, error in the finding not being demonstrated,—not being made manifest—it is impossible for us to interfere.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Ernest Lafontaine.*

Solicitor for the respondent: *H. J. Tribey.*

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*May 12.

DAVID GARSON AND ANOTHER.....APPELLANTS;

AND

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA SITTING IN BANCO

Appeal—Leave to appeal—S. 74 (3) of the Bankruptcy Act (D. 1919, c. 36) —N.S. Bulk Sales Act (R.S.N.S. 1923, c. 202)—Meaning of the word "settlements" in s. 60 of the Bankruptcy Act—Grant of stay of proceedings made conditional on the appellants furnishing security.

The appellants had purchased, and paid $1,600 for, the stock-in-trade of one Crouse at a bulk sale, the requirements of the Nova Scotia *Bulk Sales Act* (R.S.N.S., 1923, c. 202) not having been complied with. They afterwards sold the goods for $2,000, which proceeds were not ear-marked and were disposed of by them in the usual course of business. The questions at issue in this case were whether the bulk sale was fraudulent and utterly void under the *Bulk Sales Act*, and whether the trustee in bankruptcy could recover from the appellants the sum of $2,000, being an amount equal to the amount realized on the resale of the stock-in-trade. Both courts answered these questions adversely to the appellants, the court *in banco* as to the second question basing its judgment on sections 60 and 65 of *The Bankruptcy Act*. The appellants now seek leave to appeal to this court.

Held, that leave to appeal should be granted. Among other questions, the meaning of the word "settlements" in section 60 of the *Bankruptcy Act* appears to be involved in this appeal, the point being whether this word should receive the same construction as that given to it under the English *Bankruptcy Act* ([1914] 4 & 5 Geo. V, c. 59, s. 42).

Under the circumstances of the case, the granting of a stay of proceedings was made conditional upon the appellants giving security that they would pay the amount adjudged against them in the event of their appeal being dismissed.

APPLICATION for special leave to appeal under section 74 (3) of the *Bankruptcy Act* from a judgment of the Supreme Court of Nova Scotia sitting *in banco*.

Application granted.

A. C. Hill K.C. for the application.

E. F. Newcombe contra.

*PRESENT:—Mignault J. in Chambers.

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Mignault J.

MIGNAULT J.—The appellants applied to me, on the 27th of April, 1928, for leave to appeal from the judgment of the Supreme Court of Nova Scotia *in banco* of the 31st of March, 1928, dismissing their appeal from the judgment of Mr. Justice Carroll on a case stated by the parties.

The appellants had purchased for $1,600, which they paid, the stock-in-trade of one Crouse at a bulk sale, the requirements of the Nova Scotia *Bulk Sales Act* (c. 202, R.S.N.S., 1923) not having been complied with. They afterwards sold the goods thus purchased for $2,000, which proceeds were not ear-marked and were disposed of by them in the usual course of business. The questions at issue are whether the bulk sale was fraudulent and utterly void under the Bulk Sales Act, and whether the trustee in bankruptcy could recover from these appellants the sum of $2,000, being an amount equal to the amount realized on the re-sale of the said stock-in-trade.

Both courts answered these questions adversely to the appellants, the court *in banco,* as to the second question, basing its judgment on sections 29, subs. 1, and 33 of the *Bankruptcy Act.* (These numbers are those of the office consolidation of the Act; the sections are now numbered 60 and 66 in chapter 11, R.S.C., 1927).

Among other questions, the meaning of the word "settlements" in section 29 (now section 60 of the *Bankruptcy Act*) appears to be here involved, the point being whether this word should receive the same construction as that given to it under the English *Bankruptcy Act* (4 & 5 Geo. 5, c. 59, s. 42, 1914). See *In re Plummer* (1), and other decisions noted in Duncan's treatise on Bankruptcy, p. 329, note 1.

I think that the questions involved in this case are of sufficient importance to justify me in granting special leave to the appellants to appeal to this court. I therefore give them this leave. Whether there should be a stay of proceedings pending the appeal is however a matter left to my discretion, and, in view of all the circumstances of the case and of the fact that the sum involved, if it can be claimed by the trustee, represents by far the greater part of the assets of the bankrupt estate, I would make the stay

(1) [1900] 2 Q.B. 790.

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Mignault J.

of proceedings conditional upon the appellants giving, within fifteen days from this date, or such other time which a judge of this court may on proper cause being shown grant to the appellants, proper security to the satisfaction of the registrar that they will pay the amount which has been adjudged against them, in the event of the appeal to this court being dismissed. Otherwise, stay of proceedings shall be refused.

As to security for the costs of the appeal to this court, the provisions of subs. 4 of s. 174 of the *Bankruptcy Act* (R.S.C., 1927) shall govern. Costs of this application to be costs in the cause.

Application granted.

KIVENKO *v.* YAGOD

1928

*May 14.
*May 16.

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

Habeas corpus—Minor child—Possession of—Father claiming child from uncle—Art. 243 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Montreal, Bond J., and maintaining a writ of *habeas corpus* issued at the demand of the respondent for the possession and custody of his minor child.

The respondent seeks, by means of a writ of habeas corpus, to recover from the appellant the custody and possession of his minor child, a little girl about six years of age. The child was born in December, 1921, and her mother died in Toronto, where she had gone for medical treatment, on the 1st April, 1922. At the time of the death of the mother the child was with her, and the respondent, who was then residing in Montreal, went to Toronto and brought the child back. Together they lived with the appellant who is an uncle of the respondent, until the latter, in October, 1923, married a second time. At the time of

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) (1928) Q.R. 44 K.B. 330.

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his wife's death, and for some time thereafter, the respondent was in poor financial circumstances, and the appellant and his wife were anxious to take care of the child for him as they had become very much attached to her. Partly through the intervention of Rabbi Cohen, of Montreal, an agreement was ultimately drawn up regarding the child, and it is principally on the strength of this agreement that the appellant contests the present petition. In his return to the writ, the appellant asserts a right to the custody of the child on the ground that it was entrusted to him and his wife when the child was only twelve weeks' old; that the child was so entrusted to him by the mother and father of the child; and the last words of her mother before she died were to the effect that the child was to remain with the appellant and his wife who were to bring her up and keep her in their custody. He further alleges that in the year 1923, before Rabbi Cohen, the parties hereto agreed in writing that the child was to remain forever in the custody of the appellant under certain conditions, which the appellant has always fulfilled.

In his petition for a writ of *habeas corpus* the respondent alleges the relationship, and asserts his right to the possession and custody of his child. It is admitted that the respondent is the father of the child, and it is common ground that unless he has surrendered his rights or forfeited the same, he is entitled to the custody.

The Superior Court maintained the writ of *habeas corpus,* holding that the right of a father to the custody of his minor child was absolute and that, upon the evidence, this right had not been destroyed or obliterated by the father's conduct, character, mode of life, temperament or circumstances. That judgment was affirmed by the appellate court.

The Supreme Court of Canada, after hearing counsel for the respondent, no counsel having appeared for the appellant, reserved judgment, and at a subsequent date, delivered an oral judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Cohen & Gameroff for the appellant.

M. Garber for the respondent.

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ROBIN LINE STEAMSHIP COMPANY (DEFENDANT) ..... } APPELLANT;

AND

CANADIAN STEVEDORING COMPANY (PLAINTIFF) ..... } RESPONDENT.

*Apr. 24.
*May 2.

SEAS SHIPPING COMPANY (DEFENDANT) . APPELLANT;

AND

CANADIAN STEVEDORING COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Maritime law—Shipping—"Space" charter-party—Stevedores—Engagement by charterer—Liability of owners of vessels—Principal and agent—Actual agency—Ostensible agency.

The appellants entered into a "space" charter-party with the Southern Alberta Lumber Company under which the latter agreed to load lumber on appellants' ships. Afterwards the Southern Alberta Lumber Company, as charterer, engaged the respondent to do the stevedoring work. Owing to the bankruptcy of the charterer before the respondent was paid, the latter sued, not the charterer who engaged it but the appellants who owned the ships, alleging agency. Clause 15 and addendum C of the charter-party read as follows: "15. (Printed) Cargo to be stowed under the master's supervision and direction, and the stevedore to be employed by the steamer for loading and discharging, to be nominated by the charterers or their agents, at current rates. "C" (typewritten) In connection with clause 15, charterers agree to load and stow cargo for one dollar seventy cents ($1.70) per thousand board feet or its equivalent, * * *." The court of appeal construed the charter-party as constituting agency in fact.

Held, reversing the judgment of the Court of Appeal ([1928] 1 W.W.R. 308), that, although clause 15 without the addendum may support actual agency, the stipulation in the addendum "charterers to load and stow the cargo, etc.," excludes any actual agency of the charterer to engage a stevedore on behalf of the owners of the vessels and thus to render them liable to such stevedore for the cost of the loading and stowing of cargo.

Held, also, that, upon the evidence, there was no ostensible agency of the charterer entailing the same result. When actual authority of an alleged agent has been negatived, a plaintiff seeking to hold the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Lamont JJ.

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alleged principal liable on the basis of ostensible authority either must shew a holding out by the principal of the alleged agent as such or must give proof of some custom on which ostensible agency can be predicated.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of McDonald J. (2) and maintaining the respondent's actions.

The appellants are companies incorporated in the United States of America. The appellant Robin Line Steamship Company, Inc., is the owner of the steamships Robin Goodfellow and Robin Gray, and the appellant Seas Shipping Company, Inc., is the owner of the steamships Robin Adair and Robin Hood. These four ships, together with others, are known as the Isthmian Lines. The respondent is a stevedoring company carrying on business in Vancouver, B.C. This is an appeal by the two appellants from a judgment of the Court of Appeal for British Columbia dismissing two consolidated appeals by the appellants from judgments against them in the Supreme Court of British Columbia for payment for stevedoring work performed by the respondent in British Columbia on three of the above ships, namely the Robin Goodfellow, the Robin Gray and the Robin Adair. The work was ordered by the charterer of the ships, the Southern Alberta Lumber Company, Limited, purporting to act on behalf of the appellants. The charter-party is the only document in writing. There was no communication oral or written between the parties to this action. The difficulty arose through the bankruptcy of the charterer before the respondent company was paid.

A. R. Holden K.C. for the appellants.

G. B. Duncan for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff (respondent), a stevedoring company, has recovered judgment against the appellants as owners of several steamships for the cost of loading and stowing cargo at Vancouver. The vessels were chartered to the Southern Alberta Lumber Company by what is known as a "space charter." The provincial courts con-

(1) [1928] 1 W.W.R. 412. (2) [1927] 2 W.W.R. 737.

strued this charter as constituting the charterer agent for the appellants and authorizing it as such to bind the appellants by a contract, which, it is said, it purported to make on their behalf with the stevedoring company. The latter supports the judgment in its favour on this ground of actual agency, and, should that fail, maintains that under the circumstances there was an ostensible agency of the charterer entailing the same result.

The majority of the Court of Appeal (Macdonald C.J.A., Galliher and McPhillips JJ.A.), affirming the trial judge, construed this charter as constituting agency in fact of the charterer. Martin and Macdonald JJ.A., dissenting, held that the charterer expressly excluded actual agency, and that ostensible agency of the charterer had not been established.

Material clauses of the charter read as follows:

13. Steamer to pay all port charges, harbour dues and other customary charges and expenses in loading and discharging cargo.

15. Cargo to be stowed under the master's supervision and direction, and the stevedore to be employed by the steamer for loading and discharging, to be nominated by the charterers or their agents, at current rates.

Addendum C. In connection with clause 15, charterers agree to load and stow cargo for one dollar seventy cents ($1.70) per thousand board feet or its equivalent, and agree there will be no extra charges during customary working hours, unless detention is caused by break-down of machinery, winches, or other defects of the steamer. Charterers have the option of working overtime by paying all expenses in connection therewith, but if owners elect to have the steamer worked overtime, it is understood this will be subject to charterers' approval and all expenses in this case to be for owner's account.

32. Steamer to be consigned at ports or places of loading to charterers' agents, steamer paying the customary agency fees, not to exceed $100 total for all loading ports, and at ports of discharge to owners or their agents, by whom steamer is to be reported and entered at Custom House.

Clauses 13, 15 and 32 are in the printed form of the charter party which is used. Addendum C is inserted in typewriting.

It was common ground at bar that clause 15 and addendum C must, if possible, be read together and effect given to both, but that, if they are in irreconcilable conflict, the terms of the addendum will prevail so far as may be necessary to give them full operation. Counsel also agreed that clause 15, unaffected by the addendum, would support the actual agency found below.

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While the principles of construction on which these conclusions rest are indubitable, with the utmost respect we are unable to agree in the view taken by the learned appellate judges who upheld the judgment of the trial judge as to the effect of clause 15 read with the addendum. That view ignores the positive and unqualified words of the addendum:

> Charterers agree to load and stow the cargo for one dollar seventy cents ($1.70) per thousand board feet or its equivalent.

Either this was a "nomination" of the charterer as stevedore for loading within the terms of clause 15, and a substitution (for that service) of the fixed loading price of $1.70 per 1,000 M for the current rates mentioned in clause 15, or, if that view should be untenable, would amount to a supersession of clause 15 so far as that clause standing alone might constitute the charterer agent of the owners to "nominate" a stevedore to load cargo at current prices. Any other construction of the addendum fails to give effect to the express provision: "Charterers to load and stow the cargo." We agree with the view expressed by Macdonald J.A., that this stipulation excludes any actual agency of the charterer to engage a stevedore on behalf of the owners and thus to render them liable to such stevedore for the cost of the loading and stowing of cargo at $1.70 per 1,000 M.

There remains the question of the ostensible agency of the charterer to bind the appellant by a contract with the stevedore (respondent).

Counsel for the respondent presented a double-barrelled argument on this part of the case:

First, he contended, there was an actual general agency created by clause 32 and the limitation of that agency by the addendum C being unknown to the respondent it had the right to rely on such general agency. But to sustain a claim by virtue of such general agency the respondent must have known of clause 32. If he did, he also had knowledge of the limitation of any authority conferred by clause 32 contained in the same instrument. He, however, denies knowledge of both clause 32 and the addendum C. He cannot, therefore, rely upon clause 32 of which he had no knowledge.

Second, counsel for the respondent contended that at common law the duty of loading rests on the shipowner

and that, in the absence of knowledge of any stipulation that that duty had been undertaken by the charterer, a third party, such as the stevedore, dealing with the charterer is entitled to assume that the common law duty remains unchanged and to rely upon the representation of the charterer, whom he finds in actual control of the ship for loading purposes, that he is the agent of the owner to make contracts for such loading. But the common law only imposes the duty of loading on the owner "in the absence of custom or agreement to the contrary." *Blakie et al* v. *Stembridge* (1). Here the stevedoring company knew that the ships were under charter and, as pointed out by Macdonald J.A.:

> parts of it (the charter) were read to its manager and he was at liberty to read it all.

The stevedoring company must be taken to have known that it was quite usual for charter parties to make special provisions in regard to stevedoring and liability therefor. If its manager did not take the trouble to inform himself in the present case of what these arrangements were, he cannot rely upon his neglect to do so to induce the court to hold that there was an ostensible authority in the charterer (which had itself undertaken the stevedoring work) to contract for the owner becoming liable directly to the stevedoring company, which was in reality the charterer's sub-contractor. As Lord Watson said in *Baumwoll Manufacturer* v. *Furness* (2):

> I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship in order to prevent the servant of the charterer from pledging his credit.

It had been there argued that the

> respondent (owner) remains liable for contracts made by the charterers' agent with shippers who had no notice of the terms of the charter.

But, Lord Watson answered:

> For that proposition no authority whatever was produced. All the decisions cited at bar, so far as they had any bearing upon such circumstances, appear to me to point very distinctly to the opposite direction.

True that was a case of a "demise" of a ship, or what was treated as tantamount thereto and the question was as to

(1) (1859) 58 L.J. C.P., n.s. 329, at p. 351.
(2) [1893] A.C. 8, at p. 21.

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agency of the master for the owner; but the general principle on which the non-liability of the owner was decided seems to be equally applicable to the case at bar. Here the owner had contracted with the charterer that the latter would do the stevedoring work and had given him such control of the ship as was requisite to enable him to do so. When actual authority of an alleged agent has been negatived a plaintiff seeking to hold the alleged principal liable on the basis of ostensible authority either must shew a holding out by the principal of the alleged agent as such, of which there is here no evidence, or must give proof of some custom on which ostensible agency can be predicated, which is here entirely lacking. There is no rule of law under which an implication of agency of the charterer for the shipowner, such as here suggested, arises from the mere existence of that relation.

For these reasons we are of the opinion that the appeal must be allowed with costs in this court and in the Court of Appeal and judgment entered for the appellants-defendants dismissing these actions with costs.

Appeal allowed with costs.

Solicitor for the appellants: *J. H. Lawson.*

Solicitors for the respondent: *McPhillips & Duncan.*

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*Apr. 24.
*May 2.

JOHN HENRY HAND (MIS EN-CAUSE) ..... APPELLANT;

AND

HAMPSTEAD LAND & CONSTRUCTION COMPANY (PLAINTIFF) ..... } RESPONDENT;

AND

THE TOWN OF HAMPSTEAD ..... (DEFENDANT)

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

Appeal—Leave to appeal—Question of public importance affecting only one province—Proper construction of s. 41, Supreme Court Act—Jurisdiction of an appellate court to grant leave to appeal—Jurisdiction of the Supreme Court of Canada to grant same.

Leave to appeal will not be granted from a judgment solely because it involves the construction of a provincial statute of a public nature

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

where it does not affect some interest outside the province. Every judgment of a provincial appellate court interpreting a statute of purely provincial application is not *per se* of such general importance as to warrant the granting of special leave to appeal to this court, its construction being *prima facie* a proper subject for final determination by the provincial courts.

Special leave to appeal may be granted by "the highest court of final resort having jurisdiction in" a province in any case (which in its opinion is otherwise a proper subject for "special leave") if it falls within s. 36 of the *Supreme Court Act*, i.e., in any case (save those specially excepted in s. 36) in which there has been a judgment of such "highest court of final resort" in a "judicial proceeding" which is either (*a*) "a final judgment" or (*b*) "a judgment granting a motion for nonsuit or directing a new trial" and in which the amount or value of the matter in controversy in the proposed appeal will not exceed $2,000.

The proviso to s. 41, with its sub-clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) has no bearing upon the jurisdiction of the provincial court of final resort to grant special leave to appeal, but relates exclusively to, and states the conditions of, the jurisdiction of the Supreme Court of Canada to grant special leave to appeal to it when such leave has been already refused by the highest court of final resort in the province.

MOTION for leave to appeal to the Supreme Court of Canada from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court and maintaining the plaintiff's action.

The action was brought for a declaration that a transfer of land by the appellant to the respondent was invalid and should be quashed and annulled on the ground that the consideration therefore was illegal because in contravention of a provision in the municipal code of the province of Quebec; and the question at issue in the appeal is whether it was within the authority of a municipal council to acquire property from a ratepayer of the municipality for the consideration of granting to the ratepayer exemption from taxation on other property owned by the ratepayer within the municipality.

Eug. Lafleur K.C. and *E. G. Place K.C.* for the motion.

C. Laurendeau K.C. contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—The mis-en-cause Hand having unsuccessfully applied to the Court of King's Bench of the prov-

(1) (1928) Q.R. 44 K.B. 321.

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ince of Quebec for special leave to appeal from the adverse judgment of that court, now moves here for such leave.

The judgment refusing leave was in the following terms:

Whereas the mis-en-cause, appellant, petitions this court for special leave to appeal to the Supreme Court of Canada and alleges in support that the amount involved exceeds the sum of $2,000 and, moreover, involves the title to real estate,

Considering that it does not appear that the amount in controversy exceeds the sum of $2,000 (*sic*) and the judgment sought to be appealed from does not concern or determine a controversy with regard to title to any real estate,

Considering that the only question of law was whether it was within the authority of a municipal council to acquire property from a ratepayer of the municipality for the consideration of granting to the ratepayer exemption from taxation on other property owned by the ratepayer within the municipality,

Considering the judgment does not come within the terms of sec. 41 of the *Supreme Court Act*,

For these reasons the petition for leave to appeal to the Supreme Court is dismissed with costs; Mr. Justice Howard is of opinion that the petition should be granted.

It would appear from this judgment that the Court of King's Bench considered that because this case did not come within any of the sub-clauses of the proviso thereto, it was not within s. 41 of the *Supreme Court Act* so as to enable that court to grant special leave to appeal and on that ground refused the motion. With great respect this implies a misunderstanding of the first clause of s. 41, which alone relates to the granting of special leave to appeal by "the highest court of final resort having jurisdiction in the province." Special leave to appeal may be granted by that court in any case (which in its opinion is otherwise a proper subject for "special leave") if it falls within s. 36 of the *Supreme Court Act*, i.e., in any case (save those specially excepted in s. 36) in which there has been a judgment of such "highest court of final resort" in a "judicial proceeding" which is either (*a*) "a final judgment" or (*b*) "a judgment granting a motion for non-suit or directing a new trial" and in which the amount or value of the matter in controversy in the proposed appeal will not exceed $2,000. That this is the proper construction of the first clause of s. 41 has been indicated in several judgments of this court.

The proviso to s. 41, with its sub-clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*), has no bearing upon the jurisdiction of

the provincial court of final resort to grant special leave to appeal, but relates exclusively to, and states the conditions of, the jurisdiction of the Supreme Court of Canada to grant special leave to appeal to it when such leave has been already refused by the highest court of final resort in the province.

There being apparently no power, however, to refer this matter back for further consideration by the Court of King's Bench, we find ourselves obliged to deal with it without having the advantage of the views of that court upon the fitness of the case for special leave. Having regard to the limitations upon our jurisdiction contained in the proviso to s. 41, we have first to determine whether the case now before us falls within some one of its sub-clauses. We are of the opinion that it falls within clause (*d*), because the matter in controversy in the projected appeal involves, in our opinion, " a title to real estate or some interest therein."

The action was brought for a declaration that a transfer of land by the mis-en-cause Hand to the town of Hampstead was invalid and should be quashed and annulled on the ground that the consideration therefor was illegal because in contravention of a provision in the *Cities and Towns Act* of the province of Quebec. The Court of King's Bench, reversing the judgment of the learned trial judge, granted the conclusions of the plaintiff's action and declared the transfer null and without effect. This judgment, no doubt, involved the construction of a statute of a public nature as well as the validity of the title to the land acquired by the municipality from the mis-en-cause, Hand.

But, while the statutory provision in question is of public importance, in the sense that it is of general application throughout the province of Quebec and deals with municipal matters, it is not suggested that its construction will affect any interest outside that province. It would seem, therefore, to be *prima facie* a proper subject for final determination by the provincial courts. *La Corporation du Comté d'Arthabaska* v. *La Corporation de Chester Est* (1).

We are not disposed to hold that every judgment of a provincial appellate court interpreting a statute of purely

(1) 63 Can. S.C.R. 49, at p. 66.

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provincial application is *per se* of such general importance as to warrant the granting of special leave to appeal to this court. Were the present motion to be granted, it would serve as a precedent for the asking of special leave to appeal in every case in which a question of the interpretation of a provincial municipal Act might arise. We think it was not the purpose of Parliament in providing for special leave to appeal to this court that every case of this type might be brought before it.

We would, accordingly, on this ground refuse the motion with costs.

Leave to appeal refused.

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*Apr. 24, 25.

AMERICAN SECURITIES CORPORATION, LIMITED *v.* WOLDSON

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trusts and trustees—Order to trustee—Trustee directed to give notice of assignment of moneys—Discretionary nature of the order—Appeal—Jurisdiction—Pecuniary value attached to the order—Supreme Court Act, s. 39.

APPEAL by the plaintiff from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of McDonald J.—Appeal dismissed for want of jurisdiction.

The appellant assigned to the Royal Trust Company, *inter alia,* future instalments of moneys which might become payable to the appellant under a designated option to the Granby Consolidated Mining, Smelting and Power Company, to purchase mining property. The assignment was to secure the payment of a bond issue. A bank in Seattle was by deed nominated to keep a record of the bonds which might be registered there and to retire them out of the moneys which should be paid into it from time to time by the payee of the instalments, the Granby Company. Matters went on smoothly for a time until the bank at the request or instigation of the appellant, diverted some

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1927] 3 W.W.R. 756.

of the said moneys to a purpose not authorized by the deed. On discovering this act the respondent, a holder of more than one-fourth of the said bonds, made a demand upon the trustee that it should notify the Granby Company of the assignment and require payment of the instalments in future to itself.

The order granted by the trial judge was held by the Court of Appeal to have been within his discretion and, therefore, one which should not be interfered with, since it was not based on an error in principle or made in the absence of materials affording ground for the exercise of the discretion.

On conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, the judgment of the court was orally delivered by

DUFF J.—We think the appeal should be dismissed for want of jurisdiction. Section 39 of the *Supreme Court Act* limits the right of appeal to cases in which the amount or value of the matter in controversy exceeds the sum of $2,000. The question of the jurisdiction to entertain this appeal came before us on a motion to quash, and for the purpose of enabling the parties to provide further material, and in order that the court might be more fully informed as to the precise facts, the disposition of the motion was deferred until the hearing of the appeal.

It is now suggested by Mr. Griffin that there should be an adjournment to enable him to file an affidavit. I think, in the circumstances, that this is an indulgence which cannot be allowed. On the facts before us there is really nothing to show what (if any) pecuniary value attaches to that control of which the appellants have been deprived by the order of which they now complain. It seems to be precisely one of those cases which the statute provides for by giving an appeal only upon condition that special leave shall be obtained.

However we think it right to say—after consultation with my colleagues—that, having had an opportunity to consider the questions at issue since the close of Mr. Griffin's argument, we are all quite clearly of the opinion that the appeal could not succeed on the merits. We think it right to say that, in the circumstances.

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Duff J.

We think that the appeal should be dismissed on the point of jurisdiction, because we are quite clear, on the material before us, that there is no jurisdiction. We are equally clear, if we did not deal with the appeal on that ground, that we should be obliged to dismiss it on the merits.

Appeal dismissed with costs.

Martin Griffin for the appellant.

W. D. Herridge for the respondent.

1928

*Apr. 17.

CHARLES DONOHUE (CREDITOR).....APPELLANT;

AND

ERNEST LEFAIVRE (TRUSTEE).....RESPONDENT;

AND

NEUVILLE BELLEAU (DEBTOR).

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

Leave to appeal—Question of public interest involved—Judgment of the appellate court on question of facts only—Doubt as to whether finding of the trial judge should have been reversed.

When a question of public interest is involved in an appeal to this court, although the appellate court did not base its judgment upon it, leave to appeal to this court will be granted, if there is a doubt as to the sufficiency of the circumstances in the case to overcome, as held by the appellate court, the finding of the trial judge.

APPLICATION for special leave to appeal under section 74 (3) of the *Bankruptcy Act* from a judgment of the Court of King's Bench, appeal side, province of Quebec. Application granted.

St. Laurent K.C. for the application.

Boisvert contra.

LAMONT J.—One of the questions of public interest which, the appellant contends, is involved in this appeal is: Whether the law of the province of Quebec which declares (with certain exceptions not material here) that no trans-

*PRESENT:—Lamont J. in chambers.

fer of shares in a company shall have any effect until it is registered in the transfer register of the company (art. 6003 of *Companies Act*) is applicable in bankruptcy proceedings so as to deprive a creditor, who, for valuable consideration, holds an unregistered transfer of shares, of the benefit of that security.

If this question is involved in the appeal, leave to appeal, in my opinion, should be granted. The court, however, from which leave to appeal is sought did not base its judgment upon that point. By a majority of three to two the court held that at the time the transfer in question was taken (six years before the debtor became a bankrupt) the debtor was in insolvent circumstances, and was so to the knowledge of the creditor Donohue, who held the unregistered transfer.

The debtor's insolvency, and Donohue's knowledge thereof are questions of fact, and if the finding of fact be upheld the question of law above mentioned would not come before this court for determination.

The trial judge held that the assignments appeared to have been made in good faith for adequate valuable consideration, and that they were not void under any of the sections of the *Bankruptcy Act*. He also held that Donohue had not abandoned his rights in the Russian bonds under the terms of the writing of December 29, 1920; that the assignment of the shares in the Montcalm Land Company was valid as between the parties without registration, and that even if it were true that Belleau (debtor) was not solvent when the assignments were made, his insolvency was not notorious nor known to Donohue and that the transactions between them appeared to be transactions in the ordinary course of business which created no assumption of guilty knowledge by Donohue.

With the trial judge's finding that Donohue had no knowledge of the debtor's insolvency, two judges of the Court of King's Bench agreed. The other three were of opinion that the circumstances raised a presumption of such knowledge on the part of Donohue.

Where a trial judge who has seen and heard both the debtor and the creditor finds as a fact that the creditor at the time of the transfer had no knowledge of the debtor's insolvency, the circumstances, to justify a presumption of

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knowledge sufficient to overcome that finding, must, in my opinion, be strong and conclusive. Being in doubt as to the sufficiency of the circumstances in this case to overcome the finding, and believing the point first above mentioned may possibly come before the court for determination if the appellants are allowed to proceed with their appeal, leave to appeal will be granted.

Application granted.

Solicitors for the appellant: *St.-Laurent, Gagné, Devlin & Taschereau.*

Solicitors for the respondent: *Galipault, Lapointe & Boisvert.*

1927

*Oct. 10, 12.
*Oct. 13.

THOMAS D. BULGER (PLAINTIFF).....APPELLANT;

AND

THE HOME INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (1)

Insurance, fire—Arbitration—Fire Insurance Policy Act, s. 22—Arbitration Act, s. 8—Defendant's right to appointment of arbitrator—Stay of action pending arbitration—Waste of time and money in trivial technical disputes.

In an action on a fire insurance policy on household furniture, the appellant claimed damages for the respondent's failure to repair or replace the goods as the plaintiff alleged the insurance company had elected to do; and in the alternative, indemnity for loss of, or damage to, the goods insured. The insurance company having given notice of the appointment of an arbitrator under statutory condition no. 2, and the appellant having refused to appoint an arbitrator, the respondent applied for an order directing such an appointment, and also for an order for a stay of proceedings pending the arbitration. Both applications were dismissed by the trial judge; and the Court of Appeal allowed both appeals.

Held, that if in fact there had been an election by the respondent to take advantage of the re-instatement clause, the appellant was entitled to enforce the obligation to re-instate, and in respect of the appellant's claim for damages for failure to do so, the arbitration clause would have no operation, and the respondent would not be entitled either to an order directing the appointment of an arbitrator or to a stay. It

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) See [1927] S.C.R. 451.

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was ordered that the issue of election or no election should be determined, and on the determination of that issue, further proceedings should take place, as stated in the judgment now reported. Observations upon waste of time and money in trivial and technical disputes, especially where the amount involved are insignificant.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Hunter C.J. and granting an order appointing an arbitrator and another order staying all proceeding in an action on a fire insurance policy pending the arbitration.

L. G. McPhillips K.C. for the appellant.

C. W. Craig K.C. for the respondent.

At the conclusion of argument by counsel, the judgment of the court was orally delivered by

DUFF J.—If, as the appellant alleges, the respondent company did elect to take advantage of the re-instatement clause in the policy, then, the appellant, having asserted his right to enforce the company's obligation to re-instate, would have no right to indemnity, pursuant to the proofs of loss; and the arbitration clause would never come into play.

The company therefore was not entitled to a stay of proceedings under the *Arbitration Act* until it had been determined that there had been no election.

If, on the contrary, there was no election, there was no reason for refusing the application of the respondent for an order for the appointment of an arbitrator or a stay of proceedings.

Therefore the judgment of the Court of Appeal, as well as the orders made on the respondent company's two applications, should be set aside.

The dispute as to the alleged election could be decided on the hearing of the company's application for a stay, if both parties should so desire; but if they do not agree upon that course, then upon delivery of the statement of defence, an issue should be directed to determine that dispute. If the issue be decided in favour of the appellant, the action should proceed for the disposition of the claim for dam-

(1) [1927] 2 W.W.R. 456.

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Duff J.

ages; and, if otherwise, further proceedings in the action should be stayed, and the arbitration proceeded with.

Meantime, the applications for a stay and for the appointment of an arbitrator should be kept on foot.

The appellant should have the costs of the present appeal and the respondent those of the appeal to the Court of Appeal.

The costs already incurred are quite disproportionate to the importance of the matters in dispute, and it is hoped that all parties will concur in a serious effort to avoid waste of time and energy in barren quarrels about questions of practice, and to have the questions of substance disposed of as speedily and inexpensively as possible.

Appeal allowed with costs.

Solicitors for the appellant: *McPhillips & Duncan.*

Solicitors for the respondent: *Walsh, McKim, Housser & Molson.*

GUETTLER ET AL *v.* CANADIAN INTERNATIONAL PAPER COMPANY ET AL.

1928

*Mar. 12, 13.
*April 24.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—No patentable invention—Alleged improvements in barking drum for stripping logs in making of pulp—Commercial success.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the plaintiffs' action for infringement of patent, on the ground of invalidity of the patent. The appeal was dismissed with costs.

The patent in question was for alleged improvements in a barking drum used for stripping logs in the making of pulp, the improvements consisting of devices for effecting the required tumbling action, constructed in such a way as to avoid the brooming or splintering of the ends of the logs which is liable to occur when tumbling devices of the usual character are employed.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1928] Ex. C.R. 21.

The judgment of the Court dismissing the appeal was delivered by Duff J. After referring to the appellants' claims in support of the patent, he said:

"The sole question on the appeal concerns the validity of the appellant's patent; and that reduces itself to the question, which is a question, of fact: Have the respondents established the proposition on which their case in the court below was rested that the subject matter of the appellant's patent does not disclose invention?"

He then discussed the subject of the patent, and the claims in regard to it, and discussed a number of earlier patents obtained by others, and concluded as follows:

"* * * It does not seem to be seriously doubtful that Alfsen, Ross, Hussey and Paulson had all conceived and disclosed the idea of a rigid drum composed, in its longitudinal elements, of iron bars so arranged as to lift the pieces of wood, tumble them over one another in such a way as to remove the bark without seriously injuring the wood; nor does it appear to be doubtful that both Ross and Hussey definitely conceived and disclosed the idea of inwardly projecting parts, or that Ross conceived the notion of rounding the projections in order to avoid the brooming and splintering of the logs. Furthermore, in both the Wertheim and the Ehrler patents, the use of the U bar is suggested and disclosed for purposes which, if not in all respects identical with the purposes sought to be obtained by the appellant, were so analogous as to make it impossible to ascribe to his adoption or adaptation of the idea, the character of patentable invention. Nor can it be disputed that Paulson effectively embodied his ideas in a barking machine, which has had a considerable degree of commercial success.

"Mr. Anglin, in his elaborate argument, urged upon us, properly enough, the degree of commercial success which had been achieved by Guettler's drum. Commercial success may be due to many factors, and the learned trial judge was not satisfied that Guettler's drum is more efficient than Paulson's. The evidence of commercial success cannot afford a basis for refusing to give effect to the conclusion necessitated, I think, by the recital itself of the facts already mentioned, that Guettler's improvements were not

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of such a character as to imply invention in the pertinent sense.

"The appeal should be dismissed with costs."

Appeal dismissed with costs.

A. W. Anglin K.C. and *W. D. Herridge* for the appellants.

O. M. Biggar K.C., R. S. Smart K.C., and *J. A. Mann K.C.* for the respondents.

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*May 1, 2.
*June 12.

THE COLONIAL INVESTMENT AND LOAN COMPANY (PLAINTIFF)..... } APPELLANT;

AND

HARRY JAMES MARTIN (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Limitation of actions—Mortgage—Action in Manitoba to recover money secured by mortgage—Real Property Limitation Act, Man. (R.S.M. 1913, c. 116), s. 24 (1)—Application of s. 24 (1) in favour of person who joined with mortgagor in personal covenant—Surety—Mortgaged land situate outside of province.

The limitation of ten years imposed by s. 24 (1) of the Manitoba *Real Property Limitation Act* (R.S.M. 1913, c. 116) to an action to recover money secured by mortgage applies to the personal remedy on the covenant in the mortgage deed as well as to the remedy against the land (*Sutton* v. *Sutton,* 22 Ch. D. 511, followed); and it applies in favour of a person, not a surety, who has joined with the mortgagor in the personal covenant; (*Quaere,* whether or not it applies to the personal obligation entered into by a surety for the mortgagor. In the case in question it was held that, on construction of the mortgage agreement, the defendant had not entered into it as a surety but had assumed a personal obligation to the mortgagee to repay the loan); and it applies whether the land charged be within the province of Manitoba or elsewhere.

Judgment of the Court of Appeal of Manitoba (37 Man. R. 215) affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal of Manitoba (1) affirming the judgment Curran J. (2) dismissing the plaintiff's action to recover from the defendant the amount alleged to be owing under

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Smith JJ.

(1) 37 Man. R. 215; [1928] 1 W.W.R. 245.

(2) [1927] 2 W.W.R. 94.

a mortgage agreement. The material facts of the case and the questions for consideration by the Court are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

A. C. McMaster K.C. for the appellant.

C. K. Guild for the respondent.

The judgment of Anglin C.J.C. and Mignault, Rinfret and Smith JJ. was delivered by

MIGNAULT J.—This is an appeal from a judgment of the Court of Appeal of Manitoba, which affirmed (Trueman J.A., dissenting) the judgment at the trial of the late Mr. Justice Curran. The litigation arose out of the following circumstances:

On May 9, 1911, at Sedley, Saskatchewan, The Sedley Rink Company, Limited, and Harry Marsden Paine, John O. Scott, John F. MacDonald and the respondent Martin entered into a mortgage agreement with the appellant in consideration of a loan by it to them of $1,000, payable by instalments, with interest at 8½ per cent. per annum. This mortgage is, I take it, in the usual form under the Saskatchewan Land Titles Act, and one of the questions is whether Paine, Scott, MacDonald and the respondent became parties to the mortgage as sureties for the Rink Company, or as principals with the latter. They were interested in the Rink Company, and no doubt it was considered more prudent to have them join in the mortgage.

The respondent Martin, at that time, resided in Sedley, but a year or so afterwards he removed to Grenfell, Saskatchewan. He joined the Canadian expeditionary forces shortly after the outbreak of the late war and was on active service in France. He was demobilized in 1919 at Edmonton, Alberta, where his family then resided. He subsequently moved to Dauphin, Manitoba, and when this action was brought resided in Winnipeg.

It appears that after the mortgage agreement some payments were made on account of instalments of principal and interest. The appellant obtained a final order of foreclosure in 1917, and caused itself to be registered as owner of the lands. Proceedings to collect the mortgage debt were unsuccessfully taken in Saskatchewan in 1919, but

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although the respondent, as well as Paine, Scott and MacDonald, were made defendants, their names were struck out for the reason, it is stated, that they were then protected by the moratorium legislation of Saskatchewan. In August, 1918, the rink building was destroyed by a cyclone and the appellant caused the ruins to be sold at public auction, the highest price obtainable being some $215, out of which the expenses of the sale had to be paid.

The present action was brought in Manitoba on the 13th of December, 1924. The amount claimed is $2,244.04, alleged to be the balance due for principal and interest on the mortgage, and the action is directed solely against the respondent, who is alleged to have signed the mortgage as a surety. The appellant avers that the principal debtor (meaning the Rink Company) defaulted on the 15th of December, 1914; the trial judge found that the default was on the 15th of November of that year.

The principal defence—in fact the one considered and given effect to in the courts below—is that the appellant's remedy against Martin is now barred by reason of the limitation period, ten years, under s. 24 of the Manitoba *Real Property Limitation Act* (R.S.M., 1913, c. 116, which originated in R.S.M. 1892, c. 89, and was subsequently reenacted several times), having expired before this action was brought.

At the trial the appellant attempted to prove a part payment within the limitation period, to wit a payment alleged to have been received by it on December 15, 1914. An unsigned letter, with addressed envelope, purporting to have been sent to the appellant by its local agent at Selden, one John Auchmuty, was tendered in evidence. This letter, dated December 11, 1914, stated that a draft was enclosed for $80.50, being payment of principal due November 15 on loan no. 1038 on the Sedley Rink, and interest to date.

The letter with the draft was received apparently by the appellant on December 15, but so far as it could be evidence of a part payment on account of the mortgage loan, it would show a payment made to the appellant's agent not later than the 11th of December, and therefore outside of the limitation period.

John Auchmuty was not called at the trial, it was said that he had returned to Scotland, and there was no evidence showing from whom he received the money which he sent to his principals. The admissibility, to defeat the operation of the Statute of Limitations, of evidence of a part payment of that character, which emanates from the creditor or his agent, is very doubtful (Lightwood, Time Limit on Actions, p. 379). Here, however, it would not prove a payment within the limitation period and is therefore of no assistance to the appellant. Nor—unless it were established by competent evidence that on the 11th of December, 1914, everything that had fallen due under the mortgage agreement had been paid by the debtor—could it be said that the right to demand payment of money under the mortgage did not accrue to the appellant until the next instalment became due on the 15th of May, 1915, and that the limitation period started only then. The appellant makes no such contention here; it sought at the trial merely to prove a part payment within the limitation period, and in that it failed.

This brings me to consider the respondent's plea that the appellant's remedy against him under the personal covenant in the mortgage agreement is barred by reason of s. 24 of the Manitoba *Real Property Limitation Act.* This section—and, if it applies, no other provision of the Statute of Limitations need be looked at—is in the following terms:

> 24. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten years next after the present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon has been paid, or some acknowledgment of the right thereon has been given in writing signed by the person by whom the same is payable or his agent, to the person entitled thereto or his agent; and in such case no action, suit or proceeding shall be brought, but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was made or given.

Section 24 is taken from section 8 of the Imperial *Real Property Limitation Act,* 37-38 Vict. (1874) c. 57, (a re-enactment of section 40 of 3 & 4 Will. IV, c. 27 (1833), with a change of the prescriptive period), the language of which is in substance the same, except that the limitation

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period is twelve years under the Imperial statute and ten years under the Manitoba enactment.

The appellant meets the argument based on s. 24 by three contentions:

1. The respondent signed the mortgage agreement as a surety for the Sedley Rink Company, and even if s. 24 applies to the personal covenant of the mortgagor, it cannot be extended to the personal obligation entered into by a surety for the mortgagor;

2. Section 24, which enacts that no action or suit or other proceeding shall be brought to recover money secured by a mortgage charged upon or payable out of any land but within ten years after the present right to receive the same has accrued,—applies only to claims for money secured by a mortgage charged upon or payable out of land in Manitoba, and therefore, inasmuch as land in Saskatchewan was here charged, s. 24 does not defeat the appellant's action;

3. Even assuming that s. 24 could be applied to an action brought in Manitoba to recover money secured by a mortgage charged on land outside of Manitoba, it would not avail against an action brought against a person, other than the mortgagor, who in the mortgage agreement assumed liability for the payment of the mortgage debt, even although such person were not a surety for the mortgagor.

The first contention involves the construction of the mortgage agreement, and both courts have held that the respondent Martin did not enter into the agreement as a surety for the Sedley Rink Company, but assumed a primary and not an accessory obligation.

The appellant, in its statement of claim, treated the respondent as having been a surety for the Rink Company, and it now relies on the fact that the respondent (who had denied signing the agreement as surety or otherwise) in several paragraphs of his plea, containing, it is true, alternative contentions, expressly stated that if he had signed the agreement it was as a surety. This, however, inasmuch as it involves the construction of the instrument, is a question of law, and the courts below did not consider that the contention thus alternatively made in the respondent's plea precluded them from giving to the mortgage agreement its proper interpretation.

This agreement is not as clear as it might have been made. It is on a printed form of the appellant, and it begins by this statement:

We, the Sedley Rink Company, Limited, whose office is at the Village of Sedley, in the Province of Saskatchewan (hereinafter called the mortgagor), being registered as owner of an estate in fee simple in possession . . . in all that piece of land described as follows:—[description of three lots in the Village of Sedley.]

and

Harry Marsden Paine, merchant; John O. Scott, merchant; John F. MacDonald, merchant; and Harry James Martin, agent, all of Sedley aforesaid,

In consideration of the sum of one thousand dollars lent to *us* by the Colonial Investment and Loan Company (who and whose successors and assigns are hereinafter included in the expression "the mortgagees"), the receipt of which sum *we* do hereby acknowledge, covenant jointly and severally with the said mortgagees.

Firstly: That *we* will pay to them, the said mortgagees, the said principal money and interest thereon at 8½ per cent. per annum, as follows:—

Fifty dollars on the 15th day of November, 1911.

Fifty dollars on the 15th days of May and November in each of the years 1912, 1913, 1914 and 1915,

and the balance of the said principal sum $550 shall become due and payable on the 15th day of May, A.D. 1916 * * *.

There is an acceleration clause providing that on default of payment of any portion of the moneys hereby secured, the whole of the moneys shall become due and payable.

At the end of the agreement there is the following clause:

And for better securing to the said mortgagees the payment in manner aforesaid of the instalments hereinbefore provided for, and other charges and moneys hereby secured *we* hereby mortgage to the said mortgagees all our estate and interest in the lands above described.

In so far as the appellant is concerned—whatever may have been the relations of the parties *inter se*—it is impossible to construe the clauses which I have cited otherwise than as having created, on the part of the Sedley Rink Company, Limited, and of Messrs. Paine, Scott, MacDonald and the respondent, a personal obligation as principals to pay the money loaned, which is expressly stated to have been loaned to them. There is nothing to prevent several persons entering into a contract of loan as borrowers, one of whom gives a mortgage on his land to secure repayment of the loan. On the construction of the deed, I can discover naught that shows that it is anything else than what is expressly stated, i.e., a principal as well as a joint and

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several obligation assumed by the borrowers to repay the loan. The appellant's insistence that the respondent was merely a surety is prompted by its hope that it can thus exclude the application of s. 24. It relies on the decision of the English Court of Appeal in *In re Powers; Lindsell* v. *Phillips* (1), which, however, is an entirely different case. There a bond, separate from the mortgage agreement, had been given by third parties to secure in part the payment of the mortgage debt, and it was held that a claim on the bond did not come within section 8 of the English *Real Property Limitation Act.*

Four years later the same court decided the case of *In re Frisby; Allison* v. *Frisby* (2). In that case, the action was against a surety, who had joined with the mortgagor in covenanting to pay the mortgage debt, and the trial judge, Kay J., and Bowen L.J., in the Court of Appeal, were of the opinion that section 8 does not apply to an action on the covenant in a mortgage unless brought against the mortgagor or his representatives. Cotton L.J., expressed the contrary view, and Fry L.J., stated that he gave no opinion whether section 8 applies to an action against a surety. The ground of the decision was, however, that payment of interest by the mortgagor had prevented the statute from running in favour of the surety.

I cannot think that the appellant gets much assistance from these two cases. In both of them *Sutton* v. *Sutton* (3), with which I will presently deal, is referred to, but distinguished as not being in point.

However, the first contention of the appellant being predicated on the assumption that the respondent was a surety, whereas I find he was a principal, it is unnecessary to discuss further these two decisions, or to express any opinion on the question with which they deal.

The second and third contentions of the appellant may be taken together. They are that, in an action brought in Manitoba, s. 24 should be restricted to claims for money secured by a mortgage charged upon or payable out of land in Manitoba, and that, at all events, s. 24 cannot be applied to defeat an action brought, under the mortgage agreement, against a person other than the mortgagor.

(1) (1885) 30 Ch. D. 291. (2) (1889) 43 Ch. D. 106.
(3) (1882) 22 Ch. D. 511.

The appellant goes even further and asserts that an action against the mortgagor on the personal covenant does not come within s. 24.

The courts below decided this question against the appellant on the authority of the judgment of the English Court of Appeal in *Sutton* v. *Sutton* (1). It was there held that the limitation of twelve years (in Manitoba ten years) imposed by the *Real Property Limitation Act,* 1874, s. 8, to actions and suits for the recovery of money charged on land, applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. The question there arose on a demurrer to the defendant's plea which had set up the statute to defeat an action by the plaintiff on the defendant's covenant in the mortgage deed.

Sutton v. *Sutton* (1) is cited in the two other cases which I have already referred to, and has always been considered in England as of binding authority. It was mentioned with approval in *In re England; Steward* v. *England* (2); distinguished, but considered binding, in *Barnes* v. *Glenton* (3); referred to in *London and Midland Bank* v. *Mitchell* (4); followed in *Kirkland* v. *Peatfield* (5); and applied in *In re Turner; Klaftenberger* v. *Groombridge* (6).

In Ontario, four years before *Sutton* v. *Sutton* (7) was decided, the Ontario Court of Appeal in *Allan* v. *McTavish* (8), had held that s. 11 of 38 Vict., c. 16 (Ontario), similar to s. 24 of the Manitoba statute, did not apply to an action on a covenant in a mortgage for the payment of the mortgage money. In his factum the respondent states, and I assume correctly, that *Allan* v. *McTavish* (8), was consistently followed in Ontario down to 1894, when the period for recovery on specialty contracts was cut down to ten years. In Ontario, by c. 34 of the Statutes of 1910 (10 Edw. VII), s. 24, subs. 1, it is enacted that no action shall be brought to recover *out of any land* or rent any sum of money secured by any mortgage charged upon or payable out of such land but within ten years after the right to receive the same has accrued. However, inasmuch as by s.

(1) (1882) 22 Ch. D. 511.
(2) [1895] 2 Ch. 820.
(3) [1899] 1 Q.B. 885.
(4) [1899] 2 Ch. 161.
(5) [1903] 1 K.B. 756.
(6) (1917) 86 L.J. Ch. 290.
(7) (1882) 22 Ch. D. 511.
(8) (1878) 2 Ont. A.R. 278.

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49, subs. *k*, of the same statute, the limitation period is ten years in an action upon a covenant contained in an indenture of mortgage made after the 1st of July, 1894, the question with which we are concerned can no longer arise in Ontario, the prescription being the same in both cases.

In Manitoba, *Sutton* v. *Sutton* (1) appears to have been followed. See *Lowery* v. *Lamont* (2), and also *Wilson* v. *Graham* (3), where the decision of Dubuc C.J., based on *Sutton* v. *Sutton* (1), was reversed, but on another point.

I recognize the authority of *Sutton* v. *Sutton* (1) with respect to the construction of an enactment such as the one here in question, which is derived from Imperial legislation. It certainly does no violence to the terms of the section.

Sutton v. *Sutton* (1) was the case of an action against the mortgagor on his personal covenant. I think, however, the same rule can be applied to the liability of a person, not a surety, who joins with the mortgagor in the personal covenant. And if we must admit that an action against the Rink Company, the mortgagor, on this very covenant, would be barred after ten years, I can discover no reason why a claim against the respondent, who bound himself with the Rink Company in the same terms, and jointly and severally, should last and be enforceable for a longer period.

But the appellant contends that when s. 24 speaks of money secured by a mortgage charged upon or payable out of any land, it must be taken to refer to land in Manitoba. If this reading of the statute be correct, then an action in Manitoba, on a covenant in a mortgage, would be subject to a different and shorter term of prescription, if the mortgaged land is in the province than if it were elsewhere. No doubt, when the legislature of a province enacts a statute concerning land, it should be assumed, as a general rule, that land within the territorial limits of the province alone is affected by the legislation. It may nevertheless be observed that this statute deals principally with the limitation of suits and actions, and, being a rule of procedure, it applies to all suits and actions in the Manitoba courts, no matter where the right of action accrued. And the re-

(1) (1882) 22 Ch. D. 511. (2) [1927] 1 W.W.R. 95.
(3) (1906) 16 Man. R. 101.

spondent relies here on an express decision of the late Chief Justice Dubuc (then Mr. Justice Dubuc), in 1892, which he states has never been questioned in Manitoba: *McLenaghan* v. *Hetherington* (1), where that learned judge held that s. 24 applies, whether the land charged be within the province or elsewhere. Section 24 has been re-enacted in the same terms in the different consolidations of Manitoba statutes (see R.S.M., 1902, c. 100, s. 24; R.S.M., 1913, c. 116, s. 24, subs. 1), and the construction placed on it in *McLenaghan* v. *Hetherington* (1), the respondent contends with much plausibility, has been tacitly accepted by the Legislature.

In his dissenting judgment in the court below, Mr. Justice Trueman refers to the expression "judgment" in s. 24, which is placed in collocation with, and between the words "mortgage" and "lien." The "judgment" within s. 24, he argues, is a judgment recovered in Manitoba. It is unnecessary to express any opinion on this point, but I may perhaps be permitted to say, with respect, that the authorities cited by the learned judge in support of his proposition—such as *Hebblethwaite* v. *Peever* (2); *Jay* v. *Johnstone* (3); and *Blanchard* v. *Muir* (4), which followed the first two cases,—are rather to the effect that the word "judgment" comprises judgments generally, and not merely those which operate as charges on land.

The learned judge also refers to what he terms the subsequent history of *Sutton* v. *Sutton* (5), as related by Chitty J., in *In re Turner; Turner* v. *Spencer* (6). This, of course, as Chitty J., himself observed, does not affect the authority of the decision of the Court of Appeal.

I cannot say that this case is free from difficulty, but on consideration of all the contentions—and I have mentioned only those which in my opinion really matter—I would not feel justified in disturbing the judgments of the experienced judges who have decided the case in the two courts below. If it is thought that their judgments misconstrue s. 24, it will be a matter for the consideration of the Legislature; but in my view that construction is a reasonable one.

(1) (1892) 8 Man. R. 357.
(2) [1892] 1 Q.B. 124.
(3) [1893] 1 Q.B. 25 and 189.
(4) (1900) 13 Man. R. 8.
(5) (1882) 22 Ch. D. 511.
(6) (1894) 43 W.R. 153.

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In its factum, among its reasons of appeal, the appellant takes the ground that in view of the moratorium legislation of Saskatchewan, and also of that of Manitoba, the limitation period under s. 24 was suspended. This point, however, was not pressed at the argument, nor is it mentioned in the judgments either of the majority or of the dissenting judge in the Court of Appeal. No moratorium legislation in Saskatchewan could operate as a stay of proceedings in an action brought in Manitoba, and no moratorium legislation of the province of Manitoba has been specially referred to. I do not therefore feel called upon to discuss the effect or operation in a proper case of legislation of this character.

At the hearing, the appellant made a motion for leave to introduce additional evidence which, it was argued, would show that the respondent obligated himself as a surety and not as a principal. The evidence tendered consists in: 1. An application for the loan by the Sedley Rink Company, Limited; 2. What purports to be a resolution of the Rink Company for the borrowing of $1,000; 3. A statement in the affidavit of the secretary-treasurer of the appellant that the appellant's inspector, Mr. Campbell, recommended the loan "if guaranteed by the four individual guarantors."

I am of opinion that evidence of that character could not prevail against the instrument signed by the parties, which must be construed according to its terms.

The motion therefore should be rejected with costs.

On the whole, I am of the opinion that the appeal fails and should be dismissed with costs.

DUFF J.—I concur in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *Chapman & Thornton.*

Solicitors for the respondent: *Scarth, Guild & Thorson.*

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THE LONDON LOAN AND SAVINGS COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

*Mar. 5, 6.
*April 24.

AND

FRANK E. OSBORN, SARAH OSBORN AND CECIL A. OSBORN, AN INFANT UNDER THE AGE OF SIXTEEN YEARS, BY HIS FATHER AND NEXT FRIEND, FRANK E. OSBORN (PLAINTIFFS)..... RESPONDENTS.

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

Contract—Construction—Findings as to—Estoppel—Pledge of bonds—Dispute as to purpose and conditions of pledge—Effect on rights of present litigants of findings in other proceedings—Parties.

Plaintiffs sued for the return of certain bonds or their value, alleging that they had been pledged to defendant by plaintiff O. as collateral security for payment of moneys secured by a mortgage from I. T. Co. to defendant, and, by agreement, were to be returned on the mortgage debt being reduced to $31,000, and that the mortgage had been paid, or reduced to an amount less than $31,000. Defendant contended that the advance made when the bonds were pledged formed no part of the mortgage indebtedness but was an independent advance on pledge of the bonds, and that it was entitled to realize the amount of that advance by sale of the bonds. In certain mechanics' lien proceedings against I. T. Co. (the mortgagor), to which defendant was made a party, but to which O. was not a party, although as president of I. T. Co. he was cognizant of them, it had been held that the said advance was not made on the mortgage as part of the money secured thereby, but was an independent advance on the bonds.

Held, that the view taken in the courts below (25 Ont. W.N. 43; 29 Ont. W.N. 185) that the bonds were pledged by O. as collateral security upon an additional advance on the mortgage, and that O. was in respect thereof entitled to the rights of a surety, had not been successfully impugned; that the evidence disclosed that, with defendant's concurrence, the mortgaged land was subsequently sold for a sum more than sufficient to pay off the mortgage and all other claims entitled to priority over it; that defendant had agreed to return the bonds on the loan secured by the mortgage being reduced to $31,000, and it had been so reduced within the meaning of the agreement; that, as a result of above facts, as found, O. became entitled to return of the bonds, and defendant, who had since disposed of them, was accountable for their value.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Lamont JJ.

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Held, further, that O. was not estopped by reason of said holding in the mechanics' lien proceedings from asserting that the advance was secured by the mortgage; he was not a party to those proceedings, he was present at them only as a representative of I. T. Co. (*In re Deeley's Patent,* [1895] 1 Ch. 687, referred to); neither personally nor as president of I. T. Co. did he derive any benefit from the judgment therein (cases such as *In re Lart* [1896] 2 Ch. 788, held inapplicable; *Leicester & Co.* v. *Cherryman* [1907] 2 K.B. 101, at p. 103, referred to); on the facts established, defendant was not misled to its prejudice by any conduct of O.; if O. as a person entitled to redeem the mortgage had a status to intervene, it did not follow that he was obliged to do so; if defendant desired to hold him bound by anything determined in those proceedings it should have taken steps to have him made a party.

Held, further, that, although the plaintiffs other than O., who claimed as owners of the bonds, had no independent right of action against defendant, and could claim only through O., yet, as O. was consenting, the fact of the judgment having been entered for his co-plaintiffs afforded no ground for objection.

Judgment of the Appellate Division, Ont. (29 Ont. W.N. 185), affirming Judgment of Mulock C.J. Ex. (25 Ont. W.N. 43), affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Mulock C.J. Ex. (2), in favour of the plaintiffs.

The action was to recover bearer bonds of the Dominion of Canada, of the par value of $10,000, and accumulated interest thereon, or the value thereof.

The plaintiff Frank E. Osborn was president of Independent Theatres of Ontario Ltd., which, for the purpose of raising money necessary for the building of a theatre, executed a mortgage on its land to the defendant. The building was being erected for the theatres company by Schultz Bros. Co. Ltd., contractors. During the progress of the work, as the theatres company required more money for payment to the contractors, Osborn on its behalf applied to the defendant for a further advance, which the defendant refused, claiming that the mortgagor was not entitled to any advances beyond those already made. Negotiations followed, which resulted in Osborn placing the $10,000 of bonds in question with the defendant and

(1) (1925) 29 Ont. W.N. 185. (2) (1923) 25 Ont. W.N. 43.

the defendant advancing the sum of $10,000. The defendant gave a receipt for the bonds in the following terms:

"Received from Mr. F. Osborn, ten thousand Dominion of Canada bonds [describing them] as collateral security for further advance of ten thousand dollars for Independent Theatres Loan No. I.4. Said bonds to be returnable to Mr. F. Osborn on the loan being reduced to $31,000.00."

In subsequent mechanics' lien proceedings against the theatres company, to which the present defendant was made a party defendant, but to which none of the present plaintiffs were parties (Osborn, however, as president of the theatres company, being present and knowing what was going on), it was held that the said advance of $10,000 was not made on the mortgage as part of the money secured thereby, but was in fact an advance on the bonds independent of the mortgage.

In the mechanics' lien proceedings a sale was effected of the property, and Schultz Bros. Co. Ltd., became the purchasers; and arrangements took place under which the defendant made a new loan on the security of a new mortgage on the property, this mortgage being executed by the Lyric Theatre Co. Ltd., a company formed for the purpose of taking over and operating the theatre. Schultz Bros. Co. Ltd., was a party to the mortgage, and therein covenanted with the mortgagee (the defendant) for payment of the moneys secured. Out of the new loan was deducted the amount owing to the defendant under the old mortgage (not including the $10,000 advanced at the time of deposit of the bonds), and the old mortgage was discharged. Schultz Bros. Co. Ltd., gave to the defendant a covenant of indemnity against any claim made against the defendant's title to the bonds now in question or its right to sell the same. The defendant sold the bonds and out of the proceeds paid off the $10,000 and interest upon it.

The plaintiffs then brought this action, claiming that the bonds in question had been deposited as collateral security for payment of the mortgage moneys, that the contract under which they were deposited provided that they were to be returned whenever the mortgage debt was reduced to $31,000, that the mortgage had been paid, or reduced to an amount less than $31,000, and claiming from

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the defendant a return of the bonds or payment of their value. It was alleged that the plaintiffs Sarah Osborn and Cecil A. Osborn were in truth the owners of the bonds, which had been used by the plaintiff Frank E. Osborn as aforesaid with their consent.

The defendant contended that the payment of $10,000 was the outcome of a separate and distinct negotiation, and formed no part of the mortgage indebtedness; that in any case it had by a subsequent agreement become an independent debt; that its contentions were established by the evidence taken as a whole, and particularly by reason of certain correspondence; that the plaintiffs Sarah Osborn and Cecil A. Osborn had no rights whatever as against it, there being no evidence that it had any knowledge of any interest on their part; that the plaintiff Frank E. Osborn was estopped (as were also the other plaintiffs, whose rights, if any, could not be higher or other than his) by the finding in the mechanics' lien proceedings from enforcing now any claim to the bonds or their proceeds.

At the trial Mulock C.J. Ex., gave judgment for the plaintiffs (1), which was affirmed by the Appellate Division (2). The defendant appealed to this Court.

R. S. Cassels K.C. and *G. A. P. Brickenden* for the appellant.

R. S. Robertson K.C. for the respondents.

The judgment of Anglin C.J.C. and Mignault, Newcombe and Lamont JJ. was delivered by

ANGLIN C.J.C.—The defendant, The London Loan & Savings Company of Canada, appeals from a judgment of the Appellate Division of the Supreme Court of Ontario (2), affirming the judgment of Mulock C.J. Ex., in favour of the plaintiffs (1). The material facts sufficiently appear in these judgments.

On evidence which certainly supports that view, and probably admits of no other, the learned Chief Justice, who tried the action, found that the bonds in question had been pledged to the appellant Loan Company by Frank Osborn, one of the plaintiffs, as collateral security upon an addi-

(1) (1923) 25 Ont. W.N. 43. (2) (1925) 29 Ont. W.N. 185.

tional advance of $10,000 being made by it on a $50,000 mortgage which it held on the property of the Independent Theatres Company, and which then stood as security for $37,000 and some interest, and held that in respect of such bonds Osborn was in the position of and was entitled to the rights of a surety. That view, confirmed in the Appellate Division, has not been successfully impugned; and, subject to the question of estoppel, below adverted to, must form the basis of the disposal of the present appeal.

The evidence discloses that, with the concurrence of the appellant, the mortgaged property of the Theatres Company was subsequently sold for a sum considerably more than sufficient to pay off in full the appellant's mortgage and all other claims upon the property entitled to priority over it. As a result the plaintiff Frank Osborn became entitled to the return of the bonds, to recover which he sues, and, as they have since been disposed of by the appellant, wrongfully and without assent by him, that Company is accountable to him for their value.

But it is urged that Osborn is estopped from asserting that the $10,000 advance made by the appellant company when the bonds were pledged to it was secured by its mortgage on the Theatres Company's property, because, in certain mechanics' lien proceedings, to which the Theatres Company was a party, it was held that the $10,000 was advanced as an independent loan made to the Theatres Company by the appellant directly on the security of the bonds in question. Osborn was not a party to the mechanics' lien proceedings; but he was cognizant of them as president and general manager of the Theatres Company.

The immediate effect of the judgment holding that the $10,000 was not advanced on the $50,000 mortgage security was that, to the extent of that advance, and interest thereon, the amount of money available for the building contractors, The Schultz Brothers Company, as lien-holders subject to the appellant's mortgage, was augmented. The Theatres Company gained nothing thereby, since it remained liable to the appellant for the $10,000 advanced by it when the bonds were pledged. The sale of the mortgaged premises was made under the judgment in the me-

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chanics' lien proceedings, but the disposition of the proceeds became the subject of an extra-curial agreement between the appellant Loan Company and the contractors, The Schultz Brothers Company. Before, or as a term of, assenting to that transaction being put through, by which its $50,000 mortgage was extinguished, the appellant obtained from The Schultz Brothers Company a bond and agreement indemnifying it against loss in the event of its being held liable to account for the bonds in question to the plaintiff Osborn.

No estoppel can be established as against Osborn because he was not a party to the mechanics' lien proceedings. He was present at them only as a representative of the Theatres Company. *In re Deeley's Patent* (1). Neither personally, nor as president and general manager of the Theatres Company, did Osborn derive any benefit from the judgment in the mechanics' lien proceedings. Cases such as *In re Lart* (2), relied on by counsel for the appellant, are, therefore, inapplicable. The case at bar falls rather within the principle of the decision in *Leicester & Co.* v. *Cherryman* (3). Under the circumstances above disclosed estoppel in pais would seem to be out of the question. The appellant company was not misled to its prejudice by anything Osborn did or refrained from doing. The indemnity which it took from The Schultz Brothers Company is conclusive on this aspect of the matter. It is, however, suggested that, as a person entitled to redeem the appellant's mortgage, Osborn had a status to intervene. But it does not follow that he was under an obligation to do so. The appellant was fully apprised of all the material facts. If it desired to hold Osborn bound by anything determined in the mechanics' lien proceedings, it should have taken steps to have him made a party. On the other hand, whether or not the finding of the local judge, in the mechanics' lien proceedings, that the appellant had advanced the $10,000 not on the mortgage but as an independent loan to the Theatres Company, should be regarded as binding on Osborn, it certainly is so on the appellant. The result would be, as Mr. Justice Smith pointed

(1) [1895] 1 Ch. 687. (2) [1896] 2 Ch. 788.
(3) [1907] 2 K.B. 101, at p. 103.

out in the Divisional Court, that the appellant would have no right to hold the pledged bonds, since the debt for which they were pledged as collateral, i.e., a loan on the mortgage security, never came into existence.

We agree with the view, which prevailed in the trial court and on appeal, that the receipt given by the appellant for the bonds when they were pledged to it evidenced the terms of the pledge and that, within the meaning of that receipt, the loan secured by the $50,000 mortgage was reduced below $31,000—it was, in fact, wholly extinguished. The bonds were, therefore, returnable to Mr. Osborn, the receipt providing for their return "on the loan being reduced to $31,000."

The plaintiffs Sarah Osborn and Cecil A. Osborn have no independent right of action against the appellant. They can claim only through Frank Osborn, and their right can in no event be higher than his. But, as he was consenting and approving, the fact of the judgment having been entered for his co-plaintiffs, his wife and infant son, affords the appellant no ground for objecting to it.

The appeal fails and must be dismissed with costs.

Duff J. concurred in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *G. A. P. Brickenden & Co.*

Solicitors for the respondents: *Jeffery, Weir, McElheran & Moorhouse.*

IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OF CERTAIN SECTIONS OF THE FISHERIES ACT, 1914.

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*Feb. 9, 10.
*May 28.

Constitutional law—Fish or salmon cannery—License to operate—Sections 7a and 18 of the Fisheries Act, 1914—Ultra vires—License to fish or to operate a fish or salmon cannery in the province of British Columbia—Whether any resident has a right to receive license or the Minister of Marine and Fisheries has a discretionary authority to grant or refuse such license.

Section 7*a* of the *Fisheries Act,* 1914, which enacts that "no one shall operate a fish cannery for commercial purposes without first obtaining an annual license from the Minister" and section 18 of the same

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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Act, which enacts that "no one shall operate a salmon cannery * * * in British Columbia for commercial purposes except under a license from the Minister", are both *ultra vires* of the Parliament of Canada. In the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the province where the operation is carried on, like the right to operate a fruit or vegetable cannery; and the exercise of that right is not restricted or regulated by force of any enumerated Dominion power to which the above sections may be justifiably attributed.

Per Anglin C.J.C. and Newcombe, Rinfret and Lamont JJ.—Under the provisions of the Special Fishery Regulations for the province of British Columbia (made by the Governor in Council under the authority of s. 45 of the *Fisheries Act,* 1914), respecting licenses to fish, viz: subs. 3 of s. 14; par. (*a*) or (*b*) of subs. 1 of s. 15, or par (*a*) of subs. 7 of s. 24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has the right to receive a license to fish or to operate a fish or salmon cannery in that province, if he submit a proper application and tender the prescribed fee. As to any person resident in the province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in subs. 3 of s. 14, it being expressly declared by that subsection that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by par. (*b*) of subs. 1 of s. 15, be granted to any person, unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas."

Per Duff, Mignault and Smith JJ.—The above sections of the Special Fishery Regulations are subject to the provisions of section 7 of the *Fisheries Act* which enacts that "the Minister (of Marine and Fisheries) may * * * issue, or authorize to be issued, fishery leases and licenses * * *" and therefore the Minister has a discretionary authority to grant, or refuse, such license to any person who is a British subject resident in the province of British Columbia, or is a returned soldier who has served in His Majesty's Canadian navy or army overseas; in other words, the authority of the Minister is a permissive one and he is under no legal duty to grant licenses to those who may apply for them.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act,* of certain questions for hearing and consideration, as to the constitutional validity of certain sections of the *Fisheries Act,* 1914, and of certain regulations passed thereunder.

The Order in Council providing for the reference was dated 19th October, 1927, (P.C. 2032) and is as follows:

"The Committee of the Privy Council have had before them a report, dated 18th October, 1927, from the Minister

of Justice, submitting that by a judgment recently pronounced by the Honourable Mr. Justice Macdonald of the Supreme Court of British Columbia upon a case stated by H. O. Alexander, Esq., Stipendiary Magistrate in and for the county of Vancouver in the province of British Columbia, under the provisions of section 761 of the Criminal Code, in the case of *The King* v. *The Somerville Cannery Company, Limited,* the learned judge affirmed the determination of the Magistrate acquitting the defendant company of the charge that, on the 25th day of March, 1917, at Seal Cove, in the city of Prince Rupert, it did unlawfully operate a fish cannery, to wit, a clam cannery, contrary to and in violation of the provisions of the *Fisheries Act,* 1914, without first obtaining an annual license therefor from the Minister of Marine and Fisheries. The judgment proceeds upon the ground that section 7A of the said Act which requires an annual license from the Minister to be obtained for the operation of a fish cannery for commercial purposes, is *ultra vires* of the Parliament of Canada. From this decision there is no appeal, and the Minister, therefore, considers it to be expedient that immediate steps should be taken to obtain an ultimate judicial determination of the important questions, which this decision raises, as to the constitutional validity of section 7A and of other like provisions of the *Fisheries Act,* 1914.

" The Minister further submits that important questions have also been raised as to the constitutional validity of certain other provisions of the *Fisheries Act,* 1914, and as to whether, under certain provisions of the said Act and of the Special Fishery Regulations for the province of British Columbia made under the authority of the said Act, the Minister of Marine and Fisheries has a discretionary authority to grant or refuse licenses to fish or to operate a fish or salmon cannery in that province; and the Minister also considers it to be expedient to obtain a final judicial determination of these questions.

" The Minister accordingly 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 provisions of section 60 of the *Supreme Court Act:*

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1. Are sections 7A and 18 of the *Fisheries Act,* 1914, or either of them and in what particular or particulars or to what extent *ultra vires* of the Parliament of Canada?

2. If the said provisions of the *Fisheries Act,* 1914, or either of them be *intra vires* of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the license subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia?

3. Under the provisions of the Special Fishery Regulations for the province of British Columbia (made by the Governor in Council under the authority of section 45 of the *Fisheries Act,* 1914), respecting licenses to fish, viz., subsection 3 of section 14; paragraph (*a*) or (*b*) of subsection 1 of section 15 or paragraph (*a*) of subsection 7 of section 24 of the said regulations, or under said section 7A or 18 of the said Act, (if these sections or either of them be *intra vires* of the Parliament of Canada), has

(*a*) any British subject resident in the province of British Columbia, or

(*b*) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that province, or has the Minister a discretionary authority to grant or refuse such license to any such person whether a British subject or not?"

Pursuant to an order of the court, notification of the hearing of the reference was sent to the Attorneys General of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan. The Attorneys General of the provinces of Ontario, Quebec and British Columbia were represented by counsel at hearing; and the fishermen of Japanese origin in the province of British Columbia, as a class of persons interested, were represented by counsel as provided by subs. 4 of s. 60 of the *Supreme Court Act.*

Eug. Lafleur K.C., and *A. B. McDonald K.C.* for the Attorney General of Canada.

Chs. Lanctot K.C. and *Aimé Geoffrion K.C.* for the Attorney General of Quebec.

F. D. Hoff K.C. for the Attorney General of Ontario.

W. E. Williams for the Attorney General of British Columbia.

Aimé Geoffrion K.C. and *E. F. Newcombe* for the Japanese fishermen.

ANGLIN C.J.C.—I concur with Mr. Justice Newcombe.

DUFF J.—As to questions 1 and 2, I concur entirely with the view of my brother Newcombe.

As to question 3. The only express authority for the grant of licenses by the Minister of Marine and Fisheries is that given by section 7 of the Act, which is in these words:

> The Minister may, wherever the exclusive right of fishing does not already exist by law, issue, or authorize to be issued, fishery leases and licenses for fisheries and fishing wheresoever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor in Council.

This section was considered by the Judicial Committee of the Privy Council on the *Fisheries Reference* in 1898 (1). And it was there held that, in so far as it authorized the granting of the leases for fishing in places which were the property, not of the Dominion, but of a province, it was beyond the power of Parliament to enact; and, by section 3, the Act is to be read subject to this pronouncement. Section 3 leaves a considerable field for the operation of section 7 in relation to leases and exclusive licenses. When sect. 3 was passed, beds of the tidal waters within the British Columbia Railway Belt and on the coast of James Bay and the Arctic were the property of the Crown in the right of the Dominion, and to these waters the provisions of the section would apply. It would also apply to fresh water lakes and rivers, the beds of which are in the Dominion. In British Columbia this would include the beds of such waters in the Railway Belt and in the Peace River tract.

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

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When section 7 was first enacted, it was no doubt assumed, according to the view then held by the advisers of the Dominion, that the property in the beds of tidal waters was in the Crown in the right of the Dominion, and probably the intention of the section was to vest in the Minister authority to grant leases, and licences, exclusive as well as non-exclusive apparently, for fishing in such waters.

In view of the history of the section, there is much to be said for the view that the authority vested in the Minister under it is a discretionary authority. That is to say, that in point of law the Minister is under no legal duty to grant leases or licenses, or to grant any particular lease or any particular license. It is sometimes not easy in construing the provisions of a modern statute, by which powers are vested in a Minister of the Crown, to determine whether or not the Minister, as the depository of such powers, is intended to be constituted an agent of the legislature (see the argument of Sir George Jessel in *The Queen* v. *The Lords Commissioners of the Treasury* (1)), to exercise those powers, an instance of that being the statute considered in *Re Massey* (2); or whether the legislature has named him as the donee of the power in his capacity of servant of the Crown. As the Minister here is authorized to grant leases of Crown property, it seems probable that he is intended in executing his powers under the section, to act for, and in the name of the Crown. In this view of the Minister's functions, a subject would possess no right capable of specific enforcement in a court of law to demand a lease or license, *The Queen* v. *The Lords Commissioners of the Treasury* (1), although it would not necessarily follow that the Minister is not under a duty, a legal duty owing to and enforceable by the Crown, to grant licenses to applicants as they demand them.

In considering the question whether or not the section has the effect of constituting rights, that is to say, legal rights, vested in His Majesty's subjects, or a legal duty binding the Minister, owing to the Crown, one must first notice that, in form, the clause is permissive only. There has been a good deal of discussion upon the subject of the

(1) (1872) L.R. 7 Q.B. 387 at p. 389.

(2) (1886) 13 Ont. App. R. 446.

indicia, to which one must give attention, in considering whether a grant of authority permissive in form is coupled with an obligation to exercise that authority. The word "may" and similar expressions are always, in themselves, permissive in effect as well as in form, and a grant of authority in the form of section 7 does not itself imply any direction requiring the donee to act under the power. The subject was very fully discussed in the well-known case of *Julius* v. *The Bishop of Oxford* (1). At p. 235, Lord Selborne observes upon the question whether an enforceable duty arose to exercise a power admittedly conferred by statute, that in general such a question must be solved from the context of the particular provision and from the general scope and objects of the enactment conferring the power.

Looking first at the section itself, it is impossible to suppose that the authority vested in the Minister to grant leases was not a discretionary one, and, *prima facie,* at all events, the same must be said with regard to the authority to grant licenses. Is there anything, then, in the context—that is to say, in the parts of the Act which are *in pari materia* with section 7—or in the subject matter of the legislation, which requires us to imply the existence of a legal duty incident upon the Minister? Before turning to the particular regulations now before us, it should be noted that section 45, which empowers the Governor-in- Council to make regulations, expressly authorizes, in subsection (*c*), the prohibition of fishing except under the authority of leases or licenses. This enactment, in so far as it relates to leases or licenses by the Minister, seems to contemplate leases or licenses under section 7, and the particular regulations now in question (subsection (3) of section 14, paragraphs (*a*) and (*b*) of subsection 1 of section 14, and subsection (7) of section 24) were probably passed in execution of this specific authority. At all events, there seems to be no reason to doubt that a license under the authority of section 7 would constitute a sufficient warrant to exempt the holder of it from the prohibitions enacted by the regulations in question.

(1) 5 App. Cas. 514.

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There is nothing in the terms in which these provisions are expressed, nor, as far as I have been able to discover, in the terms of the regulations, pointing to a conclusion that the authority of the Minister is not a permissive one. Are there reasons, then, arising from the character of the subject matter, sufficiently potent to require us to hold that the Minister is under a duty to grant licenses to those who apply for them?

Speaking broadly, every subject of His Majesty is entitled to exercise the right of fishing in tidal waters in British Columbia, and a statutory enactment which in a reasonable view of it might expose such rights to oppressive or arbitrary or capricious restrictions, would receive a jealous scrutiny in any court called upon to enforce it. But, on the other hand, the authority to grant leases, given by section 7, necessarily involves some restriction of the public right, that is to say, the exclusion of the public as a whole, from the waters in which the exclusive right of the lessee prevails, and in the case of leases for nine years and less, the discretion to grant them is vested in the Minister; and so with regard to exclusive licenses. As to leases and exclusive licenses, the Minister's power is, of course, necessarily discretionary. You cannot, self-evidently, have two leases or exclusive licenses operating in the same *locus* at the same time and affecting the same kinds of fish, and, as no two localities are exactly the same, there is necessarily not only a limitation in respect of numbers, but discrimination as between parties to whom applications are granted. And, of course, in cases where a competition occurs, one applicant is unavoidably favoured to the disadvantage of all the rest. The natural inclination of Parliament against favouritism, to this extent at all events, yielded to considerations which must have appeared to be sufficient.

As to non-exclusive licenses, I can discover nothing in the subject matter which dictates an inference that, as regards these, the authority of the Minister is of a different order. There is a power of cancellation given to the Minister in the case of licensees who offend against the law. It seems difficult to suppose, if, in point of law, a discretion was not vested in the Minister to refuse an application for a license, that provision would not have been made, empowering

him to refuse, in cases in which he was satisfied, for any reason, that the applicant was not a fit person to receive a license from the point of view of a government department concerned with the observance or enforcement of enactments or regulations governing fisheries.

The authority of the Minister to grant licenses would appear to embrace the right to determine the stipulations of the lease, including in his discretion clauses of re-entry and forfeiture. I see no reason why it should be supposed that the Minister would not be entitled to insist upon special stipulations as to the methods by which fish should be caught. The same with regard to exclusive licenses. As to non-exclusive licenses, I should suppose that the regulations contemplate at least the possibility of special provisions as to special areas, and as to the kinds of fishing permitted. Where a license is granted for fishing with nets or other apparatus, I should suppose that the license ought to define in some way the instruments permitted and the manner and conditions in which such instruments are to be employed, and there would appear to be some reason to think, although we have not been favoured with any explanations on the point, that, as regards such licenses, some sort of discretionary authority would almost be necessary, in order to secure, with any degree of confidence, the objects of the regulation.

I do not see any reason for holding that the Minister might not refuse all licenses to fish for salmon, for example, with a particular kind of instrument, either generally or in a particular district. And it would, I think, be a singular thing if there were no discretion to refuse a license to employ a particular kind of instrument to a person who was known to have systematically abused his privilege by violating the Act or the regulations.

One consideration seems to be of importance. The donee of the power in this case is a Minister of the Crown, accountable, first of all to the Crown, that is to say, to the Government as a whole, and then to Parliament, for the execution of his powers. The subject is not susceptible of extended discussion; but such examination as I have made of the statute and such attention as I have given to the subject matter have not disclosed good reasons why the political sanctions, under which the Minister acts, should not,

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in the view of the legislature, have been regarded as quite adequate in themselves to insure an administration of the Act in good faith, with an eye to the public interest.

MIGNAULT J.—I fully accept the answers suggested by my brother Newcombe to questions 1 and 2 submitted under this reference.

With regard to question 3, however, I concur in the reasons stated in the judgment of my brother Duff, and I am of opinion that the authority delegated to the Minister is a discretionary one.

NEWCOMBE J.—The questions referred for the hearing and consideration of the court, with the enactments or regulations to which they relate, are the following:

Question 1.

Are sections 7A and 18 of the *Fisheries Act,* 1914, or either of them, and in what particular or particulars, or to what extent, *ultra vires* of the Parliament of Canada?

Section 7A of the *Fisheries Act,* 1914, of the Dominion, was enacted as an addition to the Act of 1914. It is to be found in c. 16 of 1917, and reads as follows:

7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual license therefor from the Minister. Where no other fee is in this Act prescribed for a cannery license, the annual fee for each such license shall be one dollar.

Section 18 appeared in the *Consolidated Fisheries Act,* c. 8 of 1914, as a section of four lines, but it was amended in 1919 by c. 52; in 1922 by c. 24, and again in 1924 by c. 24. These amendments have made important additions, and the section, as it stands within the purview of the question, as I interpret it, and as submitted at the hearing, reads as follows:

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a license from the Minister (1914, c. 8, s. 18).

(2) (*a*) The annual fee for a salmon cannery license shall be twenty dollars, and in addition, four cents for each case of forty-eight one-pound cans, or the equivalent thereto, of sockeye salmon, and three cents for each case of forty-eight one-pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (*salmo rivularis*), packed in such cannery during the continuance in force of the license. The said twenty dollars shall be paid before the license is issued, and the remainder of the license fee shall be paid as the Minister may from time to time by regulation prescribe. (1924, c. 43).

(*b*) The annual license fee for a salmon curing establishment shall be:—

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons;

Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons, but is not more than twenty tons;

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons, but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons. (1922, c. 24, s. 1).

Question 2.

2. If the said provisions of the Fisheries Act, 1914, or either of them be *intra vires* of the Parliament of Canada, has the Minister authority to issue a license for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationery cannery constructed on land, and, if so, is he entitled to make the license subject to any restrictions, particularly as to the place of operation of any such cannery in British Columbia?

Question 3.

3. Under the provisions of the Special Fishery Regulations for the province of British Columbia (made by the Governor in Council under the authority of sec. 45 of the *Fisheries Act*, 1914), respecting licenses to fish, viz., subs. 3 of sec. 14; par. (*a*) or (*b*) of subs. 1 of sec. 15, or par. (*a*) of subs. 7 of sec. 24 of the said regulations, or under said sec. 7A or 18 of the said Act, (if these sections or either of them be *intra vires* of the Parliament of Canada) has

(*a*) any British subject resident in the province of British Columbia, or

(*b*) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a license to fish or to operate a fish or salmon cannery in that province, or has the Minister a discretionary authority to grant or refuse such license to any such person, whether a British subject or not?

The special fishery regulations for the province of British Columbia to which this question refers are to be found in a pamphlet printed for the Department of Marine and Fisheries, which was introduced by counsel for the Attorney General at the hearing. They read as follows:

Subs. 3 of sec. 14: If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a license from the Minister to authorize

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his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such license. The fee for such license shall be one dollar.

Paragraphs (*a*) and (*b*) of subs. 1 of sec. 15:

(*a*) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under license from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing, except under license from the Minister.

(*b*) No license shall be granted to any person, company or firm, unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm, unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

Paragraph (*a*) of subs. 7 of sec. 24:

7. (*a*) No one shall fish for salmon for commercial purposes by means of trolling, except under license from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a license.

Paragraph (*b*) of this section adds that "the fee for a salmon trolling license shall be one dollar."

Section 45 of the *Fisheries Act*, 1914, under which these regulations were made, is in the following words:

45. The Governor in Council may make regulations:—

(*a*) for the better management and regulation of the seacoast and inland fisheries;

(*b*) to prevent or remedy the obstruction and pollution of streams;

(*c*) to regulate and prevent fishing;

(*d*) to prohibit the destruction of fish;

(*e*) to forbid fishing except under authority of leases or licenses; R.S., s. 54.

(*f*) prescribing the time and the manner in which fish may be fished for and caught;

(*g*) to prohibit the export or sale of any fish or any portion of any fish from Canada, or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in the *Canada Gazette* or from the date specified for such purpose in such regulations and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extended (*sic*) vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (*g*) shall not take effect until after six months after the date of its publication in the *Canada Gazette*.

3. Every offence against any regulation made under this Act may be stated as in violation of this Act.

At the hearing, the case was presented on behalf of the Attorney General, and counsel were also heard for the provinces of Quebec and British Columbia, and on behalf of fishermen of Japanese origin in the latter province, as a class of persons interested, as provided by subs. 4 of sec. 60 of the *Supreme Court Act*, under which the questions were referred.

Turning now to the first question, it will be observed that sec. 7A is grouped by Parliament along with sec. 7, under the subtitle "Fishery Leases and Licenses." Section 7 appeared, in identical terms, as sec. 4 of the *Fisheries* Act, c. 95 of the Revised Statutes of Canada 1886, and it was impeached by the provinces in the argument of the *Fisheries Case* of 1898, (1), but it withstood that attack, subject to one observation which I shall mention. Lord Herschell had pointed out that sec. 91 of the *British North America Act*, 1867, did not convey to the Dominion any proprietary rights in relation to fisheries; he had referred to the distinction which should be borne in mind between rights of property and legislative jurisdiction; it was only the latter, he said, which was conferred under the 12th enumeration, "Seacoast and Inland Fisheries"; he had held moreover that, in addition to the legislative power derived under the item "Seacoast and Inland Fisheries," the third item of sec. 91, "the raising of money by any mode or system of taxation," conferred that power exclusively, and he said

> their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish. It is true that by virtue of sec. 92 the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Then came the observation to which I have alluded. It followed, he said, that, in so far as sec. 4 of the Revised Statutes of Canada, 1886, c. 95, "empowers the grant of fishery leases" (with which in the text of the section is coupled "licenses")

> conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it.

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

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The qualification expressed in the last sentence was subsequently introduced by Parliament, *ipsissima verba,* into the Fisheries Act, and appears in the Consolidated Act of 1914 as sec. 3, limiting the application of the whole Act. That limitation was legislatively declared so early as the Revised Statutes of 1906, the revision which followed the reference of 1898, and it seems therefore to be manifest that the licensing of fish canneries for which sec. 7A provides is not intended to affect rights in the soil. It is an annual license for the operation of a fish cannery which the section requires, and it is inaptly grouped with the licenses mentioned in the preceding section.

An annual fee of $1.00 is imposed, unless another fee be prescribed by the Act; I have not discovered any such other provision, and our attention was not directed to any. It appears difficult to realize that the purpose of this section could have been the raising of money by taxation; certainly that was not the only purpose. The tax viewed as such is merely nominal, and could not, I should think, have been expected to indemnify for the cost of raising it. I have no doubt that the section, if it can be sustained at all, must be referred to the power which Parliament exercises in the regulation of Seacoast and Inland Fisheries. Undoubtedly Parliament has the exclusive authority to regulate what falls within that description, and one sort of regulation might be a licensing requirement. But a fish cannery is not, according to any of the definitions, or in practice, embraced within a fishery, seacoast or inland. It is for the preservation and marketing of the fish when caught and landed that the cannery fulfils a commercial purpose.

It was argued on behalf of the Attorney General that, although the canning of fish may not be a fishing operation, it is nevertheless ancillary to the exercise of the powers of regulation which the Dominion possesses under the *British North America Act,* and the obligation which it assumed under the terms of Union with British Columbia; much reliance was founded upon the powers which are described as ancillary. The word does not occur either in the act or terms of Union; but

> it must be borne in mind in construing the two sections (91 and 92) that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other,

John Deere Plow Co. v. *Wharton* (1), and "ancillary" has on occasions been used judicially as a convenient expression, by which to characterize some Dominion powers which have a provincial aspect, in relation to which the province may legislate, in the absence of a conflicting Dominion provision. An instance of this is to be found in the *Assignments & Preferences Case* (2); but the explanation is not that the Parliament, in the execution of an ancillary power, legislates upon a subject not strictly comprised in the enumerations of sec. 91, but that, when the Dominion power, in the particular in question, overlaps provincial powers, it suspends them only to the extent of its exercise.

Sec. 19 expressly declares that "notwithstanding anything in this Act" the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament so long as it strictly relates to these matters is to be of paramount authority.

Tennant v. *Union Bank of Canada* (3).

The powers thus known as ancillary must belong to the Dominion enumerated powers, while the subject, in another aspect, and for another purpose, is embraced within the provincial powers. Usually the competition has arisen as between a specified Dominion power and the very comprehensive provincial power of property and civil rights within the province. These enumerations, as has been said, do not embody exact logical disjunctions. Precise definition of the area broadly embraced under an enumerated power is possible only to a limited extent. There is, not unfrequently, as has been pointed out, a margin within which either legislation may operate, the one in the aspect of the enumerated Dominion power, the other under the broad provincial powers, so long as the field be clear. But the Dominion authority when exercised is paramount.

Now applying these principles, I think it is undoubted that, in the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the province where the operation is carried on, like the right to operate a fruit cannery or a vegetable cannery; and the question, as I see it, is whether the exer-

(1) [1915] A.C. 339. (2) [1894] A.C. 189.
(3) [1894] A.C. 31 at 46.

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cise of this right may be restricted or regulated by force of any enumerated Dominion power to which sec. 7A may be justifiably attributed.

I have said that in my opinion the enactment is not upheld by virtue of the taxing power.

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:

> A fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.

In Dr. Murray's New English Dictionary, the leading definition is:

> The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.

Neither the business of canning fish, nor the operation of a fish canning factory, is, by either of these definitions, nor by any other which I have found, comprised in "fisheries," as that word is used in sec. 91, or the terms of Union with British Columbia. Section 7A has no limited or special application to British Columbia, nor to anyone of the provinces as distinguished from another, and it should therefore receive a general and uniform interpretation. The colony was admitted into the Union on the terms and conditions expressed, subject to the provisions of the *British North America Act*, 1867, and the stipulation with regard to the fisheries which is embodied in the terms of Union consists merely in an undertaking on the part of the Dominion to "assume and defray the charges for the * * * protection and encouragement of fisheries," a provision which I am disposed to think does not extend the legislative powers of the Dominion to the licensing of fish canneries.

To prohibit, or to impose restrictive regulations upon, the sale or the storage of fish, or the manufacture and sale of fishing lines or nets, or of whalebone, etc., might operate to protect the fish and to reduce the catch. It might be a useful power to possess in connection with, or as auxiliary to, the regulation of the fisheries. Unlimited powers would be still more useful, but none of these powers can become effective in the hands of the Dominion unless, upon the true interpretation, included within the definition of sea-coast and inland fisheries, as used in sec. 91. While the catching of fish for canning may, I suggest, be prohibited or

regulated, there is no grant to the Dominion of the power, which s. 7A assumes, to control broadly the operation of the canneries.

It was urged by the factum of the Dominion, but was not pressed at the argument, that sec. 7A might be sanctioned under the power to regulate trade and commerce, but that contention may I think be regarded as disposed of by the considerations which were discussed by their Lordships of the Judicial Committee in the Insurance Reference. *Attorney General of Canada* vs. *Attorney General of Alberta* (1).

There is no other enumeration of s. 91 which covers the case, and therefore I come to the conclusion that the power to enact s. 7A is not to be found in any of the enumerations, and is not possessed by the Dominion, seeing that the subject belongs to one of the provincial enumerations.

Section 18 relates to salmon canneries and salmon curing establishments in British Columbia, and, viewed as a regulating provision, is governed by the considerations which determine the invalidity of sec. 7A. But there are, in the case of salmon canneries, a fixed annual license fee of $20.00, and additional payments to be made which are regulated according to the annual pack; it is moreover provided that, for a salmon curing establishment, the annual license fee shall be from fifty cents per ton to $1.25 per ton for the number of tons put up in the establishment during the season. These exactions give the enactment the appearance of a taxing provision, and it might perhaps, in other company, pass for that; but the Fishery Act is throughout a regulating Act, and it was as such that its predecessor, R.S.C., 1886, c. 95, was upheld in the *Fishery Case* of 1898 (2). In like manner in the present case, sections 7A and 18 were, on behalf of the Attorney General, maintained as deriving their sanction through the Dominion power to regulate sea-coast and inland fisheries. In the Special Fishery Regulations which were introduced into the case for purposes of the third question, it will be seen, by reference to s. 16, that the power to license canneries is, in fact, administered with a purpose to regulate their erection and operation. It provides as follows:

(1) [1916] A.C. 588. (2) [1898] A.C. 700.

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Section 16: Before a cannery license shall be granted the applicant therefor shall make a statutory declaration setting forth, in the case of an existing cannery, if it is owned by a company or firm, the name of such company or firm, whether it is a Canadian company or firm, licensed to do business in the province, or if not owned by a company or firm, the name or names and nationality or nationalities of the actual owner or owners of such cannery, and in the case of a new cannery, if it will be owned by a company or firm, the name of such company or firm and whether it is a Canadian company or firm licensed to do business in the province, or if it will not be owned by a company or firm, the name or names and nationality or nationalities of the person or persons who will own such cannery, and that in either case the applicant or applicants have the necessary capital to erect and operate such cannery.

This regulation was passed under no other power than that which the Governor in Council has by sec. 45 of the *Fisheries Act* to regulate the sea-coast and inland fisheries. There is of course nothing conclusive about it, but it seems to put the governmental practice in accord with the contention which was advanced on behalf of the Attorney General that sections 7A and 18 were enacted in execution of the regulating power. If, then, the regulation of the fisheries by means of the local establishments be a real purpose, as it is an avowed purpose, of requiring the licenses in respect of which the fees are imposed, it must I think follow that if these two sections fail in that respect for lack of enacting authority, they cannot be saved by invoking the taxing power.

Within the spheres allotted to them by the (B.N.A.) Act the Dominion and the Provinces are rendered on general principle co-ordinate governments. As a consequence where one has legislative power the other has not, speaking broadly, the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly,

per Lord Haldane in *Great West Saddlery Co.* v. *The King* (1). And in the same case His Lordship, in approaching the consideration of the pertinent question, which had to do with the validity of provincial legislation affecting the powers of Dominion companies, put it this way at p. 114:

Can the relevant provisions of all or any of the three sets of provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by sec. 92 to the legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion and so affect its status?

I think a purpose of s. 18 was to authorize the Minister to regulate salmon canneries and salmon curing establish-

(1) [1921] 2 A.C. 91 at p. 100.

ments by means of a system of licenses, and I think, for reasons which I have indicated, that the Dominion had no power to do this; and that, if so, the legislation is not exclusively attributable to the exercise of powers possessed by the Dominion, and cannot therefore be upheld as an exercise of the taxing power.

Question 2, in view of the foregoing, requires no answer.

As to question 3, that part of it which relates to ss. 7A and 18, is disposed of by the answer to question 1.

There remain subs. 3 of sec. 14; pars. (*a*) and (*b*) of subs. 1 of sec. 15, and par. (*a*) of subs. 7 of sec. 24 of the Special Fishery Regulations for British Columbia. These regulations are made by the Governor in Council under the authority of s. 45 of the *Fisheries Act*, 1914. It is not necessary to determine whether this section contains any delegation of authority to levy taxes. The regulations specified are put forward as Special Fishery Regulations for British Columbia, and the question submitted appears to be intended to relate only to their interpretation.

These regulations are of the same character and subject to common considerations. They prohibit fishing of various kinds, except under license from the Minister. They affect the public right of fishing, and, in some cases, may be found to extend to private rights, or several fisheries.

Subsection 3 of s. 14 is confined to fishing for herring or pilchard by drag-seine or purse-seine, and it is declared that no other than a British subject shall be eligible for the license provided for.

Paragraphs (*a*) and (*b*) of subs. 1 of s. 15 are introduced under the general heading of "Leases or Licenses"; paragraph (*a*) relates to the taking of abalone or crabs, and salmon fishing by means of drifting, or the operation of purse-seines or drag-seines; but paragraph (*b*) is of general application; it prescribes generally the conditions of disqualification for license in these words:

> No license shall be granted to any person, company or firm unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army Overseas, or to such company or firm, unless it is a Canadian company or firm, or is authorized by the Provincial Government to do business in the province.

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As to s. 24, subs. 7 (*a*), it applies only to the fishing for salmon for commercial purposes by means of trolling, and requires that every person in a boat that is being used in trolling for salmon shall have a license.

The regulations in question thus affect both public and private rights of fishing, and they should not be interpreted to derogate from those rights further than may be requisite to give the regulations their necessary and due effect. Those who are, according to the regulating provisions, declared to be ineligible, may not of course receive licenses; but where an applicant is eligible within the regulations, and not otherwise disqualified, there is no express provision for withholding a license, if he submit a proper application, and pay the prescribed fee, which, in each of the cases specified, appears to be no more than the sum of $1.

It is true that the licensing power is committed to the head of the Department, and no doubt will be administered with due care, but, if it were intended that he should exercise a discretion to refuse a license to a qualified applicant, there would, I should think, have been something expressive and definitive of that intention. The regulations which we are asked to construe derive their force not by direct legislative enactment, but through the exercise of powers delegated by the statute to the Governor in Council. The powers are very large, and the regulations to be made under them are declared to have the same force and effect as if enacted in the Fisheries Act. They are of the nature of statutory rules. Section 45 of the *Fisheries Act*, 1914, authorizing the regulations, is like the provision which was interpreted by the House of Lords in *Institute of Patent Agents* v. *Lockwood* (1), where the Lord Chancellor (Herschell) said in his speech:

> The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions, and if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was

(1) [1894] A.C. 347, at pp. 359, 360.

within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration whether it be so or not.

But no legislative power is delegated to the Minister, even if the Governor in Council could delegate any of his statutory powers. No express power is conferred upon the Minister, except to issue licenses, and, in my view, it is improbable that it was intended to confer a reviewable discretion, or that, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner which might sanction discrimination. There is no provision, beyond those contained in subs. 3 of s. 14, and subs. 1, pars. (*a*) and (*b*) of s. 15, of the regulations submitted, which prescribes disqualifications or prohibited classes, and I am not satisfied that the statutory rules, which go no further than to impose a general requirement for licenses, for which a fee is to be paid as a condition to the exercise of the right of fishing, should be interpreted by implication further to limit that right by making the issue of the license discretionary in the judgment of the licensing authority.

The answers may therefore be stated as follows:

Question 1: The answer, as to both sections 7A and 18, is entirely in the affirmative.

Question 2: In view of the preceding answer, this question requires no answer.

Question 3: As to each of the specified regulations, viz., subs. 3 of sec. 14; pars. (*a*) and (*b*) of subs. 1 of sec. 15, and pars. (*a*) and (*b*) of subs. 1 of sec. 15, and par. (*a*) of subs. 7 of sec. 24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has, according to the true interpretation of these clauses, the right to receive a license, if he submit a proper application and tender the prescribed fee. As to any person resident in the province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in subs. 3 of sec. 14, it being expressly declared by that subsection that " no other than a British subject shall be eligible for such license." And none of the

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other licenses in question shall, as provided by par. (*b*) of subs. 1 of sec. 15, be granted to any person, unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as sections 7A and 18 are held to be *ultra vires*.

RINFRET J.—I concur with Mr. Justice Newcombe.

LAMONT J.—I concur with Mr. Justice Newcombe.

SMITH J.—I concur with Mr. Justice Duff.

The judgment of the court is as follows:

The unanimous answers may be stated as follows:

Question no. 1: The answer, as to both sections 7A and 18, is entirely in the affirmative.

Question no. 2: In view of the preceding answer, this question requires no answer.

As to question no. 3, the answer found by Anglin C.J.C. and Newcombe, Rinfret and Lamont JJ., is as follows:

As to each of the specified regulations, viz., subs. 3 of s. 14; paras. (*a*) and (*b*) of subs. 1 of s. 15, and para. (*a*) of subs. 7 of s. 24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has, according to the true interpretation of these clauses, the right to receive a license, if he submit a proper application and tender the prescribed fee. As to any person resident in the province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in subsec. 3 of sec. 14, it being expressly declared by that subsection that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by para. (*b*) of subsec. 1 of sec. 15, be granted to any person, unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret

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the regulations with respect to the operation of fish or salmon canneries, inasmuch as sections 7A and 18 are held to be *ultra vires*.

But this answer is varied by that of Duff, Mignault and Smith JJ., as follows:

The Minister has a discretionary authority to grant, or refuse, such license to any person who is a British subject resident in the province of British Columbia, or is a returned soldier who has served in His Majesty's Canadian Navy or Army overseas.

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*May 3.
*June 12.

MARY V. BUSCH AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE EASTERN TRUST COMPANY (PLAINTIFF)

AND

HOWARD WHISTON AND MARION B. BUSCH, EXECUTORS OF THE LAST WILL AND TESTAMENT OF WALTER J. BUSCH, DECEASED (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Will—Construction—Vesting—Direction to divide at future time

A testator's will, after providing for collection and payment of debts and for certain specific legacies, provided for sale of certain property, comprising the residue of his estate, and investment of the proceeds and payment of the interest for the maintenance of his wife and daughter A until A (who, however, predeceased the testator) attained 21 years of age, and, on A attaining 21 years of age or dying, for payment of $400 of interest to his wife annually during her life, and then provided that "any money remaining after the payment of said $400 shall be equally divided among my children * * * the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares."

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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Held, that the estate of any deceased child of the testator who died in the lifetime of the testator's widow and left no issue him surviving was not entitled to share in the income from the said residue or in the corpus when divided on the widow's death.

The following passage from Williams on Executors, 11th ed., p. 981, quoted with approval: "Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected."

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 486) reversed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming the judgment of Graham J. (2) on the construction of a will. The provisions of the will, the questions to be determined, and all material facts are sufficiently stated in the judgment now reported. The appeal was allowed.

Carl P. Bethune for the appellants.

E. Hart Nichols K.C. for the respondents Howard Whiston and Marion B. Busch, executors of the last will and testament of Walter J. Busch, deceased.

The judgment of the court was delivered by

NEWCOMBE J.—In order to grasp this case, it is necessary to read the following clauses of the testator's will:

I direct that so soon after my decease as practicable my book debts and choses in action to be collected and my debts paid;

I give, devise and bequeath:

(1) To my wife all my household furniture;

(2) To my son, WALTER JOHANNES, my business, office furniture, books, plans, papers, and instruments connected therewith or belonging thereto;

(3) To my son, ERNEST and his Heirs, a lot of land owned by me on Clifton Street in the said City, 40 x 120 feet and purchased by me from representatives of Lahey;

(4) I give, devise and bequeath my properties on Gottingen, North and Creighton Streets to my said Trustees or the survivor of them upon trust to sell said properties or either of them if they shall see fit, either at Public Auction or Private Sale. And in the event of such sale I direct them to invest the proceeds arising therefrom in Mortgages of real estate

(1) (1927) 59 N.S. Rep. 486; (2) (1927) 59 N.S. Rep. 486. [1928] 1 D.L.R. 554.

or other security approved by them and pay the interest of such investments to my wife for the proper maintenance of herself and the support and education of my youngest daughter until she shall reach the age of twenty-one years;

It is my will that my Uncle, CHARLES WALTHER, shall have a home with my wife for his life but should any disagreement take place to prevent, then I direct my Trustees to deduct from the interest of said investments the sum of $100, One Hundred Dollars, annually and pay the sum in quarterly instalments during his life-time to my said Uncle. Should my said Trustees not sell said properties I hereby authorize them to let the same and apply the rentals towards the maintenance of my said wife, the support and education of my said daughter and to provide a home for my said Uncle, for the payment to him of said One Hundred Dollars as aforesaid;

On my daughter, AMELIA, reaching the age of twenty-one years, or dying before said property shall be sold, I direct that out of the proceeds to be realized therefrom, a sufficient sum shall be invested as aforesaid so as to produce Four Hundred Dollars ($400) annually, which shall be paid to my wife in quarterly instalments for the support of herself and a home of my said Uncle which sum shall include the One Hundred Dollars hereinbefore provided to be paid to him on disagreement. On his decease, the whole of the said sum shall be paid to my wife during her life for her sole use. Any money remaining after the payment of said Four Hundred Dollars shall be equally divided among my children free from the interference or control of any other person; the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares and free from the interference or control of my daughters' husbands;

The above bequests are made to my wife upon the condition that she releases all other interests she may have in my property by right of dower or otherwise; On the marriage of my wife all payments to her as hereinbefore provided shall immediately cease and all my real estate then held shall be sold and the proceeds divided; One-third to my wife (in lieu of dower) and the balance together with the residue of my estate in equal shares among my children, and the share of my daughters to be free from the control of their respective husbands, the issue of a deceased child to take parent's share;

The testator, Henry F. Busch, who resided at Halifax, Nova Scotia, died on 28th January, 1902, leaving a will, without date, which was proved on 3rd February following. The probate was granted to executors named in the will, but subsequently, by order of the court of 7th August, 1925, the Eastern Trust Company (plaintiff) was appointed executor and trustee, to act jointly with the testator's widow and son, Henry C. Busch.

The proceeding was by originating summons, dated 22nd March, 1927, at the instance of the Trust Company, to de-

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termine certain questions which are thus set out in the summons:

(*a*) Whether under the true construction of the Last Will and Testament of Henry F. Busch, late of Halifax in the County of Halifax, Architect, deceased, the Trustees under said will were required to invest the whole of the residue of the said Estate (after payment of debts, liabilities, expenses and specific legacies) or only so much thereof as would be reasonably necessary to produce the annuity of $400 per annum by the said Will directed to be paid to the widow of the Testator during her widowhood?

(*b*) Whether under the true construction of the said Will any portion of the corpus of the said residue should be paid to the Testator's children or their issue prior to the death of the Testator's widow?

(*c*) Whether under the true construction of the said Will the estates of any deceased children of the Testator who died in the lifetime of the Testator's widow, and left no issue them surviving respectively are entitled to share in the income from the said residue or to any share of the said residue when same is divided?

(*d*) Whether under the true construction of the said Will when the said residue is divided the issue of any deceased child or children will share equally with the children of the Testator living at the date of the death of Testator's widow or whether on such division such issue of any deceased child or children shall respectively divide the share or shares their parent or parents would, if living, have respectively taken?

(*e*) How the costs of this application are to be borne?

The only evidence introduced came by way of the admissions, which are stated as follows:

For the purpose of determining the questions raised by the Originating Summons issued herein, the following facts are agreed upon by Counsel representing all the parties herein, namely:

1. Henry F. Busch, the Testator died on the 28th of January, A.D. 1902, leaving a Will, copy of which is hereto attached and marked "A."

2. Probate of the said Will was granted in the year 1902 to the Executors therein named.

3. By an Order of the Supreme Court of Nova Scotia dated August 7, 1925, and made in a certain proceeding to be identified as 1924 C. No. 6329, The Eastern Trust Company, the above named Plaintiff, was appointed Trustee under the said Will and has since been carrying on the trusts imposed by the Will.

4. The Testator's Uncle, Charles Walther, and the Testator's youngest daughter, Amelia, referred to in the said Will, both predeceased the Testator.

5. At the time of his death the Testator left surviving him his widow, Mary Victoria Busch, who is a Defendant herein and three sons, namely, Henry C. Busch of Boston, Mass., Ernest A. Busch of Halifax, N.S., and Walter J. Busch of Halifax, N.S., now deceased, and two daughters, Marea R. C. Whiston of Halifax, N.S., and Wilhelmina Boutilier, now deceased. The said Henry C. Busch, Marea R. C. Whiston and Ernest A. Busch are Defendants herein.

6. The Testator's son, Walter J. Busch died on or about the 14th day of July, 1924, leaving no issue him surviving but having first made

a Will, the Executors of which are Howard Whiston and Marion B. Busch, who are Defendants herein.

7. The Testator's daughter, Wilhelmina Boutilier died after the death of the Testator leaving her surviving the following children, namely, Marion V. M. Bray, Marea T. C. Boutilier and Herbert R. Boutilier of Soda Lake, in the Province of Alberta and Ruth Boutilier of Halifax, N.S., Lily M. Boutilier, Robert J. Boutilier and Arthur B. Boutilier. The said Marion V. M. Bray, Marea T. C. Boutilier, Herbert R. Boutilier and Ruth Boutilier are Defendants herein as is also Arthur M. Boutilier, the Guardian of the minor children of the said Wilhelmina Boutilier deceased, namely Lily M. Boutilier, Robert J. Boutilier and Arthur B. Boutilier.

The case was tried by Graham J., who gave the following answers, as settled by the order of 21st October, 1927:

(*a*) The Trustees were empowered to sell the whole or any part of the residue of the said Estate (after payment of debts, liabilities, expenses and specific legacies) and were required to invest the proceeds of all the residue so sold.

(*b*) No portion of the corpus of the said estate was to be paid to the Testator's children or their issue prior to the death of the Testator's widow.

(*c*) The estates of any deceased children of the Testator who died in the lifetime of the Testator's widow, and left no issue them surviving respectively are entitled to share both in the income from the said residue and in the said residue itself when same is divided.

(*d*) On the division of the residue of the said estate the issue of any deceased child or children of the Testator shall respectively divide the share or shares their parent or parents would, if living, have respectively taken.

The parties accepted these answers, except the third, marked (*c*), as to which the testator's widow, and the other parties who had been summoned, except the executors of Walter J. Busch, appealed to the Supreme Court of Nova Scotia *en banc,* and the respondents were the Eastern Trust Company, and the last mentioned executors. Chisholm J., with whom the Chief Justice, Carroll and Jenks JJ. concurred, pronounced the judgment of the Court *en banc,* whereby the trial judge was upheld, and the appeal was dismissed. Mellish J. dissented. There is an appeal to this Court by the same appellants, and limited to the same question.

One must decide according to the intent appearing upon the will. I see nothing to suggest that this testator was *inops consilii,* and there is no defect of words for the law to supply; when a bequest is given, it is framed in apt terms, whether the gift is to take effect in future, or to continue for a limited time, or where the payment is to be post-

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poned; when specific properties are given with the intent that the gift shall take immediate effect, the testator says: "I give, devise and bequeath"; and he repeats these words with respect to the Gottingen, North and Creighton St. properties, which are put in trust; and, the testator's directions to his trustees with respect to these properties are expressed in language which regard for simplicity makes sufficiently intelligible.

The trustees were empowered to sell the whole or any part of the lands so devised, which, in the findings, are apparently regarded as the whole of the residue of the estate, and they were required to invest the proceeds of the residue so sold, and to pay the interest of the investments to the testator's widow for the maintenance of herself and daughter Amelia, until the latter should reach the age of twenty-one years. If the trustees did not sell they were authorized to lease, and to apply the rents to the maintenance of the widow and her daughter, and to provide a home for the testator's uncle, but, in the events which happened, both the daughter and uncle having died before the testator, the direction was that, out of the proceeds to be realized, a sufficient sum should be invested to produce $400 annually, to be paid to the widow, in quarterly instalments, during her life, for her sole use. Then follows this sentence: "Any money remaining after the payment of said $400 shall be equally divided among my children, free from the interference or control of any other person; the issue of any deceased child to take parent's share." It is here that the testator's children, and their issue, are first introduced. We have no copy of the inventory or accounts, but there is an affidavit of Marea R. C. Whiston, one of the testator's daughters, sworn on 27th February, 1928, which forms part of the case, with which is produced a statement of the Eastern Trust Company showing that the value of the investments held by it on behalf of the testator's estate amounts to $13,462.78, also that there is a balance to the credit of Income Account, amounting to $689.37, and she says therefore that she believes the present value of the estate to be $14,152.15. There was thus probably some income in excess of that required for the widow.

It is not suggested that, in the clause last quoted, "any money remaining after the payment of said $400," includes

capital of the estate, or that this clause refers to a distribution of capital antecedent to the death of the testator's widow; and, however reasonable it may be that the residue should be reserved for the testator's children and their issue upon the death of his widow, I cannot discover that he has revealed any intention to make it the subject of gift previous to that event.

The learned trial judge finds, and it is not questioned, that, as to the surplus income, the testator had in view a periodic division, so that annually, after the death of Amelia, the excess income, if any, of the fund which had been invested by the trustees to produce $400 annually for the widow, should be equally divided among the testator's children, "the issue of any deceased child to take parent's share." I am willing to acquiesce in that interpretation; it has become conclusive by the findings; but I deny that any implication or inference arises from it, either upon reason or authority, that, on the death of the widow, when the purpose of the investment is satisfied, the testator intended that the children, or their issue, should take the whole, and especially so, seeing that the testator expressed his intention in the next succeeding sentence, which provides for the disposition of the residue, and upon which the controversy turns.

It must be remembered that the residue had been given in trust, and that no provision whatever had been made for the children, except the gift of some interest already mentioned. The testator's words then are "On the death of my wife, the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share), said division to be in equal shares and free from the interference or control of my daughters' husbands." Upon the assumption that the widow satisfied the condition upon which the testamentary provisions for her benefit were expressly made, the clause which directs the division of the residue upon her death is the only expression of the will which gives the testator's children an interest in the residue, and it does not, according to my interpretation, in the grammatical and ordinary sense of the language used, operate before the time so specified. This interpretation produces no absurdity, repugnance or inconsistency with the rest of the instru-

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ment; and, so far from coming into conflict with any recognized rule of construction, it is in conformity with the rules declared in the books. It is "On the death of my wife" that "the whole of my property shall be divided," etc. It is then that "the issue of any deceased child shall be entitled."

It is said in Williams on Executors, 11th ed., p. 981,

> Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected.

And this rule is established by numerous authorities cited in the note. To the like effect is the text of Mr. Jarman's original edition, as incorporated in the sixth edition at p. 1399. And see *Smell* v. *Dee* (1), and the judgment of Kekewich J., in *Re Eve* (2). It is unnecessary, however, to go beyond the golden rule, to which I have already referred. There are, for the children and their issue, no words of present gift to be found in the will, and no language to interpret which can, consistently with the will, be made effective to vest the residue at the testator's death.

The learned trial judge finds such a provision by implication, because the children, he says, immediately became beneficiaries. They may have done so with respect to uncertain amounts of surplus income, if any, by reason of the death of Amelia in the testator's life time, but I do not feel justified to infer or to imply from this accident a gift of the residue, or one which the testator has failed to express.

Referring to the clause which provides for the residue, the Court *en banc* paraphrases the words in brackets thus:

"In the case of the death of any of my children leaving issue, then to such issue."

And it is said that a reasonable construction would be that the testator intended to make a vested gift to each of his children, subject to be divested in favour of the issue, in case of the death of a child leaving issue. I have already said that I see no evidence of beneficial vesting of the corpus before the death of the widow, and it is, I am sure, not permissible to introduce it by way of a paraphrase. It

(1) 2 Salk. 415.

(2) (1905) 93 L.T. 235.

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has been said not infrequently, and with great force, that it is mischievous to regard the testator as saying anything which he has not said, and especially must this be so when the paraphrase serves to eliminate a pregnant expression.

I would allow the appeal and answer the question in the negative.

Appeal allowed.

Solicitor for the appellants: *E. C. Phinney.*

Solicitor for the respondents Howard Whiston and Marion B. Busch, executors of the last will and testament of Walter J. Busch, deceased: *E. Hart Nicholls.*

Solicitor for the respondent The Eastern Trust Company: *C. B. Smith.*

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*Feb. 8, 10.
*May 18.

WILLIAM C. KRUMM (PLAINTIFF).....APPELLANT;

AND

MUNICIPAL DISTRICT OF SHEPARD No. 220 AND WILLIAM HINDE (DEFENDANTS) ..... } RESPONDENTS.

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

Municipal corporation—Taxation—Sale of land for taxes—Action for damages—Land assessed to son of owner—Son instructed by owner to pay taxes—Inference of owner's knowledge of wrongful assessment—Estoppel—Rural Municipality Act, (1911-12), s. 290.

The appellant's testator, residing at Philo, Illinois, was the registered owner of a half section of land, upon which he had been paying taxes for many years. On the 9th of May, 1919, he wrote the respondent Hinde, who was the secretary-treasurer of the respondent municipality, asking for the amount due for taxes. Notice of the assessment for 1919 and the taxation notice were subsequently sent to the deceased. In the admission of facts by the parties, it is stated that the father instructed his son "to pay the taxes on said land and (the son) did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so." The taxes for 1919 were remitted by the son in his own name and an official receipt in the same name was sent to the son, whose post office address was the same as the father's. Assuming that the son had become the owner of the land, the respondent Hinde made

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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up the 1920 assessment (which carried five years) in the name of the son, prepared and sent the assessment and taxation notices for that year in the name of and to the latter and received payment of those taxes from him. For the succeeding years, the requisite taxation notices in the name of the son were sent to him. No further taxes having been paid, the land was sold under the *Tax Recovery Act*, R.S.A., 1922, c. 122. The appellant brought an action in damages for the loss of the land by reason of the alleged wrongful acts of the respondents.

Held, Mignault J. dissenting, that the respondents were not liable.

Per Duff, Lamont and Smith JJ.—The respondent Hinde's delinquency in omitting the father's name from the assessment roll falls wholly within the intendment of the words "error committed in or with regard to such roll" comprised in section 290 of the *Rural Municipality Act* and this curative section applies and has the effect of validating the roll. Mignault and Newcombe JJ. *contra*.

Per Duff and Smith JJ.—The facts admitted afford sufficient evidence to establish, at least *prima facie*, that the act of the son in paying the taxes of 1920, as demanded from him, that is to say, as taxes payable by him as the person assessed as owner of the land, was the act of the father. That again appears, in the absence of explanation, to be sufficient evidence of the assent of the father to the assessment of the land in the name of his son. Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation, and instructed the son specifically to pay "pursuant to the notice," or he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction, it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father (Story par. 140). Mignault and Lamont JJ. *contra*.

Per Newcombe J.—The taxes for 1920 were paid upon the assessment of the son, and they were paid by the father as owner of the land, although assessed in the name of the son, because the latter was acting as his father's agent, and therefore it may be inferred, there being nothing to the contrary, with his father's knowledge of the facts relating to the assessment, which had come into the son's possession in the course of his agency; and if the owner intended to question the assessment or taxation, that was surely the time to raise the objection; but no exception was taken, and not unnaturally the municipality proceeded upon the assessment in the following years in the manner which it had adopted in 1920; and the facts which are admitted or in proof should be held to justify a finding of acquiescence, or of leave and license of the respondents to do the acts complained of. The act is not injurious, and the proof constitutes a defence according to the maxim *volenti non fit injuria*. Not only is it to be inferred that the owner paid the taxes of 1920 with the knowledge that the assessment, which was a continuing assessment, was against his agent, to whom the statutory notices had been sent, but it would appear from the admission that his instructions continued to extend also to subse-

quent years covered by the assessment of 1920, or at least to 1921. Therefore the municipality was entitled to proceed on the faith of the owner's acquiescence and consent. Mignault and Lamont JJ. *contra.*

Per Mignault J.—The appellant is not estopped from objecting to the wrongful assessment. The father did nothing which could in any way lead the assessor to believe that the son had become the owner of the land. Any agency which may have existed between the father and the son did not go further than an instruction to pay the taxes, which presupposed an assessment of the father rendering him liable to municipal taxation. There was no such assessment, and moreover the respondent Hinde never dealt with the son as an agent of his father, but as the owner of the land, which the respondent Hinde gratuitously assumed him to be. No knowledge by the father of the assessment of his son has been established, nor can such knowledge be inferred, the more so as the respondents took no steps to secure the testimony of the son, the onus of proving knowledge, as a basis for estoppel, being on them.

Per Lamont J.—According to the admission of facts, the son received instructions to pay the taxes in 1919, and "pursuant to said instructions" he paid in 1919 and 1920. The construction to be placed upon the language of this admission is that prior to the time he paid the taxes in 1919, the son had received general instructions from his father to pay the taxes on the land, and that, pursuant thereto, he paid them for two years. The admission does not justify the inference that the father gave instructions each year to pay the taxes, or that he had any knowledge that the land was assessed to his son in 1920. If the parties had intended by this admission to state that the father had given fresh instructions to his son each year, the admission would have been couched in different language.

Judgment of the Appellate Division (23 Alta. L.R. 113) aff. Mignault J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Walsh J. (2) and dismissing the appellant's action in damages.

R. B. Bennett K.C. and *H. G. Nolan* for the appellant.

C. S. Ford K.C. for the respondents.

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

(1) (1927) 23 Alta. L.R. 113; [1927] 2 W.W.R. 330.

(2) [1927] 1 W.W.R. 586.

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DUFF J.—The basis of the appellant's claim is that the lands in question were never assessed, that the sale was consequently a wrongful sale, and he claims reparation by way of damages.

The cardinal point in controversy concerns the validity of the assessment. Has the appellant established that there was no assessment upon which, under the statutory law of Alberta, the taxation of the testator's land could validly proceed?

The facts pertinent to this dispute about the assessment are these. The lands were assessed in the name of John F. Krumm for the year 1919 and for many years preceding. The assessor, the respondent, William Hind, in that year, having in response to a tax notice, in the usual form, addressed to John F. Krumm, received payment of the sum demanded, from Herbert Krumm, who was in fact a son of John F. Krumm, assumed from the form in which the payment was made (the particulars of which are not before us), that there had been a change of ownership; and in the following year, 1920, in course of a five-year (so called) assessment made in that year, the assessor, without further inquiry, changed the entry in the assessment roll, striking out the name of John F. Krumm as owner, and substituting therefor the name of Herbert Krumm. The roll containing this entry was finally completed by the assessor, and certified by the secretary, pursuant to the requirements of section 290, and no appeal was taken in respect of this assessment.

In point of fact there had been no change of ownership. John F. Krumm was still the owner, and Herbert Krumm possessed no interest in the property.

By reason of this erroneous statement of the fact of ownership, and of the circumstances in which the entry of the name of Herbert Krumm was made, the purported assessment is alleged to be in point of law no assessment at all, within the provisions of the assessment law of Alberta. More precisely, the purported assessment is impeached in this way. John F. Krumm had, as already mentioned, for many years been assessed as owner, had received the assessment notices and the tax notices, and in response thereto, had duly paid his taxes. The owner, for the present purpose, within the meaning of the *Rural Municipality*

Act, is a person possessing a registered interest or an interest under an agreement for purchase expressed in writing.

The law, it is argued, requires that land be assessed in the name of the person who is the owner in the statutory sense, and this, it is said, is an essential condition of a valid assessment. It follows, it is contended, that the entry of the name of Herbert Krumm as owner, is, in law, no entry at all, and that the purported assessment, lacking one of the essential ingredients of an assessment, is void.

Further, it is contended that, before striking the name of John F. Krumm from the roll, the assessor was bound, it was his duty as assessor, at least to take the usual measures for ascertaining whether or not he was no longer interested as owner in the statutory sense. Common prudence would have suggested, it is argued, a search in the land registry office or communication with John F. Krumm himself. Neither of these obvious steps was taken. The assessor, in effecting the change under an impression produced by the communication from Herbert Krumm, was palpably departing from his statutory duty, it is argued, to investigate the facts before doing so.

The court below have held that this contention in both branches of it is completely answered by the terms of Section 290, already alluded to, and I come at once to an examination of that Section, in its bearing upon the facts in evidence. It is in these words.

290. When the roll is finally completed the secretary shall over his signature, enter at the foot of the last page of the roll the following certificate filling in the date of such entry: "Roll finally completed this * * * day of * * * 19 * *, and the roll as thus finally completed and certified to shall be valid and bind all parties concerned subject to amendment on appeal to the court of revision and to further amendment on appeal to the District Court Judge notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in any notice required by this Act or any omission to deliver or to transmit any such notice.

This section, of course, only takes effect where there is an assessment roll within the meaning of the section, and where the impeached assessment is something which can be described as an assessment recorded in the roll. As to the roll, it is not disputed that it was prepared by a legally competent assessor professing to act generally in compliance with the requirements of the law, and that *ex facie*

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it does conform to those requirements. In form, it was duly completed by the assessor, and it was certified by the secretary, pursuant to section 290. It is, therefore, the assessment roll, within the meaning of section 274, and within the contemplation of section 290. The impugned entries constitute, *ex facie*, the record of an assessment which is part of the roll.

These being the facts, what is the effect of section 290? "The roll," as thus finally completed and certified, and including the impeached assessment,

shall be valid and bind all parties concerned subject to amendment on appeal, notwithstanding any defect or error committed in or with regard to the roll.

There is, I think, little or no doubt as to the force of these words. As regards any such "defect or error," the conditions prescribed being fulfilled, the roll, as well as the assessments recorded in the roll, are to be deemed to be valid, and, among all parties concerned, the roll is to be taken as the unimpeachable record of those assessments.

Was the deviation from the statutory directions which this case presents, a

defect or error committed in or with regard to the roll?

Or, was it, on the contrary, as is contended, a deflection of a kind to which the protection of this enactment does not extend? That it involved such an "error," hardly admits of dispute. Error, for our present purpose, cannot be better defined than in the words of the Oxford Dictionary.

Something incorrectly done through ignorance or inadvertence; a mistake, in calculation, judgment, speech, writings, action, etc.

The assessor's act in substituting Herbert Krumm's name for that of John F. Krumm seems to fall, in this sense, within the description "error committed in or with regard to such roll." Nor can I agree that the facts in evidence impart to the assessor's act such a character as to remove the assessment from the ambit of section 290.

First, it is to be observed that, in order to place a particular assessment beyond the operation of the section, it is not sufficient to establish that the blemish is of a kind which, but for the section, would have vitiated it in point of law. That is decided in the *City of Wetaskiwin* v. C. *& E. Townsites Ltd.* (1).

(1) (1919) 59 Can. S.C.R. 578.

Nor is it enough, for this purpose, to show that the names of the persons interested in the property assessed have been omitted from the roll, and that the person whose name has been placed there has no interest in the property. Obviously, since everybody possessing an interest under a written agreement for purchase falls within the category of owner, such a rule would be impracticable; and section 261, which in such cases provides for an appeal by the same procedure as that prescribed where the complaint is against the valuation, shows that the statute does not so treat such a misstatement of the facts of ownership. A misstatement concerning those facts, may, of course, be specially noxious, inasmuch as the owner interested may, by reason of it, be deprived of the benefit of notice. But section 290, by explicit terms, embraces cases in which no notice has been sent, and the grievance arising from absence of notice may be just as serious where the omission of the true owner's name is natural or almost inevitable, as when it is due to culpable neglect. The fact that omission to transmit notice is a result or a concomitant of the error complained of, cannot, therefore, be a ground for holding the municipality disentitled to the benefit of section 290.

Nor can I discern any reason, founded in legal principle, for holding that this result accrues from the fact that the assessor's error arises from a palpable mistake of judgment or from negligence—gross negligence, if you will. We are told that the entry must be regarded as non-existent. I cannot agree. Both in intent and in deed, in making the entry, the assessor was officially engaged in preparing the assessment roll. His bona fides, the genuineness of his belief that it was his duty to make the change, is not assailed. Besides, as already observed, the assessment forms part of the roll, which, by the express enactment of section 274, is the assessment roll of the municipality. Beyond doubt an appeal would have been competent, under section 261.

I cannot understand upon what principle we can affirm that this assessment is so destitute of substance that there is nothing upon which section 290 can take effect. The assessor's act, to borrow an expression from the law af agency, was done in the course of his employment, and it was one of the class of acts which it was his official duty to do; and if he had been the agent of the municipality, the munici-

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pality would be responsible for his negligence. On this point we may perhaps receive some enlightenment from the decision of the Privy Council in the *Shannon Realties Case* (1). The assessment authorities of a municipality, who were required by statute to value land, for assessment purposes, at its real value, had, during a series of years, disregarded the statutory rule, and had, designedly, as the trial judge found, assessed the lands in the municipality upon a different principle, and according to a scale which had no relation to their real value. The statutory rule had been deliberately discarded by the municipality. On that ground the assessment rolls for the years in question were attacked, in an action claiming a declaration of nullity, and in the courts of Quebec the assessments were set aside. In this court, the judgment of the Quebec courts was reversed, on the ground that there was a statutory remedy by way of appeal for grievances in respect of valuation, and that, as this remedy was available, notwithstanding the intentional departure from the statutory principle, the assessments could not be treated as nullities. The Quebec legislation, which was there applied, contains no curative provision such as section 290, but the decision illustrates the distinction between nullity, resulting from incompetency, and mere illegality, in the sense of a culpable failure to observe a statutory direction in the performance of official duty. The decision of this court was confirmed by the Judicial Committee.

I am not quite convinced that, in testing the appellant's contention, one can admit any real distinction between an error in the identification of the owner and an error consisting in a departure from the statutory rule governing valuation. Section 252 of the Alberta Act prescribes this rule,

> Land shall be assessed at its actual cash value as it would be appraised in payment of a just debt from a short debtor.

The right of appeal in respect of a misstatement in relation to ownership is given in the same section (Sec. 261), and *uno flatu,* with the right of appeal in respect of excessive or insufficient valuation; and the procedure in appeal is identical in the two classes of cases. If error

(1) [1924] A.C. 185.

springing from negligence, gross negligence, if you like, when it relates to the first matter, is a good ground for affirming non-existence of the assessment, and for holding that the rehabilitating operation of section 290 does not come into play, there is at least no patently necessary reason for affirming that, in the matter of valuation, violation of the statutory rule, originating in similar derelictions, is entirely without effect upon the legal validity of the assessor's proceedings. Absence of notice is not important here, because, as we have observed, in the scheme of section 290, absence of notice is immaterial.

It would not be suggested that an excessive valuation in deliberate disregard of the rule of sec. 252, or due to the assessor's indifference to his duty, or to his rash acceptance of some erroneous and unjustifiable assumption of fact, would not be appealable under section 261 *et seq.* Neither would it be suggested that a person aggrieved by an assessment so effected, could, on that ground alone, permit the opportunity of appealing to pass, and then successfully attack the assessment as a nullity, in, for example, an action against him for taxes. The admission of a right of attack in such circumstances might—it is self-evident—reduce the system of municipal taxation and the municipal finances associated therewith to a state of disorder.

Nor do I observe any ground for holding that, superadded to the error committed by the assessor, there was any other element, the presence of which has the effect of removing the case from the operation of section 290. Fraud is not alleged or suggested. I am unable to escape the conclusion that the assessor's delinquency falls wholly within the intendment of the words " error committed in or with regard to such roll."

But there is another answer to the appellant's claim, Herbert Krumm must have become aware of the change in the assessment, in consequence of the assessment notice and the tax notice which he received in 1920. Indeed the tax notice, itself, would inform him that the taxes were due by him as the person assessed (section 298). In the admissions of facts, it is stated that he

> paid the taxes on the said lands for the year 1920 pursuant to the said tax notice;

that is to say, he paid the taxes, as the person from whom

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they had been demanded, and by whom they were due. From paragraph 20 of the admissions, it appears that this payment was made "pursuant to the instructions" of John F. Krumm. This last statement may mean that the act of paying the taxes according to the notice was performed under the specific instructions of the father, or, and this seems the preferable reading, that the son had instructions to pay the taxes for the year 1920, and that his act in paying them, in the circumstances, was within the scope of the authority conveyed by those instructions. On either construction, the son was acting within the scope of his employment in doing the very thing it is admitted he did; that is to say paying the taxes for the year 1920 "pursuant to the tax notice" for that year. In either view, the conclusion necessarily results, that the very act of the son in paying the taxes for 1920, as the person liable to pay them, as the person assessed, was the act of the father.

There is another way of putting it. Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation, and instructed the son specifically to pay "pursuant to the notice," or, as paragraph 20 would seem to suggest, he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction, it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father (Story par. 140).

Before passing to the effect of this on the present controversy, it should be noticed that, as between the appellant and the respondents, the appellant's opportunities of knowledge, in relation to these things, are peculiar, if not exclusive, and this circumstance must be considered in determining the sufficiency of the facts proved to establish a *prima facie* case (Stephen, Evidence Act. 96d). I think the rule by which courts govern themselves, in practice, is thus correctly stated by the editors of the last edition of Taylor on Evidence;

> Where the facts lie peculiarly within the knowledge of one of the parties very slight evidence may be sufficient to discharge the burden of proof resting upon the other party (2 Taylor, on Evidence 285).

My conclusion, then is, that the facts admitted afford sufficient evidence to establish, at least *prima facie,* that the act of Herbert Krumm in paying the taxes of 1920, as demanded from him, that is to say, as taxes payable by him as the person assessed as owner of the land, was the act of John F. Krumm.

That again appears, in the absence of explanation, to be sufficient evidence of the assent of John F. Krumm to the assessment of the land in the name of the son. Such conduct must be considered from the point of view, neither of the Krumms exclusively, nor of the assessor exclusively. It must be regarded from both points of view. The question is, what interpretation ought a reasonable man in the Krumms' situation, engaged in transacting such business, to have anticipated, as that likely to be ascribed by the assessment authorities to Herbert Krumm's act in paying the taxes, as he did, pursuant to the tax notice? The question seems to admit of only one answer. There can be no doubt there was here sufficient evidence of assent (See *Rullell* v. *Toronto* (1) and *Ewing* v. *Dominion Bank* (2).

The appeal should be dismissed with costs.

MIGNAULT J. (dissenting).—This is an action brought by the appellant as executor of the late John F. Krumm, claiming damages for the loss, through the negligence of the respondents, of a property belonging to the deceased, and which was sold at a municipal tax sale. The plaintiff apparently considered that he could not impeach the sale as against the purchaser, so his action, which is an action in damages for the loss of his land by reason of the wrongful acts of the respondents, is for the value of the property and his expenses.

John F. Krumm, who died on July 19th, 1925, was the registered owner of a half section of unoccupied land in the municipal district of Shepard, no. 220. His address was Philo, Illinois, U.S.A. From 1907 until 1919, he was assessed, under his own name and with that address, by the respondent municipality, or its predecessor in interest, for this land, and tax notices were mailed to him, addressed to Philo, Illinois. Herbert Krumm, the son of John F. Krumm, paid the taxes on the land for 1919 and 1920, and

(1) [1908] A.C. at p. . (2) [1904] A.C. 806.

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the tax receipts were sent to him. In 1920, the respondent Hinde, secretary-treasurer and assessor of the municipality, assessed "H. Krumm, Philo, Ill., U.S.A." as the owner of the land in question. Hinde made no inquiries at the land titles office to ascertain who was the registered owner of the half section, but assumed, when he received the money for the taxes of 1919 from Herbert Krumm, that the latter had become the owner of the land, either by succession or otherwise. From and including 1920, the assessment and tax notices were sent to Herbert Krumm.

The 1921 taxes were not paid. Tax sale proceedings with respect to this land were taken under the provisions of chapter 122 of the Statutes of Alberta, 1922, a caveat having been lodged by the municipality in the land titles office. On December 31, 1924, the certificate of title in the name of John F. Krumm was cancelled, and a new certificate of title in the name of the municipal district of Shepard, no. 220, was issued by the registrar. Finally the land was sold by the municipal district to one Chas. Horrill for $5,476.72, the sale agreement bearing date the 5th of May, 1925.

To complete the statement of pertinent facts, reference must be made to some correspondence which was placed in the record at the trial. There is first a letter by John F. Krumm to Hinde, dated May 9, 1919, asking that an account of taxes due on this land be sent to him, to which Hinde answered on May 17, 1919, that the assessment was not yet quite complete, but that notices would be sent out within the next week or so. Then Herbert Krumm having paid the 1919 taxes, a receipt was mailed to him on October 1, 1919, marked "Received from Herbert Krumm (change initial to H".) A similar receipt, save the entry "change initial to H", was sent to Herbert Krumm on December 1, 1920, for the 1920 taxes. Then we find a letter from Hinde to "Mr. H. Krumm, Philo, Illinois, U.S.A.", dated October 29, 1924, stating that the land was on the municipality's caveat list for arrears of taxes for the years 1921 to 1923, that the caveat had expired and that the council had passed a resolution to take title to the land unless the taxes, amounting to $590.47, were paid before December 15. Apparently this letter was not answered, and on February 10, 1925, Hinde wrote to H. Krumm that the land would

be offered for sale on the 28th of that month, unless the arrears of taxes and costs to the amount of $796.52 were paid. The final letter from Hinde was sent on March 26, 1925, to "Mrs. Effie Krumm, Philo, Illinois, U.S.A." (Hinde took her to be the widow of John F. Krumm), saying that an offer of $17 per acre for the land had been received, payable by instalments, and asking whether that offer, which would leave a substantial balance for the owner after payment of taxes, should be accepted. Herbert Krumm answered this letter, on March 31, 1925, saying that the offer would be accepted.

As above stated, John F. Krumm died on the 19th of July, 1925. The only witness called at the trial was Hinde, the secretary-treasurer and assessor. The parties, however, made some written admissions, the last of which is that John F. Krumm instructed Herbert Krumm to pay the taxes on the lands, and that the latter paid the same for 1919 and 1920,

and intended to pay the taxes for the year 1921 but overlooked doing so.

It may be added that under section 251 of the *Municipal District Act* (chapter 3 of the Statutes of Alberta, 1911 and 1912, and amendments), the assessment made in 1920 stood for the five year period beginning in that year, subject to sending out tax notices each year to every person whose name appeared on the assessment roll (sect. 298).

It will not be necessary to deal in any detail with the provisions of the *Municipal District Act* (1) with respect to municipal assessment for taxes. The assessment is of the owner or occupant of land in the municipality (sect. 251), and "owner" means and includes any person who appears by the records of the land titles office to have any right, title or interest in the land, other than that of a mortgagee, lessee or encumbrancee (subsect. 8 of sect. 2). The name of the owner and his post office address, if known, are entered upon the assessment roll (sect. 251), and upon completion of the roll the assessor is directed to forthwith mail to each person whose name appears on the roll a notice of his assessment (sect. 257). If the name of the

(1) The 1911-1912 enactment was called *The Rural Municipality Act*. The name is now *The Municipal District Act*, c. 110, R.S.A. The numbering of the sections here is that of the 1911-1912 statute under which the assessment was made.

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owner is not known and cannot after reasonable inquiry be ascertained, the land is deemed to be duly assessed if entered on the roll with a note stating that such owner is unknown (sect. 255). Assessment notices are issued only in the years in which an assessment is made (sect. 257), but tax notices are sent each year (sect. 298).

When this assessment was made in 1920, there was no intention whatever to assess John F. Krumm, the registered owner of the land. Hinde, the assessor, quite frankly states that upon receiving the 1919 taxes from Herbert Krumm, he assumed that the latter was owner of the land and that John F. Krumm was dead. He never dealt with Herbert Krumm as agent for John F. Krumm, and it was Herbert Krumm alone whom he intended to assess and who in fact was assessed for the land belonging to his father. Hinde could easily have found out who was the real owner of the land by inspecting the records of the land titles office, but he neglected doing so until the land was sold and it was desired to give a title to the purchaser. This is all the more remarkable as for some twelve years John F. Krumm had been assessed as owner, and as late as May 9, 1919, had written to Hinde, asking for an account of taxes due on his land. The good faith of Hinde is not in question; the mistake he made, however, was in no way induced by John F. Krumm, and he was negligent in not having made an inquiry before assessing the land in the name of another.

Under these circumstances, the decisions and the enactments relied on by the respondents have no application. This is not the case of a mistake made in the name of the person intended to be assessed, or of the effect of the curative section of the statute (sect. 290) validating the roll, notwithstanding any defect, error or misstatement. The assessor did here what he intended to do, and negligently assessed a third person as the owner of John F. Krumm's land. As far as John F. Krumm was concerned, there was no assessment whatever.

The respondent relies on subsection 3 of section 12 of the *Tax Recovery Act*, 1922 (c. 25 of the Alberta statutes for 1922), which states that a duplicate certificate of title purporting to be issued under the authority of that Act, shall be conclusive evidence of the compliance with all conditions precedent to the issue of such certificate, and its

validity shall not be questioned in any court of law or equity.

But this action is not based on the illegality of the certificate of title. The plaintiff does not seek to recover his land for which the certificate of title issued, and which was sold by the municipal district. He recognizes that he cannot get the land back, but he claims damages for the wrongful act of Hinde in negligently assessing a third person as owner of his land, by reason of which, and of the subsequent sale, his land was lost. No question arises as to the liability of the municipal district for these damages, for counsel for the municipality, at the hearing, assumed responsibility for what Hinde had done.

I see no basis for the contention of the respondents founded on estoppel. John F. Krumm did nothing which could in any way lead the assessor to believe that Herbert Krumm had become the owner of the land. Any agency which may have existed between John F. Krumm and Herbert Krumm did not go further than an instruction to pay the taxes, which presupposed an assessment of John F. Krumm rendering him liable to municipal taxation. There was no such assessment, and moreover Hinde never dealt with Herbert Krumm as an agent of John F. Krumm, but as the owner of the land, which Hinde gratuitously assumed him to be. No knowledge by John F. Krumm of the assessment of Herbert Krumm has been established, nor can such knowledge be inferred, the more so as the respondents took no steps to secure the testimony of Herbert Krumm, the onus of proving knowledge, as a basis for estoppel, being on them. With great respect, I think the judgments of the courts below cannot be supported.

I would allow the appeal with costs throughout and remit the case to the trial court for the assessment of damages.

NEWCOMBE J.—The deceased, who resided at Philo, Illinois, was the registered owner of unoccupied waste land in the province of Alberta, upon which he had been paying taxes for many years. On 9th May, 1919, he wrote the respondent Hinde, who was the secretary-treasurer of the respondent municipality, within the limits of which the land lies, asking for a statement of the amount due for taxes on the "S. ½ Sec. 5, Lot 28, Block 23, Rge. 28, Mer. 4,"

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the land in question. The answer was that the assessment was not then quite complete, but that the writer, the respondent, Hinde, hoped to send out notices within the next week or so. Subsequently notice of the assessment for 1919 was sent to the deceased, also the taxation notice, and he instructed his son Herbert Krumm, who also lived at Philo, Illinois, to pay the taxes. There is no evidence of any further communication, from or to, between the deceased, who died in 1925, and the municipality or its officers. It is admitted that none was sent by or for the municipality. The subsequent proceedings with regard to the lands are, in these circumstances, somewhat remarkable. Herbert Krumm paid the taxes in 1919 in due course, but the respondent, Hinde, who conducted the business of the municipality, and whose probity is not questioned, supposing, apparently because Herbert had paid the taxes, that he must therefore have become the owner of the property, but, without consulting the registry to ascertain the fact, made up the assessment of 1920 in the name of Herbert, prepared and sent the assessment and taxation notices for that year in the name of and to the latter, and received payment of those taxes from him. That assessment became by statute the governing assessment for five years. No further taxes were paid, although, for the succeeding years, the requisite taxation notices in the name of Herbert were sent to him. Tax recovery proceedings were consequently taken under the *Tax Recovery Act*, R.S.A., 1922, c. 122, resulting, on 31st October, 1924, in the existing certificate of title of the deceased being cancelled and a new certificate issued in the name of the respondent municipality. Section 12 of the Act provides as follows:

12. (1) If any parcel of land is not redeemed within one year from the filing of a caveat in respect thereof the treasurer shall issue a transfer to the municipality within whose area the parcel of land is situated and file a memorandum of such issue in the proper Land Titles Office, whereupon the Registrar shall cancel the certificate of title to such parcel and register the municipality as owner of such parcel and issue a new duplicate certificate of title to it.

(2) A memorandum shall be entered upon the certificate of title and also upon any new duplicate certificate reserving the privilege of redemption in accordance with the terms of this Act.

(3) A duplicate certificate of title purporting to be issued under the authority of this Act shall be conclusive evidence of the compliance with all conditions precedent to the issue of such certificate and its validity shall not be questioned in any court of law or equity.

The municipality assumes responsibility for what was done, or neglected to be done, by its secretary-treasurer, the respondent, Hinde.

In these circumstances the appellant, the executor of the deceased John F. Krumm, claims to recover the value of the land, which was lost to the estate by reason of the alleged illegal and unauthorized proceedings of the municipality, and its secretary-treasurer, in subjecting the land to the provisions of the *Tax Recovery Act*, without any assessment of the owner or notice to him, and it would appear that the vesting of the land in the municipality was a direct and natural consequence of the proceedings which were taken.

So far as the case has been stated, it would seem that the municipality has adopted a course which deprived the owner of any notice or chance of notice which the law contemplates or requires for his protection. It is not a mere irregularity, oversight or omission in the matter of procedure or detail of which the appellant complains; it is the initial act of assessment, which, not only did not operate against the owner, but directed the course of the proceedings in a manner inevitably to escape all contact with the owner—a deliberate *ex parte* proceeding, and I am not satisfied to accept an interpretation of the statute which holds him nevertheless bound.

It is extraordinary however that no explanation comes from Philo, Illinois, except as stated in the admissions, and the last of these is very significant. It reads:

> That the said John F. Krumm instructed the said Herbert Krumm to pay the taxes on said lands and said Herbert Krumm did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so.

Now the taxes for 1920 were paid upon the assessment of Herbert Krumm, and they were paid by John F. Krumm, as owner of the land, although assessed in the name of Herbert, because the latter was acting as his father's agent, and therefore I think it may be inferred, there being nothing to the contrary, with his father's knowledge of the facts relating to the assessment, which had come into Herbert's possession in the course of his agency; and if the owner intended to question the assessment or taxation, that was surely the time to raise the objection; but no exception

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was taken, and not unnaturally the municipality proceeded upon the assessment in the following years in the manner which it had adopted in 1920; and now, when the facts are presented which are admitted or in proof, I think they should be held to justify a finding of acquiescence, or of leave and license of the defendants to do the acts complained of. The fact is that the act is not injurious, and the proof constitutes a defence according to the maxim *volenti non fit injuria.* Not only is it to be inferred that the owner paid the taxes of 1920 with the knowledge that the assessment, which was a continuing assessment, was against his agent, to whom the statutory notices had been sent, but it would appear from the admission that his instructions continued to extend also to subsequent years covered by the assessment of 1920, or at least to 1921, because it is admitted that the agent

> intended to pay the taxes for the year 1921, but overlooked doing so.

Therefore, in the circumstances I think the municipality was entitled to proceed on the faith of the owner's acquiescence and consent. It may aptly be said in the language of Willes J., in *Davies* v. *Marshall* (1), upon the evidence as it stands, that either the owner

> actually gave his consent to the doing of the acts complained of, or that he so conducted himself that a reasonable man might fairly conclude that he did give that consent. Conduct in a court of common law often does amount to an estoppel, and is evidence of leave and license which is incapable of being controverted.

I would for this reason dismiss the appeal.

LAMONT J.—The facts in this case are not in dispute. With the exception of the evidence of the defendant, William Hinde, and certain documents, the case was tried on admissions of fact made by the parties. Briefly the facts are that at all times material John F. Krumm was the registered owner of the lands in question (322 acres); that from 1907 to 1919 inclusive, he was assessed as owner thereof by the defendant District and its predecessor, the Local Improvement District. On May 9, 1919, John F. Krumm wrote to the defendant Hinde, who was secretary-treasurer of the defendant District, asking for the amount of the taxes due on his land. On August 26, 1919, Hinde sent him

(1) 10 C.B., N.S., at 711.

the tax notice and on October 1 Herbert Krumm forwarded to Hinde $137.55, the amount of taxes claimed in the notice. A receipt for the money was sent to Herbert Krumm and on the stub of the receipt kept in his book Hinde made a note to "change the initial to H." When making up the assessment roll for 1920, Hinde dropped the name John F. Krumm as assessed owner of the land in question and inserted that of Herbert Krumm, and thereafter all notices and communications were sent to Herbert Krumm.

The reason given by Hinde for making the change was that John F. Krumm had always been very punctual in the payment of his taxes and as he had written in 1919 for his tax notice and a few months later the taxes were forwarded by Herbert Krumm in his own name, he assumed that John F. Krumm was no longer living and that Herbert Krumm had become the owner. Herbert paid the taxes for 1920, but thereafter no taxes were paid in respect of the land. The taxes for 1921 not being paid the district, in October, 1922, commenced proceedings to have the land forfeited for taxes and, on December 1, 1924, the certificate of title of the said land in the name of John F. Krumm was cancelled and a new certificate was issued to the district. On July 5, 1925, the District sold the land for some $2,000 less than its assessed value. In July, 1925, John F. Krumm died, and in the following October his executor brought this action in which he claims damages for the illegal sale of the land.

The argument on behalf of the plaintiff is that the taxes for which the land was sold had not been legally imposed, in that the defendant Hinde, who was the assessor of the District as well as its secretary-treasurer, in making the assessment roll for the year 1920, assessed the land to Herbert Krumm; that he did this without any request to do so and without making inquiry as required by the statute to ascertain who was the real owner; that this breach of the statutory provision rendered the assessment not merely erroneous and defective, but prevented it being an assessment at all because an essential constituent of an assessment—namely the name of the owner as ascertained by inquiry—was entirely lacking.

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The argument on behalf of the defendants is twofold:

1. That on the facts admitted, John F. Krumm knew that the land was assessed to Herbert Krumm in 1920, and, knowing that, he instructed Herbert to pay the taxes for that year, and is therefore estopped from objecting to the assessment in Herbert's name.

2. That in any event the curative section of the Municipal District Act (s. 290) applies and has the effect of validating the assessment roll withstanding any error or defect therein.

If either of these contentions made by the defendants be upheld, the plaintiff's action must fail.

The first contention, in my opinion, cannot be upheld. The admission which is relied upon as establishing knowledge on the part of John F. Krumm that the land was assessed to his son Herbert in 1920, is as follows:—

> 20. That the said John F. Krumm instructed the said Herbert Krumm to pay the taxes on said lands and said Herbert Krumm did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so.

According to this admission Herbert Krumm received instructions to pay the taxes in 1919, and "pursuant to said instructions" he paid in 1919 and 1920. The construction which, in my opinion, should be placed upon the language of this admission is that prior to the time he paid the taxes in 1919, Herbert Krumm had received general instructions from his father to pay the taxes on this land, and that, pursuant thereto, he paid them for two years. I cannot read the admission as justifying the inference that John F. Krumm gave instructions each year to pay the taxes, or that he had any knowledge that the land was assessed to his son in 1920. If the parties had intended by this admission to state that John F. Krumm had given fresh instructions to his son each year, I think the admission would have been couched in different language.

It was also suggested that in view of the fact that Herbert Krumm and his father lived in the same town and were members of the same family, and of the fact that Herbert who could have given definite evidence on the point, did not appear at the trial, very slight evidence would justify the inference of knowledge on the part of the father that

the land had been assessed to Herbert. The short answer to this suggestion, in my opinion, is, that the onus of establishing knowledge on the part of John F. Krumm was on the defendants and that they chose to go to trial without the evidence of Herbert Krumm, and on admissions made on behalf of the plaintiff. If the admissions are not sufficient to establish a point material to the defence, the defendants have only themselves to blame for not having the point clearly covered by the admissions.

The next question is: Does s. 290 apply so as to validate the assessment of the land in the name of Herbert Krumm for the year 1920, without any inquiry by the assessor as to whether or not there had been any change in ownership. S. 290 reads as follows:—

> When the roll is finally completed the Secretary shall over his signature enter at the foot of the last page of the roll the the following Certicate, filling in the date of such entry: Roll finally completed this * * day of * * *, 19 * , and the Roll as thus finally completed and certified to shall be valid and binding on all parties concerned, subject to amendment on appeal to the Court of Revision and to further Amendment on appeal to the District Court Judge, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in any notice required by this Act, or any omission to deliver or transmit any such notice.

The roll which by this section is made binding upon all parties concerned is the roll which the Act contemplated the assessor would make. If in that roll there appears an assessment which was beyond the jurisdiction of the assessor to make, s. 290 cannot be invoked to validate that assessment. *City of Wetaskiwin* v. *C. & E. Townsites Limited* (1). To ascertain therefore, whether it was competent for the assessor to place the name of Herbert Krumm on the roll as owner of the land in question without inquiring if there had been a change of ownership, necessitates an examination of the statutory provisions authorizing the assessor to make the assessment.

The Act provides that all land not exempt shall be liable to assessment and taxation and that it shall be the duty of the assessor to make the assessment of such land in the manner hereinafter provided. The manner provided is set out in sections 251, 254 and 255 of the Act, which read as follows:

(1) 59 Can. S.C.R. 578.

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251. As soon as may be in each year but not later than the first day of July the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be,

(*a*) The name of the owner of every lot or parcel of land in the municipality which is liable to assessment * * *.

(*b*) A brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof. * * *

254. It shall be the duty of every person whose land is assessable to give to the assessor all information necessary to enable him to make up the roll; but no statement made by any such person shall bind the assessor or shall excuse him from making inquiry as to its correctness. * * *.

255. If the assessor does not know and cannot after reasonable inquiry ascertain the name of the owner of any unoccupied lot or parcel of land in the municipality the same shall be deemed to be duly assessed if entered on the roll with a note stating that such owner is unknown.

To be an assessment within the contemplation of the statute the property assessed must be taxable, otherwise there is no subject matter upon which s. 290 can operate. *Toronto Railway* v. *City of Toronto* (1).

Given taxable property an assessment to be valid, as was pointed out by the present Chief Justice of this court in the *Wetaskiwin Case* (2), must possess two essential constituents (1) Designation of owner, and (2) Description of property. With the former of these only are we concerned here. Under the above quoted sections the statutory duty of the assessor is to set down the name of the owner "as accurately as may be." That implies diligent inquiry on his part as is shewn by sections 254 and 255. That such is the assessor's duty cannot, in my opinion, be doubted, but the question is: Does a failure to make reasonable inquiry go to the assessor's jurisdiction so as to make him incompetent to enter any name on the roll as owner until after inquiry, or would an entry without inquiry be simply a failure to observe a statutory procedure for performing a duty wholly within his jurisdiction? If the former the entry would be null *ab initio;* if the latter it would be an irregularity which s. 290 would cure. Upon this point my brother Duff, in *La Ville St. Michel* v. *Shannon Realties Limited* (3), expressed an opinion which is very apposite here. At page 435 he said:—

(1) [1904] A.C. 809. (2) 59 S.C.R. 579.
(3) 64 Can. S.C.R. 420.

Where you have authority to do a certain class of acts coupled with a rule prescribing the manner in which the act is to be done or prohibiting the doing of it in a given way, you may always have the question whether the rule imports a limitation of authority; and whether it does or does not import a limitation of authority is a question to be decided on the construction of the instrument creating the authority viewed in light of the circumstances and the object and purpose for which the authority is given.

In that case the statutory mandate which had not been observed was that taxable property "shall be assessed according to its real value"; and this court held that notwithstanding the failure of the assessor to observe this statutory direction in making the assessment, the roll had been made within the powers of the municipal corporation. That decision was affirmed by the Privy Council (1). In the judgment given by their Lordships the rule was laid down that

where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

Their Lordships, at page 193, further said:

In this view it is of cardinal importance to consider what is the remedy provided for the situation in which a ratepayer or body of ratepayers has been put by a valuation roll which is said to be illegal and invalid by reason either of error in its particular items, or by reason of fundamental error in principle. Once such a roll appears, the statute steps in to provide a remedy to "every person who, personally or as representing another person, deems himself aggrieved by the roll as drawn up," and the appeal is to state "the grounds of his complaint." What the Act provides by way of prescription of appeal is to give by that means a remedy for a grievance which is complained of.

In the present case, we have a failure to observe the statutory direction for ascertaining the owner of the property assessed. Can such a failure affect the jurisdiction of the assessor to make the roll to any greater extent than a failure to follow the statutory direction in valuing the property? In my opinion it cannot. Yet the above mentioned cases shew that a failure to follow the statutory direction as to valuation does not deprive the assessor of jurisdiction where the statute provides a remedy by way of appeal for improper valuation.

S. 258 of the Act provides that it shall be the duty of the assessor, within two weeks after the completion of the roll,

(1) [1924] A.C. 185.

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to post up a notice that the roll is open for inspection and that any ratepayer desiring to object to the assessment of himself or any other person must lodge his complaint within twenty days. S. 261 provides that if any person thinks his name or the name of any other person has been wrongfully inserted in or omitted from the roll, he may, within the said twenty days, lodge a complaint with the secretary. Such a complaint constitutes an appeal to the Court of Revision, and from a decision of the Court of Revision the statute provides a further appeal to the District Court Judge. Although he might have appealed against the substitution of Herbert Krumm's name for his own, John F. Krumm did not do so. He would, therefore, appear to come within the principle of the above mentioned decisions.

It was argued on his behalf that his failure to appeal did not bring him within these decisions because in those cases the persons who failed to appeal had received notice of assessment, whereas in the present case it is admitted that no notice had been sent to John F. Krumm. The fact that no notice was sent to him does not, in my opinion, affect the validity of the assessment, for by s. 290 the roll is declared to be binding notwithstanding any omission to deliver or transmit any notice required by the Act.

The roll shews an assessable person, Herbert Krumm, designated as owner. It also shews the land properly described. The posting up of a notice by the assessor informing every ratepayer that the roll was open for inspection, and that he had a right of appeal if he was not satisfied with the assessment, gave John F. Krumm an efficient remedy for the grievance of which his executor now complains.

It was also urged upon us that if the assessor could validly enter the name of Herbert Krumm on the roll without making any inquiry as to his ownership of the land for which he was assessed, he could, with equal validity, do the same for every parcel of land on the roll. In my opinion that does not follow. If the assessor set down a series of names as owners, without inquiry and without a belief that they had any interest in the property of which he designated them owners, he would not be preparing the roll contemplated by the statute and his action in so doing

might, it seems to me, be considered a fraudulent exercise of his powers. That question, however, does not arise here. It is not suggested that in assessing the land to Herbert Krumm, Assessor Hinde had any other motive than that of carrying out the duty which, under the statute, devolved upon him. His alteration of the assessment was an error which he made through drawing a wrong inference from certain facts before him, but in making that alteration he was endeavouring to compile the roll called for by the statute.

The object of the legislation was to make provision for the distribution of the burden of the municipality's financial obligations over the taxable lands of the municipality according to their respective values. To attain that object it was necessary to have a time fixed beyond which the legality of the assessment could not be questioned, so as to insure that each parcel of land would bear its proper share of the burden.

It was also necessary once an assessment was made, that no uncertainty should exist as to the right of the municipality to obtain the taxes levied (if unpaid) out of the land by forfeiture proceedings. That forfeiture proceedings are drastic and in some cases work hardship is beside the question. The Legislature in passing the Act no doubt foresaw the possibility of an owner being deprived of his land through non-payment of the taxes levied against it by reason of forgetfulness or inattention on his part, but it evidently concluded that a want of finality in reference to the assessment or a want of certainty as to the municipality's right to recover the taxes out of the land, with its consequent derangement of the municipal finances, would be a much greater evil.

An owner of taxable land in a municipality is supposed to know that his land is liable to such taxation as the municipality under the law may impose. If he does not receive notice of what has been assessed against him he is not, in my opinion, justified in concluding that no taxes have been levied against his land,. The language of sections 258, 260 and 261, would seem to indicate that the Legislature in passing the Act did not consider an owner free from all responsibility for the correct assessment of his land. Knowing that his land is subject to taxation he is

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Lamont J.

presumed to know what may follow if the taxes are not paid.

In view of the object and purposes of the Act and the necessity of securing finality in the assessment to prevent confusion in the municipal finances, I am of opinion that the statutory mandate to set down the name of the owner "as accurately as may be" should be construed as a direction to the assessor relating to the procedure to be adopted and not as a limitation on his competence to make the assessment. The assessor's failure to observe this statutory procedure was no doubt an error on his part, but, in my opinion, it was error in regard to the roll, which s. 290 was intended to cure.

I would, therefore, dismiss the appeal.

SMITH J.—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Bennett, Hannah & Sanford.*

Solicitors for the respondents: *Ford, Miller & Harvie.*

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*May 14, 15.
*June 12.

IN THE MATTER OF

THE NORTHERN LIFE ASSURANCE COMPANY OF CANADA (CLIENT)... } APPELLANT;

AND IN THE MATTER OF

MESSRS McMASTER, MONTGOMERY, FLEURY & CO., GENTLEMEN, SOLICITORS OF THE SUPREME COURT OF ONTARIO (SOLICITORS)..... } RESPONDENTS.

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

Solicitor—Company—Solicitor retained to act for company and directors in litigation—Company's liability to solicitor for costs.

The appellant company was a party to certain actions, and, in each case, by resolution of the directors, M. was retained as its solicitor, and also as solicitor for the individual directors where they were made

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

co-defendants. The actions were settled. The company disputed its liability for payment, in large part, of the solicitor's bill, on the ground that the litigation was merely a contest between opposing bodies of shareholders, in which the company, as such, had no interest, that the company should have adopted a neutral attitude and merely submitted its rights to the court, and that the retainers in the terms in which they were given were consequently *ultra vires* and of no effect, and that, even if the solicitor was justified in taking up for the company the burden of the litigation, the bills of costs showed that the services rendered in the negotiations leading to settlement were for the benefit of individual directors whose shares, as a result thereof, were sold or transferred, and not for the benefit of the company or under its instructions.

Held: The company was liable. As, in the litigation in which the costs were incurred, certain resolutions of the directors and issues of shares by the company, which must now, on the record, be taken as valid and regular, were impeached, the costs of defending the company and directors in respect thereof should be borne by the company. As corporate acts of the company were impeached, it could not be said that the solicitor should have held merely a watching brief for it. As to the services rendered in negotiations for settlement, the company had a vital interest in having the litigation speedily terminated, and, on the evidence, it was impossible to hold that they were rendered on behalf of any person other than the company; the test to be applied, in the circumstances, to determine on whose behalf the solicitor was acting, was not "could he have rendered the services without instructions from some one other than the company?", but rather "were the services reasonably necessary to procure a settlement of the litigation in which the company was involved?"

While it is a well established rule that directors may not use the company's funds in payment of their own costs, although such costs would not have been incurred if they had not been directors (5 Hals., p. 227), yet it is equally well established that directors acting as such within such of the company's powers as are confided to them, and without gross negligence, cannot be called upon to pay out of their own funds the costs of defending resolutions passed by them in the interests of the company, simply because a plaintiff has chosen to make them individually co-defendants (*Breay* v. *Royal British Nurses' Assn.*, [1897] 2 Ch. 272).

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment of Grant J. (2) which dismissed an appeal by the present appellant from the report of the Taxing Officer at Toronto made upon the taxation of certain bills of costs rendered by the respondents to the appellant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) (1927) 33 Ont. W.N. 175. (2) (1927) 33 Ont. W.N. 32.

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NORTHERN LIFE ASSUR. CO. OF CANADA v. MCMASTER.

H. H. Davis and *H. E. Manning* for the appellant.

R. S. Robertson K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from a judgment of the Second Divisional Court (Ont.), dismissing an appeal from an order made by Mr. Justice Grant, confirming a report of the taxing officer in reference to the taxation of certain solicitor and client bills of costs. In his report the taxing officer says:

> The bills are for services rendered by the Solicitors in connection with certain actions in which the Northern Life Assurance Company and its directors were joined as defendants and the evidence shows the Solicitors were retained in these actions to represent the company and certain of the directors, their retainers in each case being in accordance with a resolution passed at a Directors' meeting.
>
> The contention is now advanced by those opposing the bill that the litigation in question was merely a contest between two opposing bodies of shareholders in which the Company as such had no interest, that in these circumstances the Company should have adopted a neutral attitude and contented itself with submitting its right to the Court and the retainers in the terms in which they were given were consequently *ultra vires* and of no effect. If this contention is correct it follows that practically all the solicitor and client charges made against the Company in the bills must be disallowed.

After considering the matter from the point of view of the solicitor, the company, and the directors, the taxing officer rejected the contention of the company, holding that, as the validity of the allotments of certain shares of its stock was involved, the interest of the company in the litigation was a most substantial one. This ruling was approved by Mr. Justice Grant on appeal to him, and by the Divisional Court.

Before us the company urged the contention it had advanced before the taxing officer, and submitted the further argument that, even if the solicitor was justified in taking up for the company the burden of the litigation, the bills of costs rendered, particularly the general bill, shew that the services rendered by the solicitor in the negotiations which led up to the final settlement were rendered for the benefit of the individual directors whose shares, as a result thereof, were sold and transferred, and not for the benefit of the company or under its instructions.

There were four actions in all. They arose out of an attempt on part of certain shareholders to obtain control

of the company. In two of these the company, and the directors individually, were defendants; in the third the company and one Roadhouse, while in the fourth the company was plaintiff. In each case by a resolution of the board of directors Mr. McMaster was retained on behalf of the company and also on behalf of the individual directors, in the actions in which they were co-defendants.

In the first action—McKnight v. Purdom et al—the plaintiff sought, *inter alia,* to set aside the confirmation to T. H. Purdom by the board of directors of an allotment of 2,219 shares in the company's capital stock, and to set aside an allotment and issue to S. C. Tweed of 830 shares of the company's treasury stock, on the following grounds:

1. That the 2,219 shares standing in the name of T. H. Purdom in the books of the company, and on which he had voted for years, did not belong to him but were shares originally subscribed for by others, but which had been surrendered to the company and which, after being surrendered, Purdom caused to be entered in the books as shares belonging to himself, and

2. That the allotment and issue of 830 shares to S. C. Tweed was simply a sham and was carried out as part of a previously arranged scheme to enable the Purdom interests to keep control of the company.

It is, no doubt, a well established rule that directors may not use the funds of the company in payment of their own costs, although such costs would not have been incurred if they had not been directors. Halsbury's Laws of England, vol. 5, p. 227. It is, however, equally well established that directors acting as such within such of the powers of the company as are confided to them, and without gross negligence, cannot be called upon to pay out of their own private purses the costs of defending resolutions passed by them in the interests of the company, simply because a plaintiff has chosen to make the directors individually co-defendants. *Breay* v. *Royal British Nurses' Association* (1).

By a final settlement it was agreed by all parties to the various actions that the allotment of these shares as and how they were allotted should be held to be valid and bind-

(1) [1897] 2 Ch. 272.

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Lamont J.

ing; and that a consent judgment to that effect should be entered. It was also agreed that consent judgments should be entered in the other actions. The parties, therefore, by the settlement and judgments have made it impossible for the court to say that the resolutions of the directors of September 13 and September 20, 1923, which, in the first action, the plaintiff McKnight sought to set aside, were invalid or even irregular. We must take it, therefore, that these resolutions were properly passed by the directors, and the issue of the shares valid corporate acts of the company.

The costs incurred in defending the company against attacks in respect of valid corporate acts, and the directors in respect of resolutions regularly passed authorizing the same, should, in our opinion, be borne by the company. As the corporate acts of the company were impeached in the litigation, we cannot see any solid foundation for the contention that the solicitor should have held merely a watching brief for the company.

Then can it fairly be said that the services rendered by the solicitor in carrying on negotiations for the purpose of arriving at a basis on which the litigation could be terminated, were services rendered for individual directors or shareholders and not for the company?

The evidence shews that, very shortly after being retained, Mr. McMaster clearly perceived that if the litigation was protracted it might, and probably would, have serious consequences to the business of the company through creating a widespread suspicion as to the validity of the company's acts and the integrity of its directors, as such. The success of a life insurance company depends, to a great extent, upon its ability to secure insurance. Anything which casts suspicion upon the regularity of the acts of the company or indicates that its directors are manipulating its shares for their individual benefit, rather than for the benefit of the company, is bound, in our opinion, to adversely affect the company's prestige. The company, therefore, had, as was frankly admitted by its counsel, a vital interest in having the litigation brought to a speedy termination. In its factum the company admits that it was being seriously affected by the litigation. No one has suggested any way other than that taken by Mr. McMaster by which a settlement could have been brought about.

Neither has anyone questioned the advisability, in the company's interest, of having the settlement take place, rather than a continuation of the litigation. The position taken by the company is not that the settlement was not beneficial to it, but that it was primarily beneficial to the shareholders whose shares were sold and transferred as a result of the negotiations, namely, the shares of the Purdom family and the shares controlled by the Honourable Manning Doherty and Mr. Tweed.

In his evidence Mr. McMaster testified that anything he did for T. H. Purdom or on his behalf, including the sale of his shares to Doherty and Tweed, was paid for by Purdom. He further testified that he had no retainer to act for Doherty or Tweed and that he did not advise them. This evidence being in no way impeached, it seems to us impossible to hold that the services for which the solicitor has charged were rendered on behalf of any person other than the company.

In his argument Mr. Manning suggested that the following as a proper test to determine on whose behalf the solicitor was acting:

"Could Mr. McMaster have rendered the services set out in the general bill without instructions from some one other than the company?"

In our opinion this is not the test to be applied. We think, in the circumstances of this case, the test should rather be this:

"Were the services rendered reasonably necessary to procure a settlement of the litigation in which the company was involved?"

We are of opinion that they were.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Long & Daly.*

Solicitors for the respondents: *Donald, Mason, White & Foulds.*

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*May 16.
*June 12.

IN THE MATTER OF AN AGREEMENT FOR SALE OF LAND

WILLIAM LOUCH AS PURCHASER.....APPELLANT;

AND

PAPE AVENUE LAND COMPANY LIMITED AS VENDOR..... } RESPONDENT;

AND IN THE MATTER OF RULES 605 AND 606 OF THE CONSOLIDATED RULES OF PRACTICE OF THE SUPREME COURT OF ONTARIO.

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

Sale of land—Objections to title—Clause in agreement providing for rescission in case of objections to title which vendor is unable or unwilling to remove—Operation of clause—Purchaser claiming right to specific performance with compensation—Contention that vendor by conduct elected to abandon rights under clause.

An agreement for sale of land provided that "the purchaser is to be allowed 40 days * * * to investigate the title * * *. If within said 40 days the purchaser shall make any valid objection to title in writing, which the vendor is unable or unwilling to remove and which the purchaser will not waive, this agreement shall be null and void." The purchaser made requisitions on title, as to some of which the vendor notified him that it was unable to comply. Some negotiations took place touching an offer by the vendor to substitute other lands for those affected, but without result; and on October 18 the vendor's solicitors wrote the purchaser's solicitors that the vendor was ready to close and unless the transaction was closed by October 25 it would cancel the agreement; and on October 26 orally informed them that the agreement was no longer in force. The purchaser contended (1) that the vendor by its conduct in answering the purchaser's requisitions and in endeavouring to remove his objections elected to abandon its rights under the above quoted clause; and (2) that, as the objections in question affected only an insignificant part of the lands, he was entitled to insist upon specific performance with compensation, and that he should be given adequate time to consider whether or not he should take that course, before the clause was put into operation.

Held: The vendor was within the protection of said clause, and the agreement had been rescinded. The purchaser's first contention failed in point of fact, as he was never misled into a belief that the vendor had assumed the obligation of meeting the demands in the requisitions in question. As to the purchaser's second contention, the right to rescind given by said clause was not subject to an over-riding right in the purchaser to insist upon specific performance with compensa-

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

tion, even though, but for that clause, he might, on the facts, have been entitled to such relief; the right given by the clause was for the vendor's protection in just such situations, and to enable him in such circumstances to insist upon receiving the contract price without abatement or to withdraw from the contract (*Ashburner* v. *Sewell*, [1891] 3 Ch. 405, at p. 410, cited).

Judgment of the Appellate Division, Ont., affirmed.

APPEAL by the purchaser from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing the purchaser's appeal from the judgment of Raney J. (2), pronounced upon an application made by the vendor by originating notice of motion, under Rules 605 and 606 of the Consolidated Rules of Practice of the Supreme Court of Ontario, for an order declaring the vendor's rights under a written contract for sale of lands. The material parts of the agreement and the material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Arthur Macdonald for the appellant.

Fraser Raney for the respondent.

The judgment of the court was delivered by

DUFF J.—This is an appeal from the judgment of the Second Divisional Court of the Supreme Court of Ontario, dismissing an appeal from a judgment of Raney J., pronounced upon an application, under Rules 605 and 606 of the Consolidated Rules of Practice, on behalf of the respondent company as vendor, for an order declaring the rights of that company under an agreement in writing of the 27th of June, 1927, between the respondent company as vendor, and the appellant as purchaser, relating to certain lands in the township of East York.

The material parts of the agreement are these:

8. The purchaser is to be allowed forty days from the date hereof to investigate the title at purchaser's expense * * *. If within said forty days the purchaser shall make any valid objection to title in writing, which the vendor is unable or unwilling to remove and which the purchaser will not waive, this agreement shall be null and void and the deposit money shall be returned to the purchaser without interest * * *.

9. (Containing, *inter alia*, a declaration that "time shall be of the essence of every term of this contract").

(1) (1927) 33 Ont. W.N. 184. (2) (1927) 33 Ont. W.N. 156.

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Duff J.

14. The vendor covenants, promises and agrees to assume and pay the existing registered charge or mortgage and to indemnify and keep indemnified the purchaser from all damages, costs and other charges arising from its failure so to do. It shall be a condition precedent to payments hereunder by the purchaser that the said mortgage account shall be in good standing and free from arrears at the time of the making payment by the purchaser.

On the 23rd of July the requisitions on title were delivered, and, by these and later requisitions, the appellant as purchaser,

(*a*) required evidence that a certain mortgage was in "good standing" and free from arrears of interest and principal, and

(*b*) demanded that certain rights of way should be surrendered and that an agreement for sale affecting part of the land should be discharged.

The respondent company appears to have satisfied the appellant as to the first of these requirements. But as to those comprised under head (*b*), the appellant was notified in due course that the respondent company was unable to comply with them. Some negotiations took place touching an offer by the respondent company to substitute other lands for those affected by the agreement and rights of way, but without result; and on the 18th of October, the solicitors for the respondent company wrote to the solicitors for the appellant that "our clients are ready to close and have instructed us to notify you on behalf of your client that unless this transaction is closed on or before the 25th inst., that they will cancel the agreement and withdraw therefrom." The appellant having done nothing in consequence of this notice, the solicitors for the respondent company, on the 26th of October, orally informed the purchaser's solicitors, that the agreement was no longer in force. On the 3rd of November a caution was filed by the appellant in the Land Titles Office, and on the 9th of November the originating notice was served. The contention on the part of the respondent company was that the facts were such as to bring into play article 8 of the agreement, quoted above.

Mr. Justice Raney, after stating the facts substantially as I have stated them, and pointing out that since there

were no material facts in controversy, the dispute fell within the scope of Consolidated Rule 605, proceeded:

It is conceded that the purchaser's objections to the title were made in writing and that they were valid objections. It appears also that the Vendor is "unable or unwilling" to remove the objections other than that in respect of the mortgage, and there is no suggestion of bad faith. The purchaser declines to waive these objections. The matter is thus brought, I think, squarely within the eighth clause of the agreement, and the agreement is, therefore, in my view, null and void. There will be a declaration to that effect and an order for the repayment of the deposit money, and on the return of the deposit money for the vacation of the caution. There will be no costs to either party.

There is before us no report of the reasons for the judgment of the Second Appellate Division.

Several contentions were advanced in support of the appeal, of which it is only necessary to mention two.

First, it is argued that the respondent company, by its conduct in answering the appellant's requisitions and in endeavouring to remove his objections, elected to abandon its rights under article 8. This contention fails in point of fact. The appellant was never misled into a belief that the respondent company had assumed the obligation of meeting the demands in the requisitions in respect of the agreement of sale and the rights of way. On the contrary, he was informed in due course that the respondent company was unable to comply with them. The proposal to substitute other lands was an act indicating, not a willingness to meet the requisitions in these respects, but the opposite.

Second, it is contended that, since the agreement of sale, to which exception was taken, and the rights of way mentioned, affected only an insignificant part of the lands in question, the appellant was entitled, if so advised, to insist upon specific performance with compensation in respect of the part so affected, notwithstanding the terms of article 8; and further, that he was entitled, before that article was put into operation, to be given adequate time to consider whether or not he should take that course. The answer to this contention is, that the right to rescind given by article 8 is not subject to an over-riding right vested in the appellant to insist upon specific performance with compensation, even though, but for the stipulations of that article, he might, on the facts, have been entitled to such relief. It is a right given to the vendor for his protection in just such situations as that we are now considering, and

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to enable him in such circumstances to insist upon receiving the contract price without abatement, or to withdraw from the contract. In the contract in question in *Ashburner* v. *Sewell* (1), there was a clause similar in all pertinent respects to clause 8, and another clause providing for compensation in case of the description proving erroneous. Mr. Justice Chitty, as reported on page 410, says:

> The question whether errors which fall within clause 6 also fall within the protection given to the vendor under clause 8, is one of fact, to be decided in the particular circumstances of each case, and is one requiring great consideration. Take, for instance, the case where a piece of land is included in the description to which a title cannot be made out: regard must be had to the importance of that particular piece, and the amount of compensation which would have to be paid. I think it quite reasonable for the vendor to say, "I will reserve to myself a mode of escape from all the trouble of these inquiries and investigations and expenses of arbitration. I desire to settle the price myself; and if the purchaser insists on his objections to my title, I will retain in my own hands the power to rescind." That, I think, is a reasonable view to take of a contract like the one under consideration. In the result, I am of opinion that the purchaser's construction of the contract is not well founded, and that the objection raised is one of title falling within clause 8, and that the vendor was right in giving the purchaser notice of rescission.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald & Louch.*

Solicitors for the respondent: *Wickett & McNish.*

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*Feb. 13, 14.
*June 12.

MALCOLM FORBES GROAT AND WALTER S. GROAT (PLAINTIFFS) .. } APPELLANTS;

AND

THE MAYOR, ALDERMEN AND BURGESSES, BEING THE CORPORATION OF THE CITY OF EDMONTON (DEFENDANTS) ..... } RESPONDENTS.

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

Waters and watercourses—Drainage—Upper and lower riparian owners—Rights of drainage by upper owner—Pollution of water—Drainage of streets by municipality through sewer into watercourse.

Plaintiffs claimed an injunction and damages against defendant city for polluting the waters flowing through a ravine which traversed or bounded their land. They recovered judgment at trial in respect of

(1) [1891] 3 Ch. 405.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

various acts complained of, but this judgment was modified by the Appellate Division, Alta. (22 Alta. L.R. 457), which held that the city was not liable for alleged pollution caused by certain storm sewers. Against this holding the plaintiffs appealed. The city had constructed a large storm sewer having its outlet in an arm of the ravine above plaintiffs' land. Its purpose was primarily to carry off the surplus water from streets in the vicinity, but (as found on the evidence) through it discharged into the stream in the ravine, not only surface water, but all filth from the streets; also a mass of dirt was allowed to form and accumulate during the winter in the sewer, and in the spring the rush of water washed this into the stream.

Held (reversing judgment of the Appellate Division, Smith J. dissenting), that the operation of the sewer as aforesaid violated plaintiffs' riparian rights; and they were entitled to an injunction (failing abatement of the nuisance within the delay allowed) and to damages.

Per Anglin C.J.C. and Rinfret J.: The common law right of a riparian owner to drain his land into a natural stream affords no defence to an action for polluting the water in the stream; pollution is always unlawful and, in itself, constitutes a nuisance. *Broughton* v. *Township of Grey* (27 Can. S.C.R. 495) and *In re Townships of Oxford and Howard* (18 Ont. A.R. 496) distinguished.

Whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals" (*Atty. Gen.* v. *Birmingham*, 4 K. & J. 528, cited).

The Edmonton charter, which conferred the relevant powers on the city, did not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its natural state, in flow, quantity and quality" (*Chasemore* v. *Richards*, 7 H.L.C. 349, at p. 382), except when necessary, and then upon payment of adequate compensation.

Statutory powers should not be understood as authorizing the creation of a private nuisance, unless the statute expressly so states.

Per Duff J.: The existence of a nuisance in fact was established; and the city failed to justify its acts as acts done under its charter powers; nor could they be justified as an exercise of the common law rights of a riparian owner.

While the making of streets by macadamizing or paving, etc., is a natural use of the land owned by the city, and it is under no duty to intercept rain water which, having fallen from the clouds, is pursuing its way under the impulsion of gravity or other natural forces towards a watercourse, it is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a watercourse, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparian owners.

Per Lamont J.: The city had the right to develop its lands in the way cities ordinarily do by constructing and paving streets and lanes, and if, as a result of such user, an increased quantity of street sweepings, horse droppings and other impurities accumulated on its land, and

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these were washed down by the rain through a natural watercourse to the stream, the plaintiffs, as lower riparian owners, had no ground of complaint; but, apart from statutory authority so to do, the city could not by flushing its streets collect these impurities and by means of a storm sewer pour them into a stream the waters of which the plaintiffs had a right to take for domestic or other purposes; under English law an upper riparian owner "must not discharge his filth on his neighbour's land" (principles laid down in *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.*, [1918] A.C. 485; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *John Young & Co.* v. *Bankier Distillery Co.*, [1893] A.C. 691, applied; *In re Townships of Oxford and Howard*, 18 Ont. A.R. 496, at p. 505; *Gibbons* v. *Lenfestey*, 84 L.J.P.C. 158, at p. 160, distinguished). The city's charter did not limit plaintiffs' right of action, as the city had taken no statutory proceedings to acquire a right to pour the polluted output of its sewer into the stream.

Smith J. dissented, holding that the city had a right to drain the surface water from its streets into the storm sewer and through it to the natural watercourse; that there was no evidence of any pollution from this surface drainage other than what would occur in a state of nature; the only kind of pollution shown was such as would naturally be found in any similar stream draining an area where animals were kept.

The sewer, as originally constructed, had been cut to provide drainage facilities for a certain district, thus creating a diversion of drainage, causing, as plaintiffs complained, a substantial decrease in the quantity of water that would otherwise have gone into the ravine, and thus, by reason of less dilution of the dirt and filth, increasing the dangers of pollution. Dealing with this point, Anglin C.J.C. and Rinfret J. held that the diversion gave plaintiffs no right of action; they had no right to the drainage water collected by the sewer; in complaining against the diversion they were really claiming a right to compel the city to drain into the ravine; diversion of drainage is quite a different thing from diversion of a stream; and, while riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth; and though riparian owners above them may be entitled to drain their lands into the stream, they are not obliged to do so.

As to certain smaller storm sewers discharging into the stream, it was held (sustaining, in this respect, the judgment of the Appellate Division) that, on the evidence as to their operation and the waters discharged thereby, the plaintiffs had no right of action.

Duff and Lamont JJ. pointed out that they had not dealt with the provisions of the *Irrigation Act* (R.S.C., 1906, c. 61), no question thereon having been raised in the argument.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing in part an appeal by the defendant city from part of the judgment of Ives J. in favour of the plaintiffs.

(1) 22 Alta. L.R. 457; [1927] 1 W.W.R. 882.

The plaintiffs claimed damages and an injunction against the defendant for polluting the waters flowing through a ravine, known as "Groat's Ravine," in the City of Edmonton, which ravine, lower down than where the alleged acts causing pollution took place, traversed or bounded the plaintiffs' land.

The plaintiffs' land was south of 102nd Avenue. On 102nd Avenue a bridge, referred to as "Athabasca Bridge," crossed the ravine. It was immediately south of this bridge, and just above the plaintiffs' land, that the smaller storm sewers in question discharged into the ravine. At a short distance north of 102nd Avenue two branches of the ravine, referred to as the "northeast arm" and the "northwest arm" came together. The large storm sewer in question, which was six feet in diameter, had its outlet in the northeast arm.

The action was tried before Ives J., who gave judgment for the plaintiffs in respect of various acts complained of by the plaintiffs as causing pollution of the water.

The formal judgment at trial declared that the pollution complained of in the stream in the ravine was caused by the city, and that the plaintiffs were riparian owners of lands abutting the stream south of 102nd Avenue, and were entitled to relief; that the pollution was a nuisance and was caused: (1) by the city's dump at the junction of the northwest arm of the ravine and 106th Avenue; (2) by the storm sewer and the sanitary sewer situate in the northeast arm of the ravine and discharging into the stream; (3) by the storm sewers discharging into the ravine immediately south of Athabasca Bridge on 102nd Avenue; and ordered that the city be restrained from continuing the nuisances, and that, in the event of the city failing to abate them and keep them abated within a period of two years, the plaintiffs, upon the expiration of two years from the date of the judgment, should be entitled to take out an order restraining the city from continuance thereof. The trial of the issue of damages was reserved for further inquiry, with terms as to costs of the issue depending on the amount established.

The city appealed from part of this judgment, its appeal being practically confined to the matters of the dump at 106th Avenue and of the storm sewer on the northeast arm

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of the ravine, and of the storm sewers discharging into the ravine south of Athabasca Bridge on 102nd Avenue.

The Appellate Division (1) allowed in part the city's appeal. It maintained the judgment below as to the dump at 106th Avenue (though with some doubt, on the evidence, as to its being a cause of pollution), but it allowed the appeal "in respect to the surface drainage through the storm sewers," and, by its formal judgment, amended the judgment at trial by striking out therefrom any declaration: "(*a*) That the pollution caused by or from the storm sewer situate on the northeast arm of the said ravine and discharging into the said stream is or constitutes a nuisance; (*b*) That the pollution caused by or from the storm sewer discharging into the said ravine immediately south of Athabasca Bridge on 102nd Avenue, is or constitutes a nuisance; (*c*) That the surface drainage through any of the storm sewers is or constitutes a nuisance"; and by striking out therefrom "any order that the defendant do abate the use of any of the said storm sewers for drainage purposes, or be restrained from continuing the use of the said storm sewers for such purposes, or that the plaintiffs shall be entitled to take out an order restraining the defendant from the continuance of the use of the said sewers for such drainage purposes."

By the judgment now reported, this Court (Smith J., dissenting) allowed the plaintiffs' appeal, with costs here and in the Appellate Division, and restored the judgment of the trial judge, except as to the smaller storm sewers discharging into the stream south of the bridge on 102nd Avenue.

James A. Ross K.C. for the appellants.

O. M. Biggar K.C. for the respondent.

ANGLIN C.J.C. concurred with Rinfret J.

DUFF J.—I concur in the judgment for these reasons.

The existence of a state of affairs constituting a nuisance in fact, is found, and is, I think, established as resulting from the construction and use of the large sewer extending through the northeast arm; and this was in law a nuisance chargeable to the municipality, unless sufficient justification or excuse has also been established.

(1) 22 Alta. L.R. 457; [1927] 1 W.W.R. 882.

Mr. Biggar's argument founded on the statute, fails, because justification under the statute was not proved at the trial. Indeed there was no attempt to prove it. That the municipality possesses authority under its charter to construct sewers and drains for carrying away water from its streets is beyond question. But it is only in respect of the authorized works and the necessary results of such works that the municipality is entitled to the protection of the statute; and that protection is not available where the nature of the specific work alleged to be authorized under the statute is not made to appear. In this case, no by-law or other instrument evidencing authority or defining the work alleged to be authorized was adduced; and there is no finding, either by the trial judge or by the Appellate Division, that the nuisance complained of was authorized, or was the necessary result of works authorized pursuant to the charter.

I agree that the making of streets by macadamizing or paving or otherwise, is a natural use of the land owned by the municipality; and, moreover, that the municipality is under no duty to intercept rain water which, having fallen from the clouds, is pursuing its way under the impulsion of gravity or other natural forces towards a water course. But the municipality is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a water course, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparian proprietors. I can perceive no warrant for this under the common law. I refrain from discussing the provisions of the *Irrigation Act,* R.S.C., 1906, c. 61, because these were not mentioned in the argument.

The appeal, as I view it, turns exclusively upon points of fact. A nuisance in fact has been found, and is, I think, proved. The municipality has not exonerated itself from responsibility by justifying its acts as acts done under the powers conferred upon it by its charter; nor can they be justified as an exercise of the common law rights of a riparian proprietor.

RINFRET J.—This appeal involves a consideration of the rights of riparian owners in a natural water-course.

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The appellants hold, in the western portion of the city of Edmonton, a block of land bordering on the north bank of the Saskatchewan river. A deep ravine, known as Groat's Ravine, which extends northward from the river, traverses their property or bounds it to the west. It is formed of two branches: one coming from the northwest, and, as would appear from the plan, starting approximately at 109th Avenue; the other coming from the northeast, at the corner of 105th Avenue and 123rd Street. The two branches are joined at a comparatively short distance north of 102nd Avenue (also referred to in the case as Athabaska Avenue) in the Groat Ravine Park which belongs to the City of Edmonton. The ravine then proceeds under a bridge at 102nd Avenue and, shortly below, meets the appellants' land, along which it extends until it eventually reaches the river.

It forms a natural drainage basin for a large district and, prior to the settlement, the appellants and their predecessors had found there a continual flow of water, "pure and healthy," according to the evidence, which was used for drinking purposes, or at least offered a sufficient supply for stock purposes.

The appellants complained that the City of Edmonton caused or permitted the northwest branch of the ravine, at 106th Avenue, to be used "as a nuisance dumping ground for very large mounds of garbage and general city refuse" and that the water passing through it was adulterated and rendered noxious by the fault of the city; that the city had also erected on the northeast branch, in the neighbourhood of 126th Street and 103rd Avenue, a pumping station designed to raise a sewage system outflow into another sewer at a higher level, but because this pump either failed to function or became overtaxed, or because stuff was actually taken out by the city employees and deposited at the side of the station, sewage matter accumulated on the bank of, or in the channel of, the ravine and was carried to the main stream, much to the appellants' injury.

Then the city constructed a storm sewer, six feet in diameter, having its outlet in the northeast arm, at a short distance below the pumping station. Its purpose was primarily to carry off the surface waters from streets in the

vicinity. The appellants, however, alleged that all street dirt and filth were washed into this sewer. Later, the pumping station was connected with it in order that any outflow of sewage from the station might be thrown into the sewer and through it discharged into the ravine. To this the appellants strongly objected, on the ground that the effect was to pollute the water in the stream.

Still another complaint was as follows:

Between the outlet of the six foot storm sewer and the bridge at 102nd Avenue, the stream was left open; but, under the bridge and at the bottom of the ravine, a pipe was placed in order to confine the waters and protect the abutments of the bridge. This pipe extended into the appellants' property, and so, it was contended, constituted a trespass upon the appellants' land, while it increased the velocity of the water in the stream and undermined the banks, which had slipped into the ravine.

Finally, the appellants said the city had laid two pipes, immediately below the 102nd Avenue bridge, respectively on the east and west banks of the ravine, to conduct the street drainage into the latter. They complained that the result was also to foul and pollute the water in the stream.

The appellants accordingly asked for an injunction and an inquiry as to damages.

At the trial, they were successful in all their contentions. Ives J. thought

> the evidence clearly proves that the natural stream found in what is called Groat's Ravine * * * is grossly polluted, and the conclusion is irresistable that such pollution is caused, first, by the dump on 106th Avenue, which crosses the northwest branch of the stream; secondly, by the storm sewer and the sanitary sewer (*sic*) situate in the northeast branch of the stream and discharging into it; and thirdly, by the storm sewer discharging into the stream immediately south of the bridge (on) 102nd Avenue.

He declared that the dump and sewers "in their operation cause a nuisance." He therefore granted the injunction, to become effective after two years, during which the city was ordered to abate the nuisance. The issue of damages was reserved for inquiry before himself, with the proviso that the costs thereof would be borne by the appellants, unless they succeeded in establishing damages in a sum greater than $100.

As will be noticed, there was no adjudication upon two points: 1. The complaint about the supposed injury to the

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banks of the water-course. 2. The alleged trespass upon the appellants' land by laying thereon, for a distance of thirty to thirty-five feet, the large pipe intended to confine the water of the stream under the bridge and protect the abutments thereof.

The absence of findings on these points is consistent with the assumption that they were not pressed before the trial judge. At all events, the appellants accepted his judgment. The city alone appealed therefrom to the Appellate Division of the Supreme Court of Alberta. Neither of those points was again raised before us; indeed, the city conceded the appellants' right in respect to "the construction and maintenance of pipes on (their) property south of 102nd Avenue."

In the Appellate Division, the city admitted that in so far as the judgment declared it a nuisance to permit "the house sewage to escape from the (pumping station) into the ravine it was unobjectionable," and submitted "to the order requiring it to be abated." Moreover, the city was unsuccessful in its attack upon the order concerning the dump at 106th Avenue.

The appeal was allowed, however, with regard to "the surface drainage through the storm sewers," and the judgment was amended by

striking out therefrom any declaration:

(*a*) That the pollution caused by or from the storm sewer situate on the northeast arm of the said ravine and discharging into the said stream is or constitutes a nuisance;

(*b*) That the pollution caused by or from the storm sewer discharging into the said ravine immediately south of Athabasca Bridge on 102nd Avenue, is or constitutes a nuisance.

(*c*) That the surface drainage through any of the storm sewers is or constitutes a nuisance.

And the said Judgment is further amended by striking out therefrom any order that the Defendant do abate the use of any of the said storm sewers for drainage purposes, or be restrained from continuing the use of the said storm sewers for such purposes, or that the Plaintiffs shall be entitled to take out an order restraining the Defendant from the continuance of the use of the said sewers for such drainage purposes.

Another modification was introduced allowing the appellants to elect to take judgment for $100 damages in lieu of the inquiry; but they have since given notice of their refusal to accept this sum and we need not further concern ourselves about it.

The City of Edmonton is willing to abide by the decision of the Appellate Division, but the plaintiffs now ask us to restore the original judgment, and, in addition. would like us to consider a further question which it will now be convenient to examine.

The six-foot storm sewer, as originally constructed, took care of the storm water drainage from the district west of 121st Street. It extended on its southerly course from 121st Avenue down to the northeast arm of Groat's Ravine. In 1924 and 1925, it was cut at 114th Avenue to provide drainage facilities for the town of Calder. The appellants argued that the natural flow of the stream had been thereby interfered with and a substantial proportion of the water subtracted from the ravine. It was said that the decrease in the quantity of water caused the dirt and filth carried by it to be less diluted and therefore the diversion at 114th Avenue correspondingly increased the dangers of pollution.

In our opinion, this argument cannot be entertained. No doubt a riparian owner may not divert the water of a natural stream to the injury of the lower riparian owners. He may, while the water flows through his land, put it to any lawful use for reasonable purposes, but he must return it to its regular course in the stream beyond the property. Diversion of drainage, however, is quite a different thing from the diversion of a stream. While riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth. Owners, though they may be entitled to drain their lands in a water-course, are evidently not under any obligation to do so. The appellants, when they complain against the diversion of the storm sewer at 114th street, are really claiming a right to compel the city to drain into Groat's Ravine. It may be granted that the object of the six-foot storm sewer is to collect the drainage water from the area already described; yet, the appellants hold no absolute right to such water, and no action lies for its diversion.

The remaining question on the appeal is solely whether the amendments made to the judgment by the Appellate Division "in respect to the surface drainage through the storm sewers" were justified under the circumstances.

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We have the holding of the trial judge that the natural stream across the appellants' lands was grossly polluted, and that such pollution was caused by the dump, the six-foot storm sewer, the "sanitary sewer" (which meant, no doubt, the connection through which the overflow of the pumping station was directed into the storm sewer), and the storm sewers discharging into the ravine immediately south of the 102nd Avenue bridge. Subject to what will be said with regard to the latter, there was no reversal of these findings by the Appellate Division. Its judgment proceeds on the assumption that these facts were established and then states, as a proposition of law, that the respondent as riparian owner had the right to act as it did. As authority for this proposition, the Court relied on a decision of this Court in *Broughton* v. *Township of Grey* (1), where Gwynne J., dealing with an alleged liability under an Ontario Drainage Act, referred to a judgment of the Ontario Court of Appeal in *In re Townships of Oxford and Howard et al* (2), and expressed his concurrence with "the reasons given by the learned judges who pronounced it." One of those judges, in the course of his remarks (p. 505), happened to have said that

> while the landowners exercise their rights [to drain into a natural watercourse] reasonably, whether they do so individually or collectively, they are not concerned with the effects produced lower down the stream.

In the above case, however, there was no suggestion of pollution; nor was there in the *Broughton Case* (1). Pollution does not appear to have been discussed by any of the judges, and the remarks just quoted were not addressed to a situation such as is held to exist here.

The right of a riparian proprietor to drain his land into a natural stream is an undoubted common law right, but it may not be exercised to the injury and damage of the riparian proprietor below, and it can afford no defence to an action for polluting the water in the stream. Pollution is always unlawful and, in itself, constitutes a nuisance.

In cities and towns, drains and sewers are a necessity. Generally they are built under statutory powers. They may also be said to be constructed in the exercise of the collective rights which, in that respect, the local ratepayers have at common law and which are represented by the

(1) (1897) 27 Can. S.C.R. 495. (2) (1891) 18 Ont. A.R. 496.

municipality. But these rights are necessarily restricted by correlative obligations. Although held by the municipalities for the benefit of all the inhabitants, they must not—except upon the basis of due compensation—be exercised by them to the prejudice of an individual ratepayer. So far as statutory powers are concerned, they should not be understood as authorizing the creation of a private nuisance—unless indeed the statute expressly so states.

We have been referred to the sections of the Edmonton Charter whereby the relevant powers were conferred on the city by the Legislature of Alberta. As they include the power to interfere with the property of the citizen, they are to be construed favourably to the latter's rights.

In our opinion, they do not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its natural state, in flow, quantity and quality" (*Chasemore* v. *Richards* (1)), except when necessary and then upon payment of adequate compensation.

Through the 6 foot storm sewer and into this natural stream (which up to that time afforded "pure and healthy" water used for drinking and stock purposes), the city discharges not only surface water, but all the street washings and filth, the horse droppings, the sweepings "and anything else that happened to be there." This is not ordinary street drainage, but street sewage. In addition to that, a mass of dirt was allowed to form and to accumulate during the winter in that large storm sewer back of the pumping station. In the spring, the rush of water coming down washed this filthy stuff into the stream.

We think a distinction ought to be made between this condition and mere natural drainage through pipes arranged to take care of rain-water or melted snow. This difference indeed was at the basis of the decision in *Durrant* v. *Branksome Urban District Council* (2) to which reference was made by counsel for the respondent, in the course of his very able argument.

For that reason, we agree with the Appellate Division in respect to the small pipes by the Athabaska Avenue bridge. We do not think the evidence shows anything more than

(1) (1859) 7 H.L.C. 349, at p. 382. (2) [1897] 2 Ch. 291.

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that "they simply confine, control and conduct to the channel the waters which reach the top of the bank in a natural way and which but for the pipes would make their way down the bank, no doubt in many cases to its injury."

In the case of the six foot storm sewer, however, there is ample evidence to justify the holding of the trial judge. The city engineer admitted that it would be possible to prevent the pollution. The city therefore has inflicted and still inflicts unnecessary injury upon the appellant.

While the courts will naturally be slow to grant an injunction against a public body carrying out an important public work, they cannot lose sight of the fact that in this case there is an existing nuisance caused by the respondent. The appellants' established riparian rights have been and still are violated. They are entitled to an order forbidding the fouling of the water and abating the nuisance, as well as preventing the recurrence of the wrong and protecting them against the acquisition of prescriptive rights.

It has been suggested that this would necessitate very large expenditures and require considerable time. In fact, the judgment of the trial judge rather gave credit to that contention and, for that reason, prescribed that the order restraining the operation of the sewers should be taken out only at the expiration "of two years, provided such nuisance is not abated in the meantime."

Although it is no part of the court's duty to inquire how the respondent can best abate the nuisance, we entertain little doubt that within the delay thus granted the city respondent, either through the instrumentality of the Board of Public Health or through the exercise of its powers of expropriation, may avoid the removal of the sewer and the modification of its system. The city may acquire an easement through the appellant's land or the right to discharge upon it the stream water injured in quality. But, whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals" (*Atty. Gen.* v. *Birmingham* (1)).

The appeal should be allowed and the judgment of the trial judge restored (with costs here and in the Court of

(1) (1858) 4 K. & J. 528.

Appeal), except in respect of "the storm sewers discharging into the ravine immediately south of Athabaska Bridge on 102nd Avenue."

But although, after the judgment of the Appellate Division, the respondent elected to refuse the sum of $100 as damages, we see no harm in preserving his right of electing to take judgment for that sum or to take an inquiry as stated in the judgment of the Court of Appeal, with the modification that the delay of two weeks within which to make such election will run only from the day of the present judgment.

LAMONT J.—This action was brought to restrain the defendant city from trespassing upon and committing a nuisance on the plaintiffs' property and from polluting the water of a natural stream on which both plaintiffs and defendants were riparian owners. The learned trial judge found as follows:—

> I think the evidence clearly proves that the natural stream found in what is called Groat's Ravine, in this city, is grossly polluted, and the conclusion is irresistible that such pollution is caused, first, by the dump on 106th Avenue, which crosses the northwest branch of the stream; secondly, by the storm sewer and the sanitary sewer situate on the northeast branch of the stream, and discharging into it; and thirdly, by the storm sewer discharging into the stream immediately south of the bridge crossing 102nd Avenue.
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> * * * *
>
> The owners are entitled to an order for the abatement of this nuisance, and that it be kept abated.

From that part of the judgment which declared that the dump on 106th Avenue, the storm sewer on the northeast arm of the ravine, and the storm sewer discharging into the stream at 102nd Avenue, were sources from which the stream was polluted, the city appealed to the Alberta Appellate Division. That court affirmed the judgment of the trial judge as to the dump, but reversed it as to the storm sewers. From the judgment of the Appellate Division the plaintiffs appeal to this court.

Dealing first with the dump on 106th Avenue, I am of opinion that the judgment below was right. There was evidence which, in my opinion, justified the conclusion of the trial judge that it was one of the sources of the pollution of the stream. This leaves only the storm sewers to consider.

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As to the small storm sewer discharging into the stream south of the bridge crossing 102nd Avenue, there was evidence that a sample of water taken from the stream at a point opposite the out-flow of that sewer was polluted. That is practically all the evidence pointing to the pollution of the stream from this storm sewer.

As the place from which this sample was taken was south of the dump on 106th Avenue, it seems to me difficult to say that the pollution disclosed by this sample came from the storm sewer rather than the dump. I therefore agree with the Appellate Division in thinking that evidence of pollution from the small storm sewer sufficient to justify the issue of an injunction, has not been produced.

As to the large six foot sewer the city engineer says

> At the mouth of the six foot outflow there is a septic sludge which, in my opinion, is street washing, that would be animal organic matter but not human organic matter.

The engineer also testified that in August or September in each year the city placed a screen or door in the sewer a short distance from the outflow. The primary object of the screen was to prevent currents of cold air going up the sewer. It had the effect, however, of impeding the flow of the water in the sewer, with the result that the solids settled to the bottom and formed a mass of putrefaction extending up the sewer for 170 feet, and having, at the screen, a depth of one and a half feet. In the spring when the screen was removed this mass of putrid solids was swept into the stream near the plaintiffs' land and so polluted the water that the plaintiffs' animals refused to drink it.

It was contended that this pollution could be accounted for by the overflow of the pump at the sanitary sewage station. The evidence, however, is that the overflow from the pump entered the storm sewer at a point only fifty feet back from the screen, while the sludge extends back 170 feet. As the flow from the pump entrance was towards the mouth of the sewer, the sludge above that entrance could not have come from the pump. The samples of water taken at the mouth of this sewer, on being analysed, were found to be grossly polluted. I am, therefore, of opinion that there was sufficient evidence to justify the finding of the trial judge that the large six foot storm sewer was a source of pollution.

The correctness of this finding was not questioned by the Appellate Division. The reversal by that court of the trial judge's finding that the storm sewers were creating a nuisance on the plaintiffs' property was based upon what it conceived to be the right of the city to use the natural water course of Groat's Ravine for draining any part of its natural drainage area, and to do so by the aid of the construction of works useful for that purpose, and that if, in so doing, without more, the water was polluted, the consequences must be borne by the owner affected. As authority for this proposition the judgment of Maclennan J.A. in *In re Townships of Orford and Howard et al* (1), was cited, where, at page 505, the learned judge said:—

I think that by the common law it is the right of every landowner to drain his land into any natural water-course accessible to him. Indeed, it is the principal function and purpose which a water-course serves, to carry off to great lakes or to the sea, the surplus precipitation from the atmosphere, whether rainfall or melted snow, beyond what is required to support vegetation, and to supply the needs of mankind; and I think that while the landowners exercise their rights reasonably, whether they do so individually or collectively, they are not concerned with the effects produced lower down the stream.

The principle there enunciated was expressed by Lord Dunedin in giving the judgment of the Privy Council in *Gibbons* v. *Lenfestey et al* (2), in the following words:

Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

It will be observed that neither of these cases deals with the pollution of a stream the water of which a lower riparian owner is entitled to appropriate to himself. Has an upper riparian owner a right to drain on to the land of a lower owner water which has become polluted by impurities on the land of the upper owner? In *Ballard* v. *Tomlinson* (3), Lord Lindley said:

The right to foul water is not the same as the right to get it; and in my opinion does not depend on the same principles.

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(1) (1891) 18 Ont. A.R. 496.

(2) (1915) 84 L.J.P.C. 158, at p. 160.

(3) (1885) 29 Ch. D. 115, at p. 126.

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Prima facie no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbour's land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial. If a man chooses to put filth on his own land he must take care not to let it escape on to his neighbour's land.

Then on page 127, after referring to *Womersley* v. *Church* (1); *Hodgkinson* v. *Ennor* (2), and *Whaley* v. *Laing* (3), he said:

These decisions shew that *prima facie* one man has no right to foul water which another has a right to get.

In *John Young & Co.* v. *Bankier Distillery Co.* (4), Lord Macnaghten laid down the law in these words:

Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.

In that case the appellants, without any prescriptive right so to do, pumped from their mines and poured into the stream from which the respondents obtained their water for distilling purposes, a quantity of water which without being pumped up would never have reached the stream, and which so hardened the water of the stream that it was rendered unfit for the respondents' purposes. It was held that the appellants had no right to do this, on the ground that a lower riparian owner was under no obligation to receive foreign water brought to the surface of the upper owner's property by artificial means. In his judgment Lord Shand, at page 701, after pointing out that the appellants had a right to work their mines, said:

If in doing so in the ordinary course of working they should happen to tap springs or a water waste from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually and slowly and in much smaller volume.

The obligation of a lower riparian owner to receive surface water saturated with impurities from the land of an upper owner, was discussed by the Privy Council in *Stollmeyer* v. *Trinidad Lake Petroleum Co., Ltd.* (5). In that

(1) (1867) 17 L.T. (N.S.) 190.

(2) (1863) 32 L.J. (Q.B.) 231.

(3) (1857) 2 H. & N. 476; (1858) 3 H. & N. 675.

(4) [1893] A.C. 691, at p. 698.

(5) [1918] A.C. 485.

case the appellant and respondents were riparian owners, the appellant being the lower. The business of the respondents was boring for and pumping oil. In carrying on their operations, which were performed properly and without negligence, some oil would escape from the pipes and spill on the surface so that during the rainy season the surface water which made its way in the ordinary course of drainage into the river Vessigny, came to be water polluted with oil. The appellant brought an action to restrain the respondents from polluting the water. The Privy Council held that he was entitled to succeed, as the pollution from oil was greater than in an ordinary region an upper riparian proprietor was entitled to inflict upon a lower one, except by prescription. Their Lordships, while recognizing the right of an upper owner to make any natural user of his land that he wished, held that such right was subject to the limitation that he must not use it in such a way as to be a nuisance to his neighbour. Two passages from their Lordships' judgment are instructive. The first, at page 496, reads:

> If, again, the pollution, such as it is, arises simply because the rain water falls on an oily surface and, running over it until it reaches the defined channel or watercourse, collects there and flows away as oily water, the appellants would again fail. The respondents are not bound to abstain from a normal use of their own ground merely in order that it may remain as clean a catchment area for the rainfall as it was in its virgin state.

The other, at page 497, is as follows:—

> It would not be an application of English law to Trinidad, but an abandonment of it, to hold that an invasion of the appellants' rights must go without remedy, unless it is accompanied by present and substantial damage. Still less can it be called an application of the maxim *sic utere tuo* to Trinidad to say that while in England a landed proprietor must not discharge his own filth on to his neighbour's land at all he may do so in Trinidad, if only he is careful about it and does it for his own benefit.

Applying the principles laid down in the above decisions to the case before us, it would appear to follow that the city has a right to develop its lands in the way cities ordinarily do by constructing and paving streets and lanes thereon, and that if, as a result of such user, an increased quantity of street sweepings, horse droppings, and other impurities accumulates on its land, and these are washed down by the rain through a natural water-course to the stream, the plaintiffs, as lower riparian owners, have no

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ground of complaint. But, apart from statutory authority so to do, the city cannot by flushing its streets collect these impurities and by means of a storm sewer pour them into a stream the waters of which the plaintiffs have a right to take for domestic or other purposes. Under English law an upper riparian owner "must not discharge his filth on his neighbour's land."

Counsel for the city quoted section 433 of the City Charter, which gives the Corporation power to construct, manage and conduct a system of storm sewers or sanitary sewers, or both, and section 463, which provides for compensating "persons interested in the land, waters, rights or privileges entered upon, taken or used by the Corporation, or injuriously affected by the exercise of such powers," and he contended that the plaintiffs' remedy was compensation under this section.

As the city has taken no steps by the payment of compensation or by other statutory procedure to acquire a right to pour the polluted output of its storm sewer into the stream, the statute places no limitation on the plaintiffs' right of action.

As no question has been raised, either in the pleadings or on the argument before us, as to the effect, if any, of the provisions of the *Irrigation Act* (Dom.) on the rights of riparian owners, I have not considered that question.

I would, therefore, allow the appeal and restore the judgment of the trial judge, except as to the storm sewer discharging into the stream immediately south of Athabasca Bridge on 102nd Avenue. As practically no attention was paid at the trial to this storm sewer the plaintiffs, in my opinion, are entitled to their costs throughout.

SMITH J. (dissenting).—I have carefully read all the evidence in this case, and am completely in accord with the judgment of the Appellate Division, for the reasons there stated.

The City of Edmonton, in my opinion, has a perfect right to drain the surface water from its streets into the storm sewer referred to in the pleadings and, through it, to the natural water course.

There is absolutely no evidence of any pollution from this surface drainage other than what would occur in a

state of nature. It is the surface drainage of an area that forms rivulets such as that in question here, and the natural result of such surface drainage, whether in a city or in a country place, is the kind of pollution complained of in reference to the surface waters from the streets of Edmonton.

Putting aside the pollution from the dump and the pump-house well, for which a remedy is given in the judgment appealed from, the only pollution proved is that caused by the mixture of soil, such as mould, clay, sand, grit and animal droppings carried into the stream by the flow of surface waters. This kind of pollution, it is admitted by plaintiff's own expert witness, will naturally be found in any similar stream draining an area where animals are kept within that area.

The evidence discloses that the plaintiff himself had on his own premises a dozen cattle and some forty horses having access to this stream. In addition to this, several sleughs and an area extending for several miles were drained by this rivulet. Coli baccilli found in the waters of this rivulet are just what would be found in any similar rivulet running through an area where animals were pastured, as is admitted by Dr. Shaw, the plaintiffs' expert. Some of this coli baccilli, no doubt, would be contributed from the surface drainage of the City of Edmonton streets and other lands in the city, but not, I think, in greater proportion than by plaintiff's own land, with its barnyard, piles of manure and toilet on the bank, and his large stock of cattle and horses that had access to the rivulet.

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

Appeal allowed in part, with costs.

Solicitors for the appellants: *Lavell & Ross.*

Solicitor for the respondent: *J. C. F. Bown.*

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*Mar. 7, 8.
*June 12.

CHANNELL LIMITED (PLAINTIFF).....APPELLANT;

AND

O'CEDAR CORP'N. (DEFENDANT).....RESPONDENT.

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

Patent—Trade-Mark—Grant of exclusive license for Canada as to inventions and trade-mark—Alleged breach of license agreement—Construction of agreement—Licensor's covenant as to proceedings to prevent infringement—Licensee's agreement to operate under the letters patent —Liability for royalties.

Defendant granted to plaintiff the exclusive license to make, use and vend in Canada certain patented inventions relating to improvements in mops, and also the exclusive use in Canada of the trade-mark "O Cedar" with which the articles manufactured under the patents were to be labelled, and plaintiff agreed to operate in Canada under the letters patent and to use the trade-mark, and to pay a royalty of 10% of the net amount of O'Cedar products shipped and billed in Canada. The agreement further provided (*inter alia*) that the defendant should "within one month after receipt of written demand by [plaintiff] institute and prosecute all actions and proceedings necessary to prevent any infringement of the said letters patent * * * and said trade-mark" within Canada, and that if a certain mop patent should, in any action for infringement, be declared invalid, all royalties payable in respect thereof should forthwith cease to be payable. Plaintiff, alleging that defendant had not complied with its demand to take proceedings to enjoin the manufacture and sale of certain mops alleged to infringe the letters patent, and that, as the result of an unsuccessful action by plaintiff and defendant to restrain the use of a certain trade-mark as infringing defendant's trade-mark, the latter had been declared invalid, and that defendant had failed to furnish advertising copy as agreed, sued for damages for breach of contract and for a declaration that royalties under the agreement were not payable. Defendant disputed plaintiff's allegations and claims and counterclaimed for an accounting of O'Cedar products sold and payment of royalties.

Held, affirming in this respect (Newcombe J. dissenting) judgment of the Appellate Division, Ont. (60 Ont. L.R. 525), that plaintiff's action failed; defendant was obligated to prosecute actions against actual infringers only, and plaintiff had not established that the mops alleged to infringe the patent actually did so; further, on giving to the agreement its proper construction and effect, the clause obliging defendant to take action to prevent infringement was rendered inoperative by plaintiff's failure to continue operating "under the letters patent," as, since 1921, the mops manufactured and sold by plaintiff had not been made under the patent; moreover, if plaintiff did not sell mops made under the patent, it could hardly suffer actual loss by reason of its infringement, and without establishing actual loss it

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

was not entitled to damages; moreover, although the patent had not been declared invalid, as plaintiff was not selling mops made under it there were no royalties payable "in respect of the patent," and therefore nothing upon which the relevant relieving clause could operate; plaintiff's claim for damages for defendant's failure to protect it from infringement of the trade-mark failed, because no demand for action was made pursuant to the agreement, and because of lack of evidence of infringement, or loss suffered thereby; also its claim for breach of covenant to furnish copies of advertising failed upon the evidence. (Newcombe J., dissenting, held that the contract did not require that there should be an infringement of the mop patent before the authorized demand could have its contractual effect; defendant had contracted an absolute obligation, in a reasonable case, upon the specified demand, to take the necessary proceedings; the trial judge had decided in effect that proceedings were necessary to prevent infringements, and there was adequate evidence to uphold this finding.)

Held, further, reversing in this respect the judgment of the Appellate Division, that the defendant's counterclaim failed, as, on construction of the agreement and on the evidence, the articles in question in respect of which royalties were claimed were not "O'Cedar products" and therefore not liable to royalties.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which (reversing judgment of Kelly J. (1)) held that the plaintiff's action should be dismissed and the defendant's counterclaim allowed.

The defendant was a company incorporated under the laws of the State of Illinois, with its head office in the city of Chicago. It manufactured and sold in the United States products consisting of (*inter alia*) polishing mops, labelled and marked "O'Cedar." The plaintiff was a company incorporated under the laws of the Province of Ontario, with head office in the city of Toronto. By an agreement dated May 1, 1915, which recited (*inter alia*) that the defendant was entitled to certain letters patent for the Dominion of Canada, and was the owner of the trade-mark "O'Cedar" duly registered in Canada, and that all articles manufactured under the patents should be labelled or marked with said trade mark, the defendant granted to the plaintiff the exclusive license to make, use, exercise and vend in Canada the inventions which were the subject matter of the letters patent; the plaintiff to pay a royalty of 10% of the net amount of O'Cedar products shipped and billed in Canada. The plaintiff was not, during the subsistence of the license, to raise any objection to the validity of the let-

(1) 60 Ont. L.R. 525.

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ters patent or inventions, and was to do all in its power to detect infringements and threatened infringements of the letters patent and trade-mark within Canada, and, if required by defendant, but at the cost of defendant, to assist it in instituting and prosecuting legal proceedings for the prevention of such infringements. The defendant granted to the plaintiff the right to the exclusive use of the trade-mark "O'Cedar." The plaintiff agreed "to operate in the Dominion of Canada under the letters patent * * * and to use the said trade-mark." By clause 10 of the agreement the defendant agreed that it would "within one month after receipt of written demand by the [plaintiff] institute and prosecute all actions and proceedings necessary to prevent any infringement of the said letters patent * * * and said trade-mark within the Dominion of Canada," and, by clause 11, it was agreed that if a certain mop patent should in any action for infringement or proceedings for revocation be declared to be invalid all royalties payable in respect thereof under the agreement should forthwith cease to be payable, but if the decision of the court making such declaration should be reversed on appeal, the said royalties should forthwith again become payable together with all royalties which would have been payable but for the adverse decision. By clause 18 the defendant agreed to furnish from time to time to the plaintiff copies of all advertising which it might use.

In its statement of claim the plaintiff, among other things, alleged that it had demanded that defendant should take proceedings to enjoin the manufacture and sale in Canada of certain mops which, plaintiff alleged, infringed the letters patent, and that defendant failed or omitted to comply; that in or about the year 1922 the plaintiff and defendant brought an action in the province of British Columbia to restrain certain persons from manufacturing or selling mops and polishes under the trade-mark of "Cedar-Brite" or similar word infringing the defendant's trade-mark "O'Cedar," but that the action failed, and in the result the defendant's trade-mark was declared to be invalid (1); that, by reason of defendant's failure or omission to protect the plaintiff from infringements of the mop patents and trade-mark, it was relieved from liability to

(1) See [1924] S.C.R. 600.

pay royalties; that the defendant had failed to furnish it with advertising copy in accordance with the agreement; and the plaintiff claimed (*inter alia*) a declaration that the royalties were not payable, and damages.

The defendant disputed the plaintiff's said allegations and claims, denied any default on its part under the agreement, and, alleging that the plaintiff had failed to account for O'Cedar products sold, counterclaimed for an accounting and payment of the amount of royalties found due.

Kelly J. gave judgment for the plaintiff on its claim, and dismissed the defendant's counterclaim (1). His judgment was reversed by the Appellate Division, which held that the plaintiff's action should be dismissed and the defendant's counterclaim allowed (1). The plaintiff appealed to this Court.

By the judgment of this Court, now reported, as to plaintiff's claim the appeal was dismissed with costs, Newcombe J. dissenting; as to defendant's counterclaim, the appeal was allowed with costs in this Court and in the Appellate Division, and the judgment of the trial judge restored.

G. W. Mason K.C. and *F. W. Torrance* for the appellant.

R. S. Robertson K.C. and *J. W. Pickup* for the respondent

The judgment of the majority of the court (Anglin C.J.C. and Duff, Rinfret and Lamont JJ.) was delivered by

LAMONT J.—In this action the plaintiff seeks to recover from the defendant damages for the defendant's failure to observe the terms of the agreement entered into on May 1, 1915, and for a declaration that the royalties payable by the plaintiff under said agreement should not become payable until the defendant remedies its default.

The parties to the agreement were the defendant as licensor, the plaintiff as licensee, C. A. Channell, president of the defendant corporation, and A. T. Channell, president of the plaintiff company.

The agreement recited that the licensor had been granted letters patent no. 150,322 in the Dominion of Canada for

(1) 60 Ont. L.R. 525.

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inventions relating to improvements in polishing mops, dusters, and polishing and cleaning materials and processes, and that it had applied for letters patent for improvements in respect of the said inventions. It also recited that the licensor was "the owner of the trade-mark O'Cedar, duly registered in the Dominion of Canada," and that "all articles manufactured under said patents, granted, applied for or to be applied for hereafter, shall be labelled or marked with such trade-mark." By the agreement the licensor granted to the licensee the exclusive license to make, use and vend in Canada the inventions which were the subject matter of the letters patent, and also the exclusive use in Canada of the trade-mark "O'Cedar." The licensee on its part agreed to operate in Canada under the letters patent and to use the trade-mark, and to pay to the licensor monthly a royalty of 10% of the net amount of O'Cedar products shipped and billed in Canada. Then there are the following provisions:—

10. THE LICENSOR shall within one month after receipt of written demand by the Licensee institute and prosecute all actions and proceedings necessary to prevent any infringement of the said letters patent, granted, applied for or to be applied for, and said trade-mark within the Dominion of Canada.

11. If the Letters Patent Numbered 1 in the First Part of Schedule "A" hereto shall in any action for infringement or proceedings for revocation be declared to be invalid on any ground whatsoever all royalties payable in respect of such patent hereunder shall forthwith cease to be payable, but if the decision of the Court making such declaration shall be reversed on appeal, the said royalties shall forthwith again become payable together with all royalties which would have been payable but for the adverse decision * * *.

Clause 13 provides that during the continuance of the license the licensor will not make or vend within Canada any O'Cedar product; and clause 18 provides that the licensor shall furnish free of charge to the licensee "copies of any and all advertising which it may use or cause to be used."

In 1922 the plaintiff and the defendant joined in bringing an action in the courts of British Columbia to restrain one Rombough and the Dust Control Company from selling in that province mops and polishes under the name of "Cedar" or "Cedarbrite" on the ground that these names were an infringement of the trade-mark "O'Cedar." The action failed and it was held that the registration of the word "O'Cedar" as a trade-mark did not prevent the use

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by another person of the word " Cedar " as applied to goods manufactured for a similar purpose. (*Channell Limited* v. *Rombough* (1)). The plaintiff then complained that it had lost the exclusive use of the trade-mark which the defendant covenanted it should have and requested the defendant to make a reduction in the royalties payable under the agreement. The defendant would not agree. The plaintiff then wrote to the defendant complaining that two mops—the Universal Polish Mop and the Big Wonder Oil Mop—were being sold in large numbers in Canada in competition with the plaintiff's mops; that these mops were an infringement of the defendant's patent, and requesting the defendant to take legal proceedings to restrain the sale of these mops. As no proceedings were taken the plaintiff made a demand upon the defendant, in accordance with clause 10 of the agreement, that it should institute and prosecute actions against the Robert Simpson Company, Limited, and the T. Eaton Company, Limited, both of Toronto, for selling the above mentioned mops. The defendant did not comply with this demand and the plaintiff thereupon brought this action.

In its pleadings the defendant denied that it had made any default in the observance or performance of the terms of the contract by it to be performed, and, by way of counterclaim, asked an accounting by the plaintiff of the O'Cedar products sold, and of the royalties payable thereon. The trial judge gave judgment in the plaintiff's favour (2), holding that the defendant was, by reason of clause 10, under obligation to take legal proceedings against alleged infringers upon demand being made therefor, and he directed a reference to ascertain the damages suffered by the plaintiff by reason of the non-performance by the defendant of its obligation. He also relieved the plaintiff from paying royalties so long as the defendant neglected to take proceedings. The defendant's counterclaim he dismissed with costs. On appeal the First Divisional Court (2) reversed this judgment and dismissed the action. On the counterclaim the defendant was held entitled to succeed, with a reference as to the amount of the royalties due. From that judgment the plaintiff now appeals.

(1) [1924] S.C.R. 600.

(2) 60 Ont. L.R. 525.

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To the plaintiff's claim that it is entitled to be relieved from liability to pay royalties in respect of the mops manufactured under the mop patent or sold under the trade-mark, or to damages for breach of contract by reason of the failure of the defendant to protect it against infringements of the patent, there are two answers: The first answer is that given by the First Divisional Court that clause 10 obligated the defendant to prosecute actions against actual infringers only, and that the plaintiff failed to establish that the mops which were alleged to infringe the patent, actually did so.

The second answer is, that the obligation imposed on the defendant by clause 10 is dependent upon the performance by the plaintiff of its covenant "to operate in the Dominion of Canada under the letters patent," and that covenant the plaintiff has not performed. It is admitted by the plaintiff that since 1921, when it commenced to rivet the fabric to the mop head, the mops which it has been manufacturing and selling were not made under the patent. Now it is, in our opinion, quite clear that both clause 10 and clause 11 contemplate the continued manufacture and sale of mops in accordance with the patent. A failure, therefore, on the part of the plaintiff to continue operating under the patent would, we think, render inoperative that part of clause 10 which refers to proceedings to protect the patent from being infringed. In any event, it is difficult to see how the plaintiff, who does not sell mops made under the patent, can suffer any actual loss by reason of its infringement. Without establishing actual loss, in a case such as this, the plaintiff is not entitled to damages, for, as pointed out by Ferguson J.A. in the court below, "damages must be something awarded to compensate for an actual loss rather than a theoretical loss." Under the contract the only royalties the payment of which are to cease in case the patent is declared invalid are those "payable in respect of such patent." The patent has not been declared invalid nor is its validity in issue in this action. The plaintiff covenanted that it would not question its validity during the continuance of the agreement and the defendant cannot derogate from its own grant. Both parties admit its validity. We cannot, therefore, pass upon it. But even if the patent had been declared invalid, the plaintiff,

under clause 11, could only be relieved from the payment of those royalties which are "payable in respect of the patent," that is, those payable on mops manufactured in accordance with the patent and sold in Canada. As the plaintiff was not selling mops manufactured under the patent there were no royalties payable "in respect of the patent" and therefore nothing upon which clause 11 could operate. The plaintiff, it is true, was paying royalties to the defendant, but it was in respect of mops manufactured outside of the patent which were shipped and billed in Canada as "O'Cedar products." We are, therefore, of opinion that the plaintiff had not established any right to be relieved of its liability for the payment of royalties or for damages for failure by the defendant to protect it from infringements of the patent.

As to the trade-mark: The plaintiff performed its covenant "to use the trade-mark," and claims damages for the failure of the defendant to protect it from the infringement thereof. Under clause 10 the defendant is under obligation to institute an action to prevent infringement of the trade-mark, only after the receipt of a written demand therefor. No demand was made. Further, there was no evidence that any infringement existed, or that the plaintiff had suffered loss thereby. This may be accounted for by the fact that this court in the *Rombough case* (1), if it did not expressly declare the trade-mark to be invalid, in effect did so. The agreement, however, makes no provision as to the plaintiff's right in such event. It could doubtless allege a partial failure of consideration and claim damages therefor. But to succeed on that ground the plaintiff would have to submit evidence of infringement and loss suffered thereby. No such evidence is before us. So far as the evidence discloses, the plaintiff may have been the only person in Canada using the trade-mark when this action was commenced.

The plaintiff also claims damages for breach of the covenant contained in clause 18. Upon this claim it is not entitled to succeed. The evidence shews that the defendant reasonably and substantially complied with the covenant. It also shews that the gist of the plaintiff's complaint was not that it was not supplied with copies of the adver-

(1) [1924] S.C.R. 600.

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tising matter used by the defendant, but that it did not get in advance a synopsis of the ideas which the defendant intended embodying in its future advertisements. The agreement did not require the defendant to furnish such a synopsis. So far, therefore, as the plaintiff's claim is concerned, we agree with the Appellate Division that it should be dismissed.

In reference to the counterclaim, the real question involved is whether Char Mops, Victor Mops, and a polish called Chan Wax, manufactured and sold by the plaintiff, were O'Cedar products, and therefore liable to royalties.

The term " O'Cedar products " was not defined in the agreement, nor was there a word of evidence given at the trial as to what the parties understood it to include. We must, therefore, construe it in the light of the language of the agreement and the conduct of the parties.

In view of

(1) the fact that the plaintiff obtained the exclusive use in Canada of the trade-mark " O'Cedar ", and agreed to operate in Canada under the letters patent and to use the trade-mark;

(2) the recital that all articles manufactured under the letters patent should be labelled or marked with the trade-mark, and

(3) the fact that the only part of the plaintiff's business affected by the agreement was manufacturing under the letters patent and selling under the trade-mark,

we are of opinion that the term " O'Cedar products " was intended by the parties to mean and include all articles manufactured by the plaintiff under the letters patent, and all articles advertised or sold by it under the trade-mark.

The Char Mop was designed by one Peters of the plaintiff company. Admittedly it does not come within the defendant's Canadian patent, and it was not advertised or sold under the trade-mark " O'Cedar." It was devised for the purpose of meeting a demand for a cheaper mop than the O'Cedar mops, and was sold at cost so as to hold the trade and increase the volume of factory production. Being sold as one of the plaintiff's products, no doubt it derived some benefit from the advertising of the O'Cedar products, but it is not claimed that the agreement prohibits the plaintiff from manufacturing and selling outside of the agree-

ment. The Victor Mop is in a similar position. At the time of the trial it had been on the market only two months. Like the Char Mop it does not come within the patent, and was not advertised or sold under the trade-mark. In our opinion neither of these mops can be said to be O'Cedar products.

The polish known as Chan Wax was put up by the plaintiff from a formula arrived at by means of experiments made by one of its employees without any information or assistance from the defendant. In putting it on the market the plaintiff had printed on the box in which the wax was sold the statement that it was manufactured by the makers of O'Cedar products, and in one of its circulars it advertised O'Cedar products and Chan Wax together. These acts, in our opinion, do not justify the inference that the wax was being sold as an O'Cedar product.

Furthermore, in his testimony A. T. Channell stated that within three months after the wax was put on the market he had a conversation with the president of the defendant company in reference to it. His evidence as to what was said is as follows:—

Q. What did you say to him?

A. I told him we were changing the name from "O'Cedar" to "Chan." We were not using O'Cedar but Chan.

There was no contradiction of this. As the defendant was well aware that the plaintiff was selling the wax under the name of "Chan" and not under "O'Cedar", and made no claim for royalties thereon, the proper inference to be drawn, in our opinion, is that the defendant recognized the right of the plaintiff to manufacture and sell the wax, without paying a royalty thereon, so long as it was not advertised or sold under the trade-mark "O'Cedar".

We are, therefore, of opinion that the defendant is not entitled to royalties in respect of these three articles, and, as it was admitted that all other royalties on O'Cedar products had been paid, the counterclaim, in our opinion, should have been dismissed.

The appeal as to the plaintiff's claim should, therefore, be dismissed with costs. The appeal as to the counterclaim should be allowed with costs.

NEWCOMBE J. (dissenting in part).—My difficulty is that the contract does not require that there shall be an in-

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fringement of the mop-patent before the written demand authorized by paragraph 10 of the agreement can have its contractual effect. What the clause says is that:

> 10. THE LICENSOR shall within one month after receipt of written demand by the licensee institute and prosecute all actions and proceedings necessary to prevent any infringement of the said letters patent, granted, applied for or to be applied for, and said trade-mark within the Dominion of Canada.

This I interpret to mean that the licensor has contracted an absolute obligation, in a reasonable case, upon the specified demand, to institute and prosecute the necessary actions and proceedings. The learned trial judge has decided in effect that proceedings were necessary to prevent infringements, and there is adequate evidence to uphold this finding. The purpose of the covenant, as I read it, was to assure the licensee, who was to use the patent and pay royalties to the licensor for this privilege, that he would be protected in the market to the extent that threatened infringements would be prevented, and that, if, in any action for that purpose, or in any proceedings for revocation, the patent were declared invalid, payment of royalties would be suspended or cease. Thus, in a way, the licensor, in order to earn his royalties, undertook to uphold his title. Obviously the licensor cannot escape liability by refusing to concern himself in alleged infringements which might upon trial result in a declaration of invalidity, and, subject to the provisions of clause 11, terminate the royalties. It would be unjust that the licensor should be allowed to prevent or obstruct the working of clauses 10 and 11, which were designed for the security of the licensee in the conditions for which those two clauses provide.

As to the registered trade-mark, in the circumstances disclosed by the case, it appears, as such, to have become frustrate.

In my opinion, there is a breach of the agreement as expressed, and I would allow the appeal, but I agree in the conclusion as to the counterclaim.

As to plaintiff's claim, appeal dismissed with costs; as to defendant's counterclaim, appeal allowed with costs.

Solicitors for the appellant: *McWhinney & Brown.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

MAX STEIN .....APPELLANT; 1928 *Oct. 29.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Conviction on charge of receiving stolen goods —Evidence of statements made by the thieves in presence of accused— —Misdirection in judge's charge to jury—Contention that no miscarriage of Justice (Cr. Code, s. 1014 (2)).

The accused was convicted on a charge of receiving stolen goods, knowing them to have been stolen. At his trial, evidence was admitted of statements made in his presence by the supposed thieves to a constable. In charging the jury, the judge referred to these statements as evidence that might be regarded, but warned them of the danger of accepting evidence of accomplices without corroboration. On objection by accused's counsel to the charge, he recalled the jury and said: "I have already warned you in this case it would be most dangerous for you to rely on (the thieves') evidence as against the prisoner without feeling it was corroborated in other respects because (of) what they said (when) the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you."

Held: The conviction should be set aside and a new trial ordered, on the ground of misdirection. It is only when the accused, by "word or conduct, action or demeanour," has accepted what they contain, and to the extent that he does so, that statements made by other persons in his presence have any evidentiary value; and there was no evidence from which a jury might infer anything in the nature of an admission by accused of the accuracy of what was incriminating in the statements in question. The jury should have been told that, in the absence of any assent by the accused either by word or conduct to the correctness of the statements, they had no evidentiary value whatever as against him and should be entirely disregarded. It was impossible to say that there had been no miscarriage of justice, and apply s. 1014 (2) of the *Criminal Code;* it may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and, on that ground, in refusing to set aside the verdict (*Kelly* v. *R.* 54 Can. S.C.R. 220); but here, in a most vital matter, the judge had not only failed to warn the jury to disregard the statements, but had actually stressed them, in that he in effect told the jury that they were "evidence" upon which, if corroborated, they might act.

Canadian Encyclopedic Digest, Ont. Ed., vol. 4, pp. 405, 406-7; *Makin* v. *Att. Gen. for New South Wales,* [1894] A.C. 57, at p. 70; *Ibrahim* v. *R.,* [1914] A.C. 599, at p. 616; *Allen* v. *R.,* 44 Can. S.C.R. 331; *Gouin* v. *R.,* [1926] S.C.R. 539; *R.* v. *Christie,* [1914] A.C. 545, referred to.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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STEIN
v.
THE KING.

Judgment of the Court of Appeal for Manitoba (37 Man. R. 367) reversed.

APPEAL on behalf of the accused from the judgment of the Court of Appeal for Manitoba (1) affirming (Fullerton J.A. dissenting) his conviction at trial before Galt J. with a jury, for the offences of unlawfully receiving and of unlawfully retaining stolen goods, knowing same to have been stolen.

The grounds of appeal were: insufficiency of evidence on which a jury could convict, wrongful admission of evidence, and misdirection in the trial judge's charge to the jury.

At the trial the Crown called as a witness one Alexander, a detective, who, in the course of his evidence, deposed that, after the accused was arrested, he confronted him with the two men (one after the other) who had been charged with the theft of the goods in question, that (after giving the usual caution to these men and to the accused) he had questioned these men in the accused's presence; and what was said on that occasion (of which Alexander took notes at the time) was given by Alexander in evidence, counsel for the accused objecting to its admissibility. On the appeal it was contended (*inter alia*) on behalf of the accused that that evidence should not have been admitted, and that the statements made by the said two men on the occasion in question, to which the accused had not assented, were, in the trial judge's charge to the jury, wrongfully assumed to be evidence against the accused.

On the ground of misdirection in the trial judge's charge to the jury, this Court allowed the accused's appeal, set aside the conviction, and ordered a new trial. Portions of the judge's charge to which this Court made special reference are set out in the judgment now reported.

J. M. Isaacs for the appellant.

J. Allen K.C. for the respondent.

Argument by counsel for the appellant on the ground of misdirection was stopped by the Court, but he was directed to proceed, if so advised, on the other ground of his appeal, namely: that there were not sufficient evidence of identification of the goods alleged to have been stolen. Counsel

(1) 37 Man. R. 367; [1928] 2 W.W.R. 346.

representing the Attorney General was informed that he might confine his answer to the questions of misdirection and whether substantial wrong or miscarriage had resulted therefrom.

On the conclusion of the argument, the judgment of the court was rendered by

ANGLIN C.J.C.—We are all of opinion that the conviction cannot stand. There was clearly misdirection by the learned trial judge on a very important and most material matter.

Certain statements made in the presence of the accused by the supposed thieves to a constable (Alexander) were deposed to by the latter. In reference to these statements, and after reading at length to the jury the evidence pertinent thereto given by Alexander, the learned trial judge said:

> That's the interview that was mentioned to you by Alexander, and as I said before you must accept that evidence. Bear in mind it is very dangerous to accept the evidence of accomplices like these fellows unless you feel satisfied it corresponds with the truth as told by other witnesses;

and again

> In the 9th volume of Halsbury it states: To prove that the goods were stolen, a confession by the thief is admissible; if it was made in the prisoner's presence, but not otherwise. * * * The thief is an admissible witness but the alleged receiver should not be convicted on his evidence alone without corroboration.

But for the introductory allusion to the Alexander interview, all this might be taken to have reference to the testimony given orally by Paulin and Webster at the trial, which, however, was markedly less incriminating for the accused than were their answers to Alexander in the interview related by him—and the learned judge may have so intended these observations. Moreover, on objection being taken by the prisoner's counsel, citing *R.* v. *Christie* (1), counsel for the Crown replied:

> *Rex* v. *Christie* lays down this, that where a statement is made in the presence of the accused it is admissible in evidence, but in instructing the jury on the Statute (*sic*), your Lordship must point out that what is contained in the statement is not evidence unless it is admitted.

The learned judge thereupon recalled the jury and said to them:

> Objections are being raised by Mr. Isaacs (to) the evidence that has been put in by these two thieves, who did steal coats from Eatons. I have

(1) [1914] A.C. 545.

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already warned you in this case it would be most dangerous for you to rely on their evidence as against the prisoner without feeling it was corroborated in other respects because (of) what they said (when) the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you.

This is very far indeed from telling the jury, as the learned judge should have done, that, in the absence of any assent by the accused either by word or conduct to the correctness of the statements made in his presence, they had no evidentiary value whatever as against him and should be entirely disregarded.

Counsel representing the Attorney General at bar admitted that in his original direction the trial judge had failed to appreciate the rule laid down in *Christie's Case* (1), but argued that he had corrected this error when the jury was recalled. We think he rather accentuated it, however, by again referring to the statements as "*evidence*" susceptible of corroboration.

It has been urged that this misdirection did not cause a miscarriage of justice and that s. 1014 (2) of the *Criminal Code*, therefore, applies. That subject has been ably dealt with in a recent article on "Evidence" by Dr. D. A. MacRae, a professor in the Law School at Osgoode Hall, published in the Fourth Volume of the Canadian Encyclopaedic Digest, Ontario Edition, which reviews all the leading decisions. In section 17, at p. 405, referring to the *Makin Case* (2), the writer points out (notes "x" and "y") that Lord Herschell, in delivering the judgment of the Privy Council, said:

> The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury. * * * Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

(1) [1914] A.C. 545.

(2) [1894] A.C. 57, at p. 70.

Dr. MacRae also quotes from the judgment of the Privy Council, delivered by Lord Sumner, in *Ibrahim* v. *R.* (1):

> Where the trial judge has warned the jury not to act upon the objectionable evidence, the Court of Criminal Appeal * * * may refuse to interfere, if it thinks that the jury, giving heed to that warning, would have returned the same verdict * * * or where evidence has been admitted inadvertently or erroneously, which is inadmissible but of small importance * * * or most unlikely to have affected the verdict. * * * Where the objectionable evidence has been left for the consideration of the jury without any warning to disregard it, the Court of Criminal Appeal quashes the conviction, if it thinks that the jury may have been influenced by it, even though without it there was evidence sufficient to warrant a conviction.

The present provision of the *Criminal Code* of Canada (s. 1014 (2)) is substantially the same as that dealt with in the *Makin Case* (2), and in *Ibrahim* v. *R.* (3). This Court had, in the *Allen Case* (4), already taken the same view of the effect of the former section 1019 of the Criminal Code and, since the substitution for it in 1923 of s. 1014 (2) in its present form, the statement of the law made in the earlier case (*Allen* v. *The King* (4)) was reaffirmed in *Gouin* v. *The King* (5).

It is impossible to say that in the case now before us there has been no miscarriage of justice. It may be that sometimes objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and, on that ground, in refusing to set aside the verdict. (*Kelly* v. *R.* (6). But it is impossible so to regard this case, where, in a most vital matter, the learned judge did not merely fail to warn the jury to disregard the objectionable matter contained in the statements which had been admitted in evidence, but actually stressed it. It is only when the accused by "word or conduct, action or demeanour" has accepted what they contain, and to the extent that he does so, that statements made by other persons in his presence have any evidentiary value. In the present case there is no evidence in the record from which a jury might infer anything in the nature of an admission by the accused of the accuracy of what was incriminating in the statements

(1) [1914] A.C. 599, at p. 616.
(2) [1894] A.C. 57.
(3) [1914] A.C. 599.
(4) (1911) 44 Can. S.C.R. 331.
(5) [1926] S.C.R. 539.
(6) (1916) 54 Can. S.C.R. 220.

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of the thieves given in evidence by Alexander. When the jury was recalled, the learned trial judge, far from telling them, as Crown Counsel had suggested was the course indicated in *Christie's Case* (1), that the statements in question had no evidentiary value in the absence of some such admission by the accused, in effect told them that they were "evidence" upon which they might act, if corroborated, inasmuch as he said to them that it would be dangerous for them to rely upon such evidence as against the prisoner "without feeling that it was corroborated."

On this ground we are of opinion that the appeal must succeed.

As to the other ground taken by Mr. Isaacs, we are clearly of the view that there was sufficient evidence to go to the jury and that, if there had been a proper direction as to the statements so much discussed, the attack upon the conviction must have failed.

As in the recent cases of *Brooks* v. *The King* (2), and *Hubin* v. *The King* (3), "the circumstances do not seem to call for an unqualified order quashing the conviction and directing the discharge of the appellant." On the contrary, we think it clear that our discretion "should be exercised in such a manner as to afford the Crown an opportunity of once more putting the law in motion." *R.* v. *Burr* (4).

The conviction will, accordingly, be set aside and a new trial ordered.

Appeal allowed, conviction set aside and new trial ordered.

Solicitors for the appellant: *Isaacs & Isaacs.*

Solicitor for the respondent: *John Allen.*

(1) [1914] A.C. 545.
(2) [1927] S.C.R. 633.
(3) [1927] S.C.R. 442.
(4) (1906) 13 Ont. L.R. 485.

JOHN DOHERTY (PETITIONER).....APPELLANT;

AND

JOHN B. HAWTHORNE ET AL (RESPONDENTS) ..... } RESPONDENTS.

1928

*Oct. 15.
*Oct. 16.
**Nov. 13.

Habeas corpus—Jurisdiction of judge of Supreme Court of Canada—"Commitment in any criminal case under any Act of the Parliament of Canada" (Supreme Court Act, s. 57).

The petitioner was convicted, in July and October, 1928, on charges under the *Intoxicating Liquor Act* of New Brunswick, and was committed to gaol in York County, N.B. He applied to a judge of this Court for a writ of *habeas corpus*, alleging that on and prior to December 10, 1917, the *Canada Temperance Act* was in force in said county, that on that date an Order in Council, passed pursuant to c. 30 of the Statutes of Canada, 1917, became effective, suspending the operation of the *Canada Temperance Act* in said county; that, at the time of the passing of said Order in Council, there was in force the New Brunswick *Intoxicating Liquor Act, 1916,* referred to in said Order in Council as being as restrictive as the *Canada Temperance Act;* that in 1927 the New Brunswick *Intoxicating Liquor Act, 1927,* (c. 3) came into force, which repealed the 1916 Act, and was less restrictive than the *Canada Temperance Act;* and he contended that, as a result, the said suspension of the operation of the *Canada Temperance Act* automatically ceased, and that Act came into force in said county, and that the offences for which he was convicted and committed to gaol were offences against that Act and not against the provincial Act.

Held (by Mignault J., and, on appeal, by the Court), without pronouncing on the merits of said contention, that a judge of this Court had no jurisdiction to issue the writ applied for, as the commitment was not "in any criminal case under any Act of the Parliament of Canada" within the meaning of s. 57 of the *Supreme Court Act* (*In re Roberts* [1923] S.C.R. 152; *In re Dean,* 48 Can. S.C.R. 235, referred to).

APPEAL from the judgment of Mignault J., dismissing a petition for a writ of *habeas corpus*. The material facts, and the grounds of the petition, are sufficiently set out in the judgment of Mignault J. now reported. The appeal from his judgment was dismissed.

The petition was heard by Mignault J. on October 15, 1928, and on October 16, 1928, he gave judgment as follows:

*Mignault J. in chambers.

**PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

1928

DOHERTY v. HAWTHORNE

MIGNAULT J.—This is an application to me for a writ of *habeas corpus* on behalf of the petitioner Doherty. The respondents are John B. Hawthorne, keeper of the common gaol of the county of York, N.B., and Walter Limerick, Esq., police magistrate for the city of Fredericton.

The petitioner alleges that he is confined in the common gaol of the county of York in the province of New Brunswick under a warrant of commitment which he sets out in full. This commitment is signed by Walter Limerick, police magistrate, and commits the petitioner to the common gaol of the county of York under a conviction before the said police magistrate on October 1, 1928, and another conviction before the same magistrate on July 24, 1928. The conviction of October 1, 1928, was on a charge that Doherty "did sell intoxicating liquor, contrary to section 56 of the Intoxicating Liquor Act" (a New Brunswick statute), and the conviction of July 24, 1928, was on a charge that Doherty did "have liquor in his possession in an unauthorized place, contrary to the Intoxicating Liquor Act (also a New Brunswick statute), section 69."

The petition further alleges that on and prior to December 10, 1917, the *Canada Temperance Act* was in force in the county of York; and that by chapter 30 of the statutes of Canada of 1917, it was provided that on receipt of a petition in accordance with sections 111, 112 and 113 of the *Canada Temperance Act,* praying for the revocation of any Order in Council passed for bringing Part II of that Act into force in any city or county, if the Governor in Council should be of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquor, were as restrictive as the provisions of the *Canada Temperance Act,* the Governor in Council might, without the polling of any vote, by order published in the *Canada Gazette,* suspend the operation of the *Canada Temperance Act* in such city or county, such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws should continue as restrictive as aforesaid.

The petitioner states that, pursuant to the last mentioned statute, an Order in Council was passed on November 23, 1917, by the Governor in Council, and pub-

lished in the *Canada Gazette* on December 1, 1917, suspending the operation of the *Canada Temperance Act* in the county of York in terms of the last mentioned statute. He says that at the time of the passing of the Order in Council there was in force in the province of New Brunswick the *Intoxicating Liquor Act, 1916,* and an Act in amendment thereof, whereby the sale of intoxicating liquor in the province for beverage purposes was prohibited, and was prohibited for all purposes except mechanical, religious, scientific and medicinal purposes, which statute is that referred to in the Order in Council of November 23, 1917, as being equally restrictive as the *Canada Temperance Act.*

The petitioner alleges that on September 6, 1927, the Act of Assembly of the Province of New Brunswick, assented to on April 20, 1927 (c. 3 of the Acts of 1927), came into force, and the *Intoxicating Liquor Act, 1916,* with amendments thereto, was repealed. Chapter 3 of 1927, he says, permits the sale of intoxicating liquor for beverage purposes, as well as for mechanical, religious, scientific and medicinal purposes, and is less restrictive in respect of provisions for the sale of intoxicating liquor than the *Canada Temperance Act.*

It is further alleged that upon repeal of the *Intoxicating Liquor Act, 1916,* and amendments, and the coming into force of the *Intoxicating Liquor Act, 1927,* the *Canada Temperance Act* came into force in the county of York; and that the offence of which the petitioner was convicted, and for which he was committed to the common gaol of the county of York, is an offence against the *Canada Temperance Act* and not against the *Intoxicating Liquor Act, 1927.*

On these grounds, the petitioner prays for the issue of a writ of *habeas corpus ad subjiciendum,* with a writ of *certiorari* to the police magistrate to produce all proceedings on record.

At the hearing, Mr. J. J. F. Winslow, K.C., appeared for the petitioner, and Mr. J. B. M. Baxter, K.C., Attorney General of New Brunswick, for the respondents. Mr. Baxter immediately took exception to my jurisdiction to issue the writ, on the ground that the petitioner had not been committed to gaol under an Act of the Parliament of

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Canada, citing section 57 of the *Supreme Court Act* (R.S.C., 1927, c. 35), subsection one of which is as follows:

> 57. Every judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

I thought it preferable to restrict the hearing to the discussion of Mr. Baxter's objection to my jurisdiction, for if the objection be well taken, it disposes of the application.

Mr. Winslow's contention is sufficiently shewn by the averments of the petition which, for that reason, I have deemed it proper to set out in full detail. It is that, on the enactment by the New Brunswick Legislature of the 1927 statute, and the repeal of the statute of 1916, the suspension of the *Canada Temperance Act* by the Order in Council of 1917, automatically came to an end, and the latter Act is now in force in New Brunswick, and the offences committed by the petitioner were offences against it, the new provincial statute being alleged to be less restrictive than the *Canada Temperance Act*. A similar contention, I may say, was rejected by the Supreme Court of New Brunswick in *Sheehan* v. *Shaw* (1), which considered that the suspension could cease only if the Governor in Council revoked the suspending Order in Council.

I have not, however, to pronounce on the merits of the point raised by Mr. Winslow, that the suspension of the *Canada Temperance Act* automatically came to an end on the enactment of the new provincial statute, for I am of opinion that Mr. Baxter's objection to my jurisdiction to issue a writ of *habeas corpus* is well taken.

All the pertinent authorities are cited in the recent decision of Mr. Justice Anglin (now Chief Justice of Canada) in *In re J. H. Roberts* (2), by which it was held that the limitation imposed by the concluding words of section 57, subsection 1, (then section 62) of the *Supreme Court Act* is absolute. Here, on its face, the commitment shews that the petitioner was committed under a conviction for an offence against a provincial statute, the New Brunswick *Intoxicating Liquor Act*. The second charge against Doherty, which I have seen, is that he did " sell intoxicat-

(1) [1928] 2 D.L.R. 468. (2) [1923] S.C.R. 152.

ing liquor contrary to section 56 of the Intoxicating Liquor Act, 1927," and the penalty imposed, counsel states, is that provided by the provincial law. It follows that the criminal case in which the petitioner was convicted and committed to gaol was not a criminal case under the *Canada Temperance Act,* and I cannot say that the commitment was "in any criminal case under any Act of the Parliament of Canada."

Mr. Winslow strongly relied on the decision of Mr. Justice Duff in *In re Dean* (1). In my opinion, however, it fully supports the conclusion to which I have come. There the offence charged was the crime of house-breaking, which was a criminal offence under the law of British Columbia, so that, as in the present case, the commitment was not in a criminal case under an Act of the Parliament of Canada.

I can feel no doubt whatever that I am without jurisdiction to grant the writ, so I do not think I should accede to Mr. Winslow's request to refer this application to the court.

The petition is dismissed. I make no order as to costs.

The appeal from the above judgment was heard by the Court on November 13, 1928.

J. J. F. Winslow K.C. for the appellant (petitioner).

J. B. M. Baxter K.C. for the respondents.

On conclusion of the argument by counsel for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the appeal fails; the judgment appealed from seems entirely right; it is clear that a judge of this Court has no jurisdiction, there being no commitment in a criminal case under an Act of the Parliament of Canada. Section 57 of the *Supreme Court Act* is explicit. The appeal is dismissed without costs.

Appeal dismissed.

Solicitors for the appellant (petitioner): *Winslow & McNair.*

Solicitor for the respondents: *J. B. M. Baxter.*

(1) (1913) 48 Can. S.C.R. 235.

1928
*Oct. 23.
*Oct. 29.

INTERNATIONAL TIMBER COMPANY (DEFENDANT) ..... } APPELLANT;

AND

H. E. FIELD (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Labour—Wages—Regulation under statute—Male Minimum Wage Act, B.C., 1925, c. 32—Functions thereunder of Board of Adjustment—Invalidity of Board's order fixing minimum wage "for all employees in the lumbering industry."

The Board of Adjustment (constituted under the *Hours of Work Act, 1923*, c. 22, B.C.) made an order, dated September 29, 1926, under the *Male Minimum Wage Act* (B.C., 1925, c. 32) fixing 40 cents per hour as the "minimum wage for all employees in the lumbering industry," and defining "lumbering industry" to include "all operations in or incidental to the carrying on of" logging camps, certain kinds of factories, etc.

Held: The order was *ultra vires* and invalid; it was apparent on its face that the Board had misconceived the nature and scope of its functions under the *Male Minimum Wage Act*, which dealt, not with the industries or businesses of employers as such, but with the occupations of employees. The same business or industry might include many different occupations. The Board, in its order, had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged, than to the particular occupations therein of such employees. What the Act contemplated was that the Board, in fixing minimum wages, would take account of the nature of the employee's work rather than the general character of the industry or business in the carrying on of which the work would be done. The ascertainment of an employee's connection with a particular industry would not suffice to determine what would be for him a proper minimum wage.

Judgment of the Court of Appeal for British Columbia ([1928] 2 W.W.R. 1) allowing plaintiff's claim for wages as a "dish washer" and waiter in defendant's logging camp, based on said order, reversed.

Rex v. *Robertson & Hackett Sawmills Ltd.* (38 B.C. Rep. 222) and *Compton* v. *Allen Thrasher Lumber Co.* (39 B.C. Rep. 70), so far as they are inconsistent herewith, overruled.

APPEAL by the defendant, by special leave, from the judgment of the Court of Appeal for British Columbia (1) which (reversing the judgment of Cayley C.C.J.) held in favour of the plaintiff's claim. The plaintiff had been em-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) [1928] 2 W.W.R. 1.

ployed as a "dish-washer" and, later, as a waiter or "flunkey" in the defendant's logging camp, and had been paid by defendant at certain contract wages per day for his work, but he claimed that he was entitled to payment at the rate of 40 cents per hour, as being the minimum wage fixed by order of the Board of Adjustment dated September 29, 1926, and made under the *Male Minimum Wage Act* (Statutes of British Columbia, 1925, c. 32), and on the basis of having worked 13 hours per day.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was allowed, on the ground of invalidity of the said order of the Board of Adjustment.

J. W. de B. Farris K.C. for the appellant.

A. C. Boyce K.C. and *Alexis Martin* for the respondent (and also for the Attorney General of British Columbia).

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff (respondent) was engaged by the defendant company in its logging camp at Campbell River, British Columbia, for two periods during the year, 1927,—first as a "dish-washer" at $3.20 per day and afterwards as a waiter, or "flunkey," at first at the same wage and later at $3.45 a day. He appears to have been treated by his employers as liable to contribute to the Workmen's Compensation Fund a percentage of these wages. R.S.B.C., 1924, c. 278, s. 33.

By an Order of the Board of Adjustment (constituted under the *Hours of Work Act, 1923*) dated the 29th of September, 1926, and made under the *Male Minimum Wage Act* (B.C. Statutes, 1925, c. 32) the "minimum wage for all employees in the lumbering industry" was fixed at "forty cents per hour." "Lumbering industry" was by the Order defined to include

> all operations in or incidental to the carrying on of logging camps, shingle mills, saw-mills, planing-mills, lath-mills, sash and door factories, box factories, barrel factories, veneer factories, and pulp and paper mills, and all operations in or incidental to the driving, rafting and booming of logs.

Alleging that he was an employee in the "lumbering industry" of the defendants, the plaintiff sued in the County Court to recover the difference between the amounts paid

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him at the contract prices above stated and 40 cents per hour on the basis of having worked 13 hours per day.

"Employee" is defined by the Act to mean

Every adult male person to whom this Act applies who is in receipt of or entitled to any compensation for labour or services performed for another.

but, by section 13, the Act is declared inapplicable to the occupations of "farm labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants."

The County Court Judge found that the working time of the plaintiff amounted in all to only 10 hours per day and that from that time must be deducted 1½ hours to cover meal times, leaving only 8½ hours as the actual working day to which the 40 cent rate per hour could apply. He also held, however, that the plaintiff was a "domestic servant" within section 13 and, accordingly, dismissed the action.

The Court of Appeal for British Columbia reversed this judgment, holding that the plaintiff's working time was 13 hours per day and that he was not a "domestic servant" within section 13. Judgment was, accordingly, directed to be entered for the plaintiff for the sum of $187.30 with costs throughout.

Subsequently special leave to appeal to this Court was obtained by the defendant company on the terms of its paying the costs of the Attorney General and of the plaintiff of the proposed appeal in any event thereof.

As the foundation of his action the plaintiff prefers the Order of the Board of Adjustment and it is obvious that validity of that Order is essential to his success.

We are, with respect, of the opinion that it is apparent on the face of the Order of the 29th of September, 1926, that, in making it, the Board misconceived the nature and scope of its functions under the *Male Minimum Wage Act* and that the Order, as made, is *ultra vires* and invalid.

The following portions of the statute indicate the powers and duties of the Board, so far as presently material:

3. It shall be the duty of the Board to ascertain the wages paid to employees in the various occupations to which this Act applies, and to fix a minimum wage for such employees in the manner provided in this Act.

5. (1) After inquiry the Board may by order establish a minimum wage for employees, and may establish a different minimum wage for different conditions and times of employment.

* * * *

13. This Act shall apply to all occupations other than those of farm-labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants.

It is apparent that the Act deals not with the industries or businesses of employers as such, but with the occupations of employees. The same business or industry may include many different occupations: thus, a bread-making establishment may employ bread-makers, drivers of distributing wagons, book-keepers, shop assistants, etc.; and of such employees each of the classes mentioned would have a different occupation. A fruit rancher may employ fruit-cultivators, fruit-pickers, fruit-packers, fruit-canners, book-keepers, drivers, etc.; yet, while the fruit-cultivator and the driver and the book keeper have occupations which may bring them within the Act, the occupations of the fruit-picker, fruit-packer and fruit-canner exclude them from its operation. These illustrations suffice to make it apparent that, the occupation of the employee being what the Act is concerned with, the ascertainment of his connection with a particular industry or business does not suffice to determine what will be for him a proper minimum wage.

The enumeration in the Board's Order of the activities included by it in the "lumbering industry" makes it abundantly clear that in making its Order, it had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged than to the particular occupations therein of such employees. The carpenter or painter is not the less engaged each in a different occupation because both happen to be employed in connection with erecting a factory, the one to build it and the other to paint it. The occupation of the driver of a team of horses and that of the river driver are not the less distinct because both may happen to be engaged in handling logs. The pursuits of the stationary engineer and the mill-hand do not cease to be separate and distinct occupations because each is employed in the same sash and door factory. Moreover, for men the nature of whose employment requires them to be continuously "on call" during long hours, though not actually at work (e.g., messengers and watchmen), the same minimum wage per hour of employment is scarcely appropriate as that which would be fixed for men whose employment consists of continual physical work during stated, but comparatively

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shorter hours (e.g., woodsmen, or factory hands). That the Provincial Legislature was alive to the difference in regard to the nature and hours of employment between men engaged in actual industrial work and persons employed in incidental work connected with industries, such as office clerks, boarding-house and bunk-house assistants, is manifest from s. 2 of the *Labour Regulation Act*, R.S.B.C., 1924, c. 126.

In a word, what, in our opinion, the *Male Minimum Wage Act* contemplates is that the Board in fixing minimum wages will take account of the nature of the employee's work, will consider how exacting it may be, what mental and physical effort it may entail and the conditions under which it is performed, such as the inconvenience, hardship and risk incidental to it, rather than the general character of the industry or business in the carrying on of which the work will be done or services rendered.

Just as s. 3 requires the Board to deal separately with each kind of occupation, i.e., taking an illustration from the concrete case before us, to distinguish between such entirely different occupations as that of the woodsman and of the dining room waiter, so s. 5 contemplates that it will classify and establish different rates of minimum wages for men pursuing the same trade or calling under different conditions and hours of employment, some entailing greater hardships and inconveniences than others—as, for instance, again using the concrete case before us by way of illustration, between the waiter in the town restaurant and the waiter, or "flunkey," in the distant lumber camp.

That such considerations did not influence the Board in making its Order of the 29th of September, 1926, but that, on the contrary, it grouped indiscriminately in that Order all employees engaged in the manufacture or handling of wood products and fixed for all the same minimum wage without regard to the particular occupation of each class of employee, seems to us so clear on the face of the Order that its invalidity is beyond doubt. A contrary view was taken by the British Columbia Court of Appeal in *Rex* v. *Robertson & Hackett Sawmills, Ltd.* (1). That decision has been carefully considered. In so far as it is inconsist-

(1) (1926) 38 B.C. Rep., 222.

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ent with this judgment it must be overruled, as must also *Compton* v. *Allen Thrasher Lumber Co.* (1).

The appeal will, therefore, be allowed and the action dismissed. Pursuant to the undertaking given, the appellant will pay the costs in this court of the Attorney General and of the respondent. There will be no costs to either party in the provincial courts.

Appeal allowed.

Solicitors for the appellant: *Pattullo & Tobin.*
Solicitor for the respondent: *Mark Cosgrove.*
Solicitor for the Attorney General of British Columbia: *Alexis Martin.*

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*May 10, 11.
*May 28.

A. A. COOPER INCORPORATED (PLAINTIFF) ..... } APPELLANT;

AND

CANADIAN UNION INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Insurance—Fire—Warranty—Warehouse—Building to be "used solely for warehouse purposes."

The appellant was owner of a building formerly occupied by an insolvent company, where machinery and other supplies, its remaining assets, were kept until sold by the appellant. The premises were insured against fire and, attached to each of two policies, was a rider containing the following provision: "Warranted that the building is used solely for warehouse purposes." The building was totally destroyed and action was brought to recover the amount of the policies.

Held that, upon the evidence, if used at all "for warehouse purposes" within the meaning of the above clause, the building was never at any time while insured by the respondent company solely used for such purposes.

Held, also, that the word "warehouse", whether used as a noun or an adjective, implies a place prepared and used for the storage of goods and effects, whether belonging to the proprietor of the building or to others, and also implies that the building will be properly equipped and managed so as safely to keep the goods stored in it; and that the expression "is used solely for warehouse purposes" implies further that the premises will be put to no other use than the storing and safeguarding of such goods and effects.

Judgment of the Court of King's Bench (Q.R. 45 K.B. 335) aff.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) (1927) 39 B.C. Rep., 70.

1928

A. A. COOPER INC. v. CAN. UNION INS. CO.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, at Montreal, Lane J., and dismissing the appellant's action.

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

D. C. Robertson K.C. for the appellant.

F. J. Laverty K.C., and *Jos. Blain* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The plaintiff appeals from a judgment of the Court of King's Bench affirming (Greenshields and Cannon JJ. dissenting) the judgment of Lane J., dismissing its action.

The action is based on two policies of insurance, issued by the defendant company, on a building owned by the plaintiff and therein described as

the three and four storey brick building with metal and composition roof situate, etc.

Both policies were in force at the time of the fire which destroyed the building.

The material facts as found by the learned trial judge, and as the evidence establishes them, were as follows:—

The insured premises had been occupied until the 1st day of March, 1920, by the A. A. Cooper Wagon and Buggy Company, which, as its name implies, manufactured wagons and buggies, and also awnings, and which appears to have done business as well under other names which it sometimes assumed. On the above date it ceased manufacturing or doing business * * * . It has apparently gone into voluntary liquidation, and we are told that the witness Austin A. Cooper, who is treasurer of the plaintiff company, and his brother W. F. Cooper, who Austin A. Cooper says were the shareholders in the extinct wagon and buggy company, had for five years been trying to dispose and had in part disposed of the remaining assets of the last-named company, among which was the old machinery. In March, 1926, they sold the old machinery to a firm of Lewis and Kulp, wreckers and junk dealers, and for about a month before the fire in question the latter had been removing from time to time, this scrap machinery they had purchased. Among that machinery so purchased to be removed was a large fly wheel which they needed to break up for the purposes of transportation, and, in the process of breaking it up they applied an acetylene torch, which igniting the old grease on and about the wheel, started the conflagration, which totally destroyed the premises. Austin A. Cooper says that previous to the fire, Lewis had asked permission to use such a torch, and that he had refused to grant it, and the witness Rafferty said he asked permission from him and he

(1) (1928) Q.R. 45 K.B. 335.

referred him to Austin A. Cooper. The latter claims to have been previously watching the men of Lewis and Kulp removing the machinery, but at the time of the fire, although Lewis and Kulp were strangers to him, and had had in their minds the use of an acetylene torch, the insured premises, where the old machinery was, was (*sic*) deserted by every representative of plaintiff, and the men of Lewis and Kulp were entirely alone in the premises.

Of the several defences raised by the insurance company only one, in the view we take of it, requires consideration.

Attached to each of the policies was a rider containing a clause in these words:—

> Warranted that the building is used solely for warehouse purposes.

Some question arose as to whether this clause formed part of each of the policies. The finding of the learned trial judge that the riders included these clauses to the knowledge and with the concurrence of the assured and that it was bound by them is fully supported by the evidence. Two questions arise as to them: what is their import? and, were they false?

Whether these clauses should be regarded as warranties in the strict sense of the term or as representations as to the character and description of the premises insured is probably of no importance, since, in either view, their untruth, in our opinion, if established, prevents recovery under the policies. Viewed as representations, their materiality, we think, admits of no doubt. They determined the acceptability of the risk and the rate of the premium charged for the insurance.

Although the clauses in question were pleaded as warranties that the building had been "erected as" a warehouse, the real defence based upon them and put forward at the trial, and to which the evidence was directed, was that the use made of the building at the time the policies were effected and up to the time of the fire which destroyed it was not "solely for warehouse purposes"—that at no material time was the building in use solely as a "warehouse" within any meaning which could reasonably be given to that term. We think this appeal should be determined upon the real issue presented by the alleged warranties as found in the policies and as fought out at the trial, rather than upon any erroneous conception of their purport indicated in the defendant's plea. On the issues actually tried—whether the clauses under consideration be regarded as meaning only that the insured building was at the time of effecting the insurance in use solely for

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A. A. COOPER INC. v. CAN. UNION INS. CO.

Anglin C.J.C.

warehousing purposes, or that it was then, and during the currency of the insurance would continue to be, so used (the latter, we think, was what the parties intended and understood)—the evidence, in our opinion, established conclusively that the warranties or representations were in fact false and were so to the knowledge of the insured. We agree with the view expressed by the trial judge as to the connotation of the word "warehouse" in these policies. Neither when the policies were issued, nor at any time during their currency was any substantial part of the insured building used as a "warehouse" or for "warehouse purposes"; most of it, indeed, was always used for other purposes. As put by the trial judge "the building in question was a defunct or extinct wagon and buggy factory."

As put by Mr. Justice Howard in the Court of King's Bench:

> It was submitted on behalf of the appellant that "warehouse" and "storage" are synonymous and so "for warehouse purposes" means "for the purposes of storage," and it was argued that the warranty in question was strictly fulfilled, inasmuch as the plant, tools, etc., and materials of the defunct buggy and wagon company had been left in storage in the building and that a certain part of it had been set apart, arranged and used for the storage of other effects. That submission is right so far as it goes, but to my mind it does not go far enough, for the word "warehouse," whether used as a noun or an adjective, implies a place prepared and used for the storage of goods and effects, whether belonging to the proprietor of the building or to others, and further implies that the building will be properly equipped and managed so as safely to keep goods stored in it. And the expression "is used solely for warehouse purposes" includes what I have just stated and also that the premises will be put to no other use than the storing and safeguarding of such goods and effects. I consider that the learned judge of the trial court has given a fair and reasonable definition of the expression and what is necessarily implied in it, and I agree with him that the insured premises and the use to which they were put fell far short of complying with the warranty.

If used at all "for warehouse purposes" within the meaning of the clause in question, the building was never at any time while insured by the respondent company solely used for such purposes.

We are, for these reasons, of the opinion that the judgment of the Court of King's Bench should be affirmed and this appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. C. Robertson.*

Solicitors for the respondent: *Blain & Simard.*

ROBERT H. BOURK (DEFENDANT).....APPELLANT; 1928

*April 30.

AND

CANADA PRODUCTS LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Pleadings—Refusal of amendment at trial—New trial ordered—Costs—Claim for breach of logging contract.

On the question, whether plaintiff or defendant was responsible for termination of a logging contract between them, the trial judge, on his construction of defendant's counterclaim, held that defendant was not entitled to rely on what took place prior to November 14, 1924, and refused to allow amendment. The Court of Appeal, Sask. (27 Sask. L.R. 29, allowing plaintiff's appeal, and dismissing defendant's cross-appeal, from the judgment at trial) took the same view on the pleadings, and also refused amendment. On defendant's appeal to this Court, a new trial was directed, as the Court, while not holding that the construction given below to the pleading was erroneous (though such construction seemed to this Court rather narrow), or that the trial judge had wrongly exercised his discretion as to amendment, was of opinion that, under the circumstances, the trial was unsatisfactory, and that justice could only be done by a new trial. Costs down to the asking of amendment at trial were to be borne by defendant, costs subsequent thereto to be in the discretion of the judge presiding at the new trial.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) allowing the plaintiff's appeal and dismissing the defendant's cross-appeal from the judgment of Maclean J. at the trial.

The parties entered into a contract whereby the defendant was to cut, log and deliver timber at the plaintiff's mill. The contract came to an end, the responsibility for which was a matter in dispute. The plaintiff sued for moneys alleged to have been paid by it, after the termination of the contract, to release liens placed upon their logs for wages due to the defendant's workmen. The defendant disputed the claim, and, alleging that the plaintiff had wrongfully repudiated and terminated the logging contract, counterclaimed for damages.

Maclean J. held that the plaintiff was responsible for the termination of the contract, and that, as its claim arose

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) 27 Sask. L.R. 29; [1927] 2 W.W.R. 741.

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under the contract, it could not recover, and dismissed the action; but he also held that, under the circumstances to be considered in fixing the basis and quantum of damages, and taking into account, for the purpose of estimating the damages, the moneys paid by the plaintiff to discharge the workmen's liens, the defendant had suffered no actual damage, and he dismissed the defendant's counterclaim. The plaintiff appealed, and the defendant cross-appealed, to the Court of Appeal for Saskatchewan. That Court (1) held that the defendant must be held responsible for the termination of the contract; that the plaintiff's claim should have been allowed, and the defendant's counterclaim dismissed; and, accordingly, allowed the plaintiff's appeal and dismissed the defendant's cross-appeal.

On the question of the responsibility for the termination of the contract, the judgments at trial and in the Court of Appeal proceeded upon what took place between the parties on and after November 14, 1924. Late in the course of the trial the judge interrupted defendant's counsel, while examining a witness, to remind him that the defendant was not complaining in his pleadings of having been delayed by the plaintiff before November 14. Counsel for defendant asked that, if necessary, he be allowed to amend, but this was refused. The Court of Appeal (1) took the same view as the trial judge as to the limited interpretation and effect of the defendant's pleading in charging the plaintiff for breach of contract, and also refused to allow an amendment. In the course of his argument before the Supreme Court of Canada, counsel for the defendant contended that a too narrow and strict interpretation had been taken of the defendant's pleadings in his counterclaim, and that, on such pleadings, he was entitled to rely on events prior to November 14, 1924.

After hearing argument by counsel for both parties, the members of the Court retired, and on their returning to the Bench, the judgment of the Court was orally delivered by

ANGLIN C.J.C.—While we are not prepared to hold that the view taken by the trial judge and affirmed by the Court of Appeal as to the proper construction of the pleading is erroneous, we think it rather narrow. We also think that

(1) 27 Sask. L.R. 29; [1927] 2 W.W.R. 741.

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justice was much more likely to be done if the amendment asked for had been granted. Without reviewing the judgments below, and while not saying that the learned trial judge wrongly exercised his discretion, we are all of the opinion that the trial was unsatisfactory, and that justice between the parties can only be done by a new trial. A new trial is accordingly directed. The costs down to the time when Mr. Gregory asked for the amendment at the trial (Case, p. 111), will be borne (and are to be paid forthwith) by the defendant. The costs subsequent to that time are to be in the discretion of the judge who presides at the new trial, including the costs of this appeal.

New trial ordered.

C. E. Gregory K.C. for the appellant.

C. C. Robinson K.C. for the respondent.

1928

*Mar. 15.
*April 24.

IN THE MATTER OF THE SPECIFIC TRADE-MARK CONSISTING OF THE WORDS "GOLD MEDAL"

GOLD MEDAL CAMP FURNITURE MANUFACTURING CO. (OBJECTING PARTY) ..... } APPELLANT;

AND

GOLD MEDAL FURNITURE MANUFACTURING COMPANY LIMITED (PETITIONER) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-Mark—Prior user—Expunging from register

APPEAL from the judgment of the Exchequer Court of Canada (Audette J.) (1) ordering the expunging from the entry in the Canadian Trade-Mark Register of the appellant's specific trade-mark "Gold Medal."

The appeal was heard on March 15, 1928, and on April 24, 1928, the Court delivered judgment (written reasons being given by Lamont J., with whom the other members of the Court concurred) dismissing the appeal with costs.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

(1) [1928] Ex. C.R. 65.

1928

GOLD MEDAL CAMP FURNITURE MFG. CO. v. GOLD MEDAL FURNITURE MFG. CO. LTD.

The ground of the decision was that the evidence shewed user in Canada by the respondent's predecessors in title, of the trade-mark, upon goods of the same class as those sold by the appellant, for some years before the appellant began to do business in Canada, and therefore the appellant's registration was properly expunged.

It was pointed out that the Court was not to be understood as impliedly holding that the words "Gold Medal" contain the essentials necessary to constitute a valid trade-mark; that question had not been raised.

Appeal dismissed with costs.

R. S. Robertson K.C. and *H. C. F. Mockridge* for the appellant.

R. S. Smart K.C. and R. Roy McMurtry for the respondent.

1928

*Oct. 2.
*Oct. 3.

JACQUES BUREAU (PLAINTIFF).....APPELLANT;

AND

MILTON CAMPBELL AND W. J. B. SMITH (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Jurisdiction—Amount in controversy—Action against two defendants for slander—Judgment against each for $1,500—Judgment set aside and new trial ordered by Court of Appeal—Plaintiff's appeal to Supreme Court of Canada quashed for want of jurisdiction.

Plaintiff's appeal from the judgment of the Court of Appeal for Saskatchewan ([1928] 2 W.W.R. 535) setting aside the judgment below whereby he recovered $1,500 against each defendant for damages for slander, and ordering a new trial, was quashed, on the ground that this Court had no jurisdiction, as there were separate judgments against each defendant, and each of those judgments was under the appealable amount.

MOTION by each of the defendants to quash the plaintiff's appeal from the judgment of the Court of Appeal for Saskatchewan (1), on the ground of want of jurisdiction.

The plaintiff sued the defendants, in one and the same action, for damages for alleged slanderous statements made

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1928] 2 W.W.R. 535.

against him, consisting of certain alleged statements by the defendant Smith at a public political meeting, and of certain alleged statements by the defendant Campbell, at the said meeting and afterwards, to the effect that Smith's statements were true and could have been stronger. The plaintiff claimed: damages to be paid by the defendants jointly, $16,000, and in the alternative, $8,000 to be paid by each defendant. The defendants each delivered a separate statement of defence.

The action was tried before Taylor J. with a jury. The jury gave their verdict as follows: "We find for the plaintiff against the defendants and assess the damages as against Smith, $1,500, and against Campbell, $1,500"; and the judgment was "that the plaintiff do recover from the defendant Campbell the sum of $1,500; and that the plaintiff do recover from the defendant Smith the sum of $1,500"; and "that the defendants do pay to the plaintiff his costs of this action * * *."

The defendants each appealed to the Court of Appeal for Saskatchewan, and by the judgment of that court (1) the judgment below was set aside and a new trial ordered. The formal judgment was, in part, as follows:

Upon motion * * * on behalf of the above named Milton Campbell, defendant (appellant), and upon motion * * * on behalf of the above named W. J. B. Smith, defendant (appellant), both by way of appeal from the judgment [below], upon hearing read * * * and upon hearing what was alleged by counsel * * * for the appellant Campbell, * * * for the appellant Smith, and * * * for the respondent * * *.

1. This Court doth order and adjudge that the said appeals be * * * hereby allowed with costs to be paid by the respondent to the said appellants forthwith after taxation thereof.

2. [Judgment below to be set aside and there to be a new trial, the costs of the former trial to abide the event.]

The plaintiff appealed to the Supreme Court of Canada, asking that the judgments so set aside be restored. The security approved and allowed to be given by the plaintiff in respect of the appeal consisted of two separate bonds of the plaintiff and a surety company, namely: a bond in favour of the defendant Campbell for $2,526.06, and a bond in favour of the defendant Smith for $1,053.53. As stated by affidavit on defendants' behalf on the present motions, the said sum of $2,526.06 covered $500 as security

(1) [1928] 2 W.W.R. 535.

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BUREAU v. CAMPBELL AND SMITH.

for the costs of the appeal to the Supreme Court of Canada, and $2,026.06, being the costs, as taxed, of appeal to the Court of Appeal awarded to the defendant Campbell; and the said sum of $1,053.53 covered $500 as security for the costs of the appeal to the Supreme Court of Canada, and $553.53, being the costs, as taxed, of appeal to the Court of Appeal awarded to the defendant Smith.

The defendants moved to quash the appeal for want of jurisdiction.

C. E. Gregory K.C. for the defendant Smith.

W. D. Herridge for the defendant Campbell.

S. Clark for the plaintiff.

The motions were heard on October 2, 1928, and on October 3, 1928, the Court orally gave judgment granting them, being of the opinion that there was no jurisdiction, as there were separate judgments against each defendant, and each of those judgments was under the appealable amount. The appeal was quashed with costs, limited, however, to those of a motion to affirm jurisdiction unsuccessfully made in chambers.

Motions granted. Appeal quashed.

Solicitors for the appellant: *Tingley & Malone.*
Solicitor for the respondent Campbell: *G. H. Barr.*
Solicitor for the respondent Smith: *W. P. Cumming.*

1928

*Mar. 27, 28.
*April 24.

DETROIT RUBBER PRODUCTS, INC. (PLAINTIFF) ..... } APPELLANT;

AND

REPUBLIC RUBBER COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—Lack of invention—Anticipation—Channel rubber runways for slidable windows

APPEAL from the judgment of the Exchequer Court of Canada (Audette J.) (1) dismissing the plaintiff's action

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Smith JJ.

(1) [1928] Ex. C.R. 29.

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DETROIT RUBBER PRODUCTS, INC. v. REPUBLIC RUBBER CO.

for infringement of its patent (for certain "new and useful improvements in channel rubber runways for slidable windows"), on the ground of invalidity of the patent.

The appeal was heard on March 27 and 28, 1928, and on April 24, 1928, the Court delivered judgment (written reasons being given by Smith J., with whom the other members of the Court concurred) dismissing the appeal with costs, the ground of the decision being that the patent was invalid, because of lack of invention sufficient to form the basis of a patent, and because, in any event, there had been anticipation of every feature of the device in question.

Appeal dismissed with costs.

W. D. Herridge for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

THE NIEBLO MFG. CO. INC. *v.* REID ET AL

1928

*May 18.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invalidity—No patentable invention—Golfing tees

APPEAL by the plaintiff from the judgment of the Exchequer Court of Canada (Audette J.) (1), dismissing its action for alleged infringement of its patent (for certain new and useful improvements in golfing tees) on the ground that the patent was invalid because of want of patentable invention.

At the conclusion of the argument for the appellant, and without calling on counsel for the respondent, the Court orally delivered judgment, dismissing the appeal with costs, on the ground that there was no patentable invention.

Appeal dismissed with costs.

R. S. Cassels K.C. for the appellant.

Russel S. Smart K.C. for the respondent.

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*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Smith JJ.

(1) [1928] Ex. C.R. 13.

1928

*May 15.
*May 16.

WETTLAUFER BROTHERS LIMITED (DEFENDANT) ..... } APPELLANT;

AND

ROBERT ELDER CARRIAGE WORKS LIMITED (PLAINTIFF) ..... } RESPONDENT.

ROBERT ELDER CARRIAGE WORKS LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

SNOW MOTORS INCORPORATED (DEFENDANT) ..... } RESPONDENT.

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

Contract—Action against two defendants for price of goods sold and delivered—Question as to which defendant purchased—Findings of fact.

APPEALS by the defendant Wettlaufer Brothers Limited and by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1).

The plaintiff sued the defendants, Wettlaufer Bros., Ltd. and Snow Motors Inc., for the price of goods sold and delivered. The decisions turned upon findings of fact. At the trial Riddell J. held, upon the evidence, that, as to most of the items, the defendant Snow Motors Inc. was liable as being in fact the purchaser of the goods, and the plaintiff recovered judgment against it for $1,973.71, and against the defendant Wettlaufer Bros. Ltd., in respect of certain items, for $224.79, and against the defendants for costs. The defendant Snow Motors Inc. appealed from that judgment, and the plaintiff also appealed, claiming that it was entitled to judgment against the defendant Wettlaufer Bros. Ltd. for $2,198.50, and, in the event of success of the appeal of the defendant Snow Motors Inc., it was entitled to judgment against Wettlaufer Bros. Ltd. for $2,198.50. The Appellate Division (1) allowed the

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1927] 33 Ont. W.N. 199.

appeal of the defendant Snow Motors Inc., and also allowed the plaintiff's appeal, and directed that the action be dismissed as against the defendant Snow Motors Inc. and that the plaintiff recover from the defendant Wettlaufer Bros. Ltd., the sum of $2,198.50, and that the defendant Snow Motors Inc. and the plaintiff each recover its costs of action from the defendant Wettlaufer Bros. Ltd., and that the plaintiff recover from the defendant Wettlaufer Bros. Ltd. its costs of appeal, and that the defendant Snow Motors Inc. recover from the defendant Wettlaufer Bros. Ltd. its costs of appeal. The defendant Wettlaufer Bros. Ltd. appealed to the Supreme Court of Canada, and the plaintiff also appealed to the Supreme Court of Canada against the judgment of the Appellate Division in so far as it relieved the defendant Snow Motors Inc. from its liability to the plaintiff adjudged by the trial judge. Leave to appeal was granted to the appellants by the Appellate Division.

After hearing argument by counsel for all parties, judgment was reserved, and on the following day the Court orally delivered judgment allowing both appeals with costs.

Appeals allowed with costs.

R. S. Robertson K.C. for the defendant Wettlaufer Brothers Limited.

Gordon Waldron K.C. for the plaintiff.

L. Ramsey for the defendant Snow Motors Incorporated.

1928
*May 4. 7.
*Oct. 2.

HANNAH BRODY, MADE PARTY DEFENDANT BY ORDER GRANTED HEREIN THE 27TH DECEMBER, 1927, TO CARRY ON THE PROCEEDINGS (DEFENDANT) ..... APPELLANT;

AND

THE DOMINION LIFE ASSURANCE COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Life insurance—Action by insurer for cancellation of policies on ground of insured's fraudulent misrepresentations as to health—Jury's findings held perverse by appellate court—Jurisdiction of Supreme Court of Nova Scotia en banc to substitute its findings for those of jury and give judgment thereon—Rules of Court (N.S.); O. 38, R. 10; O. 57, R. 5.

B. (the original defendant, since deceased) made three applications to plaintiff for life insurance, on each of which a policy was issued. Plaintiff sued for a declaration that the policies were null and void, on the ground that B. knew, when he made the application in each case, that he was not in good health, but fraudulently represented that he was, for the purpose of inducing issuance of the policies. At the trial, the jury found that B., at the time of the applications, was in ill health, but was unaware of that fact when he signed the first two applications, but knew it when he signed the last one. On these findings Jenks J. (60 N.S. Rep. 116) dismissed the action as to the first two policies, but directed cancellation of the last one. On appeal, the Supreme Court of Nova Scotia *en banc* (60 N.S. Rep. 116) held that the jury's findings that B. did not know he was in ill health when he signed the first two policies were perverse, and it directed that the first two policies be also cancelled, upon payment back of all premiums paid. The defendant appealed.

Held, that, upon the evidence, the jury's findings that B. did not know he was in ill health when he signed the first two applications were perverse; that the Court *en banc* had jurisdiction to substitute its own findings of fact for those of the jury and give judgment for the plaintiff; and that its judgment should be affirmed.

On said question of jurisdiction, the Court discussed Order 38, Rule 10, and Order 57, Rule 5, of the Rules of the Supreme Court of Nova Scotia, and Order 40, Rule 10, and Order 58, Rule 4, of the English Rules, and referred to *Miller* v. *Toulmin,* 17 Q.B.D. 603, and *R.M. of Victory* v. *Sask. Guar. & Fidelity Co. Ltd.* [1928] S.C.R. 264.

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), allowing the plaintiff's appeal, and dismissing the defendant's cross-

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) (1928) 60 N.S. Rep. 116.

appeal, from the judgment of Jenks J. (1), given on the findings of the jury at the trial, dismissing the plaintiff's action as to the first two policies of life insurance in question, but directing cancellation of the third one. The plaintiff's action was for a declaration that three contracts of life insurance were null and void, on grounds hereinafter mentioned.

The formal judgment of the Court *en banc* ordered "that the motion for a new trial asserted by the plaintiff herein be and the same is hereby allowed"; that "the cross-motion asserted by the defendant herein be and the same is hereby dismissed"; and that "upon the plaintiff paying or tendering to the defendant the amount of all premiums paid to the plaintiff in respect of [the three policies in question in the action], less any balance of costs that may be taxed in favour of the plaintiff * * * the said [three policies in question] be and the same are hereby cancelled and rescinded and shall forthwith be delivered to the plaintiff for cancellation."

The following statement of the case and of the proceedings below is taken from the judgment of Lamont J., who delivered the reasons for the judgment of this Court.

"The question to be decided in this appeal is: Was there evidence before the jury on which it could reasonably find that Hyman Brody believed he was in good health when he made certain applications for insurance on his own life with the respondent company?

"The applications were made on the following dates, namely, December 9th, 1925; February 15th, 1926, and March 10th, 1926. In each application Brody made the following representation:—

> I hereby declare that to the best of my knowledge, information and belief my health is good.

"Pursuant to each of these applications a policy was issued to Brody. After issuing the last of these policies, the company received information which led it to believe that Brody had not been in good health when he applied for insurance, and, on December 17th, 1926, it brought this action and asked for a declaration that the three contracts of insurance entered into with Brody were null and void

(1) (1927) 60 N.S. Rep. 116.

1928

BRODY v. DOM. LIFE ASSUR. CO.

on the ground that when he made application in each case he knew that he was not in good health, but fraudulently represented that he was, for the purpose of inducing the company to issue to him the policies which in fact it did issue. The matter came on for hearing before Mr. Justice Jenks, sitting with a jury. The jury found that at the time Brody made the applications above referred to he was in fact in ill health, but that he was unaware of that fact when he signed the applications of December 9th, 1925, and February 15th, 1926. As to the application of March 10th, 1926, the jury found that on that date Brody was in ill health to his knowledge.

"On the answers of the jury the trial judge dismissed the plaintiff's action in so far as the first two contracts of insurance were concerned, but directed that the last contract be 'cancelled and rescinded'. The plaintiff company appealed from that judgment to the Supreme Court of Nova Scotia, *en banc,* and the defendant cross-appealed in respect of the last policy.

"Hyman Brody having died, Hannah Brody, his wife and the beneficiary named in the three policies, was substituted as defendant.

"The court *en banc* held that the answers of the jury to the effect that Brody did not know that he was ill when he signed the applications of December 9th, 1925, and February 15th, 1926, were perverse. It also found as a fact that as early as October, 1925, Brody knew that he was in ill health. It therefore directed that the policies founded on the first two applications be also cancelled upon the plaintiff's paying back or tendering the premiums paid. The cross-appeal was dismissed. From the judgment *en banc* the defendant now appeals to this Court."

C. J. Burchell K.C. for the appellant.

R. S. Robertson K.C. and *G. McL. Daley* for the respondent.

After hearing argument by counsel for the parties, the Court reserved judgment, and on a subsequent day delivered judgment dismissing the appeal with costs. Written reasons were delivered by Lamont J., with whom the other members of the Court concurred.

The written judgment, after stating the case and the proceedings below, as above set out, discusses the evidence at

length, and holds that the answers of the jury that Brody believed himself to be in good health at the times of his applications for policies on December 9, 1925, and February 15, 1926, must be held perverse.

The judgment then proceeds as follows:

"The only other point to be considered is: Had the court *en banc* jurisdiction to substitute their own findings of fact for those of the jury and give judgment for the plaintiff?

"In the Rules of the Supreme Court of Nova Scotia there are two rules dealing with the power of the court to draw inferences of fact where the action has been tried with a jury. The first, Order 38, Rule 10, provides that upon a motion for judgment or upon an application for a new trial the court may draw all inferences of fact not inconsistent with the finding of the jury. The other, Order 57, Rule 5, under the heading of "Appeals", contains this provision:

> The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case requires.

"Both these rules have their counterpart in the English Rules in Order 40, Rule 10 and Order 58, Rule 4, but the latter rule refers expressly to the Court of Appeal.

"The scope of the English Rule is dealt with in *Millar* v. *Toulmin* (1),

"In Nova Scotia there is but one court, and it has both original and appellate jurisdiction and has, with certain exceptions not material here, the same powers as were, on the first day of October, 1884, exercisable in England by the Court of Appeal and the High Court of Justice. Order 58, Rule 4, was in force on that date. In my opinion, therefore, Order 38, Rule 10, cannot have the effect of limiting the power of the court in appeal given by Order 57, Rule 5.

"In the recent case of *Rural Municipality of Victory* v. *Saskatchewan Guarantee and Fidelity Company Ltd.* (2), this Court, following the decision of the House of Lords in *Calmenson* v. *Merchants' Warehousing Co. Ltd.* (3), held that the Court of Appeal of Saskatchewan, under a similar rule, had jurisdiction to substitute its own findings of fact

(1) (1886) 17 Q.B.D. 603. (2) [1928] S.C.R. 264.
(3) (1921) 125 L.T. 129, at p. 131.

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for those of the jury where the findings of the jury were perverse and the members of the court were of opinion (1) That they had all the facts before them, and (2) That if a new trial were granted no further evidence could be given, which would alter the result.

"In the present case Brody is dead. Further evidence from him cannot, therefore, be had. It was contended on his behalf that the testimony of the doctors who examined him when he applied for the policies of insurance should be placed before the jury. I am unable to see how any evidence that these doctors might give could throw any light upon the question of Brody's knowledge of the state of his health at the time he signed the applications. They could only testify as to what they found, which could not assist in determining the question before the jury. Such evidence, in my opinion, would not alter the result.

"I would therefore dismiss the appeal with costs."

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. R. Rowlings.*

Solicitor for the respondent: *E. C. Phinney.*

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*May 3, 4.
*Oct. 2.

CANADIAN PROVINCIAL POWER COMPANY LIMITED (PLAINTIFF).. } APPELLANT;

AND

THE NOVA SCOTIA POWER COMMISSION (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Waters and watercourses—Power development—Nova Scotia Water Act—Nova Scotia Power Commission Act—Expropriation of land by Power Commission for water power development purposes—Amount of compensation—Finding of jury—Insufficient direction to jury—Factors to be taken into account—New trial.

Plaintiff was incorporated by c. 181 of 1914, N.S., with comprehensive powers for its purposes of developing water power and producing and selling electric power. It acquired, for $500, about 31½ acres of land at Marshall Falls, on East River, Sheet Harbour, Nova Scotia. In

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

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1919 (c. 5) the Nova Scotia legislature passed the *Nova Scotia Water Act* which, among other things, declared that every watercourse and the sole and exclusive right to use, divert and appropriate any and all water in any watercourse was vested forever in the Crown in the right of the Province. There was provision for the Governor in Council authorizing persons to use any watercourse and any water therein on such terms and conditions as the Governor in Council might deem proper. The legislature also passed the *Power Commission Act* (1919, c. 6; subsequently, with amendments, consolidated as c. 130, R.S.N.S., 1923) by which defendant was incorporated. Under its powers given by that Act, the defendant proceeded to develop East River, Sheet Harbour, for power purposes; it contracted to supply electrical power to the Pictou County Power Board (incorporated by c. 165 of 1920); constructed storage dams above Marshall Falls; and expropriated land, including plaintiff's said land. Plaintiff filed its claim for compensation, and (as authorized under the *Power Commission Act,* defendant not having instituted action within the time prescribed) sued in the Supreme Court of Nova Scotia for a declaration that it was entitled to $80,000 as compensation. At the trial a special jury found the compensation to be $32,000. On appeal by defendant, the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 524) set aside the finding and directed a new trial. Plaintiff appealed.

Held, that the direction for a new trial should be affirmed; there was no evidence that the land's agricultural value had increased, or that it had any special suitability except in relation to the development of power at Marshall Falls; and the jury had not been sufficiently directed so as clearly to apprehend the effect of the *Nova Scotia Water Act* and the *Power Commission Act,* and of what had been done pursuant thereto, and of the resultant situation which prevailed, as affecting the plaintiff's rights and prospects, at the time its land was expropriated.

It was pointed out that unless the owner of the land constituting the dam-site had a right or privilege to use or divert the watercourse or the water, the dam-site was of no utility or value for the manufacture of power, and that subs. 2 of s. 4 of the *Nova Scotia Water Act,* as enacted by c. 75 of 1920, whereby the Governor in Council is empowered to authorize any person to use any watercourse or any water therein for such purposes and on such terms and conditions as are deemed proper or advisable, is not expressed in a manner which points to the grant of a heritable or assignable right; that the use which may be authorized is not a use which goes with the land, and that it was upon the exercise of this power by the Governor in Council that the plaintiff's claim to a value for special adaptability must depend.

The *Nova Scotia Water Act* discussed and construed, in its bearing on the matters in question.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1) setting aside the verdict of the jury at the trial and ordering a new trial.

(1) (1928) 59 N.S. Rep. 524.

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The defendant, in the exercise of its powers under the *Power Commission Act* (Statutes of Nova Scotia, 1919, c. 6; subsequently, with amendments, consolidated as c. 130, R.S.N.S. 1923) acquired by expropriation, in June, 1925, 31.48 acres of land belonging to the plaintiff (a company incorporated by c. 181 of the Statutes of Nova Scotia, 1914, with comprehensive powers for its purposes of developing water-power and producing and selling electric power) at Marshall Falls, on East River, Sheet Harbour, Nova Scotia. The plaintiff filed a claim for compensation and sued in the Supreme Court of Nova Scotia (as authorized under the *Power Commission Act,* the defendant not having instituted action within the prescribed time) for a declaration that it was entitled to receive the sum of $80,000 as compensation. At the trial, before Carroll J. with a special jury, the jury found the compensation payable to the plaintiff to be $32,500. On appeal by the defendant, the Supreme Court of Nova Scotia *en banc* (1) ordered that the verdict of the jury be set aside and that there be a new trial. From that judgment the plaintiff appealed to this Court.

The material facts of the case, and the legislation, the construction and effect of which was involved in the consideration of the case, are sufficiently set out in the judgment now reported. The appeal was dismissed with costs.

F. R. Taylor K.C. and *R. M. Fielding* for the appellant.

C. J. Burchell K.C. and *G. McL. Daley* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The appellant company seeks, in this appeal, to have restored the finding of a special jury assessing the compensation for land taken by the respondent Commission on East River, Sheet Harbour, in Nova Scotia, the finding having been set aside and a new trial ordered by the Supreme Court of that province.

In 1913 Roderick McColl, the appellant's leading witness, who had been for many years provincial engineer of Nova Scotia, in charge of all the public works, resigned his office to go into hydro electric development. He had been interested, as he says, in the fact that Nova Scotia was paying

(1) (1928) 59 N.S. Rep. 524.

so high for its power, and was making so little progress. He looked around for the best market, and it seemed to him that Halifax and Pictou Counties were the natural markets, and those that were suffering most. He was familiar with the East River, Sheet Harbour, in the County of Halifax. He obtained the provincial Act, c. 181 of 1914, incorporating the appellant company, the objects and powers of which are very comprehensive; in the words of the witness, "Briefly speaking, the Act empowered the company to develop a water-power on Sheet Harbour and electric development on that river for supplying mainly Pictou County towns." Paragraphs (*c*) and (*d*) of the objects and powers are in these terms:

(*c*) to set, erect, operate and maintain in and through the counties of Pictou, Colchester, Antigonish and Guysboro, and in that portion of the County of Halifax east of the Musquodoboit River, the usual poles with wires thereon for the purpose of conveying said electrical or galvanic currents, or for the purpose of hanging or stringing thereon telegraph or telephone wires for any of the company's purposes, from the point or points where the same is generated to the point or points of sale, which shall be and become when erected the property of the Company;

(*d*) to enter into a contract with any electric light, power, tram or other company or municipality to supply the electric current and electricity they may require in their business, or for the purposes of lighting or power, and for the use of their poles and wires and apparatus for distribution and other purposes;

By s. 19, subs. 1, it is provided that

In order to secure, have, develop, maintain or increase the power to be derived from the waters of the East River, Sheet Harbour, or any river, stream or lake tributary to, flowing into or connected with the same, and all branches thereof, the Company shall have full right, power and authority to dam, pen back and hold said waters of said East River, Sheet Harbour, and of any such river, stream or lake and all branches thereof by dams or reservoirs, and to withdraw the waters from the channel of such East River, Sheet Harbour, and of any such river, stream or lake, and all branches thereof, and to convey the water so dammed, penned back, and held, by sluice way, canal, flume, conduit or other means, over, across, under or through any lands whatever, to any penstock, sluiceway, pipes or reservoirs, as may be most expedient or efficient for delivering the water for the purpose of operating the water wheels of the said Company; the use of the water of said river to be subject to any provisions or regulations that may be made by commissioners appointed under Chapter 95, Acts of 1895, for conveying lumber and timber on rivers, or any amendments thereto.

The other subsections of section 19 provide for the ascertainment and recovery of compensation for damages or injurious affection caused by the exercise of the powers so conferred.

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By section 20, the Company is empowered, when it considers it necessary to acquire lands upon which to construct its works, or for other purposes, and, when no agreement can be made for the purchase of the land, to present a petition to the Governor in Council praying for decision of the question as to whether the property or easement sought to be acquired is necessary for any of the company's purposes, and it is provided that the Governor in Council shall thereupon determine that question according to a procedure which is outlined, and, if he decide that the property or easement sought to be acquired is necessary for any of the purposes of the company, "and by Order in Council declare that the same may be expropriated under the provisions of this section," the value of the property shall be ascertained in the manner thereby provided. There is special provision, by s. 23, for the company's acquisition of rights of way for its transmission lines through uncultivated or wilderness lands, and, by s. 24, it is provided that

> The Company shall have the right:
>
> (*a*) to enter upon and occupy any Crown Lands for a right of way for its tranmission line, or for the construction of dams, or building canals or flumes or power plant or other works of the Company;
>
> (*b*) to cause any Crown Lands to be overflowed and to keep the same overflowed.
>
> The compensation to be paid the Crown for any act or thing done under the provisions of this section shall be settled by an arbitrator * * *.

There were three waterfalls on East River where power could be developed; first, going up stream, at Ruth Falls, near the mouth of the stream; secondly, at Malay Falls, a short distance above, and thirdly, at Marshall Falls, about half a mile above Malay. The appellant company acquired some land for power sites at each of these situations, but nothing was done in the way of construction or development.

In 1919 the Legislature of Nova Scotia enacted the *Nova Scotia Water Act*, c. 5, of 1919. Its provisions have an important bearing upon the case. By section 2, par. (*b*), "watercourse" is defined to include

> every watercourse and the bed thereof and every source of water supply, whether the same usually contains water or not, and every stream, river, lake, pond, creek, spring, ravine, and gulch; but shall not include small rivulets or brooks unsuitable for milling, mechanical or power purposes.

The principal enactment is section 3, which provides that

> Notwithstanding any law of Nova Scotia, whether statutory or otherwise, or any grant, deed or transfer heretofore made, whether by the

Crown or otherwise, or any possession, occupation, use, or obstruction of any watercourse, or any use of any water by any person for any time whatever, every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse, is declared to be vested forever in the Crown in the right of the province of Nova Scotia.

By section 4, subsections 1 and 2 (the latter as enacted in substitution by c. 75 of 1920), it is enacted that

(1) Where any person within two years from the passing of this Act establishes to the satisfaction of the Minister that any watercourse or any water therein was at the time of the passing of this Act being lawfully used by him or that he was entitled to use the same, such person shall be entitled to be authorized by the Governor in Council to use such watercourse and water therein, subject to such terms and conditions as the Governor in Council deems just.

(2) Notwithstanding the provisions of the next preceding subsection, the Governor in Council may from time to time authorize any person to use any watercourse and any water therein for such purposes and on such terms and conditions as are deemed proper or advisable, including, in the discretion of the Governor in Council, the payment of compensation to any person whose rights may be injuriously affected, the amount of such compensation to be fixed and determined by the Governor in Council or fixed and determined by a Judge of the Supreme Court whom the Governor in Council may appoint, and, except as aforesaid, no action, process or proceeding whatsoever shall be commenced or issued in any court or before any tribunal by or against any person authorized by the Governor in Council to use such watercourse or any water therein conditionally or otherwise.

This Act, as consolidated and revised, now appears as c. 26 of the *Revised Statutes of Nova Scotia, 1923.*

The *Nova Scotia Water Act* was enacted on 17th May, 1919, and at the same time the legislature enacted c. 6 of 1919, "*An Act respecting the Development of Electrical Energy from Water-Power and other Sources,*" cited as the *Power Commission Act,* which, with its amendments, was subsequently consolidated as c. 130 of the Revised Statutes of 1923. By this Act the respondent Commission, consisting of three persons, appointed by the Governor in Council, "two of whom may be members, and one of whom shall be a member, of the Executive Council," was incorporated and constituted as an agency of the government, under the name of *The Nova Scotia Power Commission,* with authority to

generate, accumulate, transmit, distribute, supply and utilize electric energy and power in any part of the province of Nova Scotia, and do everything incidental thereto, or deemed by the Commission necessary or expedient therefor.

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The Commission is given comprehensive powers to acquire, expropriate and use property of various descriptions, including land, watercourses, water privileges, works, machinery and plant developed, operated, used or adapted for its purposes, and to enter upon, take and use, without the consent of the owner, any land upon which any water, watercourse or privilege is situate, or any watercourse which, in the opinion of the Commission, is capable of improvement or development for the purpose of providing water-power, and to construct such dams, sluices, canals, race-ways and other works, and to do all such acts, as may be deemed proper or expedient for such purposes, and to flood and overflow any land for the purpose of providing storage of water, or for any other purpose in connection with such works, and to acquire by purchase or otherwise, or, without the consent of the owner, to enter upon, take possession of and use any land or watercourse, and any dams, buildings or structures or improvements thereon, and any easements, rights or other privileges which, in the opinion of the Commission, are necessary, requisite or useful for the storage of water, back flowage, erection of any building or other structure, or for the doing of any work thereon, or for the full, partial or better development, extension, utilization, improvement or exercise of any water-right, water-privilege, water-power or other improvement, or work undertaken or proposed to be undertaken by the Commission, or by any municipality, corporation or individual, on such terms and conditions as the Commission may deem expedient; and to expropriate, or acquire by purchase or otherwise, real and personal property of every description deemed useful for the purpose of generating, accumulating, transmitting, distributing, supplying and utilizing electrical power or energy in a municipality, the council of which has entered into an agreement with the Commission for the supply of electrical power or energy. It is provided by s. 15, subs. 9, of the Act that

> Notwithstanding any of the provisions of the *Nova Scotia Water Act*, or of any authorization by the Governor in Council to any person to use any watercourse or the water therein, or to exercise any rights in respect thereof, the Governor in Council may and is hereby empowered to authorize the Commission to use exclusively or to such extent as the Governor in Council may specify, any watercourse and any water therein for the purposes of the Commission; and no damages or compensation shall be given or claimed in respect thereto except such amount, if any, as may be fixed and determined by the Governor in Council.

It is also provided by section 15, paragraph D, that

> In any action for compensation, whether commenced by the Commission or by any person interested, the Court shall not allow compensation for the taking or injuriously affecting by the Commission of any watercourse, but the compensation for same, if any, shall be fixed and determined by the Governor in Council.

It is enacted by s. 18 of the original Act, s. 19 as revised, that

> Expropriation powers conferred by this Chapter shall extend to land, works, rights, powers, privileges, and property, notwithstanding that the same are or may be deemed to be devoted to a public use, or that the owner thereof possesses the power of taking land compulsorily.

There is a provision that, if the Commission does not commence an action for compensation (*sic*) within three months after particulars of a claim are filed with it, any person so filing particulars may commence an action in the Supreme Court of the Province claiming compensation, in which action, however, no relief shall be claimed, except a declaration as to the amount of compensation payable, and as to the parties entitled thereto.

In this case the appellant claimed for compensation $80,000, but the Commission did not itself institute any action, and the appellant, as authorized by the statute, commenced its action in the Supreme Court of the province, and obtained a special jury for the trial of the cause.

Upon obtaining the legislation of 1919, the Government proceeded to organize the Commission, and announced its intention to develop the East River for power purposes. The *Act to Incorporate the Pictou County Power Board,* c. 165 of 1920, was enacted as a public Act of Nova Scotia on 22nd May, 1920. It recites that the incorporated towns of Pictou, Trenton, New Glasgow, Stellarton and Westville, and the Municipality of the County of Pictou, respectively, had made, or were about to make, application to the Nova Scotia Power Commission for a supply of electrical energy under the provisions of Chapter 6 of the Acts of 1919, the *Power Commission Act,* and that it was considered advisable, for the purpose of reducing overhead expenses and delays, and to facilitate the purchase, distribution and sale of electrical energy, that a Board should be appointed representing these municipalities. It provides that a Board of not more than eight, nor less than five, persons shall be appointed; that the Board shall be a body corporate; that, for the purposes of the purchase, distribution and sale of

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electrical energy and of the *Power Commission Act*, the Board shall be deemed to be a municipality, and that the provisions of the last mentioned Act relating to a municipality shall *mutatis mutandis* apply in the case of the Board. The Board is empowered to appoint a Chief Engineer, Accountant, Secretary and such other officers, servants and workmen as may be deemed requisite; to regulate their salaries and expenses, which shall be chargeable to and payable from the revenues coming to the Board from the sale of electrical power and energy, and that the Board shall be subject to the provisions of the *Public Utilities Act*, c. 1 of 1913, and the amendments thereto.

Upon the survey and exploration of the river, the Power Commission found that it was capable of a considerable development of power, which could be made available for the supply of the Pictou Municipalities by the construction and use of storage dams. Mr. Johnston, the Chief Engineer of the Power Commission, said in his evidence:

Q. You constructed storage dams above Marshall Falls prior to the expropriation of the lands in question?—A. Yes.

Q. You might explain why you put up storage dams.—A. Before the storage dams were put in, the flow of the river in summer time, in dry months, got down until there was practically nothing. It was equivalent to 25 cubic feet of water per second, that is 250 gallons per second flowing in the river at that time.

Q. How much did you need?—A. The maximum flow of the river reached 7,500 feet, that is 150 times that quantity, which is of course no use for power purposes; you must have a steady supply of water all the year, so you have to level up by the creation of these storage bases, so as to draw from the storage bases during the drought period in summer time to create the necessary quantity of water to produce power. It was calculated we would be able to have a uniform flow of 305 feet.

Q. At Marshall Falls in the summer time it was practically dry?—A. Normally, it would be practically dry. In the words of the inhabitants, one was able to walk across the river dry shod in summer time.

Q. It was therefore necessary to have a system of these storage dams? —A. Yes. Some of these storage dams were twenty miles away from the head of Marshall Falls.

Q. Prior to the time of this expropriation of lands in question how much had the storage dams cost?—A. Approximately, $250,000. That includes the lands flooded and lands round the dams themselves.

Q. How much did you pay for those lands?—A. $18,000 is shown in 1925.

Q. Subsequently, since that date?—A. Last summer two additional dams were put in, Union and Marshall Falls dams, which are to be used for storage dams initially. These two cost approximately $200,000.

Q. Your total expense up to date is $550,000 for storage dams. You keep men employed to look after the storage dams?—A. We keep one man constantly looking after the dams and one man part of the year. I

should have said, if there had been only Malay Falls on the river, it would be necessary for Malay Falls alone the same way it would have been necessary for the development of Marshall Falls.

Q. It is sufficient for all your present needs?—A. Yes.

It is, as I understood the testimony, admitted that the appellant's project for development and manufacture of power at Marshall Falls depended upon the use of the water held by the Commission's storage dams. Mr. McColl says:

Q. You were figuring on making use of the storage base. You would, necessarily, have to—the storage base is further up the river?—A. Yes. They put us to a disadvantage by taking our lower lands and they give us that additional advantage by supplying storage. The action had two effects; one was to improve our storage and the other was to take away the lower development, which also increased a little the cost of this development; so we were about even.

Q. You expect to get that for nothing?—A. Tit for tat; if they injure us in one way, I suppose they make it up in another. I never got much for nothing from them.

Q. You have to have that storage?—A. Yes.

On 7th September, 1922, the Pictou County Board entered into a contract with the Commission for the purchase of electrical energy for a period of 30 years for the use of the Municipality of the County of Pictou and the incorporated towns of Pictou, Trenton, New Glasgow, Stellarton and Westville, and the inhabitants thereof, for lighting, heating and power purposes. It is recited by the contract that the development at Malay Falls on East River, Sheet Harbour, is the most economical and best suited for the present needs of the county; that it is estimated that it will deliver eight million kilowatt hours annually in Pictou County, which may be supplemented by a second development, and that Malay Falls will utilize eight possible storage basins out of a total of 13 (large and small) available. The Commission contracts to proceed promptly with this initial development, and to complete the same within 18 months from the date of the approval of the contract by the Governor in Council, and to reserve, deliver and supply to the Board electrical power and energy specified in the contract as follows:

1. Electrical power and energy up to a total of five million six hundred thousand (5,600,000) kilowatt hours per year, at a rate not exceeding twenty-four hundred (2,400) kilowatts and not exceeding three thousand (3,000) kilowatts amperes and at the option of the Board on eighteen months previous notice being given, eight million (8,000,000) kilowatts hours per year at a rate not exceeding thirty-six hundred (3,600) kilowatts and not exceeding forty-five hundred (4,500) kilowatt amperes, and

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2. Such further quantities of electrical power and energy as the Commission may from time to time consider may be available for delivery and supply to the Board, and rateably to the then existing or future requirements of other users.

And the Board contracts to purchase from the Commission all the electrical power and energy which the Commission contracts to deliver and supply, and to pay the Commission the cost, which is to be adjusted, appropriated and fixed annually by the Commission in the manner stipulated by the contract.

The appellant company or its promoters had been endeavouring from the beginning, unsuccessfully, to obtain capital. Its act of incorporation was conditioned to cease and determine if actual work were not "commenced and continued within two years from the date of its passing." Several statutory enlargements of this period had been obtained, the latest by c. 164 of 1919, whereby it was provided in effect that the Act was still in force, but should cease and determine if actual work were not commenced and continued within seven years from the date of its passing. That period would expire on 10th June, 1921. The situation with regard to capital and work done by the company at the expiry of that date is shown by Mr. McColl, who says,

Q. Apart from surveys, the only actual construction work was done in June, 1921?—A. Yes.

Q. That consisted in sending one man down to cut some brush down? —A. Clear the land; cut some trees for camp and get ready.

Q. The total bill you paid him was $48, something like that?—A. I think altogether it cost a couple of hundred dollars.

Q. He started work; do you remember when?—A. He started about the 8th June.

Q. The seven years would expire about the 10th June, 1921?—A. Yes.

Q. This was about two days before the time expired you sent the man down?—A. Yes, to technically comply with anything that might be raised. We were advised it did not affect our charter. To technically comply with it, we did that. We knew railways sometimes do that.

Q. You also stated in your evidence before (you were asked to bring all the books of the company) that this company never had any real money in its treasury?—A. No.

Q. That is right?—A. No; I would say no real money; they may have had a little.

Upon this statement of the facts a serious question is suggested as to compliance with the statutory condition for commencement and continuance of actual work; but that question was not very fully discussed before us, and was not considered in the courts below; moreover, the facts

were not fully investigated. The defendant will therefore be at liberty to raise this objection upon the new trial, and the evidence is quoted, and becomes material now, only as affecting the value of the interest which the appellant claims to possess, assuming the action to be maintainable.

The land which had been acquired by the Company at Marshall Falls in 1914 consisted of 31·48 acres, described as

All that part or portion of a certain lot of land containing one hundred acres and granted on the 11th day of August, 1899, and recorded in grant Book No. 7, page 167, being Grant No. 19377 and being all that portion of the said lot of land lying west of the centre line or thread of East River, Sheet Harbour. Reserving to the party of the first part the right to enter and cut hardwood for fuel and remove the same.

On 10th June, 1925, the Commission, pursuant to its powers of expropriation, filed its plan and description of land at East River, which included the lands so described. The land acquired by the Company at Malay Falls had already been expropriated by the Commission by a plan filed on 6th December, 1922, and proceedings were pending for ascertainment and recovery of compensation for that parcel. The appeal book in that case, which is in evidence here, shews that the case was tried by Carroll J., without a jury; that the plaintiff's claim amounted to $96,500 for compensation or damages, and that the learned judge awarded $5,500 for compensation and costs. We were informed at the hearing that that litigation was terminated, and it is necessary to mention it only for the purpose of excluding its subject matter as a factor in ascertaining the compensation or damages now sought to be recovered with relation to the upper site.

By the present action, which was commenced 26th January, 1927, the Company seeks a declaration of the value of the land. The jury rendered its finding of $32,500 on 27th May, 1927, and the Commission gave notice of motion for an order that the verdict given, and the judgment or order directed on the trial, should be set aside, and that the Supreme Court *en banc* should declare the amount of compensation payable to the plaintiff, or alternatively, that a new trial should be had upon grounds which are stated, including weight of evidence, excess of compensation, misdirection and non-direction in certain particulars. The Court, consisting of five judges, unanimously allowed the

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motion, set aside the finding, and granted a new trial with costs; the judgment proceeding mainly upon errors found in the charge

Now it seems clear enough upon the facts which have been narrated that the jury, in considering its finding, should have realized that, before the lands in question here were taken or expropriated, the appreciable probability of a market for any power which could be developed or made available at Marshall Falls, otherwise than by the Government, had been materially reduced, if not entirely dissipated, by the legislation which was enacted during or subsequently to the Session of 1919, and the contract which had gone into effect with the Pictou County Board. The Government had adopted the policy of supplying power to the municipalities at cost, and had provided for the extension of this privilege to industrial enterprises. The project recited by the contract contemplated a junction, opposite the Nova Scotia Steel and Coal Company's plant, of the respondent's transmission line from Stellarton to the town of Pictou, " so that a circuit may be run to that plant if and when desired." Mr. McColl stated at the trial, in his answer to the question as to what the Nova Scotia Steel and Coal Company was then paying for its power, that " they are getting power for one cent from the Nova Scotia Power but they cannot get it forever. Under their contract, whenever the Nova Scotia Power Commission wants to give to anyone else they can take it from them. They are getting it below what other people are paying."

It was a question for the jury, under proper direction, whether there was any special value in the market which, in the circumstances as they existed when the Commission took or expropriated the lands, could have been substantiated or figured for the Company. The cost of the 31.48 acres, when they were acquired for the Company in 1914, was $500, and there is no evidence that their agricultural value is any greater, or that the land has any special suitability, except in relation to the development of power at Marshall Falls, where it is naturally adapted to the foundation of one end of a dam, which would serve for storage, and to enable the water to be used for the production of power.

Then, of course, in considering the special value, if any, which the riparian land possessed as a dam-site for water-

power, the jury should know the nature and extent of the existing riparian rights, and it is, in this connection, impossible to overlook the modifications which were introduced in 1919 and 1920 by the *Nova Scotia Water Act.* By section 3 "every watercourse and the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is declared to be vested forever in the Crown in the right of the province of Nova Scotia." It is true that, under subs. 1 of par. 4, any person making the requisite proof might have been authorized by the Governor in Council, subject to terms and conditions, but I think the jury should have been told that the Company was not entitled under that subsection, because it did not, within two years from the passing of that Act, make any proof to the satisfaction of the Minister. The Act was passed on 17th May, 1919, and, on the same day in 1921, the Minister received a letter written by Mr. McColl, as manager of the appellant company, stating that the company, since the acquisition of its charter, had purchased property on East River, and "made surveys and other work in connection with this development, and in accordance with their charter," and he continued:

> The company therefore begs to submit their application to you in accordance with Chapter 5 of the Acts of 1919. This application is however made without prejudice to any right which the company have under their Charter and its amendments or under any charter.

There is, however, nothing further upon the subject, and therefore nothing to entitle the Company to the use of the water under subs. 1 of s. 4. It was certainly contemplated by that clause that a mere notice without prejudice would not suffice, and that the Governor in Council should have a reasonable opportunity, within two years, to ascertain the essential facts and to consider the requirements of the case, and the terms and conditions, if any, which ought to be imposed. Mellish J., who gave the judgment of the Court on the appeal, interjected a doubt upon this point; but, looking at the words of the statute and the facts, I do not see room for any doubt.

Nevertheless there is a power in the Governor in Council, conferred by subs. 2 of s. 4, as enacted by c. 75 of 1920, whereby he may, from time to time, subject to the provisions of s. 15, subs. 9, of the *Power Commission Act,* authorize any person to use any watercourse, and any water

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therein, for such purposes, and on such terms and conditions, including compensation, as are deemed proper or advisable in the discretion of the Governor in Council.

Unless the owner of the land constituting the dam-site have a right or privilege to use or divert the watercourse or the water, the dam-site is of no utility or value to him for the manufacture of power, but the Governor in Council may authorize the use, as provided by subs. 2 of s. 4 of the *Nova Scotia Water Act*, if it be conceivable in the circumstances that he would do so, and it is, I think, upon the exercise of the power to authorize that the plaintiff's claim to a value for special adaptability must depend. It will be perceived that the clause is not expressed in a manner which points to the grant of a heritable or assignable right, and that the use which may be authorized is not a use which goes with the land. "The Governor in Council may from time to time authorize any person." Therefore the question seems to be if, and to what extent, the existence of this power in the Governor in Council adds an appreciable value to the land—and that, as I see it, must be considered as the strict and sole foundation of the claim to recover for special adaptability. See *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (1); *Corrie* v. *McDermott* (2); *Pastoral Finance Association Ltd.* v. *The Minister* (3). Lord Moulton makes a very apt remark when he says on the last mentioned page:

> Probably the most practical form in which the matter can be put is that they (the owners) were entitled to that which a prudent man, in their position, would have been willing to give for the land sooner than fail to obtain it.

The legislative declaration, embodied in section 3 of the *Nova Scotia Water Act*, that the sole and exclusive right to use, divert and appropriate any and all water at any time in any watercourse is vested forever in the Crown in the right of the province, may be regarded as strong legislation; but the legislature had authority to give effect to it. I am not unmindful of the observation of Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (4), that "the burthen lies on those who seek to establish that the legis-

(1) [1914] A.C. 569, at p. 576.
(2) [1914] A.C., 1056, at pp. 1064 and 1065.
(3) [1914] A.C., 1083, at p. 1088.
(4) (1881) 6 App. Cas. 193, at p. 208.

lature intended to take away the private rights of individuals, to show that by express words or by necessary implication, such an intention appears;" but I see no way of escape from the conclusion that this condition is satisfied by the words of the statute, and at the hearing no suggestion was made to the contrary. While no person is authorized to use the watercourse or the water therein, the exclusive use of the Crown remains unimpaired, and there is, in any case, nothing in the nature of a right of use which may be sold, but the right of use might nevertheless be considered to have a value to the owner of the land if he could obtain that right, and it therefore becomes a question whether a person willing to compete for the land would consider the possibility of obtaining such a right of use as a circumstance which in fact would enhance the price that he would give for the land.

Then, furthermore, it must be obvious that, since the river, according to its natural flow, is inadequate for the supply of the water required for a continuous generation of power, and that resort must be had to storage; and, since it is admitted that it would be necessary, for the profitable use of any dam which might be constructed upon the land in question, that use must be made from time to time of the water stored, the jury should know whether or not the company had the right to avail itself of this source of supply as impounded by the Commission; and, if so, whether or not the exercise of the right was subject to terms or conditions, including compensation, and, unfortunately, there is in the charge no reference whatever to this subject.

The learned trial judge was careful to explain to the jury that the measure of compensation was the value to the company of the property taken, not the value to the Commission. He told the jury that:

> Something has been said regarding water powers and water rights on this river and rights the Company have under their charter. You have nothing at all to do with awarding the Company damages for any water rights they have or may have had on this river. They are asking compensation for land, not water, and, if they did, they could not get it. There is another method of receiving compensation for water taken from them. The legislature saw fit to put in the Crown all title to water and water that runs through water courses. Furthermore, regarding this matter of water power at Marshall Falls, I want to say that, purely as water, you ought to award no damages. You are to award damages only and

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solely for the value of land taken over from the Company by the Power Commission of Nova Scotia.

He told the jury also that the land was confined to the 31·48 acres at Marshall Falls, excluding the lands taken at Malay Falls, and at Ruth Falls. He explained that the plaintiff was not claiming any damage or injury to its corporate rights; that it was claiming merely compensation for the land. In these circumstances, seeing that the value found by the jury was 65 times that of the purchase price, one is apt to look for the reason in the value of the access to the stream which the land affords, and to consider the possibility of some failure on the part of the jury to apprehend the effect of the legislation to which the learned judge referred in the following passages:

> It has been suggested to you that the action of the Nova Scotia Legislature regarding water rights of the province may have something to do with decreasing the value of the land to private companies or private owners on account of not having the absolute right of using the water. That is entirely a question for you. The Government of Nova Scotia representing the Crown owns every gallon of water that flows in the rivers of Nova Scotia. They have sole control over them at the present time. They did not at the time the company was incorporated but they have it to-day. Every lumberman who goes out to a river and uses that river for the purpose of rolling his logs down, must have some sort of a permit for rolling these logs down. Do you think the Government would refuse to give a permit to a person under these conditions. I think the matter was fairly well presented to you. When the Government takes these powers and gives the people the right to apply for the use of these waters, it is to be presumed the Government, or the person the Government appoints to hear application for permits and that sort of thing, will act in a reasonable manner. Under the provisions of the Water Course Act, where any person, within two years of the passing of the Act, establishes to the satisfaction of the Minister that any watercourse or water therein was at the time of the passing of the Act being lawfully used by him, such person shall be authorized to use such watercourse and water therein subject to terms and conditions of the Act of 1919. In my opinion, when this Act was passed the plaintiff had the use of the waters and lands at Marshall Falls. By the Act of 1919 the plaintiff company now and all other persons who want to use the waters of Nova Scotia must apply to the Government of Nova Scotia for a permit to use the water. The Government might place onerous terms on applicants that would make it impossible for applicants to comply with them. You know as much about governments as I do and it is for you to say if the Government would act in an unreasonable manner and withhold from this company or any other person the use of water in the streams of Nova Scotia without strong, legitimate and proper cause. I think it has been proven that this company never got that right. It is an element in this case and I think you should take it into consideration. Perhaps it is an element for you to take into consideration in awarding damages. You use your judgment as to whether or not the fact that the Government of

Nova Scotia has absolute control over the waters at Marshall Falls shall determine or lessen the value of the property. In all the circumstances of the case, I am assuming the Government of Nova Scotia would act in a reasonable, proper manner in dealing with any application of this kind if made. It is absolute speculation what terms they might impose on the applicant. If they say: Yes, you pay me fifty or a hundred thousand dollars for that water, I would have to have a mighty paying proposition. Do you think a Government would do that? It strikes me the Government would act reasonably in the matter.

I have read this part of the charge many times, and I am afraid that it may have produced some confusion in the minds of the jury. It admits of different readings, and is difficult to interpret, but it is, I have no doubt, not inapt to create the impression that the jury may, in ascertaining the compensation, find the value of the property as a power-site to the company undiminished, notwithstanding the provisions of the *Nova Scotia Water Act*.

The learned judge went on to say:

Regarding all this matter about Pictou and Springhill possibilities, I don't know exactly where it gets into this case except of course in regard to Marshall Falls having special adaptability for developing power. It would not make any difference how great the adaptability might be unless you had a market. I am not asking you to disregard one item of evidence that was given. Make use of it as best you may. I don't know that you should lay a great deal of stress on what the plaintiffs could make out of this. You heard a gentleman here, a very estimable man as far as I know; he was a good witness; he said if anyone came to him with the proposition that at the cost of $100,000 to develop the falls he could make an income of fifty thousand a year, he would be satisfied it was a good business proposition—any of you would come to the same conclusion. The trouble here is we don't know what would have occurred if the plaintiff company undertook to develop it. The land was taken in 1925 and you have to direct your attention to the condltions in 1925. They are entitled to absolutely what those lands were worth in 1925. You may have to give some consideration to Pictou County; you may have to give consideration to a new competitor in the field furnishing power at cost—that is if you take it into consideration at all. If you are satisfied this site had a special adaptability for generating power—I don't think there is an evidence of adaptability for anything else in 1925, it is an element you must consider. You must take all surrounding circumstances into consideration in arriving at a conclusion—first, as to adaptability; secondly, how much that adaptability enhances the value of the property.

At the conclusion of the charge, counsel for the Commission submitted several suggestions. He asked that:

1. the jury be instructed concerning the value on the basis of the value to the plaintiff. The jury should be instructed that the plaintiff at the time of this expropriation did not have the right to use the water in the river or the storage basins of the Commission at that time.

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2. the jury be directed that they cannot take into account in assessing the value of property the possibility of the plaintiff obtaining this authorization from the Governor in Council.

3. the jury be directed that the proper compensation would be what a prudent man in the position of the owner would be willing to pay for the property.

4. the jury be instructed that the plaintiffs only owned one side of the river.

5. with reference to special adaptability that the jury be instructed that this is merely one kind of special value which is likely in the market to attract the class of purchasers who would come into competition.

Counsel for the company replied that the Court had covered very fully and accurately all the facts of the case. The Court refused to entertain any of the respondent's suggestions, except the fourth, and as to that, the jury was recalled, and the learned judge addressed them as follows:

> It was drawn to my attention that perhaps I did not bring to the attention of the jury that fact that in 1925, at the time this land was expropriated, the plaintiffs owned property only on one side of East River. This was proven in the case. I am not suggesting you make any conclusions from this except what your intelligence will suggest to yourselves. I want to point out that, if they did not own the land, they had a right to acquire it by expropriation or otherwise for crown lot. They had expropriation powers as wide, or almost as wide, as had the defendant Commission, and they could have acquired them if they so desired.

This statement, however, fails to recognize the control by the Governor in Council, and the dominant rights of the Power Commission, provided for by the legislation to which I have referred, and seems, if I do not misapprehend its meaning, to invite the jury to consider that the powers of expropriation possessed by the company might apply to lands within the scope of the respondent's undertaking, or that these powers might be brought into competition with those possessed and subject to be exercised by the Commission under the special legislation of 1919, a result which I am sure the legislature could not have intended.

A considerable part of the learned judge's charge was devoted to evidence which the company introduced with regard to the cost incurred by the Commission for land and power development at St. Margaret's Bay, about 18 miles beyond the city of Halifax, to which the power is transmitted for the service of that city, which is situated 70 miles down the coast from Sheet Harbour. The jury was told that St. Margaret's Bay should be considered as perhaps in the vicinity of East River, Sheet Harbour, and having the same source, and that the amount paid by the

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Commission for the land and works in course of development and construction at St. Margaret's Bay was material for consideration in relation to the value of the land in question at Marshall Falls. The Supreme Court *en banc* was of the opinion that this portion of the charge was calculated to mislead the jury, and I am disposed to agree, but I would not have held that a new trial was justified for that upon this motion, because that direction was not made a ground of exception at the conclusion of the charge, even although, when the jury was recalled, the foreman specially asked to be told the amount paid for the property and work done at St. Margaret's Bay.

In my opinion, the Government, at the time of the expropriation, had control of the watercourse, and the use of the water, whether as diverted or in its natural flow, and this was a dispensation of the law which should have been made clear to the jury.

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

Appeal dismissed with costs.

Solicitor for the appellant: *Bernard W. Russell.*

Solicitor for the respondent: *C. J. Burchell.*

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*May 7.
*Oct. 2.

THE CITY OF HALIFAX (DEFENDANT).....APPELLANT;

AND

DIANA W. READ (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Municipal corporations—Water supply to dwelling house—Right to impose special rate—Halifax City Charter

The City of Halifax, in 1919, at the request of one W., laid a water main on a street, and connected it with W.'s houses, first taking from W. an agreement to pay $269.45 yearly, as a special rate. This was in accordance with the City's policy, to be satisfied, before laying a main on any street, that there should be a sufficient revenue from the persons taking water therefrom, to defray interest on the cost of the extension, and to require from any person requesting an extension where the number of consumers was insufficient to produce at the usual rates such revenue, an agreement to pay a rate equal to such

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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revenue, such rate to be proportionately reduced as other consumers became connected with the new main. From the year 1920 the City supplied meters for all water services, and all charges were meter rates. In 1922, when the said main was serving four houses, the plaintiff built a house on the street and applied for water supply. The City required an agreement from plaintiff to pay a special rate of $53.89, being one-fifth of the said sum of $269.45. Its council passed a resolution, and, later, a by-law, requiring that rate from each house on the street, to be proportionately reduced as additional houses were built. Plaintiff refused to make the agreement, and claimed the right to a water supply at the rate in general application throughout the city.

Held, that the special rate imposed was valid, and plaintiff was not entitled to water supply without entering into an agreement to pay it. The *Halifax City Charter,* 1914, especially ss. 671, 525 (1), 676 (1), 499 (1), 492, and c. 54 of 1922 (N.S.), s. 9, considered.

Att. Gen. of Canada v. *City of Toronto,* 23 Can. S.C.R. 514, and *City of Hamilton* v. *Hamilton Distillery Co.,* 38 Can. S.C.R. 239, discussed and explained. The references to "uniform" rates in the *Toronto case* had regard to the essential of uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination; and were not meant to extend the requirements of the common law, by which a by-law must be *intra vires,* certain, consistent with the statutes and the general law, and reasonable. It cannot be said, as a principle of law, that a municipal ordinance, which complies with these essentials, must operate uniformly in every part of the municipal area notwithstanding that the diversity of circumstances requires different considerations for special localities.

Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 377) reversed.

Lamont J. held, differing in this respect from the majority of the Court, that the plaintiff should be required to pay, not a flat house rate, but only her proportionate share, as determined by the meters in the houses on the extension, of the said sum of $269.45.

APPEAL by the defendant, by leave granted by the Supreme Court of Nova Scotia, from the judgment of that Court (1) whereby, upon a case stated for the opinion of the Court, under Order XXXIII of the Rules of Court, and referred, by consent, direct to the Court *en banc* for decision, it was held that the plaintiff was entitled to the supply of water to her dwelling house, no. 53 Oakland Road, in the City of Halifax, without entering into an agreement to pay a rate of $53.89 per year, and that the rate imposed by resolution of Council of July 19, 1922, and the by-law of September 14, 1922, was invalid; and that the plaintiff was entitled to the supply of water subject to the ordinary water rates.

(1) (1927) 59 N.S. Rep. 377.

The material facts of the case and the questions in issue are sufficiently stated in the judgments now reported. The appeal was allowed with costs, Lamont J. dissenting in part.

F. H. Bell K.C. for the appellant.

J. E. Read K.C. and *R. M. Fielding* for the respondent.

The judgment of the majority of the court (Duff, Mignault, Newcombe and Smith JJ.) was delivered by

NEWCOMBE J.—The defendant, the City of Halifax, appeals from the judgment of the Supreme Court of Nova Scotia, pronounced in a stated case, wherein two questions concerning water rates were submitted for the opinion of the court, and adjudicated in favour of the respondent.

In 1922 the plaintiff built a dwelling-house at no. 53 Oakland Road in the City of Halifax; the building was commenced in June and completed by 1st September; the plaintiff applied to the City for water supply, which the City was willing to furnish, stipulating, however, that the plaintiff should pay an annual rate of $53.89, for which a bond or agreement was required. The plaintiff would not agree. It is said in the stated case that

upon the completion of the house the defendant refused to turn the water on, but undertakings were arranged between the parties on September 7, and the water was turned on in accordance therewith. All claims for damages were abandoned by the plaintiff, and the action was limited to a claim for a declaration.

The questions submitted are these:

1. Whether the plaintiff was entitled to the supply of water to the dwelling-house number 53 Oakland Road without entering into an agreement to pay a rate of $53.89 per year.

2. Whether the rate imposed by the resolution of Council of 19th July, 1922, and the By-law of September 14th, 1922, was valid.

The facts which led to the dispute are set forth in paragraphs 6 and 7 of the case, as follows:

6. The water system of the Defendant is not in any way connected with or dependent upon the rates and taxes of the City, but is a separate system under the control of the Council of the City, acting by the Committee on Works, and in particular the streets in which main water pipes shall be laid are entirely in the discretion of the said Committee and Council as aforesaid. For many years it has been the policy of the Defendant to be satisfied before laying a main on any Street that there will be a sufficient revenue from the persons taking a supply of water there-

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from to defray the interest on the cost of such extension, and to require of any person requesting an extension on a street upon which the number of consumers was insufficient to produce at the usual rates such revenue, a bond or agreement to pay a rate equal to such revenue, such rate to be proportionately reduced as other consumers become connected with the new main.

7. Previous to May, 1919, no water main had been laid on Oakland Road. On that date Mr. T. J. Walsh applied for a main to be laid to houses which he proposed building on that street. The Engineer reported that the cost of laying the main would be $3,325 and the interest $305.16, and recommended that the main should be laid on, Mr. Walsh entering into an agreement to pay that amount yearly as a special rate. This was approved by the Board of Control. Mr. Walsh executed a bond for the said agreement, and the main was laid, but the Plaintiff does not admit that the rate therein was a special rate. Subsequently it was found that the actual cost of the extension was less than had been estimated and the yearly interest charge was $269.45, which rate was paid by Mr. Walsh in respect to the houses constructed by him.

In July, 1922, at the date of Plaintiff's application there were on Oakland Road four houses in addition to the one proposed to be built by Plaintiff and the Engineer on 19th July recommended the fixing of a special rate of $53.89 for each house. This report was adopted by Council 19th July, 1922.

The learned Chief Justice, who gave the judgment of the Court, prefaced his judgment with these words:

The water system of the city is under the control of the City Council acting by a committee known as the Committee on Works and it is admitted that the Council is not obliged to lay down water pipes on any street of the city. Whether or not water pipes should be so laid down on any particular street was entirely in the discretion of the Council and for many years it had been the policy of the city not to extend its water system to a new street unless satisfied that there would be a sufficient revenue from residents taking water to defray the interest on the cost of laying down the water pipes.

This statement is, of course, consistent with paragraph 6 above quoted, and, together with the admissions, is out of question. The Committee on Works has taken the place of the Board of Control.

It is enacted by s. 671 of the *Halifax City Charter*, 1914, that:

671. (1) The owner of any dwelling-house situated on any portion of a street through which a main pipe is laid, shall be entitled, on application to the Board of Control, to a service pipe one-half inch in diameter to such house.

(2) Such service pipe shall be laid at the expense of the City from the main pipe to the line of the street through the wall of the house, if the wall is on the line of the street.

(3) The cost of laying such service pipe beyond the line of the street shall be borne by the applicant.

This section regulates the mode and capacity of the connection with the source of supply, and the incidence of the

cost, where the dwelling-house is situated "on any portion of a street through which a main pipe is laid." Whether a main pipe is laid through Oakland Road does not appear, although it is shown by par. 7 of the case that, subsequent to May, 1919, pursuant to argreement with Mr. Walsh, an extension of the city water mains was laid to the houses which he constructed, or to the sites where these houses were to be built, and presumably they were between Cartaret Street and Studley Street, which is the next crossing to the westward of Cartaret, because it is provided by the City by-law of 14th September, 1922, entitled "A By-law of the City of Halifax to make a special rate for water on a portion of Oakland Road," that:

> Each property fronting on Oakland Road on which a house is erected between Cartaret street and Studley street shall be charged a water rate for water supplied it of $53.89 per annum the same being the amount required at present to produce six per cent. on the cost of the extension of the water service in that district, the same to be proportionately reduced as additional houses are erected on the said portion of the said street.

This by-law applies the practice, of long standing, which is alluded to in par. 6 of the case; but that practice is not shown to have been previously sanctioned by by-law, except in so far as the facts narrated in par. 6 may be considered as evidence of a by-law.

The power of the City to make such a by-law is in question. It depends upon the inherent powers of the corporation, and upon subs. 1 of s. 525, and subs. 1 of s. 676, by which it is enacted that:

> 525. (1) The Board of Control, from time to time by By-law to be approved by the Council, may:
>
> (*a*) Prescribe rates payable in respect to water other than the rates controlled by the statute;
>
> (*b*) make regulations in respect to the mode of imposing, collecting, or enforcing payment of water rates;
>
> * * * * *
>
> 676. (1) The Council, on the recommendation of the Board of Control, may make ordinances, rules and regulations regulating the construction, location, maintenance, operation, renewal and removal of any main pipe or service pipe, conduit or tube, for any purpose, or belonging to any person, firm or corporation or association, upon, or along any street, park or public place of the City.

According to one reading, s. 525, subs. 1 (*a*), means that the Council may prescribe rates in substitution for those enacted by statute. But, if the meaning be that the Council may prescribe rates for such services only as have not been

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rated by statute, and that is in effect the plaintiff's contention, it is argued, upon that interpretation, that the rate in question is "controlled by the statute," because of subs. (1) of s. 499, which provides that:

> 499. (1) Every owner of property supplied with water through a water meter, in lieu of the rates for domestic purposes or special or extra rates specified in respect to such water in the preceding sections, shall in respect to such water passing through such meter, pay such rates and such annual rental upon the meter, as are from time to time fixed by the Board of Control, and approved by the Council.

And it is said in the case that:

> At a meeting of the Council held on the 29th January, 1920, the Council by resolution directed the Engineer to place a meter on every unmetered water service in the City, which resolution the Engineer proceeded to carry out. Since that date no new service pipe has been installed without a meter being placed upon it and meters were placed as rapidly as possible upon all existing services which work was completed in about one year from date of resolution. Since that time there has been no water service in the City not supplied with a meter and all charges for water have been meter rates fixed by the Council and no charges for water have been made on a rate mentioned in Section 486.

Now the intention of the by-law of 14th September, I would say, obviously, was that the Oakland Road houses were to pay the by-law rate, not in lieu of rates "for domestic purposes", because these houses never became subject to those rates, the compensation having been specially regulated otherwise; and not in lieu of the "special or extra rates specified in respect of such water in the preceding sections", because these "preceding sections" never had any application to the case. The by-law rate was imposed in virtue of the powers which the City had to regulate the supply of water in cases outside the pipe lines, where the introduction of the water was in the discretion of the Council. And, with the greatest respect for the contrary view, I am persuaded that the Council had adequate power. *Selwyn's Nisi Prius,* 13th Ed., pp. 1129, *et seq.*

It is not disputed that the construction of a main into Oakland Road, in the circumstances disclosed by the case, was within the powers of the City. The Walsh agreement is not printed, nor is it introduced as an exhibit, but it was subject to the terms of that agreement that the main was laid. What we know about the agreement has already been stated. It seems to have been contemplated that incoming house owners should, as a temporary condition, by agreement, contribute the interest charges upon the cost of con-

struction, until these could be produced by the application of the general rates in force within the pipe lines. So long as the latter rates would yield less than the interest, it was necessary, and good faith required, if the policy which the City had the right to dictate was to be maintained, that the conventional rate as stipulated with Mr. Walsh should be levied, and I see nothing in sec. 671, or in any other provision of the Act, which must be construed to the contrary.

The argument is, and the plaintiff's case seems to depend upon the view, that, since a main pipe exists on the street, the plaintiff is entitled to a connection, and therefore, upon demand, to a supply of water at the usual meter rates, irrespective of the effect which this might have upon the agreement, or its special purpose, or whether or not compatible with the conditions in pursuance of which the main was laid. But I should have thought that the house owners who are permitted to use the main by reason of the agreement may be required to do so *cum onere*; indeed, the burden must accompany the privilege, if the terms upon which the City was induced to build the main be enforceable. Section 671, which provides for a one-half inch service pipe, does not otherwise regulate the use or supply of the water. There are conditions under which the water may be turned on or off, and these may be regulated by the by-laws under ss. 525 and 676. The language of the statute would, in my view, have to be intractable to convince one that the person who built upon the street next after Mr. Walsh, could demand a supply of water at meter rate, and so escape the terms which the City had, in its discretion, stipulated and sanctioned.

By s. 9 of c. 54, 1922, it is enacted that,

> In the case of any property in respect to which the Council fixes a special rate for the supply of water, the Engineer may require the owner to enter into an agreement to pay such special rate before turning on the water to such property, and, if such property is sold, a supply of water thereto may be refused and the water turned off until the new owner has entered into such agreement.

If, therefore, as I think, the rate in question be a special rate for the supply of water, within the meaning of this section, there is express legislative recognition and sanction for requiring the owner to enter into an agreement to pay such special rate before the turning on of the water; and, as to the validity of the Walsh agreement, and the power of the

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City to apply it, the general subject was one with regard to which, admittedly, the City was authorized to exercise its discretion, and it cannot be doubtful that, if the plaintiff desired to avail herself of a service which the City was empowered, but not bound, to render, she could not insist upon the performance for a consideration less than that which the City had reasonably stipulated.

It is also argued for the respondent that the water rates must be uniform throughout the city, and that a special rate could not be authorized, or sanctioned by by-law, and two decisions of this Court were cited to support these contentions: the cases are *Attorney-General of Canada* v. *City of Toronto* (1) and *City of Hamilton* v. *Hamilton Distillery Co.* (2). There are some references to uniformity by Sir Henry Strong, the learned Chief Justice who gave the judgment of the court in the former case; but I have no doubt that these were not meant to extend the requirements of the common law, by which a by-law must be *intra vires,* certain, consistent with the statutes and the general law, and reasonable. I find no authority or principle of law for the proposition that an ordinance of a municipal corporation, which complies with these essentials, must operate uniformly in every part of the municipal area, notwithstanding that the diversity of circumstances requires different considerations for special localities. I am satisfied that, when the learned Chief Justice introduced the word "uniform," he meant to include nothing new as essential to the validity of a by-law, and a careful examination of his judgment makes this evident. What he regarded as a requisite or an essential was uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination. The by-law now in question is of the class which, as has been said, should be benevolently interpreted; nevertheless there may be cases, which it is not necessary for present purposes to define or to illustrate, where, in the words of the cases, a by-law is found to be capricious and oppressive; partial and unequal in its operation as between different classes; manifestly unjust; disclosing bad faith; involving such oppressive or gratuitous interference with the rights of those subject to it as can find no justification in

(1) (1893) 23 Can. S.C.R. 514. (2) (1907) 38 Can. S.C.R. 239.

the minds of reasonable men; and in such cases, as was said by Russell C.J., in *Kruse* v. *Johnson* (1) "the question of unreasonableness can properly be regarded." See also *Slattery* v. *Naylor* (2). It is, I think, plainly to be inferred from the language of Strong C.J., that it was for vice of this kind that he condemned the by-law in the *Toronto case* (3). That seems to be manifest by the context, and by the statement of the ground upon which the decision is put. The learned Chief Justice adopted a passage from *Dillon on Municipal Corporations,* 4th Ed., sec. 319 (see the 5th Ed., Vol. II, secs. 598 *et seq.*) wherein it is said in effect that every by-law must be reasonable, and not inconsistent with any statute or the general principles of the common law, and that, in the United States, the courts have often affirmed that, while municipal corporations have a general incidental power to make ordinances, these "must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the State." This, the learned Chief Justice very truly says, is not new law, and he refers to *Norris* v. *Staps* (4), a case of a municipality under letters patent. He finds that the Toronto by-law discriminates against the Crown, and says that he can conceive no stronger case of a by-law conflicting with the policy of the law; that "it is unreasonable and unfair", in making an unwarranted discrimination against the particular consumer of water. Therefore I conclude that the by-law was condemned for inequality or discrimination, and perhaps also as conflicting with the legislation in the particular case, and the decision was, I am convinced, intended and serves as an authority for nothing more. And this is consistent with the decision of the majority in the *Hamilton case* (5), in which *Attorney General of Canada* v. *City of Toronto* (6) was cited as the governing decision. It is perhaps worth while to quote the following observations of Idington J. in the later case, at pp. 253 and 254. The learned judge says, referring to the *Toronto case* (6).

> There may be cases wherein the cost of supplying the water may render an even rate per gallon most inequitable. I can conceive of cases,

(1) [1898] 2 Q.B. 91, at pp. 99, 100.
(2) (1888) 13 App. Cas., 446, at p. 453.
(3) (1893) 23 Can. S.C.R. 514.
(4) Hobart, Ed. of 1724, p. 210.
(5) (1907) 38 Can. S.C.R. 239.
(6) (1893) 23 Can. S.C.R. 514.

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where the uniform charge of a flat rate per gallon might be in itself a grave discrimination against some of those supplied, in possession of properties having great natural advantages, and in favour of those whose properties had corresponding natural disadvantages, to supply whom might cost double that of the former. I will not go further than to say that I have not overlooked possible modifications of rates that might exist and yet not be improperly discriminating in character. If the "uniformity of rates" spoken of by Sir Henry Strong in his judgment in the *Toronto case* (1), excludes the possibility of giving due consideration to such possible conditions, then I cannot in that regard agree with it. I do not, however, so read it. The general principles it enunciates, and at some length elucidates I heartily agree in. I would regret to see them impaired.

Of course each case depends upon its own legislation, but I find nothing in the *Halifax City Charter* to prohibit such an arrangement as was made with Mr. Walsh and incidentally proposed for those who desired to build houses on Oakland Road in advance of the development of the street, and before the consumption of water there would become adequate to yield, by the general system of rates, the interest upon the cost of the necessary works to introduce the water into the street. It seems not only fair and just, but also very equitable in the common interest, that, when a new street is laid out in an outlying district, before the demand is sufficient to justify the introduction of expensive waterworks, persons attracted to it for residential purposes, or perhaps having building lots to utilize in the locality, should be subjected to reasonable terms or stipulations for defraying temporarily the cost of water, if specially introduced for their accommodation while the street is in course of settlement, and unable to pay its way. Moreover, the practice seems to have proved its worth and convenience through a long course of experience.

The City was required by s. 492 to impose and levy certain extra and special rates for specified structures, and for buildings supplied by pipes exceeding one-half inch in diameter; but these provisions do not curtail the general powers of the City to make reasonable provision for special cases not otherwise provided for. And it does not follow that, because the Statute insists upon provision for certain specified cases, therefore other special cases, not provided for, may not be accommodated upon reasonable principles.

But now it is suggested, although the point was not made either in the court below or in this court, and although it is not supported by any admission or evidence, that the amount of the special rate for which the respondent was re-

(1) (1893) 23 Can. S.C.R. 514.

quired to sign was ascertained upon a wrong principle; that the respondent's liability should have been limited to her proportionate share of the interest charges, having regard to the precise quantity of water which she used, as shewn by meter; and that, inasmuch as the $53.89, or one-fifth of the total interest chargeable, represents an equal amount against each of the five householders, including the respondent, which might or might not have been the result if meter rates were applied, the respondent was therefore justified in refusing to sign. This comes to saying in effect that the by-law is unreasonable, and may therefore be declared void, because each of the five is declared liable for one-fifth. But I do not think that this proposition is any more established than it is alleged as a cause of complaint. Here is an area within the city, outside the water service, and destitute of water, to which, however, water may, if desired, be introduced by and at the discretion of the city authorities, who may, in the special circumstances, look to those who enjoy the service to pay the interest upon the cost incurred by the City of introducing the water to their houses. There are five houses within the area, evidently ordinary dwelling-houses of comparable dimensions. There are several ways—perhaps many ways—by which a division of the charge among those participating might not unfairly be reached; but there is no obligation by law or agreement, so far as I have been able to discover, to resort to meters to measure exactly the quarts or gallons which each householder consumes; and I am by no means satisfied that the City has done anything unreasonable in distributing the burden of the taxation in equal shares among those whom, at their request, it has brought into contact with the system. The difference, if any, in cost or expenditure for the service as between any one proprietor and each of the others is practically negligible. The whole expense is for service equally essential for each of the five. One may, perhaps, use a little less or a little more water than another, but it would seem to be unfair, rather than otherwise, that the proprietors should therefore contribute in different measure for the cost of the installation which made the common service possible, and for which the City insisted upon receiving indemnity in the manner and to the extent stipulated or intended by the agreement, and sanctioned by the by-law.

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I would allow the appeal and reverse the findings, with costs throughout.

LAMONT J. (dissenting in part)—This is an appeal from a judgment of the Supreme Court of Nova Scotia, *en banc*, upon a special case stated under Order XXXIII of the Rules of Court, and referred by consent directly to the Court *en banc* for decision. The amount involved in the appeal is small, but as the action is in the nature of a test case, and as the owners of a considerable number of other houses are in the same position as the respondent, leave to appeal to this Court was granted. The sole point involved in the appeal is the rate at which the respondent is entitled to have a water supply for domestic purposes from the appellant for her dwelling house on Oakland Road, Halifax.

The stated case sets out the material facts. Paragraph 6 reads as follows:—

> 6. The water system of the Defendant (Appellant) is not in any way connected with or dependent upon the rates and taxes of the City, but is a separate system under the control of the Council of the City, acting by the Committee on Works, and in particular the streets in which main water pipes shall be laid are entirely in the discretion of the said Committee and Council as aforesaid. For many years it has been the policy of the Defendant to be satisfied before laying a main on any Street that there will be a sufficient revenue from the persons taking a supply of water therefrom to defray the interest on the cost of such extension and to require of any person requesting an extension on a street upon which the number of consumers was insufficient to produce at the usual rates such revenue, a bond or agreement to pay a rate equal to such revenue, such rate to be proportionately reduced as other consumers become connected with the new main.

Prior to 1919 there was no water main on Oakland Road. In the month of May of that year Mr. T. J. Walsh requested the appellant to construct a water main along that street and connect the same with three houses he proposed building on property abutting thereon, and he agreed to pay yearly as a special rate for his water supply the sum of $269.45, being the interest at 6% on the cost of the construction of the main. The main was constructed and Mr. Walsh paid that sum in respect of the houses built by him.

In June, 1922, the respondent commenced the erection of a dwelling house on property fronting on that portion of Oakland Road served by the main. On July 14 she wrote to the appellant demanding a water supply for her house under the provisions of section 671 of the City Charter. At that time the main was serving four houses

on Oakland Road. On July 19 the respondent was informed that before her house could be connected with the main she must sign a bond conditioned for the payment of "a special rate." This bond she refused to give and, on July 22, gave notice of action. The appellant thereupon furnished the pipe connection but refused to turn on the water unless she would agree to pay a special rate of $53.89 (⅕ of the $269.45). To this she would not consent. By an arrangement between the parties, the water was turned on, the respondent's claim for damages was withdrawn and the action was limited to a claim for a declaration that the respondent was entitled to a water supply without entering into an agreement to pay a special rate.

The respondent's contention is that she was entitled to a water supply at the water rate in general application throughout the city. The contention of the appellant is that she is entitled to a water supply only at the "special rate" fixed for dwelling houses in the locality in which her house is situated. This special rate had been recommended by the engineer whose recommendation was adopted by the Council by resolution on July 19, 1922. After the commencement of the action but before the date for filing a statement of defence had expired, the Council passed the following by-law:—

A By-law of the City of Halifax to make a special rate for water on a portion of Oakland Road.

Be it enacted by the Mayor and Council of the City of Halifax as follows:—

"Each property fronting on Oakland Road on which a house is erected between Cartaret Street and Studley Street shall be charged a water rate for water supplied it of $53.89 per annum the same being the amount required at present to produce six per cent. on the cost of the extension of the water service in that district, the same to be proportionately reduced as additional houses are erected on the said portion of the said street."

This by-law was passed September 14, 1922. The position taken by the respondent in respect thereto was that the Council had no power to fix a special rate for Oakland Road.

The questions raised by the stated case are:—

1. Whether the plaintiff was entitled to the supply of water to the dwelling house number 53 Oakland Road without entering into an agreement to pay a rate of $53.89 per year.

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2. Whether the rate imposed by the resolution of Council of 19th July, 1922, and the by-law of September 14, 1922, was valid.

The Supreme Court of Nova Scotia *en banc* answered the first of these questions in the affirmative, and the second in the negative, being of opinion that the City Council had no authority to pass either the resolution of July 19 or the by-law of September 14. On these answers judgment was entered for the plaintiff and from that judgment this appeal is brought.

The right of an owner of a dwelling house in the City of Halifax to receive a supply of water from the City is provided for by section 671 of the City Charter which reads as follows:—

671. (1) The owner of any dwelling-house situated on any portion of a street through which a main pipe is laid, shall be entitled, on application to the Board of Control, to a service pipe one-half-inch in diameter to such house.

For the respondent it was contended that the right to a service pipe, given by this section, carries with it a right to a supply if water running through the pipe. As a matter of construction I agree that such would ordinarily be the case. But an owner's right to a supply of water is dependent upon his willingness to pay a proper rate for that supply. In *Dominion of Canada* v. *City of Levis* (1), the question was as to the right of the Dominion to a supply of water for one of its buildings in the City of Levis and the amount to be paid therefor. The City offered to furnish the supply for $300 a year, while the Dominion offered only $35. In giving judgment their Lordships of the Privy Council, at page 511, say:—

Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price.

Although such water was in the nature of a merchantable commodity and the supplying of the same would ordinarily be subject to an agreement express or implied as to price, their Lordships point out that the City of Levis, as a dealer in water on whom there has been conferred by statute a position of great and special advantage, might well be held

(1) [1919] A.C. 505.

to be under an implied obligation to give a water supply to owners of houses within the area of supply, provided that such owner was willing to make fair and reasonable payment therefor. Apart therefore from statutory provisions determining the rate, the respondent was entitled to have a supply of water for her dwelling house upon payment of a reasonable rate for the same.

The City Charter of 1914 makes provision for two separate systems by which the rates to be paid may be determined. The first, contained in sections 486 to 498, is designated the "general rate." The other, contained in section 499, is called the "meter rate." The general rate is based upon the values of property within the water pipe lines and is divided into two classes. First, a fire protection rate upon all lands, and secondly, a rate upon every dwelling house and the land occupied thereby. In addition to this general rate, section 492 provides that "special" and "extra" rates shall be levied on certain properties. These are buildings owned and occupied by or for the Imperial, Dominion or Provincial Governments, Breweries, Distilleries, Hotels, Founderies, etc. The special rates to be levied in these cases are such as the Board of Control may deem right. Then in respect of a number of other properties such as livery stables, bar-rooms, closets, fountains, and buildings under construction where water is required for building purposes, the statute itself fixes the special rates to be charged.

As an alternative to this system of rating, the Board of Control with the approval of the Council is authorized, by section 499, to adopt a system under which the rates would be based upon the actual consumption of water as shown by the meters. This section is as follows:

499. (1) Every owner of property supplied with water through a water meter, in lieu of the rates for domestic purposes or special or extra rates specified in respect to such water in the preceding sections, shall in respect to such water passing through such meter, pay such rates and such annual rental upon the meter, as are from time to time fixed by the Board of Control, and approved by the Council.

(2) Nothing in this section shall exempt any one from paying fire protection rates.

The powers of the Board of Control have since been transferred to the Committee on Works.

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With reference to the system of rating in actual operation when this action was commenced, the stated case contains the following:—

At a meeting of the Council held on the 29th January, 1920, the Council by resolution directed the Engineer to place a meter on every unmetered water service in the City which resolution the Engineer proceeded to carry out. Since that date no new service pipe has been installed without a meter being placed upon it and meters were placed as rapidly as possible upon all existing services which work was completed in about one year from date of resolution. Since that time there has been no water service in the City not supplied with a meter and all charges for water have been meter rates fixed by the Council and no charges for water have been made on the rate mentioned in Section 486.

Since the early part of 1921, therefore, the system of determining the rates to be paid as set out in section 486, including the "special" and "extra" rates, provided for in section 492, has not been in operation. Only the alternative system authorized by section 499 has been in actual use.

From the judgment appealed against it would appear that in the court below the appellant relied upon section 9 of Chapter 54 of 1922 as the statutory authority for fixing the special rate of $53.89 for the respondent's house. That section is as follows:—

9. In the case of any property in respect to which the Council fixes a special rate for the supply of water, the Engineer may require the owner to enter into an agreement to pay such special rate before turning on the water to such property and if such property is sold, a supply of water thereto may be refused and the water turned off until the new owner has entered into such agreement.

Before us counsel for the appellant disclaimed any intention of relying upon section 9, as authorizing the special rate. The authority to fix that rate, he contended, was contained in sections 499 and 525.

Section 525, in part, reads as follows:—

(1) The Board of Control, from time to time by by-law to be approved by the Council, may—

(*a*) prescribe rates payable in respect to water other than the rates controlled by the statute;

On behalf of the respondent it was contended that section 499 authorized a meter rate only, and that this implied a quantity charge which must be uniform; and he cited as authority therefor the judgments of this court in *Attorney-General of Canada* v. *The City of Toronto* (1), and *City of Hamilton* v. *Hamilton Distillery Company* (2)

(1) (1893) 23 Can. S.C.R. 514. (2) (1907) 38 Can. S.C.R. 239.

In the former of these cases, Strong C.J., after pointing out that the City of Toronto was under a statutory obligation to furnish water to all who might apply for it, and inferring therefrom a legislative intention that the water should be supplied upon some fixed and uniform schedule of rates, at page 520 said:—

> In other words, the city, like its predecessors in title the waterworks commissioners, is in a sense a trustee of the waterworks, not for the body of ratepayers exclusively but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable.

On the argument stress was laid upon the word "uniform" which, it was contended, meant an equal rate per gallon to all householders.

I do not read the judgment of Strong C.J., as laying down the principle that the rate charged per gallon for water passing through the meters must be the same, regardless of the circumstances under which the water was supplied. The rates must be fair and reasonable. A fixed rate per gallon which would be fair and reasonable for one householder would be fair and reasonable for another if the circumstances under which the water was supplied to each were the same. But, where the circumstances are not similar, the imposition of a uniform rate per gallon might be neither just nor reasonable. In the *Toronto case* (1), Gwynne J. limited the application of the principle of the uniform rate to customers supplied "under like circumstances." At page 526 he said:—

> In my opinion the corporation has no power to impose a greater rate or charge for water supplied to a consumer who is not liable for or subject to the assessable rate upon real property than *under like circumstances* they do impose upon consumers of water who are subjected to such assessable rate.

The question in that case was as to the validity of a by-law which allowed a discount of 50 per cent. from the water rates if paid within the first two months of the half year for which they were due, but which excepted from the benefit of the discount Government buildings which were exempt from city taxes. The by-law was held to be invalid.

(1) (1893) 23 Can. S.C.R. 514.

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In the *Hamilton case* (1), the question was whether the City could lawfully charge one class of manufacturer a higher price for water supplied than another, both classes being supplied by meter, and the only difference between them being the nature of their business. It was held that under a general power to fix the rates, the City of Hamilton could not, as to prices charged, discriminate as between different members of the same class of customers.

The authority to fix the rates for water supplied through meters given to the appellant by section 499 does not, in my opinion, necessarily compel it to impose a uniform gallon rate for water consumed upon all householders supplied. Where, as in the present case, a main water pipe has been extended into a locality into which it would not otherwise have been laid by reason of an agreement on part of a householder or householders to pay the interest on the cost of its construction and on the understanding that as other houses are built and served by the main the owners thereof will pay their proportionate share of such interest, the appellant, in my opinion, has authority to impose a special rate on those served by the main sufficient at least to cover such interest charges. Section 9, above quoted, recognizes the existence of such authority and provides certain means of enforcing the special rate. The language of the section is "In the case of any property in respect to which the council fixes a special rate for the supply of water," etc. This language clearly presupposes power in the council to fix a special rate, and I do not find anything in section 499 which could be construed as being inconsistent with its exercise. The obligation imposed on owners by that section is to pay such rates as are fixed by the Board of Control and approved of by the Council. As I read the City Charter and amendments thereto, the intention of the Legislature was to leave it to the discretion of the committee of the council to fix rates which would be fair and reasonable, excepting always those cases in which the statute itself fixes the rates. This does not imply that the council is authorized to exercise an arbitrary discretion, for a by-law imposing rates may be subject to judicial scrutiny to determine whether it is fair and

(1) (1907) 38 Can. S.C.R. 239.

reasonable under the circumstances or whether it amounts to an unwarranted discrimination as between the appellant's different customers. In determining the question of reasonableness, the court, where its opinion is sought, will have regard to all the circumstances of the particular city or corporation whose by-law is under review, the object sought to be attained thereby and the necessity therefor, always bearing in mind that the power to declare a by-law void because it is unreasonable is one which must be exercised with great care.

Now unless section 9 can be read as implying a power in the council to impose a special rate, I can find for it no field of operation, for I cannot accept the construction placed upon it by the court below, namely, that the "special rate" there referred to means the special rate for which provision was made in section 492. I think it clear that the special rate mentioned in section 9 is the entire sum to be paid by the property owner for his supply of water, for the meter rate adopted by the council in 1920 was in lieu of all other rates covered by sections 486 and 492. Under section 492 the special rate therein referred to is merely a rate additional or supplemental to the general rate provided for in s. 486. To hold that the words " special rate " had the same meaning in s. 9 as they had in s. 492 would be to attribute to the appellant, when it obtained the amendment of 1922 (s. 9), an intention to obtain legislation enabling it to require an agreement from an owner to pay the supplemental rate under s. 492 without including in the agreement the general rate payable under s. 486. It would also attribute to the appellant an intention, in 1922, of protecting a supplemental special rate the use of which it had previously discontinued. The meaning to be attributed to the word " special " in s. 9, in my opinion, is, " different from the ordinary ", " something additional to the usual or ordinary ", and the " fixing of a special rate " means the fixing of a rate which is different from the rate generally applicable.

The appellant having, as I hold, authority to levy a special rate on the owners of houses on Oakland Road, had it authority to fix, as against each house, the sum mentioned in the by-law? The by-law, which simply confirmed the resolution of July 19, fixed a flat rate of $53.89 for each

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of the five houses. This was arrived at by dividing by five the $269.45 which Mr. Walsh had agreed to pay. That is, each householder was charged a special flat rate of one-fifth of the interest on the cost of constructing the main. On this point the question is: Had the council authority to call upon each of the five householders to pay the same sum regardless of the amount of water consumed by him, or only his proportionate share of the $269.45 on a meter basis?

The stated case contains the following: "Since that time" (early in 1921) "there has been no water service in the city not supplied with a meter and all charges for water have been meter rates fixed by the council." Taken literally this statement means that even on Oakland Road the charges made were meter rates. As this is inconsistent with the by-law I take it that the parties intended the statement to mean that all charges for water other than those on Oakland Road were meter rates. A meter rate, I understand to be, a charge based upon the quantity of water passing through the meter. The council having, by its resolution of January 29th, 1920, adopted the meter system, the respondent would have a right to complain of inequitable treatment if she established that her meter rate was higher than that of her neighbours on Oakland Road. Once that was established, the onus, in my opinion, would be on the appellant to shew that as between the respondent and her neighbours it was fair and reasonable that she should pay a higher meter rate than they. The imposition of a flat house rate means that the owner of a small house occupying, say, 25 feet of ground, and using but little water, must pay for that water the same sum as the owner of a large house occupying 100 feet of ground and using four times as much water. The water supplied to the householders on Oakland Road was supplied by the appellant from artificially constructed water-works and was, therefore, in the nature of a merchantable commodity. Being a merchantable commodity, supplied to the householders under exactly similar circumstances, the price to each, as pointed out in the above mentioned cases, should be the same; otherwise there would be discrimination. *Prima facie,* therefore, if the respondent paid a higher price per gallon for the water consumed by her than was paid

by her neighbours on Oakland Road, she was being discriminated against. But here we have to face this difficulty: The case does not disclose the relative consumption of the five householders on Oakland Road. There is no material from which we can determine whether the respondent's proportionate share of the $269.45, as determined by the meter, would be more than, equal to, or less than, $53.89. It would, in my opinion, be an unwarranted assumption to hold that each householder consumed the same quantity of water. We know that the water consumed in each house passed through a meter and, to my mind, the adoption of a meter rate carries with it the idea that the charges to be made in respect thereof will be based upon the amount of water consumed. Once it was shewn that the appellant had adopted the meter system for the city, and that the charges fixed for Oakland Road were computed on a basis inconsistent therewith, the respondent was entitled to call upon the appellant to justify the adoption of a system for Oakland Road based upon the number of houses owned rather than upon the amount of water consumed. No such justification has been made or attempted. It has not been shewn that it was necessary in the appellant's interests, or even desirable, that the ordinary method of ascertaining the amount payable by a householder for water should be changed from a meter to a flat house rate. It cannot, as far as I can see, make any difference to the appellant whether the householders on Oakland Road make up the $269.45 by an equal contribution from each or by a contribution based upon the quantity of water passing through their respective meters.

As I read the above authorities, the principles to be applied to this case are: The appellant in supplying its citizens with water supplies them with a merchantable commodity. Those supplied from the Oakland Road main are supplied under exactly similar circumstances. The price which the City can charge for its commodity when sold to different customers under similar circumstances must be the same to each. That is, such price must not only be fair and reasonable but it must be uniform.

On the material before us we cannot say that the appellant charged the householders on Oakland Road the same price for water supplied in like circumstances and, there-

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fore, cannot say that the $53.89 charged the respondent was a fair and reasonable sum for the water supplied to her. She was, therefore, justified in refusing to sign an agreement to pay that sum.

This, however, in my opinion, does not conclude the appeal. The last two paragraphs of the stated case read as follows:—

> If the Court is of the opinion in the affirmative of the first question or in the negative of the second question, then judgment shall be entered for a declaration that the plaintiff was entitled to the supply of water for the dwelling house, number 53 Oakland Road, subject to the ordinary rates and for costs.
>
> If the Court shall be of opinion in the negative of the said first question or in the affirmative of the second question, then judgment shall be entered for the defendant with costs.

The formal judgment below contains the following:—

> It is ordered, adjudged, decreed and declared that the plaintiff was and is entitled to a supply of water for her dwelling house number 53 Oakland Road, Halifax, N.S., subject to the ordinary water meter rates.

For the reasons I have given above, the respondent was not and is not entitled to a water supply at the ordinary water meter rates. She is entitled to it only upon payment of her proportionate share of the $269.45 fixed by the council based on the water consumed, and the appellant is entitled to require her to sign an agreement to pay that share before turning on the water. Notwithstanding the agreement of the parties in the stated case as to the form the judgment should take, it is the duty of the court to give the judgment which will carry into effect the rights of the parties.

The appeal, therefore, should be allowed, the judgment below set aside, and judgment entered declaring the plaintiff to be entitled to a supply of water only upon entering into an agreement to pay her proportionate share, as determined by the meter, of the $269.45.

As both parties agreed to submit the case to us in the form in which it appears, I think justice will be done by directing that the parties pay their own costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *F. H. Bell.*

Solicitor for the respondent: *R. M. Fielding.*

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WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT; *May 1.

AND

FLORENCE G. SYMONS ET AL (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Street railway—Pedestrian struck by defendant's tramcar—Judgment, on verdict of jury, against defendant for damages, sustained on appeal.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing the defendant's appeal from the judgment of Curran J., on the verdict of a jury, whereby the plaintiffs recovered damages for the death of their father, caused through his being struck by an electric tramcar belonging to the defendant.

At the conclusion of the argument the Court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

W. N. Tilley K.C. for the appellant.

R. S. Robertson K.C. for the respondents.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) 37 Man. R. 170; [1927] 3 W.W.R. 650.

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ALIEN—*Concluded*

Canada and recoverable by the Custodian under the regulations of Part I of the *Treaty of Peace (Germany) Order,* 1920. There was an adequate remedy at law, as for money had and received. It mattered not, for the purposes of the case, whether P. F. looked to C. Co. or to W. Co. as its debtor; and it was none the less a "debt" because, upon the termination of the war, C. Co., being misinformed as to its duty, paid the money into court for the benefit of P. F. or its estate; the money could not by this means be diverted from its legal destination; nor was the Custodian's right of recovery affected by the fact that, at the time of the payment into court, he, not being aware of the enemy character of the obligation, did not assert his right. —The *Treaty of Peace (Germany) Order,* 1920, Parts I and II, especially clauses 3, 5, 6, 10, 26, 32, 33, 34, 41; the *Treaties of Peace Act* of Canada, 1919, (2nd sess.), c. 30, s. 1 (1), (2); the *Treaty of Peace of Versailles,* arts. 296, 297, 298; the *Consolidated Orders Respecting Trading with the Enemy* (P.C. 1023, 2nd May, 1916), ss. 26, 28, considered. THE CUSTODIAN *v.* PASSAVANT **242**

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2——*Delay in prosecuting—Appearance of bad faith—Motion to quash granted.*] Where an appellant is in serious default in the prosecution of his appeal, and his conduct in defending the action without disclosing that he had parted with his interest in the subject matter, with the result that his transferee would not be bound by the judgment, if maintained, savours of bad faith, indulgence will be refused and the appeal will be quashed at the instance of the respondent. BOWMAN *v.* PANYARD MACHINE AND MANUFACTURING CO..... 63

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4 —— *Jurisdiction — Amount in controversy—Inclusion of interest in computing amount—Supreme Court Act, ss.* 39, 40.] Where the judgment of a court of first instance for recovery of a sum of money is affirmed by a provincial court of appeal, the interest running on the judgment of the court of first instance up to the date of the judgment of the court of appeal must be included in computing the

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6 —— *Leave to appeal — Criminal law — Conflict with "any court of appeal"—English decisions—Similar law—Applicability —Cr. C. ss.* 995, 996, 998, 1025 (*R.S.C.* [1927], *c.* 36).] Upon a motion for leave to appeal under section 1025 of the Criminal Code and in order to decide whether the "judgment appealed from conflicts with the judgment of *any other court of appeal* in a like case," the judge may look at decisions not only of Canadian courts of appeal but also of English courts of criminal appeal, provided the statute governing the matter be to the same effect.—Sections 995, 996 and 998 of the Criminal Code respecting the "evidence under commission of a person dangerously ill" are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6, 7. The judgment appealed from which held that the evidence of a dying witness was regularly taken and could be considered by the jury is, if these sections apply (a point on which no opinion was expressed), in conflict with the decision of the English Court of Crown Cases Reserved in *Reg.* v. *Shurmer* (16 Cox C.C. 94). This decision strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. Under the circumstances of this case and inasmuch as there is already an appeal by the appellant before this court, leave to appeal is

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7 —— *Bankruptcy—Application for leave to appeal to Supreme Court of Canada—Application not within time specified by Bankruptcy Rule 72—Insufficient period of notice — Application dismissed without prejudice to right to obtain extension of time and renew application.*] Where an application to a judge of this Court for leave to appeal from a judgment of a provincial court of appeal in a matter arising under the *Bankruptcy Act* is not made within the 30 days specified by Bankruptcy Rule 72, or where the specified 14 days notice has not been given to the adverse party, the application must be dismissed; the judge has no power to extend the time (*Boivin* v. *Larue*, [1925] S.C.R. 275; *In re Hudson Fashion Shoppe Ltd.*, [1926] S.C.R. 26); but the order of dismissal may reserve any right of the applicant to obtain from the court having jurisdiction to grant it (See *Bankruptcy Act*, ss. (5), 2 (*l*)) an extension of time for making the application or for the service of a notice thereof, and to renew the application in the event of such extension being granted (Order as made in *In re Hudson Fashion Shoppe Ltd.* followed; see 7 C.B.R. 80).—Remarks on the desirability of amendment of Rule 72 so as to empower a judge of this Court to extend the time for applying for leave to appeal either before or after its expiration. *In re* NORTH SHORE TRADING CO..... **180**

8 —— *Jurisdiction — Amount in controversy—Inclusion of interest in computing amount—Supreme Court Act, ss.* 39, 40.] When the judgment of a court of first instance for recovery of a sum of money is affirmed by an appellate court (in this case the judgment was varied by reducing the plaintiff's recovery from $3,008.75 to $2,000), the interest running on the judgment of the court of first instance up to the date of the judgment of the appellate court must be included in computing the amount in controversy in the appeal to this court, because the judgment appealed from is necessarily the judgment of the appellate court. *Hamilton* v. *Evans* ([1923] S.C.R. 1) ref. *Bridge* v. *Eggett* ([1928] S.C.R. 154) foll. DOMINION CARTAGE CO. *v.* CLOUTIER..... **396**

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from their conviction on an indictment laid against them under section 498 Cr. C., which deals with conspiracies in restraint of trade; and the question at issue in this appeal is whether that section is within the legislative jurisdiction of the Parliament of Canada.—*Held*, that leave to appeal cannot be granted, as the judgment appealed from does not conflict with the judgment of any other appellate court in a like case. (S. 1025 Cr. C.).—*Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* (53 Ont. L.R. 627); *Attorney-General of Canada* v. *Attorney-General of Alberta* ([1922] 1 A.C. 191), and *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co.* ([1923] A.C. 695) disc. STINSON-REEB BUILDERS SUPPLY CO. *v.* THE KING..... **402**

10 —— *Jurisdiction — Plea — Paragraph alleging a set off—Judgment striking it out—Final judgment—Substantial right—Supreme Court Act, s. 2.*] An appeal lies to the Supreme Court of Canada from a judgment striking off from a plea a paragraph alleging a set off or counterclaim. THE COSGRAVE EXPORT BREWERY CO. *v.* THE KING..... **405**

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case, the granting of a stay of proceedings was made conditional upon the appellants giving security that they would pay the amount adjudged against them in the event of their appeal being dismissed. GARSON *v.* CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD..... **419**

12——*Leave to appeal—Question of public importance affecting only one province—Proper construction of s. 41, Supreme Court Act—Jurisdiction of an appellate court to grant leave to appeal—Jurisdiction of the Supreme Court of Canda to grant same.*] Leave to appeal will not be granted from a judgment solely because it involves the construction of a provincial statute of a public nature where it does not affect some interest outside the province. Every judgment of a provincial appellate court interpreting a statute of purely provincial application is not *per se* of such general importance as to warrant the granting of special leave to appeal to this court, its construction being *prima facie* a proper subject for final determination by the provincial courts.—Special leave to appeal may be granted by "the highest court of final resort having jurisdiction in" a province in any case (which in its opinion is otherwise a proper subject for "special leave") if it falls within s. 36 of the *Supreme Court Act*, i.e., in any case (save those specially excepted in s. 36) in which there has been a judgment of such "highest court of final resort" in a "judicial proceeding" which is either (*a*) "a final judgment" or (*b*) "a judgment granting a motion for non-suit or directing a new trial" and in which the amount or value of the matter in controversy in the proposed appeal will not exceed $2,000.—The proviso to s. 41, with its sub-clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) has no bearing upon the jurisdiction of the provincial court of final resort to grant special leave to appeal, but relates exclusively to, and states the conditions of, the jurisdiction of the Supreme Court of Canada to grant special leave to appeal to it when such leave has been already refused by the highest court of final resort in the province. HAND *v.* HAMPSTEAD LAND & CONSTRUCTION CO..... **428**

13——*Leave to appeal—Question of public interest involved—Judgment of the appellate court on question of facts only—Doubt as to whether finding of the trial judge should have been reversed.*] When a question of public interest is involved in an appeal to this court, although the appellate court did not base its judgment upon it, leave to appeal to this court will be granted, if there is a doubt as to the sufficiency of the circumstances in the case to overcome, as held by the appellate court, the finding of the trial judge. DONOHUE *v.* LEFAIVRE **434**

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ASSESSMENT AND TAXATION — *Sales Tax—S.* 19 *BBB of Special War Revenue Act,* 1915 (c. 8), *as amended (Dom.)—Exemption of "nursery stock" in subs.* 4 *of s.* 19*BBB—Cut flowers—Potted plants.*] Sales by florists of cut flowers and potted plants are not exempt from the sales tax imposed by s. 19BBB of the *Special War Revenue Act,* 1915 (c. 8) (Dom.) as amended, such articles not being covered by the phrase "nursery stock" in subs. 4 of s. 19BBB. BRADSHAW *v.* MINISTER OF CUSTOMS AND EXCISE..... **54**

2 —— *Municipal corporation — Taxes — Exemption — Industrial company—Cessation of operations—Immovables remaining in same condition—Right to exemption—Cities and Towns Act, R.S.Q.* (1909) *s.* 5775.] In order to continue to be entitled to the benefit of an exemption from municipal taxes granted under the *Cities and Towns Act* (R.S.Q. 1909, s. 5775), a person must actually carry on the industry, trade or enterprise in respect of which the exemption was granted; and the benefit of such exemption is suspended while the industry, trade or enterprise ceases to operate, although the immovables remain available for the same industry. *La Cie de Jesus* v. *La Cite de Montreal* ([1925] S.C.R. 120) foll.—Judgment of the Court of King's Bench (Q.R. 44 K.B. 165) aff. LE SEMINAIRE DE QUEBEC *v.* LA CITE DE LEVIS..... **187**

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BANKRUPTCY — *Appeal — Application for leave to appeal to Supreme Court of Canada—Application not within time specified by Bankruptcy Rule* 72*—Insufficient period of notice—Application dismissed without prejudice to right to obtain extension of time and renew application.*] Where an application to a judge of this Court for leave to appeal from a judgment of a provincial court of appeal in a matter arising under the *Bankruptcy Act* is not made within the 30 days specified by Bankruptcy Rule 72, or where the specified 14 days notice has not been given to the adverse party, the application must be dismissed; the judge has no power to extend the time (*Boivin* v. *Larue,* [1925] S.C.R. 275; *In re Hudson Fashion Shoppe Ltd.,* [1926] S.C.R. 26); but the order of dismissal may reserve any right of the applicant to obtain from the court having jurisdiction to grant it (*See Bankruptcy Act,* ss. 68 (5), 2 (*l*)) an extension of time for making the application or for the service of a notice thereof, and to renew the application in the event of such extension being granted (Order as made in *In re Hudson Fashion Shoppe Ltd.* followed; see 7 C.B.R. 80).—Remarks on the desirability of amendment of Rule 72 so as to empower a judge of this Court to extend the time for applying for leave to appeal either before or after its expiration. *In re* NORTH SHORE TRADING CO.... **180**

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3 —— *Appeal — Leave to appeal—S. 74 (3) of the Bankruptcy Act (D. 1919, c. 36) —N.S. Bulk Sales Act (R.S.N.S. 1923, c. 202)—Meaning of the word "settlements" in s. 60 of the Bankruptcy Act—Grant of stay of proceedings made conditional on the appellants furnishing security.*] The appellants had purchased, and paid $1,600 for, the stock-in-trade of one Crouse at a bulk sale, the requirements of the Nova Scotia *Bulk Sales Act* (R.S.N.S., 1923, c. 202) not having been complied with. They afterwards sold the goods for $2,000, which proceeds were not ear-marked and were disposed of by them in the usual course of business. The questions at issue in this case were whether the bulk sale was fraudulent and utterly void under the *Bulk Sales Act*, and whether the trustee in bankruptcy could recover from the appellants the sum of $2,000, being an amount equal to the amount realized on the resale of the stock-in-trade. Both courts answered these questions adversely to the appellants, the court *in banco* as to the second question basing its judgment on sections 60 and 65 of *The Bankruptcy Act*. The appellants now seek leave to appeal to this court.—*Held*, that leave to appeal should be granted. Among other questions, the meaning of the word "settlements" in section 60 of the *Bankruptcy Act* appears to be involved in this appeal, the point being whether this word should receive the same construction as that given to it under the English *Bankruptcy Act* ([1914] 4 & 5 Geo. V, c. 59, s. 42).— Under the circumstances of the case, the granting of a stay of proceedings was made conditional upon the appellants giving security that they would pay the amount adjudged against them in the event of their appeal being dismissed. GARSON *v.* CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD..... **419**

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4 —— *Hypothecary action — Payment by president of company with the latter's funds of an hypothecary claim against the company with transfer of the claim to the president on behalf of the company—Company insolvent —Claim of the president against the company—Transfer occurring three months before insolvency—Insolvency of the president—Transfer to president set up by president's trustee against the insolvent company—Bankruptcy Act, R.S.C. 1927, c. 11, s. 64—Arts. 1212, 1716 C.C.*.... **333**

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BARRISTERS AND SOLICITORS— *Company—Solicitor retained to act for company and directors in litigation— Company's liability to solicitor for costs.*] The appellant company was a party to certain actions, and, in each case, by resolution of the directors, M. was retained as its solicitor, and also as solicitor for the individual directors where they were made co-defendants. The actions were settled. The company disputed its liability for payment, in large part, of the solicitor's bill, on the ground that the litigation was merely a contest between opposing bodies of shareholders, in which the company, as such, had no interest, that the company should have adopted a neutral attitude and merely submitted its rights to the court, and that the retainers in the terms in which they were given were consequently *ultra vires* and of no effect, and that, even if the solicitor was justified in taking up for the company the burden of the litigation, the bills of costs showed that the services rendered in the negotiations leading to settlement were for the benefit of individual directors whose shares, as a result thereof, were sold or transferred, and not for the benefit of the company or under its instructions.— *Held:* The company was liable. As, in the litigation in which the costs were incurred, certain resolutions of the directors and issues of shares by the company, which must now, on the record,

BARRISTERS AND SOLICITORS — *Concluded*

be taken as valid and regular, were impeached, the costs of defending the company and directors in respect thereof should be borne by the company. As corporate acts of the company were impeached, it could not be said that the solicitor should have held merely a watching brief for it. As to the services rendered in negotiations for settlement, the company had a vital interest in having the litigation speedily terminated, and, on the evidence, it was impossible to hold that they were rendered on behalf of any person other than the company; the test to be applied, in the circumstances, to determine on whose behalf the solicitor was acting, was not "could he have rendered the services without instructions from some other than the company?" but rather "were the services reasonably necessary to procure a settlement of the litigation in which the company was involved?"—While it is a well established rule that directors may not use the company's funds in payment of their own costs, although such costs would not have been incurred if they had not been directors (5 Hals., p. 227), yet it is equally well established that directors acting as such within such of the company's powers as are confided to them, and without gross negligence, cannot be called upon to pay out of their own funds the costs of defending resolutions passed by them in the interests of the company, simply because a plaintiff has chosen to make them individually co-defendants (*Bray* v. *Royal British Nurses' Assn.*, [1897] 2 Ch. 272). NORTHERN LIFE ASSUR. CO. OF CANADA *v.* MCMASTER..... **512**

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COMPANY — *Sale of common shares — Statement of company's assets and liabilities — Undeclared dividends on preference shares as constituting a liability of the company.*] F. gave an option to purchase a block of common shares of a company, which purchase would give the purchaser control of the company. The optionee required that F. furnish an accountant's statement showing the company's assets and liabilities and profit and loss to August 31, 1926, and an affidavit that the company's liabilities would not exceed the amount shown by such statement. A statement and affidavit were furnished, and the acceptance of the option was expressed to be based on said statement. Preference shares had been issued by the company, non-participating and non-assessable, entitling the holders thereof to a first, fixed, cumulative dividend of 8 per cent per annum.—*Held*, that cumulative dividends on preference shares, to August 31, 1926, undeclared and unpaid, constituted a liability of the company within the meaning of the contract, and should have been included as such in the said statement; and that, therefore, upon a certain stated issue, the decision of which, on its proper construction, was held to depend on the determination of said question of law, the said liability should be borne by F.—Judgment of the Appellate Division, Ont., (61 Ont. L.R. 305, reversing judgment of Grant J., *ibid*) affirmed. FAIRHALL *v.* BUTLER..... **369**

2 —— *Transfer of shares in oil company with option of re-purchase — Nature of transaction — Construction — Alleged loan and mortgage — Admissibility of extrinsic evidence—Right to dividend accruing during option period.*] HERRON *v.* MAYLAND.. **225**
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CONSTITUTIONAL LAW — *Statute — Senate — Eligibility of women —"Qualified persons" — Meaning — B.N.A. Act*, 1867, *ss.* 23, 24.] Women are not "qualified persons" within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the

CONSTITUTIONAL LAW — *Continued*

Governor General to the Senate of Canada.—*Per* Anglin C.J.C. and Mignault, Lamont and Smith JJ.—The authority of *Chorlton* v. *Lings* (L.R. 4 C.P. 374) is conclusive alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of "qualified persons" within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched, so that if otherwise applicable) Lord Broughams' Act (which enacts that "words importing the masculine gender shall be deemed and taken to include females") cannot be invoked to extend the term "qualified persons" to bring "women" within its purview.—*Per* Anglin C.J.C. and Lamont and Smith JJ.—The various provisions of the B.N.A. Act passed in the year 1867 bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were enacted. If the phrase "qualified persons" in section 24 includes women to-day, it has so included them since 1867. But it must be inferred that the Imperial Parliament, in enacting sections 23, 24, 25, 26 and 32 of the B.N.A. Act, when read in the light of other provisions of the statute and of relevant circumstances proper to be considered, did not give to women the power to exercise the public functions of a senator, at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House.—*Per* Duff J.—It seems to be a legitimate inference that the B.N.A. Act, in enacting the sections relating to the "Senate," contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same, though, necessarily, in detail, not identical, with that of the Legislative Councils established by the earlier statutes of 1791 and 1840; and, under those statutes, it is hardly susceptible of dispute that women were not eligible for appointment. REFERENCE *re* MEANING OF WORD "PERSONS" IN S. 24 OF THE B.N.A. ACT..... **276**

2 —— *Fish or salmon cannery—License to operate—Sections 7a and 18 of the Fisheries Act, 1914—ultra vires—License to fish or to operate a fish or salmon cannery in the province of British Columbia—Whether any resident has a right to receive license or the Minister of Marine and Fisheries has a discretionary authority to grant or refuse such license.*] Section 7*a* of the *Fisheries Act*, 1914, which enacts that "no one shall operate a fish cannery for commercial purposes without first obtaining an annual license from the Minister" and section 18 of the same Act, which enacts that "no one shall operate a salmon cannery * * * in British Columbia for commercial purposes except under a license from the Minister," are both *ultra vires* of the Parliament of Canada. In the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the province where the operation is carried on, like the right to operate a fruit or vegetable cannery; and the exercise of that right is not restricted or regulated by force of any enumerated Dominion power to which the above sections may be justifiably attributed.—*Per* Anglin C.J.C. and Newcombe, Rinfret and Lamont JJ.—Under the provisions of the Special Fishery Regulations for the province of British Columbia (made by the Governor in Council under the authority of s. 45 of the *Fisheries Act*, 1914), respecting licenses to fish, viz.: subs. 3 of s. 14; par. (*a*) or (*b*) of subs. 1 of s. 15, or par. (*a*) of subs. 7 of s. 24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has the right to receive a license to fish or to operate a fish or salmon cannery in that province, if he submit a proper application and tender the prescribed fee. As to any person resident in the province of British Columbia, who is not a British subject, he is not eligible for a license of the character described in subs. 3 of s. 14, it being expressly declared by that subsection that "no other than a British subject shall be eligible for such license." And none of the other licenses in question shall, as provided by par. (*b*) of subs. 1 of s. 15, be granted to any person, unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas."—*Per* Duff, Mignault and Smith JJ.—The above sections of the Special Fishery Regulations are subject to the provisions of section 7 of the *Fisheries Act* which enacts that "the Minister (of Marine and Fisheries) may * * * issue, or authorize to be issued, fishery leases and licenses * * *" and therefore the Minister has a discretionary authority to grant, or refuse, such license to any person who is a British subject resident in the province of British Columbia, or is a returned soldier who has served in His Majesty's Canadian navy or army overseas; in other words, the authority of the Minister is a permissive one and he is under no legal duty to grant licenses to those who may apply for them. REFERENCE *re* CERTAIN SECTIONS OF THE FISHERIES ACT, 1914..... **457**

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CONTRACT — *Contract by correspondence — Offer — Acceptance – Delivery of offer by messenger—Mailing of acceptance of communication to party—Presumption.*] The defendant, on the 14th of August, 1924, made an offer in writing to the plaintiff to purchase a certain property and handed the document to one B. representing the plaintiff for delivery to the latter. On the 25th of August, the plaintiff deposes he wrote a letter of acceptance which, duly addressed to the defendant, he gave to his son to post and it was mailed the same day. The defendant denied receipt of this letter. On the 6th of September, the plaintiff received from the defendant a letter withdrawing the offer of the 14th of August. The action is to compel the defendant to carry out the transaction.—*Held* that the decision of this court in *Magann* v. *Auger* (31 Can. S.C.R. 186), holding that the mailing of the plaintiff's letter of acceptance to the defendant constituted communication of it to him, has no application to a case where the offer is communicated, as in the present case, not by mail, but by other means. The *Magann Case* was one of contract by correspondence; and, the offer having been sent by mail, that was held to constitute a nomination by the sender of the post office as his agent to receive the acceptance for carriage to him. To make a contract the law requires communication of offer and acceptance alike either to the person for whom each is respectively intended or to his authorized agent.—Judgment of the Court of King's Bench, (Q.R. 43 K.B. 295) reversed. CHARLEBOIS *v.* BARIL..... 88

2 —— *Transfer of shares in oil company with option of re-purchase—Nature of transaction — Construction — Alleged loan and mortgage—Admissibility of extrinsic evidence—Right to dividend accruing during option period.*] H. (appellant), desiring to pay off a debt of $40,000, asked M. (respondent) for a loan of that sum on the security of 1,600 shares in an oil company. M. refused, but negotiations resulted in M. paying the $40,000, taking a transfer from H. of the shares, and giving an option to H. to re-purchase them within one year for $51,280. This sum had been arrived at by including the said sum of $40,000, the sum of $6,000, being the cash payment on a house which M. had stipulated that H. should buy from him, and interest for one year on $40,000 at 12% and on $6,000 at 8%. The option to re-purchase was in writing, and recited that M. had purchased from H. and was now the holder of 1,600 shares in the oil company, and had agreed to give an option for re-purchase for the price and on the terms thereinafter set forth, and it provided that M. "in consideration of the sale of the said shares

CONTRACT—*Continued*

by [H.] to [M.], and other good and valuable considerations him thereunto moving, doth hereby give and grant unto [H.] an opinion, irrevocable within the time for acceptance herein limited, to purchase," etc.; that M. should deposit the share certificates in a certain bank, and that they should be left there so long as the option was open for acceptance; that H. might at any time within the year purchase blocks of not less than 100 shares upon paying $100 for each share so purchased, and receive a transfer thereof, all sums so paid to be deducted from the total purchase price. Before the expiry of the year H. paid the re-purchase price and received a re-transfer of the shares, but in the meantime a dividend had been declared by the oil company, and the question in dispute was as to who was entitled to it. The parties had apparently not contemplated the possibility of the payment of a dividend during the option period, and had not alluded to it in their negotiations or agreement. H. sued to recover it.—*Held*, (*a*) that the transaction intended by the parties was in reality a sale with an option to re-purchase, and not a loan or mortgage; having regard to the form in which it was deliberately put, it would require most convincing evidence to justify a contrary conclusion; and the evidence in fact tended strongly to support the view that the form of the transaction represented its real nature; (*b*) that the evidence of the surrounding circumstances and of the negotiations which resulted in the option being given did not warrant the implication of a provision entitling H. to interim dividends; there may be cases in which a court can say that it is inconceivable that, had the parties adverted to the subject, they would not have agreed to the stipulation contended for, and would then imply it; but this was very far from being such a case. M. was entitled to the dividend as incidental to his ownership of the shares at the date specified in the declaration of dividend, and no right to recover it from him, cognizable in a court of law and equity, had been shewn. In the view taken by the court on the evidence, it was unnecessary to decide as to the objection made by M. to the admissibility of the parol evidence relied on by H. The general rules as to admissibility, and the required strength, of extrinsic evidence to shew the alleged real nature of the transaction in such cases are discussed by Duff J.—Judgment of the Appellate Division of the Supreme Court of Alberta (23 Alta. L.R. 34) affirming, on equal division of the court, judgment of Ford J. (*ibid*), affirmed.—Smith J., dissenting, held that, as the written document did not, nor purported to, contain the whole bargain, parol

CONTRACT—*Continued*

evidence was admissible to shew that the complete bargain was, and the written document must be construed in the light of it; while not finding that the transaction was intended merely as a loan, he held that the terms of the agreement imported that any incidental advantages accruing to the ownership of the shares during the option period should go with the shares to the party who might ultimately become the absolute owner under the terms of the bargain; and H. was therefore entitled to the dividend. HERRON *v.* MAYLAND. **225**

3 —— *Construction — Findings as to — Estoppel—Pledge of bonds—Dispute as to purpose and conditions of pledge—Effect on rights of present litigants of findings in other proceedings—Parties.*] Plaintiffs sued for the return of certain bonds or their value, alleging that they had been pledged to defendant by plaintiff O. as collateral security for payment of moneys secured by a mortgage from I.T. Co. to defendant, and, by agreement, were to be returned on the mortgage debt being reduced to $31,000, and that the mortgage had been paid, or reduced to an amount less than $31,000. Defendant contended that the advance made when the bonds were pledged formed no part of the mortgage indebtedness but was an independent advance on pledge of the bonds, and that it was entitled to realize the amount of that advance by sale of the bonds. In certain mechanics' lien proceedings against I.T. Co. (the mortgagor), to which defendant was made a party, but to which O. was not a party, although as president of I. T. Co. he was cognizant of them, it had been held that the said advance was not made on the mortgage as part of the money secured thereby, but was an independent advance on the bonds.—*Held*, that the view taken in the courts below (25 Ont. W.N. 43; 29 Ont. W.N. 185) that the bonds were pledged by O. as collateral security upon an additional advance on the mortgage, and that O. was in respect thereof entitled to the rights of a surety, had not been successfully impugned; that the evidence disclosed that, with defendant's concurrence, the mortgaged land was subsequently sold for a sum more than sufficient to pay off the mortgage and all other claims entitled to priority over it; that defendant had agreed to return the bonds on the loan secured by the mortgage being reduced to $31,000, and it had been so reduced within the meaning of the agreement; that, as a result of above facts, as found, O. became entitled to return of the bonds, and defendant, who had since disposed of them, was accountable for their value.—*Held*, further, that O. was not estopped by reason of said holding in the mechanics' lien

CONTRACT—*Concluded*

proceedings from asserting that the advance was secured by the mortgage; he was not a party to those proceedings, he was present at them only as a representative of I. T. Co. (*In re Deeley's Patent*, [1895] 1 Ch. 687, referred to); neither personally nor as president of I. T. Co. did he derive any benefit from the judgment therein (cases such as *In re Lart* [1896] 2 Ch. 788, held inapplicable; *Leicester & Co.* v. *Cherryman* [1907] 2 K.B. 101, at p. 103, referred to); on the facts established, defendant was not misled to its prejudice by any conduct of O.; if O. as a person entitled to redeem the mortgage had a status to intervene, it did not follow that he was obliged to do so; if defendant desired to hold him bound by anything determined in those proceedings it should have taken steps to have him made a party.—*Held*, further, that, although the plaintiffs other than O., who claimed as owners of the bonds, had no independent right of action against defendant, and could claim only through O., yet, as O. was consenting, the fact of the judgment having been entered for his co-plaintiffs afforded no ground for objection.—Judgment of the Appellate Division, Ont. (29 Ont. W.N. 185), affirming judgment of Mulock C.J. Ex. (25 Ont. W.N. 43), affirmed. THE LONDON LOAN AND SAVINGS CO. OF CANADA *v.* OSBORN..... **451**

4 —— *Date — Evidence — Date of mailing —Findings of fact in courts below—Farm Implements Act, R.S.S.* 1920, *c.* 128, *ss.* 19, 31. MINNEAPOLIS STEEL & MACHINERY CO. OF CANADA LTD. *v.* BAXTER BROTHERS..... **62**

5 —— *Balance due on purchase price — Sale—Nullity—Fraud of third party —Knowledge—Art.* 993 *C.C.—Art.* 1116 *C.N.* MÉNARD *v.* LA SOCIÉTÉ D'ADMINISTRATION GÉNÉRALE..... **82**

6 —— *Arrangement for selecting, cruising and checking timber berths—Repudiation—Damages—Measure of.* HALL *v.* KNOX **87**

7 —— *Sale — Liability to deliver — Liability for payment.—Art.* 1202 *C.C.* HILL *v.* MOISAN..... **90**

8 —— *Action against two defendants for price of goods sold and delivered—Question as to which defendant purchased—Findings of fact.* WETTLAUFER BROS. LTD. *v.* ROBERT ELDER CARRIAGE WORKS LTD. **580**

COSTS—*Apportionment of.*
See HUSBAND AND WIFE

CRIMINAL LAW — *Appeal — Motion for leave to appeal from judgment of Second Divisional Court of Appellate Division, Ont.—Alleged conflict with judgment of an "other court of appeal" in "a like case" (Cr. Code, R.S.C. 1927, c. 36, s. 1025)—First Divisional Court of same Appellate Division an "other court of appeal"—Alleged error in trial judge's charge to jury.*] The First Divisional Court of the Appellate Division of the Supreme Court of Ontario is, in relation to the Second Divisional Court, an "other court of appeal" within the meaning of s. 1025 of the *Cr. Code*, R.S.C. 1927, c. 36.—The judgment of the Second Divisional Court (33 O.W.N. 301) dismissing an appeal from a conviction on a charge of rape, which conviction was attacked on the ground of error in the charge to the jury, was held not to be in conflict with the judgment of the First Divisional Court in *R.* v. *Hall* (31 O.W.N. 451) or with the judgment of this Court in *Brooks* v. *The King* ([1927] S.C.R. 633), neither of them being "a like case" (*Cr. Code*, s. 1025) to that in question; and a motion for leave to appeal to this Court was refused. HILL *v.* THE KING..... **156**

2——*Leave to appeal—Conflict with "any court of appeal"—English decisions—Similar law—Applicability—Cr. C. ss.* 995, 996, 998, 1025 (*R.S.C.* [1927], *c.* 36).] Upon a motion for leave to appeal under section 1025 of the Criminal Code and in order to decide whether the "judgment appealed from conflicts with the judgment of *any other court of appeal* in a like case," the judge may look at decisions not only of Canadian courts of appeal but also of English courts of criminal appeal, provided the statute governing the matter be to the same effect.—Sections 995, 996 and 998 of the Criminal Code respecting the "evidence under commission of a person dangerously ill" are taken from the Imperial statute 30-31 Vict., c. 35, ss. 6, 7. The judgment appealed from which held that the evidence of a dying witness was regularly taken and could be considered by the jury is, if these sections apply (a point on which no opinion was expressed), in conflict with the decision of the English Court of Crown Cases Reserved in *Reg.* v. *Shurmer* (16 Cox C.C. 94). This decision strictly applied the Imperial statute above mentioned requiring a notice in writing to the accused. Under the circumstances of this case and inasmuch as there is already an appeal by the appellant before this court, leave to appeal is granted as to the question of the admissibility at the trial of the *ante mortem* deposition. BRUNET *v.* THE KING.. **161**

3 —— *Evidence — Accomplice — Corroboration — Warning to jury—Duty of Judge—Dissenting opinion.*] The appellant was convicted on an indictment for manslaughter by performance of an illegal operation on one Alice Couture, causing a miscarriage that resulted in her death and he was sentenced to imprisonment for life. The appellant's appeal to the Court of King's Bench was dismissed, but one judge dissented on the question of law as to whether or not there was error on the part of the trial judge in not having warned the jury as to the danger of convicting on the uncorroborated evidence of the girl Couture, an accomplice.—*Held* that the appellant was entitled to have a new trial.—*Per* Duff, Mignault, Rinfret and Smith JJ.—Although there is no case in which it has been explicitly laid down that the warning must be given where there is some corroborative evidence to go to the jury, it necessarily follows from the principle laid down in the cases referred to in the judgment now reported, where the evidence of the accomplice is necessary to sustain the conviction and the corroborative evidence may or may not be accepted as sufficient by the jury. In this case, there was in fact no admissible corroborative evidence to be submitted to the jury, and it was the duty of the trial judge to have given the warning. It is not, however, to be taken that the warning would have been unnecessary, had there been some corroborative evidence proper to be submitted to the jury. It is for the jury to say whether or not the corroborative evidence is to be believed, and if it is not believed by the jury, and yet they convict, no warning having been given, they are convicting on the uncorroborated evidence of the accomplice without having been warned of the danger of doing so. On that ground and also in view of other improper evidence having been introduced at the trial, it cannot be said that the appellant has suffered no substantial wrong.—*Per* Newcombe J.—The evidence upon which the Crown relied for corroboration of the woman's testimony did not corroborate in the essential particulars; and there was no warning to the jury, such as required by the Court of Criminal Appeal in the well-known case of *Rex* v. *Baskerville* ([1916] 2 K.B. 658). BRUNET *v.* THE KING..... **375**

4——*Conviction for conspiracy in restraint of trade—Unanimous judgment—Motion for leave to appeal—Alleged conflict with other decisions of appellate court—Sections* 498, 1025 *Cr. C.*] The appellants seek leave to appeal from an unanimous judgment of the appellate court in Quebec dismissing their appeal from their conviction on an indictment laid against them under section 498 Cr. C., which deals with conspiracies in restraint of

CRIMINAL LAW—*Continued*

trade; and the question at issue in this appeal is whether that section is within the legislative jurisdiction of the Parliament of Canada.—*Held* that leave to appeal cannot be granted as the judgment appealed from does not conflict with the judgment of any other appellate court in a like case. (S. 1025 Cr. C.).—*Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* (53 Ont. L.R. 627); *Attorney-General of Canada* v. *Attorney-General of Alberta* ([1922] 1 A.C. 191), and *Fort Frances Pulp & Paper Co.* v. *Manitoba Free Press Co.* ([1923] A.C. 695) disc. STINSON-REEB BUILDERS SUPPLY CO. *v.* THE KING..... **402**

5 —— *Evidence — Conviction on charge of receiving stolen goods—Evidence of statements made by the thieves in presence of accused—Misdirection in judge's charge to jury—Contention that no miscarriage of Justice (Cr. Code, s.* 1014 (2)).] The accused was convicted on a charge of receiving stolen goods, knowing them to have been stolen. At his trial, evidence was admitted of statements made in his presence by the supposed thieves to a constable. In charging the jury, the judge referred to these statements as evidence that might be regarded, but warned them of the danger of accepting evidence of accomplices without corroboration. On objection by accused's counsel to the charge, he recalled the jury and said: "I have already warned you in this case it would be most dangerous for you to rely on (the thieves') evidence as against the prisoner without feeling it was corroborated in other respects because (of) what they said (when) the prisoner was there. He did not express any particular assent to it and you should reasonably be bound by what he did assent to and I think on the whole it is almost worthless evidence for you."—*Held:* The conviction should be set aside and a new trial ordered, on the ground of misdirection. It is only when the accused, by "werd or conduct, action or demeanour," has accepted what they contain, and to the extent that he does so, that statements made by other persons in his presence have any evidentiary value; and there was no evidence from which a jury might infer anything in the nature of an admission by accused of the accuracy of what was incriminating in the statements in question. The jury should have been told that, in the absence of an assent by the accused either by word or conduct to the correctness of the statements, they had no evidentiary value whatever as against him and should be entirely disregarded. It was impossible to say that there had been no miscarriage of justice, and apply s. 1014 (2) of the *Criminal Code*; it may be that sometimes

CRIMINAL LAW—*Concluded*

objectionable testimony as to which there has been misdirection is so unimportant that the court would be justified in taking the view that in all human probability it could have had no effect upon the jury's mind, and, on that ground, in refusing to set aside the verdict (*Kelly* v. *R.* 54 Can. S.C.R. 220); but here, in a most vital matter, the judge had not only failed to warn the jury to disregard the statements, but had actually stressed them, in that he in effect told the jury that they were "evidence" upon which, if corroborated, they might act.—Canadian Encyclopedic Digest, Ont. Ed., vol. 4, pp. 405, 406-7; *Makin* v. *Att. Gen. for New South Wales,* [1894] A.C. 57, at p. 70; *Ibrahim* v. *R.,* [1914] A.C. 599, at p. 616; *Allen* v. *R.,* 44 Can. S.C.R. 331; *Gouin* v. *R.,* [1926] S:C.R. 539; *R.* v. *Christie,* [1914] A.C. 545, referred to.—Judgment of the Court of Appeal for Manitoba (37 Man. R., 367) reversed. STEIN *v.* THE KING..... **533**

CROWN — *Claim against — Reference by Minister to Exchequer Court—Jurisdiction —Motion for permission to withdraw reference—Appeal to Supreme Court of Canada —Jurisdiction—Exchequer Court Act, R. S.C.* 1906, *c.* 140, *s.* 82—*Claim not arising "in connection with the administration of" the Minister's department (Exchequer Court Act, s.* 38)—*Order in Council purporting to direct withdrawal of reference—Res judicata—Pleadings—Restriction of statement of claim to claim as referred to the court—Amendment.*] The claimant presented, in a letter to the Minister of Railways and Canals, a claim for damages for breach of an alleged contract for sale by the Crown to claimant's assignor of certain land occupied by the Canadian National Railways. The contract involved the erection by the purchaser of a 26 storey building, four floors of which were to be leased to the Canadian National Railways, and five floors to the Department of Customs and Excise, and it was apparent from the claimant's letter that the successful financing of its project depended on these leases being entered into, and that the failure to obtain them was the substantial basis of its claim. Several cabinet ministers took part in the negotiations for the alleged contract, and it was the subject of cabinet discussions and Orders in Council. The Acting Minister of Railways and Canals, purporting to act under s. 38 of the *Exchequer Court Act,* referred the claim, as set out in claimant's letter, to the Exchequer Court. The Crown subsequently moved for permission to withdraw the reference, or, alternatively, for the statement of claim to be struck out, on the grounds: (1) that the reference was not authorized by s. 38, and was, therefore, *ultra vires* of

CROWN—*Continued*

the Minister of Railways and Canals; (2) that an Order in Council purporting to direct the withdrawal was effective, if the reference had been validly made; and (3) that the statement of claim as delivered was not within the purview of the reference authorized. The motion was dismissed ([1927] Ex. C.R. 101) and the Crown appealed.—*Held*, this Court had jurisdiction to hear the appeal, under s. 82 of the *Exchequer Court Act*; the rejection of the first and second grounds of the motion was tantamount to allowing a demurrer by the claimant to two prospective defences of the Crown, and effectively excluded them from the issues; moreover, the first ground challenged the Exchequer Court's jurisdiction, and the judgment affirming that jurisdiction was a final judgment.—*Held*, further, that the claim did not arise "in connection with the administration of " the Department of Railways and Canals, within s. 38 of the *Exchequer Court Act*; the project was a governmental undertaking, as distinguished from a merely departmental transaction; the Minister of Railways and Canals, if he executed the contract, was acting, not in the exercise of his administrative powers as such minister, but in the execution of a special authority deputed to him by the Government; the reference was, therefore, unauthorized, and the Exchequer Court had no jurisdiction to entertain the claim. On this ground, the appeal was allowed.—Dealing with the other grounds of the Crown's motion, it was *held*, that its contention that the reference had been withdrawn by Order in Council, was successfully met by claimant's answer of *res judicata*, this contention having been rejected by the Exchequer Court on a previous motion; that, as to the statement of claim, in so far as it might substantially depart from or exceed the claim set out in claimant's letter, it transcended the jurisdiction of the Exchequer Court, which was restricted to the very claim referred to it by the Minister; but the objection in this respect (if a proper subject of appeal to this Court) presented matter for the exercise of discretion as to amendment, rather than a ground for striking out the claimant's pleadings or otherwise summarily determining its action. THE KING *v.* DOMINION BUILDING CORPORATION LTD. **65**

2 —— *Negligence — Collision — Canal — Probable cause of accident — Exchequer Court Act, s. 20.*] The J.B.K. was proceeding down the Lachine Canal to Montreal and she had passed through basin No. 1 into lock No. 1 where she was duly moored to the side. While the water in the lock was being lowered to enable her to pass out, the gates between

CROWN—*Concluded*

the basin and the lock, being closed, were subjected to increasing pressure as the water below receded and they gave way releasing the water in the basin and causing the steamer to part her moorings and to break through the lower gates. While the J.B.K. was thus out of control, she came into contact with the respondent's tug V., causing damages for the recovery of which action was taken against the Crown. The trial judge held that, as it appeared upon the evidence that the breaking of the gates could only have occurred if they were not properly mitred by the servants of the Crown in charge thereof, the court should draw that inference of fact and find liability fo the Crown for negligence under s. 20, subs. *c* of the *Exchequer Court Act*.—*Held* that, upon the evidence, there was a preponderance of probability which constituted sufficient ground for the finding of the trial judge: there was ample evidence that a faulty bevel or mitre-joint would be a not improbable cause of the accident and there was no proof of any competing cause.—Judgment of the Exchequer Court ([1926] Ex. C.R. 150) aff. THE KING *v.* SINCENNES-MCNAUGHTON LINE LTD. **84**

3 —— *Crown lands — Timber limits — License—Expiration — Duration — Fire—Damages—Rights of holders.*] On the 12th of September, 1918, M. & O. acquired from the province of Quebec a license to cut timber on the line of the Transcontinental Railway Company, which license expired on the 30th of April, 1919. The license, transferred in December, 1918, to O. & D., the appellants, was not renewed until the 11th of December, 1919. Such a license could only be granted under s. 3598, R.S.Q. (1909), for a period of 12 months. The appellants claim damages for destruction of timber on the limit covered by the license, arising from a fire in June, 1919, alleged to have occurred owing to the negligence of the servants of the railway company.—*Held* that the appellants cannot recover from the Crown the damages claimed. They had no title to the timber at the time it was destroyed by fire and there is no evidence that they were then in possession of the limit nor in such possession alleged. Therefore no retroactive effect can be given to the license subsequently issued in December in such a way as to confer upon the appellants rights as against the railway company.—Judgment of the Exchequer Court of Canada ([1927] Ex. C.R. 154) aff. O'BRIEN *v.* THE KING..... **99**

ELECTRIC POWER — *Negligence — Accident — Electric current — Interior installation — Electric power furnished by another person—Electric storm—Transfor-*

ELECTRIC POWER—*Concluded*

mer out of order—Current of 2,200 volts getting into the interior circuit—Liability—Articles 1053, 1054 C.C. 340
See NEGLIGENCE 3.

EVIDENCE — *Fraudulent conveyance — Husband and wife—Farm transferred by husband to wife, both continuing to occupy and work it—Grain grown thereon subsequent to transfer siezed under execution against husband—Grain claimed by wife—Interpleader—Relevancy of evidence of circumstances of transfer—Transfer alleged to have been in fraud of creditors—Effect as to right to the grain—Exemption — Married Women's Property Act, R.S.M. 1913, c. 123, ss. 5, 2 (b), 14—Real Property Act, R.S.M. 1913, c., 171, s. 79—Executions Act, R.S.M. 1913, c. 66, ss. 29, 34—Apportionment of costs*..... 26
See HUSBAND AND WIFE.

2 —— *Criminal law — Accomplice — Corroboration — Warning to jury — Duty of Judge—Dissenting opinion*..... 375
See CRIMINAL LAW 3.

3 —— *Conviction on charge of receiving stolen goods—Evidence of statements made by the thieves in presence of accused—Misdirection in judge's charge to jury—Contention that no miscarriage of justice (Cr. Code, s. 1014 (2)).*] STEIN *v.* THE KING 533
See CRIMINAL LAW 5

4 —— *New trial—Discovery of new evidence as ground for.* VARETTE *v.* SAINSBURY..... 72
See NEW TRIAL 1

EXCHEQUER COURT
See CROWN

EXPROPRIATION
See MUNICIPAL CORPORATION.

FISHERIES ACT
See CONSTITUTIONAL LAW.

FIRE INSURANCE
See INSURANCE, FIRE.

GUARANTEE — *Company — Bond guaranteeing true accounting by liquidator of company—Default by liquidator—Dispute as to extent of guarantor's liability—Moneys received by liquidator as personal agent of a secured creditor of the company under power of attorney given to facilitate realization of securities—Claim against guarantor for interest.*] Defendant by its bond guaranteed the true accounting by L. for what he "shall receive or become liable to pay as official liquidator" of a company "at such periods and in such manner as the Judge shall appoint, and pay the same as the Judge hath by the said orders directed, or shall hereafter direct." Auditors reported a shortage in

GUARANTEE—*Continued*

L.'s accounts, and plaintiff, who had succeeded L. as liquidator, was, by order, given leave to proceed against L. under s. 123 of the *Winding-up Act* (R.S.C. 1906, c. 144), and subsequently an order was made declaring L. guilty of misfeasance and breach of trust in relation to the company, and directing him to pay to plaintiff the amount of the alleged shortage. Defendant, in paying under its bond, refused to pay part of the shortage on the ground that such part did not come within its bond, and plaintiff sued therefor.—*Held*, affirming judgment of the Court of Appeal for British Columbia (37 B.C. Rep. 373), that defendant was not liable; on the evidence, the moneys in question were received by L. as the personal agent of one O., a secured creditor of the company, when acting under a power of attorney from O., authorizing L. to deal with O's securities, and given to facilitate the realization thereof; the moneys never belonged to, and were never accountable for by, the company of which L. was liquidator, and could not properly have been made the subject of a misfeasance order under said s. 123; while some of the moneys in question appeared to have passed into L.'s account kept by him as liquidator, payment thereof into that account was without authority and L. would have been, and was, within his rights as against the company in withdrawing them and placing them to his own personal credit; the condition of the bond had no application to the moneys in question.—A claim by plaintiff for interest was disallowed, in view of the terms of the condition of the bond, and the absence of any order for payment of interest. MCFARLAND *v.* LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA 57

2——*Bond guaranteeing faithful discharge of duties by treasurer of municipality incorporated under Rural Municipality Act, Sask. (R.S.S. 1920, c. 89)—Default by treasurer—Liability of guarantor—Representations by municipality in certificates given to secure renewals of bond—Construction of certificates; contra proferentem rule—Certificate of auditor, whether representation of municipality—Alleged untruth of representations—Jury's findings—Jurisdiction of court of appeal to substitute its findings for those of jury.*] Plaintiff was a rural municipality incorporated under *The Rural Municipality Act*, R.S.S. 1920, c. 89. Defendant executed a bond as security for the faithful discharge by P. of his duties as plaintiff's treasurer. The bond was renewed from year to year on a certificate, signed each year by plaintiff's reeve and auditor, in the form forwarded by the defendant, which contained representa-

GUARANTEE—*Continued*

tions, the truth of which, in certificates of March 1, 1922, and March 16, 1923, was challenged by defendant, to the effect that all moneys in P.'s control or custody had been accounted for, and that he had "performed his duties in an acceptable and satisfactory manner." P. being found short in his cash, plaintiff sued on the bond. The jury found that said representations were material and relied on by defendant, but that they were true, and judgment was given at trial against defendant. This was reversed by the Court of Appeal (21 Sask. L.R. 551) which held that the jury's finding that the representations were true was perverse.—*Held* (1): As the members of the Court of Appeal were of opinion that they had all the facts before them and that no further evidence could be produced which would alter the result, that court had jurisdiction to draw inferences of fact inconsistent with the jury's finding, and to give effect to the same (Sask. Court of Appeal Rule 44; *Calmenson* v. *Merchants' Warehousing Co. Ltd.*, 125 L.T. 129, at p. 131; *Skeate v. Slaters Ltd.*, [1914] 2 K.B. 429; *Everett* v. *Griffiths*, [1921] 1 A.C. 631).—(2) Even if, as *The Rural Municipality Act* now reads, the auditor of a municipality can properly be called an officer thereof, he is not an officer or agent to make any representations binding the municipality; nor did the fact that he signed the certificates constitute a holding out by plaintiff that he was authorized to make any representation on its behalf; the information required by defendant by the auditor's signature to the certificates was secured at defendant's own risk from the auditor as an individual and not as a representative of the municipality.—(3): Although the truth of the representations was not the subject of warranty (as in *Dom. of Canada Guaranty & Accident Co. Ltd.* v. *Halifax Housing Commission*, [1927] S.C.R. 492, and other cases referred to), yet, it being found that they were material and were relied upon, defendant was entitled to have the renewal of the bond set aside if it could successfully challenge their truth. (The certificate being framed by defendant, any ambiguity in its language should be construed in plaintiff's favour—*Ont. Metal Products Co.* v. *Mutual Life Ins. Co. of New York*, [1924] S.C.R. 35, at p. 41; *Candogianis* v. *Guardian Ass. Co.* [1921] 2 A.C. 125, at p. 130). As to the certificate of March 1, 1922, in view of the evidence, and having regard to the questions and answers in the application for the bond, from which the jury would be justified in concluding that defendant knew that plaintiff would depend on the auditor's statement, and as the reeve was not obliged to check the auditor's statement or P.'s books, the jury were entitled

GUARANTEE—*Concluded*

to affirm, as they did, the truth of the representations. But as to the certificate of March 16, 1923, the members of the council of plaintiff municipality knew at that time of a discrepancy between the surplus shown on the auditor's balance sheet and P.'s cash; the reeve should not have been satisfied with P.'s explanation of this, and should not have certified without notifying defendant of the discrepancy; the representation that all moneys in P.'s custody had been properly accounted for was not true, and, even if innocently made, it induced a renewal of the bond, which renewal defendant was entitled to have declared void. In the result, therefore, the plaintiff's appeal was allowed in part, the defendant being held liable only for the sum (with interest) in which the jury found that P. was in default when the bond ws renewed in 1923. RURAL MUNICIPALITY OF VICTORY *v.* SASKATCHEWAN GUARANTEE & FIDELITY CO. LTD..... **264**

3 —— *Deeds and documents — Illiterate party—Misrepresentation as to contents—Separate obligations—Only one explained —Whether guarantee void is part.* J. R. WATKINS COMPANY *v.* MINKE..... **414**

4 —— *Mortgage—Action in Manitoba to recover money secured by mortgage—Real Property Limitation Act, Man.* (*R.S.M.* 1913, *c.* 116), *s.* 24 (1)—*Application of s.* 24 (1) *in favour of person who joined with mortgagor in personal covenant—Surety—Mortgaged land situate outside of province.*] THE COLONIAL INVESTMENT AND LOAN CO. *v.* MARTIN.....**440**

See LIMITATION OF ACTIONS 3.

HABEAS CORPUS—*Jurisdiction of judge of Supreme Court of Canada—"Commitment in any criminal case under any Act of the Parliament of Canada"* (*Supreme Court Act, s.* 57).] The petitioner was convicted, in July and October, 1928, on charges under the *Intoxicating Liquor Act* of New Brunswick, and was committed to gaol in York County, N.B. He applied to a judge of this Court for a writ of *habeas corpus*, alleging that on and prior to December 10, 1917, the *Canada Temperance Act* was in force in said county, that on that date an Order in Council, passed pursuant to c. 30 of the Statutes of Canada, 1917, became effective, suspending the operation of the *Canada Temperance Act* in said county; that, at the time of the passing of said Order in Council, there was in force the New Brunswick *Intoxicating Liquor Act*, 1916, referred to in said Order in Council as being as restrictive as the *Canada Temperance Act*; that in 1927 the New Brunswick *Intoxicating Liquor Act*, 1927, (c. 3) came into force, which repealed the 1916 Act,

HABEAS CORPUS—*Concluded*

and was less restrictive than the *Canada Temperance Act*; and he contended that, as a result, the said suspension of the operation of the *Canada Temperance Act* automatically ceased, and that Act came into force in said county, and that the offences for which he was convicted and committed to gaol were offences against that Act and not against the provincial Act.—*Held* (by Mignault J., and, on appeal, by the Court), without pronouncing on the merits of said contention, that a judge of this Court had no jurisdiction to issue the writ applied for, as the commitment was not "in any criminal case under any Act of the Parliament of Canada" within the meaning of s. 57 of the *Supreme Court Act* (*In re Roberts* [1923] S.C.R. 152; *In re Dean*, 48 Can. S.C.R. 235, referred to). DOHERTY *v.* HAWTHORNE..... **559**

2 —— *Minor child — Possession of — Father claiming child from uncle—Art.* 243 *C.C.* KIVENKO *v.* YAGOD..... **421**

HIGHWAYS — *Municipal corporation—Nuisance—Negligent creation of nuisance on highway by city's servants, causing special damage—Flushing of private sewer undertaken by city in exercise of statutory powers—Nuisance created consisting of dangerous ice on plaintiff's housewaу leading from street sidewalk, resulting in personal injury to plaintiff—Liability of city—Misfeasance—Liability at common law—Consolidated Municipal Act* (*Ont.*) 1922, *c.* 72, *s.* 460—*Place of accident not a "sidewalk" within s.* 460 (3)—*Notice of claim and injury not given under s.* 460 (4) —*Right of action—Construction and application of s.* 460—*Breach of private right* **309**

See MUNICIPAL CORPORATION 5.

HUSBAND AND WIFE—*Fraudulent conveyance—Farm transferred by husband to wife, both continuing to occupy and work it —Grain grown thereon subsequent to transfer seized under execution against husband—Grain claimed by wife—Interpleader — Relevancy of evidence of circumstances of transfer—Transfer alleged to have been in fraud of creditors—Effect as to right to the grain—Exemption—Married Women's Property Act, R.S.M.* 1913, *c.* 123, *ss.* 5, 2 (*b*), 14—*Real Property Act, R.S.M.* 1913, *c.* 171, *s.* 79—*Executions Act, R.S.M.* 1913, *c.* 66, *ss.* 29, 34—*Apportionment of costs.*] T., who had bought a farm under agreement of sale, transferred his interest therein (and also his stock and farming implements) to his wife, who subsequently obtained title from the vendor and became the registered owner. The consideration of the transfer was expressed to be natural love and affection and $1. T. and his wife continued to occupy and work the farm as formerly. Plaintiff recovered a judgment against

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T., and under execution issued thereon the sheriff seized certain grain which had been grown on the farm since T.'s wife became the registered owner and which grain had been shipped in her name. T.'s wife claimed the grain.—*Held* (reversing in part judgment of the Court of Appeal for Manitoba, 36 Man. R. 135, and restoring in part judgment of Macdonald J., *ibid.*, Anglin C.J.C. and Mignault J. dissenting): The trial judge's finding that the transfer was made to defraud T.'s creditors should be affirmed; (*held*, that the evidence presented as to this was open to consideration, having regard to the form of the issue and the course of the trial); therefore (subject to the effect of the *Executions Act*, Man.) the transfer was void as against them, and as against the sheriff representing them, even though as between T. and his wife, it may have been intended to operate irrevocably as an absolute gift, and, the conveyance being voluntary, it made no difference whether it was a sham or not; hence the creditors could look to T. as having the equitable and beneficial title to the farm, to which the possession and right to the crops were incident (applying the rule derived from the Roman Law, by which, at least as against a purchaser other than a *bona fide* possessor, the owner of the principal thing becomes the owner also of the fruits; and not adopting the law as stated in certain cases resting upon *Kilbride* v. *Cameron*, 17 U.C.C.P., 373, which case is discussed). T.'s wife could not justify her claim upon the evidence that she directed the farming operations and contributed to the necessary labour in which T. was also engaged. The grain was, therefore, liable to seizure under plaintiff's execution, but subject to the *Executions Act*, R.S.M. 1913, c. 66. The effect of that Act was to exempt from such seizure the grain grown on 160 acres of the farm. The grain seized was the product of 150 acres of wheat and 100 acres of rye, and, having regard to the choice allowed the judgment debtor under the Act (which choice the claimant might justly exercise) the exempted grain should be fixed as comprising all the wheat (the more valuable grain) and $\frac{1}{10}$ part of the rye. Costs of the interpleader order to go to plaintiff; all other costs in all courts to be apportioned *pro rata* according to the value of the grain as to which the parties respectively succeed (*Dixon* v. *Yates*, 5 B. & Ad. 347, and other cases, referred to).—*Per* Anglin C.J.C. and Mignault J. (dissenting): The wife, after the transfer to her, actually carried on the farming operations on her own account and without her husband having any "proprietary interest" therein or control thereof. The grain was "property acquired" by her in an "occupation in

HUSBAND AND WIFE—*Concluded*

which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest" within s. 2 (*b*) of the *Married Women's Property Act*, R.S.M. 1913, c. 123. As to the *bona fides* of her claim in that respect, evidence of the circumstances under which she acquired the farm was admissible. But, once it is found that she so carried on the farming operations, the facts that the transfer of the farm to her was fraudulent and void as against her husband's creditors (if a finding to that effect was justified) and that the husband resided on the farm and aided in the farming, did not prevent her from claiming the crops grown as her own to the exclusion of his creditors (*Kilbride* v. *Cameron*, 17 U.C.C.P. 373, and *Standard Trusts Co.* v. *Briggs*, [1926] 1 W.W.R. 832, approved on this point). S. 14 of the *Married Women's Property Act* had no bearing on the question in issue. BANQUE CANADIENNE NATIONALE *v.* TENCHA. **26**

HYPOTHECARY ACTION — *Payment by president of company with the latter's funds of an hypothecary claim against the company with transfer of the claim to the president on behalf of the company—Company insolvent—Claim of the president against the company—Transfer occurring three months before insolvency—Insolvency of the president—Transfer to president set up by president's trustee against the insolvent company—Bankruptcy Act, R.S.C.* 1927, *c.* 11, *s.* 64—*Arts.* 1212, 1716 *C.C.*] Vaillancourt & Co., Limited, had purchased an immovable hypothecated in favour of two creditors, Mercier and Grégoire, to whom different instalments of the original purchase price had been assigned. Payment of these instalments was further secured by a right of cancellation of the sale, stipulated by the original vendor, the assignor of these instalments. One Dubé was president and a large shareholder of Vaillancourt & Co. Limited. Two of the instalments payable to Mercier were in arrears in October, 1924, and an instalment assigned to Grégoire was to fall due on November 1 of that year. The company had enough of funds to pay Mercier, but was not in position to meet the instalment payable to Grégoire, who threatened proceedings to enforce payment. Under these circumstances, it was agreed between the company and Dubé that the latter would pay Mercier with the company's moneys and would take from him a transfer of his hypothecary claim, which he would hold for the benefit of the company, this being done with the hope that Dubé would thus be in a better position to negotiate for delay with Grégoire. This transfer of Mercier's claim to Dubé was made on October 29, 1924.

HYPOTHECARY ACTION—*Concluded*

Less than three months afterwards both Dubé and the company made an authorized assignment for the benefit of their creditors under the *Bankruptcy Act*. The evidence was that the company was insolvent at the date of the transfer by Mercier to Dubé to the knowledge of the latter. After the assignment of the company and of Dubé under the *Bankruptcy Act*, Dube's trustee, the respondent, brought an hypothecary action against the company's trustee, the appellant, with the usual conclusions. On this action the Superior Court and the Court of King's Bench came to the conclusion that the transfer from Mercier to Dubé was a simulated transaction, and that in view of this simulation the rule applicable was that laid down by art. 1212 C.C., with respect to the effect of *contre-lettres*, so that, the creditors of Dubé being third parties, the appellant, trustee of the company, could not set up against the respondent the fact that Dubé had acquired and held Mercier's claim for the benefit of the company, and not for himself.—*Held* (without deciding whether or not simulation had been established, or whether or not the mandate between the company and Dubé could be set up against the latter's creditors), that Dubé, being the president of the company, and having moreover acquired Mercier's claim with the company's moneys, could not obtain for himself any benefit, or acquire any right of action against the company, out of the transfer to him of Mercier's claim, and that Dube's trustee, even as representing the latter's creditors, had no right of action against the insolvent company's estate, to enforce payment of the claim acquired by Dubé from Mercier.—*Held*, also, that these transactions having taken place less than three months before the authorized assignment of the company, the transfer against the company obtained by Dubé from Mercier, could not be set up by Dube's trustee against the insolvent estate of the company. (*Bankruptcy Act*, R.S.C., 1927, c. 11, s. 64).—Judgment of the Court of King's Bench (Q.R. 43 K.B. 557) rev. GILBERT *v.* LEFAIVRE.... **333**

INSURANCE, FIRE—*Oral contract of insurance—Alleged contract of re-insurance—Correspondence—Ambiguity—Construction—Offer to re-insure as to risks to be assumed—Contract of re-insurance arising on assumption of risk.*] The judgment of the Court of Appeal of British Columbia, 38 B.C. Rep. 161, holding the defendant liable to the plaintiff under a contract of re-insurance, was affirmed.—It was held that there had been a binding agreement of the plaintiff to insure, constituted by an oral arrangement by its agent with the insured prior to the fire;

INSURANCE, FIRE—*Continued*

and that, on the construction of the communications between plaintiff and defendant prior to said agreement, the defendant had undertaken to re-insure the plaintiff, to an extent stipulated, in respect of risks to be assumed; and that, under the circumstances, the nature of the defendant's undertaking implied that its obligation was to arise immediately upon plaintiff becoming committed to liability; *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, applied. BRITISH TRADERS INSURANCE CO. LTD *v.* QUEEN INSURANCE CO. OF AMERICA..... **9**

2 —— *Arbitration—Fire Insurance Policy Act, s. 22—Arbitration Act, s. 8—Defendant's right to appointment of arbitrator—Stay of action pending arbitration—Waste of time and money in trivial technical disputes.*] In an action on a fire insurance policy on household furniture, the appellant claimed damages for the respondent's failure to repair or replace the goods as the plaintiff alleged the insurance company had elected to do; and in the alternative, indemnity for loss of, or damage to, the goods insured. The insurance company having given notice of the appointment of an arbitrator under statutory condition no. 2, and the appellant having refused to appoint an arbitrator, the respondent applied for an order directing such an appointment, and also for an order for a stay of proceedings pending the arbitration. Both applications were dismissed by the trial judge; and the Court of Appeal allowed both appeals.—*Held*, that if in fact there had been an election by the respondent to take advantage of the re-instatement clause, the appellant was entitled to enforce the obligation to re-instate, and in respect of the appellant's claim for damages for failure to do so, the arbitration clause would have no operation, and the respondent would not be entitled either to an order directing the appointment of an arbitrator or to a stay. It was ordered that the issue of election or no election should be determined, and on the determination of that issue, further proceedings should take place, as stated in the judgment now reported. Observations upon waste of time and money in trivial and technical disputes, especially where the amounts involved are insignificant. BULGER *v.* THE HOME INSURANCE CO..... 436

3 —— *Warranty — Warehouse—Building to be "used solely for warehouse purposes."*] The appellant was owner of a building formerly occupied by an insolvent company, where machinery and other supplies, its remaining assets, were kept until sold by the appellant. The premises were insured against fire and, attached to each of two policies, was a rider containing the following provision: "Warranted that the building is used solely for warehouse purposes." The building was totally destroyed and action was brought to recover the amount of the policies.—*Held* that, upon the evidence, if used at all "for warehouse purposes" within the meaning of the above clause, the building was never at any time while insured by the respondent company solely used for such purposes.—*Held*, also, that the word "warehouse," whether used as a noun or an adjective, implies a place prepared and used for the storage of goods and effects, whether belonging to the proprietor of the building or to others, and also implies that the building will be properly equipped and managed so as safely to keep the goods stored in it; and that the expression "is used solely for warehouse purposes" implies further that the premises will be put to no other use than the storing and safeguarding of such goods and effects.—Judgment of the Court of King's Bench (Q.R. 45 K.B. 335) aff. A. A. COOPER INCORP. *v.* CANADIAN UNION INSURANCE CO..... **569**

INSURANCE, LIFE—*Action by insurer for cancellation of policies on ground of insured's fraudulent misrepresentations as to health—Jury's findings held perverse by appellate court—Jurisdiction of Supreme Court of Nova Scotia en banc to substitute its findings for those of jury and give judgment thereon—Rules of Court (N.S.); O. 38, R. 10; O. 57, R. 5.*] B. (the original defendant, since deceased) made three applications to plaintiff for life insurance, on each of which a policy was issued. Plaintiff sued for a declaration that the policies were null and void, on the ground that B. knew, when he made the application in each case, that he was not in good health, but fraudulently represented that he was, for the purpose of inducing issuance of the policies. At the trial, the jury found that B., at the time of the applications, was in ill health, but was unaware of that fact when he signed the first two applications, but knew it when he signed the last one. On these findings Jenks J. (60 N.S. Rep. 116) dismissed the action as to the first two policies, but directed cancellation of the last one. On appeal, the Supreme Court of Nova Scotia *en banc* (60 N.S. Rep. 116) held that the jury's findings that B. did not know he was in ill health when he signed the first two policies were perverse, and it directed that the first two policies be also cancelled, upon payment back of all premiums paid. The defendant appealed. —*Held*, that, upon the evidence, the jury's findings that B. did not know he was in ill health when he signed the first two applications were perverse; that

INSURANCE, LIFE—*Concluded*

the Court *en banc* had jurisdiction to substitute its own findings of fact for those of the jury and give judgment for the plaintiff; and that its judgment should be affirmed.—On said question of jurisdiction, the Court discussed Order 38, Rule 10, and Order 57, Rule 5, of the Rules of the Supreme Court of Nova Scotia, and Order 40, Rule 10, and Order 58, Rule 4, of the English Rules, and referred to *Miller* v. *Toulmin*, 17 Q.B.D. 603, and *R.M. of Victory* v. *Sask. Guar. & Fidelity Co. Ltd.* [1928] S.C.R. 264. BRODY *v.* DOMINION LIFE ASSUR. CO. **582**

JOINDER OF CLAIMS..... **96**
See QUO WARRANTO.

JURY—*Jury's findings—Jurisdiction of Court of Appeal to substitute its findings for those of jury*..... **264**
See GUARANTEE 2.

2——*Life insurance—Action by insurer for cancellation of policies on ground of insured's fraudulent misrepresentations as to health—Jury's findings held perverse by appellate court—Jurisdiction of Supreme Court of Nova Scotia en banc to substitute its findings for those of jury and give judgment thereon—Rules of Court (N.S.); O. 38, R. 10; O. 57, R. 5*..... **582**
See INSURANCE, LIFE.

3——*Waters and watercourses—Power development—Nova Scotia Water Act—Nova Scotia Power Commission Act—Expropriation of land by Power Commission for water power development purposes—Amount of compensation—Finding of jury—Insufficient direction to jury—Factors to be taken into account—New trial*..... **586**
See WATERCOURSES.

LANDLORD AND TENANT—*Forfeiture of lease and re-entry—Exercise by lessor, at trial, of option to avoid lease on ground other than that previously claimed—Sufficiency of re-entry.*] D. Co. had leased lands to C.S. Co., and, on June 4, 1925, served on it notice of forfeiture for non-payment of rent. C.S. Co. being in financial difficulties, a committee of its creditors was formed to look after its affairs, and this committee negotiated with C.T. Co. for the latter to take a sub-lease, and it was alleged that a sub-lease was agreed upon for three months at a net rental of $2,400. C.S. Co. signed a lease, which C.T. Co. refused to accept. C.T. Co. went into possession on July 9, 1925. On September 28, 1925, C.S. Co. was adjudged bankrupt. On October 1, 1925, C.T. Co. took possession under a lease from D. Co. of that date. An action was brought in the name of the trustee in bankruptcy of C.S. Co. against D. Co. and C.T. Co. for possession. The lease from D. Co. to C.S. Co. contained a

LANDLORD AND TENANT—*Continued*

proviso for re-entry by the lessor on non-payment of rent, but the question arose whether D. Co.'s notice of forfeiture was sufficient to terminate the lease and allow it to re-enter without a demand for rent according to the formalities of the common law (which demand was not made), this question depending on whether the lease should be construed as being subject to the *Short Forms of Leases Act*, R.S. B.C., 1924, c. 234.—*Held*, without deciding the question last mentioned, the defendants were entitled to have the lease from D. Co. to C.S. Co. treated as void, under a covenant in the lease that the lease would cease and become void, at the option of the lessor, if the lessee became insolvent or made an assignment for the benefit of creditors, D. Co. having, at the end of the trial, exercised its option to avoid the lease on this ground. The taking of possession by C.T. Co. on October 1 as tenant of D. Co. was a sufficient re-entry by D. Co. in so far as requisite.—*Held*, further, that plaintiff could not recover from C.T. Co. the $2,400 above mentioned, either as for rent or by way of compensation for use and occupation, for the following reasons: that C.S. Co. did not profess to be in possession of the foreshore (part of the lands in question) when, at its instance, C.T. Co. entered on July 9; on the contrary, C.S. Co. was then denying the title of its landlord, D. Co., and endeavouring to obtain a lease of the foreshore from the Crown; there was no demise, and possession was never effectively given to C.T. Co. by C.S. Co.; furthermore, C.T. Co. was obliged to pay to D. Co. for its occupation compensation amounting to the said sum of $2,400.—Judgment of the Court of Appeal for British Columbia (38 B.C. Rep. 401) reversed in part. WINTER *v.* CAPILANO TIMBER CO. LTD. **1**

2 —— *Covenant in lease—Construction—Option of renewal—Appeal to Supreme Court of Canada — Jurisdiction—Value of matter in controversy.*] A lease of land for a term of 10 years contained a covenant by the lessor that he "shall if requested by [the lessee, his executors, administrators or assigns] at least three months before the expiration of the term hereby demised, pay to [the lessee, etc.] a sum of not more than $500 for the buildings now upon the said property and any further buildings that may be erected or built upon the said property during the term hereby created if being thereon at the expiration of the said term, or else grant a new lease of the aforesaid premises to [the lessee, etc.] for the further term or time of 10 years * * * and also a further renewal * * * for a further term of 10 years * * * at and under

LANDLORD AND TENANT—*Continued*

the same yearly rent."—*Held*, that under this covenant the lessor had the option of paying for the buildings at the expiration of the term of the lease or renewing the lease; it did not give the lessee an option to require a renewal.—*Held* further, that this Court had jurisdiction to hear the appeal; the matter in controversy was defendants' right to a lease for 10 years at $50 a year; the evidence showed that the property had an annual rental value of at least $400; if defendants' contention (that they had a right of renewal) was correct, plaintiffs would receive a rental of $50 a year, or a sum of $500 for the next 10 years; if plaintiffs' contention was correct they would receive a rental for the next 10 years of probably not less than $4,000; the difference between these two sums was the value of the matter in controversy, and it was more than sufficient to clothe the Court with jurisdiction. NUGENT *v.* MCLELLAN.... 48

3 —— *Lease — Action for rent — Counterclaim — Misrepresentation — Damages — Several claims based upon distinct alleged causes of action — Jury — General verdict — New trial.*] The appellant company, a canning concern, leased a sawmill and equipment to the respondents and brought action under the lease to recover rent. The respondents, by the lease, covenanted to "take up" the appellant's logging contracts, and in particular one with the Clayton Logging Company. The respondents' counterclaim was based upon three distinct alleged causes of action: first, a claim based upon the allegation that the appellant had induced the respondents to enter into the agreement by falsely and fraduulently representing the contract with the Clayton Logging Company to be a subsisting contract at the date of the lease; second, a claim for damages for breach of a contract to take and pay for box shooks which the respondents by the terms of the lease agreed to manufacture from the box lumber in the yard of the mill at the time of the lease; and third, a claim for damages arising from a series of malicious acts on the part of the appellant. A general verdict was given by the jury for the respondents for $19,460. The respondents admit in their factum that they failed to establish either the second or the third of these causes of action.—*Held* that, under the circumstances of this case, there must be a new trial. The charge of the trial judge was calculated to lead the jury to think that they might properly hold the appellant company responsible as for breach of the agreement to take and pay for the box shooks and, moreover, from some of the judge's observations, they may have received the impression that the respondents were entitled to reparation in respect of the alleged malicious acts. The jury did not disclose by their verdict how much (if any) of the damages awarded should be atrributed to these alleged causes of action now admitted to be without substance; and *prima facie*, therefore, the observations in the charge cannot be overlooked as innocuous, and they may have led the jury into substantial error. As the verdict was a general one, and as the trial judge gave the jury no guidance concerning the method by which damages should be measured, it is impossible to determine how far they may have deviated from the appropriate rule.—*Held*, also, assuming the charge of fraud established as to the misrepresentations by the appellant company touching the Clayton Co.'s contract, the respondents would be entitled to recover compensation for the loss arising naturally and directly from their assumption of the obligations of the lease and the contracts; but they were not entitled to be compensated for loss of profits which they might or would have made if the representations had been true, and which they did not realize because the facts stated to them were non-existent. The question for the jury was not, "How much would the respondents have gained in profits if the representations had been true," but, "What loss expressed in pecuniary terms, did the respondents suffer, that is directly ascribable to the transactions into which they were induced to enter." *McConnell* v. *Wright* [1903] 1 Ch. 546; *Johnston* v. *Braham* [1917] 1 K.B. 586.—*Held*, further, that the respondents, if their allegations are well founded, were, on learning the true facts, entitled to repudiate the lease and the contracts, but they were not bound to do so; and, having elected against repudiation, they were entitled to maintain an action for deceit, if the elements of such a cause of action were disclosed by the facts in evidence.—*Held*, further, that the damages recoverable would include not only sums paid in execution of the obligations entered into, but also all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made, of course, for moneys received and the pecuniary value of advantages gained.—*Held*, further, that the present case is one in which effect must be given to the British Columbia Statute, R.S.B.C., c. 58, s. 55. GOSSE-MILLERD LTD. *v.* DEVINE.... 101

4 —— *Repairs due to fire—Clause in the lease—"Repairs"—Art.* 1660 *C.C.* GAUTHIER *v.* JACOBS..... 83

LEASE

See LANDLORD AND TENANT.

LIBEL — *Privilege—Letters written by medical officer of railway company, while investigationg claim by company's employee to Workmen's Compensation Board—Disclosure of alleged communications by claimant when consulting medical officer as his personal physician—Principles underlying right to protection of privilege.*] The underlying principle on which is founded protection for a communication otherwise actionable as defamatory, is "the common convenience and welfare of society." The communication is only protected when it is fairly warranted by some reasonable occasion or exigency, and when made in discharge of some public or private duty such as would be recognized by people of ordinary intelligence and moral principles, or is fairly made in the legitimate defence of a person's own interests. It is not sufficient that the person making the statement believes, honestly and not without some ground, that the duty or interest exists. There must, in fact, be such a duty or interest as, under all the circumstances, warrants the communication.—Professional secrets acquired from a patient by a physician in the course of his practice, are the patient's secrets, and, normally, are under his control and not under that of the physician. *Prima facie* it is the patient's right that the secrets be not divulged; and that right is absolute unless there is some paramount reason overriding it.—The fact that the disclosure of a patient's secret is made by one physician to another is not a decisive factor to justify it, although in some cases that fact may have significance.—Even where the circumstances may justify a physician in disclosing his patient's secret, the justification does not extend to a wanton disclosure; and the fact that a statement is made unnecessarily (though without malice), may, having regard to its nature, make it a wanton disclosure, and bar the claim of privilege with respect to it. Also, even where a disclosure of a patient's secret may be justified, the physician should take every practicable precaution to avoid inaccuracy and unfairness, and his failure to do so (though without malice) may be fatal to a claim of privilege.—A medical officer of an industrial concern, charged with investigating an employee's claim made to the Workmen's Compensation Board (Ont.), and in preparing the evidence, (and even where any sum awarded will be paid, not by the employer, but by the Dominion Government, by reason of the claimant being a returned soldier), is not so situated that he is under a duty, for the purpose of securing information in preparing his case, to divulge, without the claimant's assent, facts which he has confidentially ascertained from the claimant as his personal medical adviser.—The absolute privilege protecting the testimony of

LIBEL—*Continued*

witnesses in court is applicable to protect statements by an intending witness, as to the nature of the evidence he can give, made to persons engaged professionally in preparing the evidence to be presented in court (*Watson* v. *McEwan*, [1905] A.C. 480); but does not extend to such statements made to persons not concerned in preparing the evidence.—Certain statements made by defendant, assistant chief medical officer of a railway company, and charged with investigating a claim made by plaintiff, an employee of the company, to the Workmen's Compensation Board (Ont.), which statements were contained in two letters, written, respectively, to an officer of the Department of Soldiers Civil Re-establishment, for information, and to an eye specialist whose opinion was required, and disclosed communications alleged by defendant to have been made to him by plaintiff when consulting defendant as a physician some years before to the effect that plaintiff had had a certain disorder, were held, in the circumstances in question, not to come within the protection of privilege.—*Macintosh* v. *Dun*, [1908] A.C. 480, at pp. 390, 398, 399; *London Assn. for Protection of Trade* v. *Greenlands Ltd.*, [1916] A.C. 15, at pp. 22-23, 2, 29; *Stuart* v. *Bell*, [1891] 2 Q.B. 341, at p. 350, and other cases, cited.—Judgment of the Appellate Division of the Supreme Court of Ontario (59 Ont. L.R. 590, reversing judgment of Wright J., 59 Ont. L.R. 385) reversed in part.—Smith J. dissented in part, holding that the second letter was privileged, being written in the performance of defendant's duty of investigating the claim, and submitting facts, as he had gathered them, on which an expert opinion was to be based; that defendant could not properly, under the circumstances, have suppressed the facts (as he understood them) which he believed would show the claim to be unfounded; as to the first letter, however, the defence of qualified privilege could not prevail; it was a letter seeking information, and there was no necessity of making therein the libellous statement complained of; and in respect thereof the plaintiff was entitled to at least nominal damages. HALLS *v.* MITCHELL..... **125**

2 —— *Publication in newspaper — Notice before action—Libel and Slander Act, R.S.O.* 1914, *c.* 71, *s.* 8—*Sufficiency of notice—Pleading—Giving of notice a "condition precedent" within Ontario C.R.* 146—*Refusal of new trial, claimed on ground of excessive damages.*] The giving of the notice required by the *Libel and Slander Act* (R.S.O. 1914, c. 71, s. 8) before an action for damages for a libel published in a newspaper, is a "condition precedent" within the meaning of Ontario

LIBEL—*Concluded*

C.R. 146, and can only be contested if its non-performance is specifically pleaded by defendant. An allegation by plaintiff in his statement of claim that he gave such notice does not relieve defendant from stating in his pleading his intention to contest it; plaintiff's allegation merely expresses what, in its absence, would be implied. The notice must indicate the intending plaintiff with reasonable certainty; but that is accomplished when words are used which are calculated to apprise the addressee of the complainant's identity.—The notice in question was held sufficient, although it was signed with the name "The Woodstock Sentinel-Review," and not in the name of the plaintiff, viz., "The Sentinel-Review Co. Ltd.," which published a newspaper at Woodstock called "The Daily Sentinel-Review."—Judgment of the Appellate Division of the Supreme Court of Ontario (61 Ont. L.R. 62) setting aside the verdict and judgment recovered by plaintiff for damages for libel published in defendant's newspaper, and dismissing the action, reversed.—The Court refused to allow defendant a new trial, claimed on the ground of excessive damages awarded by the jury. SENTINEL-REVIEW CO. LTD. *v.* ROBINSON..... **258**

LIEN

See PRIVILEGE.

LIFE INSURANCE

See INSURANCE. LIFE.

LIMITATION OF ACTIONS — *Mortgage — Default — Possession—Constructive possession of mortgagor—The Limitations Act, Ont., R.S.O.* 1914, *c.* 75, *ss.* 5, 24—*The Mortgagors' and Purchasers' Relief Acts, Ont.*; 1915, *c.* 22, *ss.* 2, 3, 4; 1920, *c.* 38, *s.* 2.] Land in Ontario was mortgaged to the appellant by deed dated December 18, 1913, for $1,565, payable in instalments of $500, $500, and $565, (with interest at 6 per cent. per annum) on June 18, September 18, and December 18, respectively, 1914. The mortgage was declared to be made in pursuance of *The Short Forms of Mortgages Act* (Ont.); the mortgagors covenanted that in default the mortgagee should have quiet possession; the mortgage provided that "the said mortgagee, on default of payment for one month, may, on one month's notice, enter on and lease or sell the said lands," that "in default of the payment of the interest hereby secured, the principal hereby secured shall become payable," and that "until default of payment the mortgagors shall have quiet possession of the said lands." The only payment made was of $156 principal and $1.57 interest, on October 3, 1914, and there was no subsequent acknowledgment in any way of the mortgagee's right or title. The mortgagee never gave notice of entry, or took proceedings to exercise its remedies under the mortgage, or had actual possession or occupation. The question arose, in a proceeding, instituted April 23, 1926, under *The Vendors and Purchasers Act* (R.S.O. 1914, c. 122), whether the mortgage was barred by *The Limitations Act* (*R.S.O.* 1914, c. 75).—*Held*: Although the evidence seemed insufficient to establish continuous actual possession by the mortgagors or their successors in title, they always retained constructive possession, of the land, and the mortgagee's right of entry and right to recover out of the land was effectually barred by ss. 5 and 24 of *The Limitations Act*, unless the application of those sections was precluded by the Ontario "Moratorium Acts." Their application was not so precluded; s. 2 of *The Mortgagors' and Purchasers' Relief Act*, 1920, (c. 38), invoked by the mortgagee, by its terms applied only to a mortgage to which ss. 2 and 3 of *The Mortgagors' and Purchasers' Relief Act*, 1915, applied; and, by reason of s. 4 (3) of said Act of 1915, ss. 2 and 3 of that Act never applied to the mortgage in question. The mortgage, therefore, had ceased to bind the land.—Judgment of the Appellate Divis-ton of the Supreme Court of Ontario (60 Ont. L.R. 543) affirmed. Mignault and Newcombe JJ. dissented, holding that s. 4. (3) of the Act of 1915 regulated the remedies for the recovery of interest, and did not interfere with the condition for recovery of principal provided by s. 2 of that Act; that the procedure for the recovery of the principal of the mortgage was governed by s. 2, which always applied; hence, s. 2 of the Act of 1920 applied, and it had the effect of postponing payments of principal in respect of which the mortgagors were in default to the date therein prescribed, which became the time when the period of limitation for recovery of the principal began to run; and hence the mortgagee's remedies were not barred. MODERN REALTY CO. LTD. *v.* SHANTZ..... **213**

2——*Action by municipality for possession of land—Municipality's title under Crown grant in trust for public wharf—Statute of Limitations set up as extinguishing municipality's title—Application of statute—Evidence failing to establish dispossession.*] Defendant claimed title to land by possession, and that plaintiff municipality's title was extinguished by force of the *Statute of Limitations*. The land was part of a tract granted to the municipality by Crown grant, to hold in trust for a public wharf and public purposes connected therewith.—*Held* that, on the

LIMITATION OF ACTIONS—*Concluded*

evidence, the decision of the Appellate Division, Ont. (61 Ont. L.R. 77), that defendant had failed satisfactorily to establish dispossession, should be sustained.—*Semble*, the land granted to the municipality was by the terms of the grant dedicated to a public use, which was accepted by the public, and this dedication gave rise to rights of enjoyment by the public, which rights were not, nor was the municipality's title which was given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by force of the *Statute of Limitations*. HACKETT *v.* COLCHESTER SOUTH..... 255

3 —— *Mortgage—Action in Manitoba to recover money secured by mortgage—Real Property Limitation Act, Man.* (*R.S.M.* 1913, *c.* 116), *s.* 24 (1)—*Application of s.* 24 (1) *in favour of person who joined with mortgagor in personal covenant—Surety—Mortgaged land situate outside of province.*] The limitation of ten years imposed by s. 24 (1) of the Manitoba *Real Property Limitation Act* (R.S.M. 1913, c. 116) to an action to recover money secured by mortgage applies to the personal remedy on the covenant in the mortgage deed as well as to the remedy against the land (*Sutton* v. *Sutton*, 22 Ch. D. 511, followed); and it applies in favour of a person, not a surety, who has joined with the mortgagor in the personal covenant; (*Quaere*, whether or not it applies to the personal obligation entered into by a surety for the mortgagor. In the case in question it was held that, on construction of the mortgage agreement, the defendant had not entered into it as a surety but had assumed a personal obligation to the mortgagee to repay the loan); and it applies whether the land charged be within the province of Manitoba or elsewhere.—Judgment of the Court of Appeal of Manitoba (37 Man. R. 215) affirmed. THE COLONIAL INVESTMENT AND LOAN CO. *v.* MARTIN 440

MALICIOUS PROSECUTION—*Swearing out and executing search warrant—S.* 73 (1) *Government Liquor Act—Reasonable and probable cause—Malice—Indirect and improper motive—Quantum of damages.* NICKERSON *v.* MANNING..... 91

MANDAMUS — *Municipal corporation—Refusal by a municipality to accept payment of money—Debt claimed not to be due—Art.* 1141 *C.C.*] The appellants seek a mandamus to compel the respondent municipality to accept payment by a third party of an alleged debt of its secretary-treasurer.—*Held* that the appellants cannot succeed, as they have failed

MANDAMUS—*Concluded*

to bring their case within the terms of article 1141 C.C. or to establish agency of such third party in making the payment for the alleged debtor.—On the first point, the debt of the secretary-treasurer was not admitted by the respondent and was even contested by the former: it cannot then be said that the payment was "for the advantage of the debtor." On the second point, the evidence shows that the payment by the third party was not made by him as agent of the debtor but on his own behalf. —Judgment of the Court of King's Bench (Q.R. 44 K.B. 400) aff. PERRON *v.* LA CORPORATION DU VILLAGE DU SACRE-COEUR DE JESUS..... 326

MARRIAGE
See HUSBAND AND WIFE.

MASTER AND SERVANT — *Labour — Wages — Regulation under statute — Male Minimum Wage Act, B.C.*, 1925, *c.* 32—*Functions thereunder of Board of Adjustment—Invalidity of Board's order fixing minimum wage "for all employees in the lumbering industry."*] The Board of Adjustment (constituted under the *Hours of Work Act*, 1923, c. 22, B.C.) made an order, dated September 29, 1926, under the *Male Minimum Wage Act* (B.C., 1925, c. 32) fixing 40 cents per hour as the "minimum wage for all employees in the lumbering industry," and defining "lumbering industry" to include "all operations in or incidental to the carrying on of " logging camps, certain kinds of factories, etc.—*Held*: The order was *ultra vires* and invalid; it was apparent on its face that the Board had misconceived the nature and scope of its functions under the *Male Minimum Wage Act*, which dealt, not with the industries or businesses of employers as such, but with the occupations of employees. The same business or industry might include many different occupations. The Board, in its order, had regard rather to the general nature of the industries in the carrying on of which the employees covered by it were engaged, than to the particular occupations therein of such employees. What the Act contemplated was that the Board, in fixing minimum wages, would take account of the nature of the employee's work rather than the general character of the industry or business in the carrying on of which the work would be done. The ascertainment of an employee's connection with a particular industry would not suffice to determine what would be for him a proper wage.—Judgment of the Court of Appeal for British Columbia ([1928] 2 W.W.R. 1) allowing plaintiff's claim for wages as a "dish washer" and waiter in defendant's logging camp, based on said order, reversed.—*Rex* v. *Robertson & Hackett*

MASTER AND SERVANT—*Concluded*

Sawmills Ltd. (38 B.C. Rep. 222) and *Compton* v. *Allen Thrasher Lumber Co.* (39 B.C. Rep. 70), so far as they are inconsistent herewith, overruled. INTERNATIONAL TIMBER CO. *v.* FIELD..... **564**

MORTGAGE — *Limitation of actions — Action in Manitoba to recover money secured by mortgage—Real Property Limitation Act, Man.* (*R.S.M.* 1913, *c.* 116), *s.* 24 (1)—*Application of s.* 24 (1) *in favour of person who joined with mortgagor in personal covenant—Surety—Mortgaged land situate outside of province.*] The limitation of ten years imposed by s. 24 (1) of the Manitoba *Real Property Limitation Act*) R.S.M. 1913, c. 116) to an action to recover money secured by mortgage applies to the personal remedy on the covenant in the mortgage deed as well as to the remedy against the land (*Sutton* v. *Sutton*, 22 Ch. D. 511, followed); and it applies in favour of a person, not a surety, who has joined with the mortgagor in the personal covenant; (*Quaere*, whether or not it applies to the personal obligation entered into by a surety for the mortgagor. In the case in question it was held that, on construction of the mortgage agreement, the defendant had not entered into it as a surety but had assumed a personal obligation to the mortgagee to repay the loan); and it applies whether the land charged be within the province of Manitoba or elsewhere.—Judgment of the Court of Appeal of Manitoba (37 Man. R. 215) affirmed. THE COLONIAL INVESTMENT AND LOAN CO. *v.* MARTIN..... **440**

2 —— *Limitation of actions — Default — Possession — Constructive Possession of mortgagor—The Limitations Act, Ont., R.S.O.* 1914, *c.* 75, *ss.* 5, 24—*The Mortgagors' and Purchasers' Relief Acts, Ont.*; 1915, *c.* 22, *ss.* 2, 3, 4; 1920, *c*: 38, *s.* 2 **213**
See LIMITATION OF ACTIONS.

MOTOR VEHICLE — *Injury to passenger — Autobus — Defence of inevitable accident—Knowledge of driver as to icy condition of street.*] The appellant's motor "bus" was being driven down a steep incline on a frosty and foggy morning, the street being in an icy condition, when the driver saw that a street car had stopped in front of him. He tried to stop the "bus" and in order to avoid a collision ran it sharply to the right over the curb and sidewalk, struck a telephone pole and injured the respondent who was a passenger in the bus. The trial judge held that "having regard to the conditions, the short range of visibility, the fact that there was a street car line upon the road, and the condition of the pavement, as it was, *or ought to* "*been known* to the driver, the motor

MOTOR VEHICLE—*Concluded*

bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage," and he gave judgment in favour of the respondent, which judgment was affirmed by the Court of Appeal.—*Held*, that there was not sufficient evidence to support the finding of the trial judge. Under the circumstances of this case it cannot be reasonably said that the driver knew or ought to have known the icy condition of the pavement, as he had been faced with an unexpected situation such that, had it not existed, no difficulty would have been experienced in negotiating the hill.—Judgment of the Court of Appeal ([1927] 2 W.W.R. 692) rev. PACIFIC STAGES LTD. *v.* JONES..... **92**

2 —— *Negligence—Motor car hitting pedestrian while running for street car—Duty of motor driver at crossing—Contributory Negligence Act.* ELLIOTT *v.* JOHNSON..... **408**

3 —— *Negligence — Injury to mechanic working on upper floor, when car fell down an elevator shaft—Cause of the accident—Liability of owner of the garage—Presumption of fault—Arts.* 1053, 1054 *C.C*..... **409**
See NEGLIGENCE 4.

4 —— *Negligence — Automobile accident—Injury to passenger—Presumption of fault —Motor Vehicles Act* (*R.S.Q.* [1925] *c.* 35, *s.* 53 (2)—*Liability of owner under Arts.* 1053 *and* 1054 *C.C*..... **416**
See NEGLIGENCE 5.

MUNICIPAL CORPORATION —*Workmen's Compensation Act — Municipal employee—Cleaning streets and occasionally working in "dangerous" premises—Injury—Compensation — R.S.Q.* (1909) *s.* 7321—*R.S.Q.* (1925), *c.* 274, *s.* 2.] An employee of a municipal corporation, whose main duties are those of cleaning streets and repairing sidewalks, but who occasionally does some work on municipal premises "in which machinery is used, moved by power other than that of men or of animals," is not entitled to claim under the Workmen's Compensation Act, if he be injured while performing his usual work upon the streets of the municipality.—Judgment of the Court of King's Bench (Q.R. 43 K.B. 355)rev. LA VILLE DE JONQUIERES *v.* BRASSARD **165**

2 —— *Taxes — Exemption — Industrial company — Cessation of operations — immovables remaining in same condition—Right to exemption—Cities and Towns Act, R.S.Q.* (1909), *s.* 5775.] In order to be entitled to the benefit of an exemption from municipal taxes granted under the

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Cities and Towns Act (R.S.Q., 1909, s. 5775), a person must actually carry on the industry, trade or enterprise in respect of which the exemption was granted; and the benefit of such exemption is suspended while the industry, trade or enterprise ceases to operate, although the immovables remain available for the same industry. *La Cie de Jesus* v. *La Cite de Montreal* ([1925] S.C.R. 120) foll. Judgment of the Court of King's Bench (Q.R. 44 K.B. 165) aff. LE SEMINAIRE DE QUEBEC *v.* LA CITE DE LEVIS..... 187

3—— *Limitation of actions — Action by municipality for possession of land — Municipality's title under Crown grant in trust for public wharf—Statute of Limitations set up as extinguishing municipality's title — Application of statute — Evidence failing to establish dispossession.*] Defendant claimed title to land by possession, and that plaintiff municipality's title was extinguished by force of the *Statute of Limitations*. The land was part of a tract granted to the municipality by Crown grant, to hold in trust for a public wharf and public purposes connected therewith. —*Held* that, on the evidence, the decision of the Appellate Division, Ont. (61 Ont. L.R. 77), that defendant had failed satisfactorily to establish dispossession, should be sustained.—*Semble*, the land granted to the municipality was by the terms of the grant dedicated to a public use, which was accepted by the public, and this dedication gave rise to rights of enjoyment by the public, which rights were not, nor was the municipality's title which was given for the purpose of supporting and protecting them, capable of being nullified, in consequence of adverse possession, by force of the *Statute of Limitations*. HACKETT *v.* COLCHESTER SOUTH..... 255

4 —— *Construction of roads and ditches by municipality—Alleged negligence in construction, causing flooding of plaintiff's lands—Plaintiff's right of action for damages—The Good Roads Act (Man.) 1914, c. 42—The Municipal Act, R.S.M. 1913, c. 133, ss. 634, 684.*] Plaintiff claimed damages from defendant (a rural municipality) for the flooding of her land, which, she alleged, was in consequence of negligent construction by defendant of certain roads and ditches. It was found in the courts below that defendant had negligently failed to provide an adequate outlet for the waters collected, and that to this negligence the damages were due. These findings this Court refused to disturb, as defendant had failed to point to any specific error vitiating them. But defendant contended (1) that as the works were constructed under the authority, and in

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accordance with the provisions, of the *Good Roads Act*, Man., 1914, c. 42, it was not responsible for injury arising from the execution of the works; and (2) that by virtue of ss. 634 and 684 of the *Municipal Act*, R.S.M. 1913, c. 133, the plaintiff's only remedy, if any, was by way of arbitration.—*Held* (1) Defendant's first contention failed, as, on the evidence, it had not shewn that the injury caused by the works executed by it was caused by a work authorized and executed according to plans approved under the provisions of the *Good Roads Act*; as defendant thus failed on the evidence, it was not necessary to consider what, otherwise, would have been the effect as to plaintiff's right of action.—(2): Defendant's second contention failed, as the provision for compensation in s. 634 of the *Municipal Act* applies only to damages suffered by reason of diversion of "water from its original course;" that section has no application to flooding by surface water; it contemplates only a diversion of water flowing in a defined water course; s. 684, which deals generally with the right to compensation for damages caused by municipal works, and accords compensation for "damages necessarily resulting" from such works, had no application.—Judgment of the Court of Appeal for Manitoba (37 Man. R. 26) affirmed. RURAL MUNICIPALITY OF BIFROST *v.* STADNICK..... 304

5 —— *Highways — Nuisance—Negligen creation of nuisance on highway by city's servants, causing special damage—Flushing of private sewer undertaken by city in exercise of statutory powers—Nuisance created consisting of dangerous ice on plaintiffs' houseway leading from street sidewalk, resulting in personal injury to plaintiff—Liability of city—Misfeasance—Liability at common law—Consolidated Municipal Act (Ont.) 1922, c. 72, s. 460—Place of accident not a "sidewalk" within s. 460 (3)—Notice of claim and injury not given under s. 460 (4)—Right of action—Construction and application of s. 460—Breach of private right.*] The servants of defendant, a city corporation, in the course of flushing a private sewer of a neighbour of the plaintiffs, undertaken by the city, in the exercise of its statutory powers, by contract in its capacity as owner and operator of a public water service, negligently created (according to findings sustained by this Court) a nuisance consisting of a patch of dangerous ice on a private houseway, lawfully constructed, leading from the street sidewalk to plaintiffs' residence; the part of the houseway on which such nuisance was created being on the highway and immediately adjoining the sidewalk; and, as a

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result, one of the plaintiffs (wife of the other plaintiff) fell on such part of the houseway and was injured. Plaintiffs claimed damages from the city.—*Held*, that the place of the accident was not a "sidewalk" within s. 460 (3) of the *Consolidated Municipal Act*, 1922 (c. 72), Ont., and, therefore, the question whether the city's servants' negligence amounted to "gross negligence" did not arise.—*Held*, further, that the plaintiffs' cause of action, being special damages sustained by reason of a nuisance on a highway, negligently created by the city's servants under the circumstances above mentioned, did not fall within s. 460 (1) of said Act, and, consequently, failure to give the notice prescribed by s. 460 (4) for claims based on default within s. 460 (1) was not available as a defence.—The introduction in 1913 of the phrase "whether the want of repair was the result of nonfeasance or misfeasance" into s. 460 (2) (which bars actions based on s. 460 (1) begun after three months from the time when the damages were sustained) did not have the effect that all the provisions of s. 460 should thereafter apply to every liability of a municipal corporation for disrepair on a highway caused by its servants' misfeasance. There existed in Ontario, before the 1913 amendment, a common law right of action against a municipality for a nuisance on a highway caused by its servants' negligence amounting to misfeasance, and which had caused special damage, apart from and in addition to any statutory liability for non-repair; and the abrogation of a well established common law right should not be inferred from a change of doubtful import, such as that made in 1913 by the introduction of the provision as to misfeasance into a subordinate clause of the section imposing the liability—a clause *ex facie* dealing only with a limitation of the time for bringing action where the claim rests on the statute. Moreover, if the amending words should be imported into s. 460 (1), their operation would still be confined to the subject matter of that subsection, i.e., actions based on default in discharging the duty of keeping in repair thereby imposed, which entails a liability entirely distinct from, and independent of, that resulting at common law from the creation of a nuisance on a highway.—History of the legislation in question discussed. *Glynn* v. *City of Niagara Falls* (29 Ont. L.R. 517, at 521); *Biggar* v. *Crowland* (13 Ont. L.R. 164, at pp. 165-6); *Keech* v. *Smith's Falls* (15 Ont. L.R. 300); *Weston* v. *Middlesex* (30 Ont. L.R. 21; 31 Ont. L.R. 148); *Halifax* v. *Tobin* (50 Can. S.C.R. 404); and *Patterson* v. *Victoria* (5 B.C.R. 628, at p. 645; affd. [1899] A.C. 615, at p. 620) referred to.—*Per*

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Duff J. (concurring in the result): The exercise of the plaintiff husband's right of access was wrongfully made dangerous by a nuisance for which the city was responsible. The right to complain of such a wrong is not limited to the owner, but inheres also in his wife and other members of his family residing with him. This *injuria* is an invasion of a private right incidental to the ownership and occupation of property—*Lyon* v. *Fishmongers' Company* (1 A.C. 662). S. 460 has no application.—Judgment of the Appellate Division, Ont. (61 Ont. L.R. 246) reversed. PRENTICE v. CITY OF SAULT STE. MARIE..... ... **309**

6 —— *Mandamus — Refusal by a municipality to accept payment of money— Debt claimed not to be due—Art.* 1141 *C.C.*] The appellants seek a mandamus to compel the respondent municipality to accept payment by a third party of an alleged debt of its secretary-treasurer.—*Held* that the appellants cannot succeed, as they have failed to bring their case within the terms of article 1141 C.C. or to establish agency of such third party in making the payment for the alleged debtor.—On the first point, the debt of the secretary-treasurer was not admitted by the respondent and was even contested by the former: it cannot then be said that the payment was "for the advantage of the debtor." On the second point, the evidence shows that the payment by the third party was not made by him as agent of the debtor but on his own behalf.—Judgment of the Court of King's Bench (Q.R. 44 K.B. 400) aff. PERRON *v.* LA CORPORATION DU VILLAGE DU SACRE-COEUR DE JESUS **326**

7 —— *Expropriation — Lane — Value — Fixing of indemnity—Right of the city to take possession—Res judicata—(Q.)* 3 *Geo. V, c.* 54, *s.* 43—*Art.* 407 *C.C.*] Section 43 of 3 Geo. V, c. 54 (Charter of the City of Montreal), which enacts that "the city is authorized to perform in and on any private street or lane any municipal works whatsoever without being held to pay any * * * compensation for the use and possession of such private street or lane * * *" does not entitle the city to turn a private street or lane into a public street without paying to the owner its fair value.—The value to be ascertained by a court in fixing the indemnity to be paid by a municipality for a lot set aside to serve as a lane for the benefit of the owners of the adjoining lots is the value to the owner of the lane excluding any advantage derived from the fact that the municipality must acquire that land in order to carry out its

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scheme of creating there a public street; and such value is affected by the fact that there is only one possible buyer, i.e., the municipality, and for only one purpose, i.e., opening of a street.—Judgment of the Court of King's Bench (Q.R. 43 K.B. 213) varied. LA CITÉ DE MONTREAL *v.* MAUCOTEL..... 384

8 —— *Taxation—Sale of land for taxes — Action for damages—Land assessed to son of owner—Son instructed by owner to pay taxes—Inference of owner's knowledge of wrongful assessment—Estoppel — Rural Municipality Act*, (1911-12), *s.* 290.] The appellant's testator, residing at Philo, Illinois, was the registered owner of a half section of land, upon which he had been paying taxes for many years. On the 9th of May, 1919, he wrote the respondent Hinde, who was the secretary-treasurer of the respondent municipality, asking for the amount due for taxes. Notice of the assessment for 1919 and the taxation notice were subsequently sent to the deceased. In the admission of facts by the parties, it is stated that the father instructed his son "to pay the taxes on said land and (the son) did pay same pursuant to the said instructions for the years 1919 and 1920, and intended to pay the taxes for the year 1921 but overlooked doing so." The taxes for 1919 were remitted by the son in his own name and an official receipt in the same name was sent to the son, whose post office address was the same as the father's. Assuming that the son had become the owner of the land, the respondent Hinde made up the 1920 assessment (which carried five years) in the name of the son, prepared and sent the assessment and taxation notices for that year in the name of and to the latter and received payment of those taxes from him. For the succeeding years, the requisite taxation notices in the name of the son were sent to him. No further taxes having been paid, the land was sold under the *Tax Recovery Act*, R.S.A., 1922, c. 122. The appellant brought an action in damages for the loss of the land by reason of the alleged wrongful acts of the respondents.—*Held*, Mignault J. dissenting, that the respondents were not liable.—*Per* Duff, Lamont and Smith JJ.—The respondent Hinde's delinquency in omitting the father's name from the assessment roll falls wholly within the intendment of the words "error committed in or with regard to such roll" comprised in section 290 of the *Rural Municipality Act* and this curative section applies and has the effect of validating the roll. Mignault and Newcombe JJ. *contra.*—*Per* Duff and Smith JJ.—The facts admitted afford sufficient evidence

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to establish, at least *prima facie*, that the act of the son in paying the taxes of 1920, as demanded from him, that is to say, as taxes payable by him as the person assessed as owner of the land, was the act of the father. That again appears, in the absence of explanation, to be sufficient evidence of the assent of the father to the assessment of the land in the name of his son. Either the father assured himself personally in the usual way, by inspection of the notices, of the accuracy of the assessor's calculation, and instructed the son specifically to pay "pursuant to the notice," or he left that business to the son. The son in either case would know, while, in the first case, both would have actual knowledge that the son was the person assessed. The son's knowledge being knowledge acquired in the course of the execution of his duty in this particular transaction, and being material to the transaction, it must, for the purpose of considering the legal effect of the transaction itself, be imputed to the father (Story par. 140). Mignault and Lamont JJ. *contra.*—*Per* Newcombe J.—The taxes for 1920 were paid upon the assessment of the son, and they were paid by the father as owner of the land, although assessed in the name of the son, because the latter was acting as his father's agent, and therefore it may be inferred, there being nothing to the contrary, with his father's knowledge of the facts relating to the assessment, which had come into the son's possession in the course of his agency; and if the owner intended to question the assessment or taxation, that was surely the time to raise the objection; but no exception was taken, and not unnaturally the municipality proceeded upon the assessment in the following years in the manner which it had adopted in 1920; and the facts which are admitted or in proof should be held to justify a finding of acquiescence, or of leave and license of the respondents to do the acts complained of. The act is not injurious, and the proof constitutes a defence according to the maxim *volenti non fit injuria*. Not only is it to be inferred that the owner paid the taxes of 1920 with the knowledge that the assessment, which was a contuing assessment, was against his agent, to whom the statutory notices had been sent, but it would appear from the admission that his instructions continued to extend also to subsequent years covered by the assessment of 1920, or at least to 1921. Therefore the municipality was entitled to proceed on the faith of the owner's acquiescence and consent. Mignault and Lamont JJ. *contra.*—*Per* Mignault J.—The appellant is not estopped from objecting to the wrongful assessment. The father did nothing which

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could in any way lead the assessor to believe that the son had become the owner of the land. Any agency which may have existed between the father and the son did not go further than an instruction to pay the taxes, which presupposed an assessment of the father rendering him liable to municipal taxation. There was no such assessment, and moreover the respondent Hinde never dealt with the son as an agent of his father, but as the owner of the land, which the respondent Hinde gratuitously assumed him to be. No knowledge by the father of the assessment of his son has been established, nor can such knowledge be inferred, the more so as the respondents took no steps to secure the testimony of the son, the onus of proving knowledge, as a basis for estoppel, being on them.—*Per* Lamont J. —According to the admission of facts, the son received instructions to pay the taxes in 1919, and "pursuant to said instructions" he paid in 1919 and 1920. The construction to be placed upon the language of this admission is that prior to the time he paid the taxes in 1919, the son had received general instructions from his father to pay the taxes on the land, and that, purusant thereto, he paid them for two years. The admission does not justify the inference that the father gave instructions each year to pay the taxes, or that he had any knowledge that the land was assessed to his son in 1920. If the parties had intended by this admission to state that the father had given fresh instructions to his son each year, the admission would have been couched in different language.—Judgment of the Appellate Division (23 Alta. L.R. 113) aff. Mignault J. dissenting. KRUMM *v.* MUN. DISTR. OF SHEPARD NO. 220..... **487**

9——*Water supply to dwelling house—Right to impose special rate—Halifax City Charter.*] The City of Halifax, in 1919, at the request of one W., laid a water main on a street, and connected it with W.'s houses, first taking from W. an agreement to pay $269.45 yearly, as a special rate. This was in accordance with the City's policy, to be satisfied, before laying a main on any street, that there should be a sufficient revenue from the persons taking water therefrom, to defray interest on the cost of the extension, and to require from any person requesting an extension where the number of consumers was insufficient to produce at the usual rates such revenue, an agreement to pay a rate equal to such revenue, such rate to be proportionately reduced as other consumers became connected with the new main. From the year 1920 the City supplied meters for all

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water services, and all charges were meter rates. In 1922, when the said main was serving four houses, the plaintiff built a house on the street and applied for water supply. The City required an agreement from plaintiff to pay a special rate of $53.89, being one-fifth of the said sum of $269.45. Its council passed a resolution, and, later, a by-law, requiring that rate from each house on the street, to be proportionately reduced as additional houses were built. Plaintiff refused to make the agreement, and claimed the right to a water supply at the rate in general application throughout the city.—*Held*, that the special rate imposed was valid, and plaintiff was not entitled to water supply without entering into an agreement to pay it. The *Halifax City Charter*, 1914, especially ss. 671, 525 (1), 676 (1), 499 (1), 492, and c. 54 of 1922 (N.S.), s. 9, considered.—*Att. Gen. of Canada* v. *City of Toronto*, 23 Can. S.C.R. 514, and *City of Hamilton* v. *Hamilton Distillery Co.*, 38 Can. S.C.R. 239, discussed and explained. The references to "uniform" rates in the *Toronto case* had regard to the essential of uniformity, not in the sense of precise arithmetical equality, but as excluding arbitrary or unjust discrimination; and were not meant to extend the requirements of the common law, by which a by-law must be *intra vires*, certain, consistent with the statutes and the general law, and reasonable. It cannot be said, as a principle of law, that a municipal ordinance, which complies with these essentials, must operate uniformly in every part of the municipal area notwithstanding that the diversity of circumstances requires different considerations for special localities.—Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 377) reversed.—Lamont J. held, differing in this respect from the majority of the Court, that the plaintiff should be required to pay, not a flat house rate, but only her proportionate share, as determined by the meters in the houses on the extension, of the said sum of $269.45. CITY OF HALIFAX *v.* READ..... **605**

10——*Guarantee—Bond guaranteeing faithful discharge of duties by treasurer of municipality incorporated under Rural Municipality Act, Sask.* (*R.S.S.* 1920, *c.* 89)—*Default by treasurer—Liability of guarantor—Representations by municipality in certificates given to secure renewals of bond—Construction of certificates; contra proferentem rule—Certificate of auditor, whether representation of municipality —Alleged untruth of representations — Jury's findings—Jurisdiction of court of appeal to substitute its findings for those of jury*..... **264**

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11 —— *Waters and watercourses — Drainage—Upper and lower riparian owners—Rights of drainage by upper owner—Pollution of water—Drainage of streets by municipality through sewer into watercourse*..... **522**
See WATERCOURSES 1.

MUNICIPAL ELECTION..... **96**
See QUO WARRANTO.

NAVIGATION
See SHIPPING.

NEGLIGENCE — *Motor vehicle—Injury to passenger—Autobus—Defence of inevitable accident—Knowledge of driver as to icy condition of street.*] The appellant's motor "bus" was being driven down a steep incline on a frosty and foggy morning, the street being in an icy condition, when the driver saw that a street car had stopped in front of him. He tried to stop the "bus" and in order to avoid a collision ran it sharply to the right over the curb and sidewalk, struck a telephone pole and injured the respondent who was a passenger in the bus. The trial judge held that "having regard to the conditions, the short range of visibility, the fact that there was a street car line upon the road, and the condition of the pavement, as it was, *or ought to have been known* to the driver, the motor bus ought to have been and might have been kept under such control that it could have been stopped without doing any damage," and he gave judgment in favour of the respondent, which judgment was affirmed by the Court of Appeal.]—*Held* that there was not sufficient evidence to support the finding of the trial judge. Under the circumstances of this case it cannot be reasonably said that the driver knew or ought to have known the icy condition of the pavement, as he had been faced with an unexpected situation such that, had it not existed, no difficulty would have been experienced in negotiating the hill.—Judgment of the Court of Appeal ([1927] 2 W.W.R. 692) rev. PACIFIC STAGES LTD. *v.* JONES..... **92**

2——*Street railway—Door of moving tramcar, wrongfully opened by passenger, striking and injuring person on station platform—Liability of railway company—Granting of "special leave" to appeal—Supreme Court Act, s.* 41.] While defendant's tramcar, which had overshot a a station platform, was backing to it, a passenger, without the knowledge of the motorman or conductor, and while the conductor was collecting fares in the front part of the car, opened a rear door by working the handle which was within the conductor's box; the opened door of

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the moving car struck and injured the plaintiff who was standing on the platform.—*Held*: Defendant was not liable for the injury. The cause of the accident was the passenger's wrongful act in operating the handle, which he must have known was intended to be operated only by the conductor. There was no evidence to warrant the conclusion that the passenger's act should have been anticipated by the defendant. As to alleged disregard of a rule requiring the conductor to go to the rear of the car when being moved reversely, it was sufficient to say that, if the rule applied at that point, its breach was not the cause of the accident; moreover, the rule was for an entirely different purpose.—Judgment of the Court of Appeal for Manitoba (36 Man. R. 592) reversed.—Newcombe J. dissented, holding that it was the conductor's neglect of his duty to be at his post at the rear when the car was backing that was the direct cause of the accident; it was a consequence of the lack of the control which he was required to exercise that the passenger opened the door for himself; the passenger's act was natural and should have been foreseen and precautions taken against it.—The court expressed the opinion that the case did not belong to the class of cases in which it was contemplated that "special leave" might be given under s. 41 of the *Supreme Court Act.* WINNIPEG ELECTRIC CO. *v.* ODEGAARD..... **192**

3 —— *Accident — Electric current — Interior installation—Electric power furnished by another person—Electric storm—Transformer out of order—Current of* 2,200 *volts getting into the interior circuit—Liability—Articles* 1053, 1054 *C.C.*] The respondent's husband, one Leon Claveau, an experienced mechanic, while employed as foreman in charge of the machine shop of the appellant company, was instantly killed by an electric shock as he was holding in his hands a portable electric lamp fixed to an extension cord. In the machine shop the interior installation for electricity was the property of the appellant and was used solely for lighting purposes. The wiring was extremely simple and consisted of two wires running on insulators with, here and there, what is known as rosettes from which lamps were hung. Some of these lamps were furnished with wire sufficiently long to permit of their being used within a certain radius. These extension lamps were attached to insulated wire, had wooden handles, and the globe itself was protected by a sort of wire basket attached to the wooden handle. At the entrance to the shop there was a cut out with fuses generally known as block switch with fuses, and of the kind generally used in

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such installations. The current contracted for and furnished for the lighting system was 110 volts. Outside the shop, the secondary wires passed through the block switch mentioned, and from there lead to a post situated about fifty feet away, and on which was installed a transformer for the purpose of reducing the high tension current of 2,200 volts to the voltage of 110 required and used for lighting. This transformer was the property of La Compagnie de Pouvoir du Bas St. Laurent, which supplied the current and under whose care and control it was. Beyond such transformer were the primary wires which carried the high tension current to the transformer where it was reduced to 110 volts and delivered to the appellant at the entrance to its shops. At the time of the accident a very intensive electric storm was raging and had been for some time. The accident occurred in this way: Claveau was overlooking some repairs to an engine and as it was dark, he picked up a portable lamp. The persons in the shop heard a cry and saw a flash of light, and Claveau fell holding the portable lamp in his hands. Apparently he was holding it by the wire screen used to protect the globe. Death was practically instantaneous. The expert evidence showed that the end of one of the primary wires stretching from one of the insulators on the post which held the transformer was broken and burnt, permitting the high tension current to enter the secondary system within the building belonging to the appellant, without passing through the transformer, the breaking and burning of this wire having been caused by a stroke of lightning or some similar occurrence. The respondent sued as well personally as in her quality of tutrix to her four minor children and claimed damages from the appellant company in an amount of $20,000. The respondent's action, having been dismissed by the trial court, was maintained by the appellate court for an amount of $6,000.—*Held* that the appellant company was not liable, Duff and Lamont JJ. dissenting.—*Held*, also, Duff and Lamont JJ. dissenting, that it was not the lamp, or at least it was not shown to have been the lamp, which caused the accident.—*Held* also, Duff and Lamont JJ. dissenting, that the burden of proof that the damage was caused by a thing which the appellant had under its care was upon the respondent. Assuming that Claveau's death was caused by an electric shock emanating from the wires by which the lamp was connected with the source of the electric supply, and seeing that the source of supply and the transmission were under the care and operation of the power company, and not under the care

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of the appellant, it follows that the burden of proof that the lamp caused the damage is not satisfied, and cannot be discharged, without evidence that the electric current which caused the death of Claveau did not exist apart from the lamp, and this has not been established.—*Per* Anglin C.J.C. and Rinfret J.—In the eyes of the law and under the present conditions of modern life electricity is an industrial product, which is carried from one place to another. In practice, it has a material existence independent of the metallic wires or conduits through which it is supplied. It is legislatively recognized as susceptible of being measured, bought and sold, distributed and stolen.—*Per* Anglin C.J.C. and Rinfret J.—Companies supplying electricity for lighting purposes have under their care the electrical current which they supply; and the responsibility under art. 1054 C.C. for a death caused by an excessive electrical current which has escaped from their primary wires and has found its way in the interior installation of the house of one of their clients rests with such companies and not with the consumer, even if the interior installation through which the excessive electrical current is carried is under the care of such consumer.—*Per* Anglin C.J.C. and Rinfret J.—The interior installation, comprising the electric current of 110 voltage, being the only "thing" which the appellant had under its care, was not the cause of the accident; the "thing" which caused the death of the respondent's husband, i.e., the excessive electric current of 2,200 volts, was entirely under the care of the power company.—*Per* Newcombe J.—There was evidence in the case upon which the trial judge might reasonably find as he did, and therefore his judgment should be restored (*Supreme Court Act*, s. 51).—*Per* Newcombe J.—If the lamp and the mysterious death-dealing agency, or force, or energy known as the electric current, can be considered as separate entities, it was the latter which was the direct operative cause—the fatal instrument, if it may be so described—and the lamp was no more than a *sine qua non*.—*Per* Newcombe J.—The burden of proof that the damage was caused by a thing which the appellant company had under its care was upon the respondent. Assuming that Claveau's death was caused by electric shock emanating from the wires by which the lamp was connected with the source of the electric supply, and seeing that the source of supply and the transmission were under the care and operation of the power company, and not under the care of the appellant, it follows that the burden of proof that the lamp caused the damage is not satisfied, and cannot be discharged, without evidence that the electric current

which caused the death of Claveau did not exist apart from the lamp, and this has not been established.—*Per* Duff and Lamont JJ. dissenting.—The appellant company is responsible under art. 1053 C.C. in not having taken all the precautions which a reasonable and competent regard for the safety of its employees would require. The appellant company must be presumed to have known that, unless the transformer was grounded, the employees in the shop were exposed to serious risk of an invasion of the interior circuit by the high-tension current. That risk was created by the connection of the company's installation with the secondary coil of the transformer, and thereby, through the primary coil, with the high-tension current as the source of energy. It was a risk arising from the tapping of that source of energy, and the connection of it with the shop, for the benefit and by the consent and direction of the appellant company. Having regard to the gravity of the risk, the appellant incurred an obligation to exercise the highest degree of care; and this obligation was not performed by simply assuming that the power company had not been negligent. The appellant ought to have ascertained that the proper precautions had been taken before connecting their interior circuit with the transformer.—*Per* Duff and Lamont JJ. dissenting. The death of the respondent's husband was "caused" by a thing under the care of the appellant, in the sense of article 1054 C.C.; and the appellant has failed to bring itself within the clause of that article, which, upon certain conditions being satisfied, exonerates it from responsibility. The wires and other appliances of the interior circuit, constituted, in their totality, a thing in the care, and under the control, of the appellant. Its function was that of a conductor of electricity. The service it performed was to receive energy from the primary circuit, and to distribute that energy to the various points at which it was utilized in the production of electric light. It was by the act of the appellant and solely by its act, that the connection was maintained, through which alone, electrical energy was, or could be transferred, from the high-tension circuit of the power company to the interior circuit. It was from this circuit that Claveau received the discharge. Whatever other causes may have co-operated, the interior circuit, as the instrument by which the diversion was effected and by which the energy diverted, was directed and conveyed into Claveau's body and was one of the factors which directly co-operated in bringing about the plaintiff's loss.—*Per* Duff and Lamont JJ. dissenting: A statutory enactment, assigning responsibility, for

damage "caused" by a given act or thing, would not, in the absence of a controlling context, naturally be read as limited in its application to damage exclusively so caused; but would ordinarily be considered to apply to damage caused by the designated person or thing functioning in conjunction with other co-operating causes. *Charing Cross* v. *Hydraulic Power Co.* ([1914] 3 K.B. 772 at p. 782). There seems to be no good reason for limiting the application of article 1054 C.C., in such a way as to exclude from its scope all damages except such as are exclusively caused by the thing under the care of the person alleged to be responsible.—*Per* Duff and Lamont JJ. dissenting. Whatever difficulties may be encountered in determining, for the purpose of applying it to other circumstances, the precise limits of the conception denoted by the word "caused" in the first paragraph of article 1054 C.C., there is no doubt that, where the damages are of such a character as to fall within the purview of risks which a person ought to recognize as arising from his maintenance of the thing which is in debate, then that paragraph comes into operation.—Judgment of the Court of King's Bench (Q.R. 43 K.B. 562) reversed, Duff and Lamont JJ. dissenting. CANADA AND GULF TERMINAL RY. CO. *v.* LEVESQUE..... **340**

4 —— *Automobile — Injury to mechanic working on upper floor, when car fell down an elevator shaft—Cause of the accident—Liability of owner of the garage—Presumption of fault—Arts.* 1053, 1054 *C.C.*] The appellant's son, a mechanic and an electrician, was working for the respondents on the third floor of their garage, repairing an automobile, when suddenly the automobile started in the direction of the open shaft of an elevator. The car fell to the bottom of the shaft and the appellant's son received bodily injuries which caused his death the same day.—*Held*, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 198), that the respondents were not liable.—*Held* also that, upon the evidence, it could be found that the appellant's son was "the author of his own injury." As a skilled workman he should have realized the risk to which he was exposed in working upon the unbraked car while in gear, situated as it was and he must have known that the means of avoiding such risk were entirely in his own hands. But, at least, it must be *held* that the appellant had failed to prove that her son's death was caused by actionable fault of the respondents necessary to entail their liability under article 1053 C.C.]—*Held*, further, that before a plaintiff can invoke a presumption of fault against a defendant under art. 1054

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C.C., he is obliged to establish (*a*) that the damage was in fact caused by the thing in question within the meaning of that article, and (*b*) that that thing was at the time under the care of the defendant. The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it and it became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased, conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C., invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed. Upon the evidence, the most likely cause of the movement of the automobile was the act of the deceased workman in pressing down the self-starter, probably inadvertently, as the car was in gear and unbraked in a place where it was dangerous to start it, and the workman must have known that fact unless he were utterly careless or indifferent as to his own safety.—*Quaere* whether, upon the facts in this case, the automobile was not, for the purposes of art. 1054 C.C., at the time of the accident under the care of the deceased who was an expert workman, rather than under the care of the respondents. LACOMBE *v.* POWER.. **409**

5 —— *Automobile accident — Injury to passenger—Presumption of fault—Motor Vehicles Act* (*R.S.Q.* [1925] *c.* 35, *s.* 53 (2))—*Liability of owner under Arts.* 1053 *and* 1054 *C.C.*] The appellant claimed damages resulting from an automobile accident and alleged that, while at the invitation of respondent's chauffeur he was a passenger on respondent's truck, he was injured through fault of the chauffeur by being caught between the car and the pavement, when the truck struck the curb and broke a wheel.—*Held*, affirming the judgment of the Court of King's Bench (Q.R. 43 K.B. 251), that the respondent was not liable.—*Held*, also, that section 53 (2) (*a*) of the *Motor Vehicles Act* (*R.S.Q.* [1925] c. 35), which creates a presumption of fault against the owner of a motor vehicle

NEGLIGENCE—*Concluded*

which he must rebut, applies only in the case of a person injured while travelling upon a highway and does not apply in favour of a passenger in an automobile which is driven by the owner's servant.—*Held*, also, that a presumption of fault cannot be urged against the defendant under article 1054 C.C. on the ground that the injury was caused by a thing under her care. That provision has no application to a case where, as in this case, the real cause of the accident is the intervention of some human agency; the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the care of the owner within the meaning of Art. 1054 C.C., where it is really due to some fault in the operation or handling of the thing by the person in control of it.—*Held*, further, that the defendant is not liable under art. 1053 C.C. as in the circumstances of this case this court would not interfere with the concurrent findings of the courts below that fault of the driver, a person under the defendant's control, had not been proved PERUSSE *v.* STAFFORD..... **416**

6——*Street railways—Non repair of crossing—Injury to pedestrian—Liability of railway company—Sufficiency of inspection —Jury's findings—Appeal.* WINNIPEG ELECTRIC CO. *v.* SCOTT..... **52**

7 —— *Municipal corporations—Construction of roads and ditches by municipality—Alleged negligence in construction causing flooding of plaintiff's lands—Plaintiff's right of action for damages—The Good Roads Act* (*Man.*) 1914, *c.* 42—*The Municipal Act, R.S.M.* 1913, *c.* 133, *ss.* 634, 684. ..... **304**
See MUNICIPAL CORPORATION 4.

8 —— *Street railway — Pedestrian struck by defendant's tramcar—Judgment, on verdict of jury, against defendant for damages, sustained on appeal.* WINNIPEG ELECTRIC CO. *v.* SYMONS..... **627**

NEW TRIAL—*Discovery of new evidence as ground for.*] A new trial, applied for on the ground that new evidence has been discovered since the trial, should be granted only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and is such that, if adduced, it would be practically conclusive. (*Young* v. *Kershaw*, 16 T.L.R. 52, at pp. 53-54, cited).—An action for specific performance of an alleged agreement for sale of a "unit" in a mining syndicate was dismissed at trial. Plaintiffs appealed, and, alternatively, asked for a new trial on the ground of discovery of new evi-

NEW TRIAL—*Concluded*

dence. The Appellate Division, Ont., without passing on the main appeal, granted a new trial. Defendant appealed to this Court and asked that the judgment at trial be affirmed.—*Held*: The new trial should not have been granted; the proposed new evidence could have been ascertained with reasonable diligence before the trial; also, it could not conclusively establish plaintiff's case, as the fact proposed to be proved could not affect the judgment unless the relation of vendor and purchaser existed between the parties, and this Court, on the evidence, sustained the trial judge's finding that that relation did not exist. The appeal was allowed, and the judgment at trial, in its result, restored. VARETTE *v.* SAINSBURY..... 72

2——*Jury—General verdict*..... 101
See LANDLORD AND TENANT 3.

NUISANCE..... 309
See MUNICIPAL CORPORATION 5.

PATENT—*Invalidity—Lack of invention—Combination of old elements for old purpose.*] The judgment of the Exchequer Court of Canada, [1927] Ex. C.R. 28, dismissing the plaintiff's action for infringement of patent, was affirmed, on the ground that the plaintiff's patent (for an appliance for carrying, in a paper manufacturing machine, the paper from the drying rolls to and through the calenders) was invalid, because the device, however useful, did not involve invention; the patentee's claim rested on a combination, all the elements of which, and the very purpose for which it was designed, were old and well-known in the art; there was no room for novelty, except possibly in certain features which were not of a nature to justify the patentee's claim. POPE APPLIANCE CORP. *v.* SPANISH RIVER PULP & PAPER MILLS LTD. 20

2 —— *Trade-Mark—Grant of exclusive license for Canada as to inventions and trade-mark—Alleged breach of license agreement—Construction of agreement—Licensor's covenant as to proceedings to prevent infringement—Licensee's agreement to operate under the letters patent—Liability for royalties.*] Defendant granted to plaintiff the exclusive license to make, use and vend in Canada certain patented inventions relating to improvements in mops, and also the exclusive use in Canada of the trade-mark "O Cedar" with which the articles manufactured under the patents were to be labelled, and plaintiff agreed to operate in Canada under the letters patent and to use the trade-mark, and to pay a royalty of 10% of the net amount of O'Cedar products shipped and billed in Canada. The agreement further provided (*inter alia*) that the defendant should "within one month after receipt of written demand by [plaintiff] institute and prosecute all actions and proceedings necessary to prevent any infringement of the said letters patent * * * and said trade-mark" within Canada, and that if a certain mop patent should, in any action for infringement, be declared invalid, all royalties payable in respect thereof should forthwith cease to be payable. Plaintiff, alleging that defendant had not complied with its demand to take proceedings to enjoin the manufacture and sale of certain mops alleged to infringe the letters patent, and that, as the result of an unsuccessful action by plaintiff and defendant to restrain the use of a certain trade-mark as infringing defendant's trade-mark, the latter had been declared invalid, and that defendant had failed to furnish advertising copy as agreed, sued for damages for breach of contract and for a declaration that royalties under the agreement were not payable. Defendant disputed plaintiff's allegations and claims and counterclaimed for an accounting of O'Cedar products sold and payment of royalties.—*Held*, affirming in this respect (Newcombe J. dissenting) judgment of the Appellate Division, Ont. (60 Ont. L.R. 525), that plaintiff's action failed; defendant was obligated to prosecute actions against actual infringers only, and plaintiff had not established that the mops alleged to infringe the patent actually did so; further, on giving to the agreement its proper construction and effect, the clause obliging defendant to take action to prevent infringement was rendered inoperative by plaintiff's failure to continue operating "under the letters patent," as since 1921, the mops manufactured and sold by plaintiff had not been made under the patent; moreover, if plaintiff did not sell mops made under the patent, it could hardly suffer actual loss by reason of its infringement, and without establishing actual loss it was not entitled to damages; moreover, although the patent had not been declared invalid, as plaintiff was not selling mops made under it there were no royalties payable "in respect of the patent," and therefore nothing upon which the relevant relieving clause could operate; plaintiff's claim for damages for defendant's failure to protect it from infringement of the trade-mark failed, because no demand for action was made pursuant to the agreement, and because of lack of evidence of infringement, or loss suffered thereby; also its claim for breach of covenant to furnish copies of advertising failed upon the evidence. (Newcombe J., dissenting, held that the contract did not require that there should be an infringement of the mop patent before

PATENT—*Continued*

PATENT—*Concluded*

the authorized demand could have its contractual effect; defendant had contracted an absolute obligation, in a reasonable case, upon the specified demand, to take the necessary proceedings; the trial judge had decided in effect that proceedings were necessary to prevent infringements, and there was adequate evidence to uphold this finding.) *Held*, further, reversing in this respect the judgment of the Appellate Division, that the defendant's counterclaim failed, as, on construction of the agreement and on the evidence, the articles in question in respect of which royalties were claimed were not "O'Cedar products" and therefore not liable to royalties. CHANNELL LTD. *v.* O'CEDAR CORPORATION..... **542**

3 —— *Invalidity — Absence of novelty — Combination of old elements—Combination not involving inventive ingenuity.* DURABLE ELECTRIC APPLIANCE CO. *v.* LTD. RENFREW ELECTRIC PRODUCTS LTD. **8**

4 —— *Action for infringement — Invalidity of patent—Anticipation—Lack of invention.* CANADIAN RAYBESTOS COMPANY, LIMITED *v.* BRAKE SERVICE CORPORATION, LIMITED..... **61**

5 —— *Invalidity — Anticipation — Radio Art.* FADA RADIO LTD. *v.* CANADIAN GENERAL ELECTRIC CO. LTD..... **239**

6 —— *Invalidity — No patentable invention — Alleged improvements in barking drum for stripping logs in making of pulp—Commercial success.* GUETTLER *v.* CANADIAN INTERNATIONAL PAPER COMPANY..... **438**

7 —— *Invalidity — Lack of invention — Anticipation — Channel rubber runways for slidable windows.* DETROIT RUBBER PRODUCTS INC. *v.* REPUBLIC RUBBER CO..... **578**

8 —— *Invalidity—No patentable invention Golfing tees.* THE NIEBLO MFG. CO. *v.* REID..... **579**

PAYMENT—*Sale—Right to inspection—Condition — The Sale of Goods Act, R.S.N.S. c.* 206, *s.* 35, *subs.* 2..... **319**
See SALE 2.

PETITION OF RIGHT — *Expropriation — Injurious affection — Acquiescence —Equitable rights —Building restrictions—Restrictive covenant — Statutory limitations.* MILLER *v.* THE KING..... **318**

POWER
See ELECTRIC POWER.

PRACTICE AND PROCEDURE — *Pleadings—Refusal of amendment at trial —New trial ordered—Costs—Claim for breach of logging contract.*] On the question, whether plaintiff or defendant was responsible for termination of a logging contract between them, the trial judge, on his construction of defendant's counterclaim, held that defendant was not entitled to rely on what took place prior to November 14, 1924, and refused to allow amendment. The Court of Appeal, Sask. (27 Sask. L.R. 29, allowing plaintiff's appeal, and dismissing defendant's cross-appeal, from the judgment at trial) took the same view on the pleadings, and also refused amendment. On defendant's appeal to this Court, a new trial was directed, as the Court, while not holding that the construction given below to the pleading was erroneous (though such construction seemed to this Court rather narrow), or that the trial judge had wrongly exercised his discretion as to amendment, was of opinion that, under the circumstances, the trial was unsatisfactory, and that justice could only be done by a new trial. Costs down to the asking of amendment at trial were to be borne by defendant, costs subsequent thereto to be in the discretion of the judge presiding at the new trial. BOURK *v.* CANADA PRODUCTS LTD..... **573**

2 —— *New trial—Discovery of new evidence as ground for*..... **72**
See NEW TRIAL 1.

3 —— *Quo warranto — Municipal election —Contestation — Mayor — Inability to perform duties—Joinder of claims—Propriety — Prescription—Arts.* 87, 177 (6), 980, 987, 988, 1150, *et sec. C.C.P.— R.S.Q.* (1909) *Arts.* 5936, 5937, 7532, 7533..... **96**
See QUO WARRANTO.

4 —— *Lease — Action for rent—Counterclaim — Misrepresentation — Damages — Several claims based upon distinct alleged causes of action—Jury—General verdict— New trial*..... **101**
See LANDLORD AND TENANT 3.

PRESCRIPTION **96**
See QUO WARRANTO.

PRINCIPAL AND AGENT
See AGENCY.

PRINCIPAL AND SURETY
See GUARANTEE.

PRIVILEGE — *Lien — Claim—Supplier of materials—When constituted—Registration—Arts.* 2013*e*, 2103 *C.C.*] The privilege of the supplier of materials is effectively constituted without registration at the date when the obligation of the owner or the contractor arises; but it

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can only be preserved by registration of the statutory memorial within the statutory period, i.e., by registration of it before the expiration of thirty days after the completion of the work.—Judgment of the Court of King's Bench (Q.R. 44 K.B. 198) aff. MUNN & SHEA LTD. *v.* HOGUE LTÉE..... **398**

QUO WARRANTO — *Municipal election — Contestation — Mayor — Inability to perform duties — Joinder of claims — Propriety — Prescription — Arts.* 87, 177 (6), 980, 987, 988, 1150, *et seq. C.C.P.—R.S.Q.* (1909) *Arts.* 5936, 5937, 7532, 7533.] The respondents brought a petition (*quo warranto*) to have the appellant's election as mayor of Quebec declared null, to remove him from that office, to disqualify him for municipal office for five years, to have him condemned to pay a fine of $400 to the Crown and to obtain an order for a new election. The joinder of these several claims was objected to by the appellant by way of a dilatory exception.—*Held* that, while the competence of an appeal from the disposition made of such an exception is doubtful, this court would in any event be loath to interfere with the judgment appealed from, as the propriety of the joinder is largely a question of practice and procedure; but, on the merits, this court is of opinion that there is nothing incompatible or contradictory in the several "causes of action" preferred by the respondents.—*Held*, also, that the fact that the requirements of art. 980 C.C.P. (which were imposed by art. 988 C.C.P.) do not apply to a proceeding for a declaration of disqualification imposed by art. 5936 R.S.Q. (1909) does not preclude the joinder of the "cause of action" given by the latter article with a proceeding properly instituted under art. 987 C.C.P.—*Held*, further, that the prescription under arts. 7532, 7533 R.S.Q. (1909), invoked by the appellant has no application to a demand for disqualification based on arts. 5936, 5937 R.S.Q. (1909).—*Held*, further, that it is within the power of a provincial legislature to impose disqualification from municipal office as a consequence of the contravention of statutory prohibitions enacted by it to ensure the proper conduct of municipal affairs. (B.N.A. Act, s. 92).—Judgment of the Court of King's Bench (Q.R. 43 K.B. 160) aff. SAMSON *v.* DROLET..... **96**

RAILWAY — *Shipping — Freight rates— Board of Railway Commissioners — Validity of orders—Maritime Freight Rates Act—St. John and Ste. Rosalie "gateways" —"Eastern lines" — "Select territory" — "Preferred movements" — Leave to appeal granted by Board—Question of jurisdiction within the Railway Act.*] The lines of the Canadian National Railways run from Sydney, Halifax and other places in Nova Scotia through Nova Scotia, New Brunswick and eastern Quebec by way of Moncton, Levis, Diamond Junction and Ste. Rosalie to stations in central and western Canada; the Canadian National Railway Co. also owns and operates a line of railway between Moncton and Saint John. The Canadian Pacific Railway Co. owns and operates a railway line which extends from Saint John to Montreal, with a branch running to Ste. Rosalie. Both of these railway systems directly or indirectly connect the Maritime Provinces with all the commercially important sections of Canada west of these provinces. For some years prior to 1925, shipments originating on the lines of the Canadian National Railways, in the Maritime provinces, could be routed, first, over the Canadian National Railways as far as Saint John or Ste. Rosalie, and thence over the Canadian Pacific Railway to their destination; and, as regards goods shipped to destinations reached by both railways, there existed parity of rates for three classes of routes; first, over the Canadian National Railways direct; second, over the Canadian National Railways to Saint John and thence by the Canadian Pacific Railway; and third over the Canadian National Railways to Ste. Rosalie and thence over the Canadian Pacific Railway. In 1925, the Canadian National Railway Co. published supplementary tariffs which purported, as to classes of traffic affected by them, "to eliminate the alternative routings by way of Saint John and Ste. Rosalie," and the Board of Railway Commissioners, October 19, 1926, disallowed the "provisions" of these supplements "in so far as they proposed to eliminate routings via Saint John and Ste. Rosalie," thus restoring "the parity of rates" mentioned above. Such was the situation when the *Maritime Freight Rates Act* of 1927 was passed. Section 2 of the Act gives the meaning of the phrase "eastern lines," as "the lines of railway now operated as a part of the Canadian National Railways and situated within the provinces of New Brunswick, Nova Scotia and Prince Edward Island, and the lines of railway, similarly operated, in the provinces of Quebec extending from the southern provincial boundary near Matapedia and near Courchesne to Diamond Junction and Levis." Section 8 defines the phrase "select territory," as including Nova Scotia, New Brunswick and Prince Edward Island in addition to the localities on "the lines in the province of Quebec mentioned in section 2." Section 3, requires the cancellation of tolls in force at its date (normal tolls), in

RAILWAY—*Continued*

RAILWAY—*Continued*

respect of the "movements of freight traffic" described as "preferred movements," and the substitution therefor of tariffs of reduced tolls (statutory rolls). The "preferred movements" comprise three classes, first, of local traffic between points on the "Eastern lines," second, of export traffic destined overseas between points on the "Eastern lines" and ocean ports on the "Eastern lines," and third, of westbound traffic originating on the "Eastern lines," and extending westward beyond those lines. As respects the first and second of these classes of "preferred movements," the statutory tolls are ascertained by making a deduction from the normal toolls of approximately twenty per cent. As respects the third class of such movements, the statutory rate is ascertained by making a deduction, also of twenty per cent, but, in this case, the deduction takes effect only upon that part of the "through rate," which the statute in section 4 describes as the "Eastern lines proportion of" that rate. Section 9 provides for the non-compulsory reduction of rates by companies, other than those concerned with the "Eastern lines," which own or operate railways "in or extending into the select territory." Such companies are permitted, in order to "meet" the compulsory statutory rates, to file tariffs of reduced rates "respecting freight movements similar to the preferred movements." Those non-compulsory reductions, sanctioned by section 9, are not ultimately borne by the companies whose tolls are affected by them, as by that section provision is made for the transfer of that burden to the Dominion Government, the Minister of Railways and Canals being required, at the end of each year, to pay to the companies availing themselves of the privileges of the section the difference, as certified by the Board of Railway Commissioners, between the amount which would have been payable in normal tolls but for the tariffs filed under it, and the sums actually "received under those tariffs." The question, whether the compulsory reductions under sections 3 and 4 applied (as shippers in the "select territory" contended) to joint tolls in respect of "movements" over joint routes through Saint John or Ste. Rosalie, or whether (as contended by the Canadian National Railway) they affected only "movements" of traffic routed over the Canadian National Railways from point of origin to point of destination, was submitted to the Board of Railway Commissioners for determination, and the adjudication by the Board in the sense adverse to the contention of the railway company is formally embodied in the two orders now under appeal. The appeal raises the question whether the orders are within

RAILWAY—*Continued*

the jurisdiction of the Board.—*Held* that, when the question at issue is examined by the light of the preamble, of the declarations in the body of the statute and of the railway situation of the Maritime provinces, "movements of freight traffic" originating on the "Eastern lines" and passing over joint routes by way of Ste. Rosalie, established at the date of the passing of the Act, are "preferred movements" within the meaning of sections 3 and 4; if such movements fall within the definition of "preferred movements," then the tariffs of tolls in force respecting them became subject to cancellation and reduction on the passing of the Act, and all persons and companies concerned in the preparation and publication of such tariffs were obliged by section 3 to concur in such cancellation, and in the substitution therefor of tariffs of statutory tolls; and the Board was acting within the limits of its jurisdiction in pronouncing the orders under consideration; but as regards the joint routes by way of Saint John, the orders of the Board are not within the ambit of its powers.—*Held*, also, that the question stated in the order giving leave to appeal is one of jurisdiction within the meaning of the *Railway Act*. The first of the above mentioned orders of the Board, in explicit terms, applies the compulsory reduction provided for by ss. 3 and 4 tariffs for the through routes in question and the second does the same thing in effect. Therefore, if such tariffs do not fall within ss. 3 and 4, then, by force of s. 7, the Board of Railway Commissioners is debarred from applying to them the principles of those sections. Where by statute the Board is given authority to make orders of a certain class in a defined type of case, and is disabled from making such orders in other cases, the question whether, in given circumstances, a case has arisen in which an order of that class can lawfully be made by the Board under the statute, is a question of competence—that is to say, a question of jurisdiction within the meaning of the *Railway Act*. THE CANADIAN NATIONAL RAILWAYS v. THE PROVINCE OF NOVA SCOTIA **106**

2 —— *Carrier — Bill of lading — Shipments of bulk grain consigned to order— Delivery of grain by carrier without surrender of bills of lading—Transfer of bills as security for advances—Liability of carrier to transferee—Estoppel.*] Eight cars of bulk grain, shipped, consigned to order, on defendant's railway, were purchased by M Co., which acquired the bills of lading and endorsed them to plaintiff as security for advances. As to seven of the cars, defendant delivered the grain to M. Co. while M. Co. held the bills of lading and before its endorsement

RAILWAY—*Continued*

of them to plaintiff. As to one car, defendant delivered the grain to M. Co. after its endorsement of the bill of lading to plaintiff. Each of the bills was in the standard form approved by the Board of Railway Commissioners for Canada, and provided that it was "not negotiable unless property is consigned 'to order' "; that "it is mutually agreed, as to each carrier * * * and as to each party at any time interested in all or any of said bulk grain, that every service to be performed hereunder shall be subject to all the conditions * * *herein contained * * * and which are agreed to by the shipper, and accepted for himself and his assigns;" and that "the surrender of this original bill of lading, properly endorsed, shall be required before delivery of the bulk grain when consigned 'to order' * * *." Plaintiff, who had taken the bills without knowing of any defect in M. Co.'s title, sued defendant for the value of the grain, claiming that defendant should not havd delivered the grain to M. Co. without requiring surrender of the bills. From the evidence it appeared that frequently a consignee is not able, on delivery of the grain, to deliver the bill of lading, and the practice is for the carrier to deliver the goods upon receiving from the consignee a bond of indemnity; of which practice plaintiff was aware.—*Held;* As to the seven cars, defendant was not liable. Estoppel was not established. The bills were not negotiable except in the limited sense that they could be transferred by endorsement, and that when the effect of the transfer was to pass the property in the goods the benefit of the contract passed also; in that view the transfer of the bills to plaintiff as pledgee did not in itself constitute it the assignee of contractual rights under the bill (*Brandt* v. *Liverpool, etc., Nav. Co. Ltd.*, [1924] 1 K.B. 575, at pp. 594 et seq.); and delivery of the goods to the person entitled, under the bill, to the possession of them at the time of delivery, was a complete answer to any claim based upon an allegation of wrongful delivery (*London Joint Stock Bank* v. *British Amsterdam Maritime Agency*, 16 Com. Cas. 102, at p. 107). The phrase in the bill, "each party at any time interested in all or any of said bulk grain" could not be reasonably extended to apply to persons acquiring an interest in the grain after delivery of it pursuant to the terms of the bill. It could not be said that the form and terms of the bill, or its approval in such form and terms by the Board of Railway Commissioners, manifested an intention to place upon the carrier the burden of protecting transferees by insisting in all cases upon observance of the condition requiring its surrender tn delivery of the goods.—*Held*, further: As to the bill endorsed to plaintiff before delivery of the grain, the defendant was liable. Plaintiff, as pledge of the bill, acquired, while the goods were still in transit, a special property in the grain. The fact that the car, originally consigned to Fort William, had been diverted to Winnipeg c/o M. Co. before transfer of the bill to plaintiff, did not amount to constructive delivery for any relevant purpose.—Judgment of the Court of Appeal for Manitoba (36 Man. R. 322) affirming, on equal division of the court, judgment of Macdonald J. (*ibid*), reversed in part. CANADIAN PACIFIC RAILWAY CO. *v.* HICKMAN GRAIN CO. **170**

3 —— *Negligence — Street railway—Door of moving tramcar, wrongfully opened by passenger, striking and injuring person on station platform—Liability of railway company—Granting of "special leave" to appeal—Supreme Court Act, s.* 41.... **192**

See NEGLIGENCE 2.

RAILWAY—*Concluded*

RES JUDICATA

See MUNICIPAL CORPORATION 7.
CROWN 1.

SALE — *Conditional sale — Conditional Sales Act, R.S.O.* 1914, *c.* 136, *s.* 3—*Delivery to "a trader or other person for the purpose of resale by him in the course of business" (s.* 3 (3))—*Resale by such trader, etc., "in the ordinary course of his business" (s.* 3 (4)).] G., who was a dealer in electrical and radio supplies, contracted with defendant to install in its school (then under construction) an electric signalling system, including a master clock and secondary clocks. G. had never carried such clocks on his premises as part of his stock in trade, and there was evidence that it was not usual for a dealer in electrical supplies to do so. For the purpose of installing them under his contract with defendant, he bought them from plaintiff under a conditional sale agreement, and they were shipped direct to the school premises. The conditional sale agreement was not filed pursuant to the *Conditional Sales Act* (R.S.O., 1914, c. 136), but the seller's name and address were plainly set out on the clocks. G. failed to pay for them, and plaintiff sued defendant for return of the clocks or for their value.—*Held*, that the delivery to G. was a delivery to "a trader or other person for the purpose of resale by him in the course of business" within s. 3 (3), and that there was a resale by G. "in the ordinary course of his business" within s. 3 (4), of the *Conditional Sales Act*; that, therefore, under the Act, the property in the goods vested in defendant, and plaintiff could not recover. —Judgment of the Appellate Division of

SALE—*Continued*

the Supreme Court of Ontario (61 Ont. L.R. 85, reversing judgment of Riddell J.A., *ibid*) affirmed. INTERNATIONAL BUSINESS MACHINES CO. *v.* THE BOARD OF EDUCATION FOR THE CITY OF GUELPH **200**

2 —— *Payment — Right to inspection — Condition—The Sale of Goods Act, R.S.N.S.* 206, *s.* 35, *subs.* 2.] The plaintiffs were grain merchants at Calgary, Alberta, and the defendant company was doing business at Truro, Nova Scotia. The action is brought to recover $4,400 damages. The plaintiffs alleged that the defendant company by telegrams and letters agreed to buy, and plaintiffs agreed to sell, a quantity of oats, approximately 10,000 bushels, at $1.15 per bushel; that defendant company wrongfully repudiated the contract and refused to accept the oats; and that the plaintiffs were obliged to sell and did sell them at 47 cents per bushel. The defendant company alleged that if there was a contract it was terminated by the wrongful refusal of the plaintiffs to ship the oats and to deliver them at Truro as required by the contract, except upon condition that payment was guaranteed by the bank of the defendant company. On the trial a further ground was raised and discussed as to the plaintiff's refusal to ship the goods with permission to defendant company to inspect them before payment.—*Held*, reversing the judgment of the Supreme Court of Nova Scotia en banc (59 N.S.R. 339), that the right of the purchaser to inspection, in the absence of a term in the contract inconsistent therewith, is determined by section 35 (2) of *The Sale of Goods Act* and that nothing in the terms of the contract in this case was so inconsistent as to preclude the appellant company from inspecting the oats before payment.—*Held*, also, that the provision for payment to the Bank of Nova Scotia at Truro by the appellant company on arrival of the car at Truro does not preclude the right of inspection by the purchaser before such payment is made.—*Held*, further, that, in view of the insistence by the respondents in their letter of the 26th of February, 1925, upon the appellants' obtaining a bank guarantee of the payments of their drafts, not withdrawn so far as the correspondence shews, it cannot be said that they were always ready and willing to make delivery according to the terms of their contract, which is essential to their right to recover upon an anticipatory breach by the appellant company. SCOTIA FLOUR AND FEED CO. *v.* STRONG..... **319**

3 —— *Sale of land—Objections to title—Clause in agreement providing for rescission in case of objections to title which vendor is unable or unwilling to remove—Operation of clause—Purchaser claiming right to specific performance with compensation—Contention that vendor by conduct elected to abandon rights under clause.*] An agreement for sale of land provided that "the purchaser is to be allowed 40 days * * * to investigate the title * * *. If within said 40 days the purchaser shall make any valid objection to title in writing, which the vendor is unable or unwilling to remove and which the purchaser will not waive, this agreement shall be null and void." The purchaser made requisitions on title, as to some of which the vendor notified him that it was unable to comply. Some negotiations took place touching an offer by the vendor to substitute other lands for those affected, but without result; and on October 18 the vendor's solicitors wrote the purchaser's solicitors that the vendor was ready to close and unless the transaction was closed by October 25 it would cancel the agreement; and on October 26 orally informed them that the agreement was no longer in force. The purchaser contended (1) that the vendor by its conduct in answering the purchaser's requisitions and in endeavouring to remove his objections elected to abandon its rights under the above quoted clause; and (2) that, as the objections in question affected only an insignificant part of the lands, he was entitled to insist upon specific performance with compensation, and that he should be given adequate time to consider whether or not he should take that course, before the clause was put into operation.—*Held*, The vendor was within the protection of said clause, and the agreement had been rescinded. The purchaser's first contention failed in point of fact, as he was never misled into a belief that the vendor had assumed the obligation of meeting the demands in the requisitions in question. As to the purchaser's second contention, the right to rescind given by said clause was not subject to an over-riding right in the purchaser to insist upon specific performance with compensation, even though, but for that clause, he might, on the facts, have been entitled to such relief; the right given by the clause was for the vendor's protection in just such situations, and to enable him in such circumstances to insist upon receiving the contract price without abatement or to withdraw from the contract (*Ashburner* v. *Sewell*, [1891] 3 Ch. 405, at p. 410, cited).—Judgment of the Appellate Division, Ont., affirmed. LOUCH *v.* PAPE AVENUE LAND CO. LTD. **518**

4 —— *First class automobile — Nullity—Error as to the substance or essential qualities of the thing sold—Arts.* 992, 993,

SALE—*Concluded*

1530 *C.C.* GRENIER MOTOR CO. *v.* BERNIER..... **86**

5 ——*Quantity not determined—Indication of the place where it is situated—Deficit—Obligation of seller—Breach of contract—Damages—Arts.* 1065, 1073, 1074, 1544 *C.C.* SIMARD *v.* ROY..... **328**

SALES TAX—*S.* 19 *BBB of Special War Revenue Act,* 1915 (*c.* 8), *as amended (Dom.)—Exemption of "nursery stock" in subs.* 4 *of s. 19BBB—Cut flowers—Potted plants.*] Sales by florists of cut flowers and potted plants are not exempt from the sales tax imposed by s. 19BBB of the *Special War Revenue Act,* 1915 (c. 8) (Dom.) as amended, such articles not being covered by the phrase "nursery stock" in subs. 4 of s. 19BBB. BRADSHAW *v.* MINISTER OF CUSTOMS AND EXCISE..... **54**

SENATE—*Eligibility of women*..... **276**
See CONSTITUTIONAL LAW 1.

SHIPPING — *Crown — Negligence — Collision — Canal — Probable cause of accident—Exchequer Court Act, s.* 20.] The J.B.K. was proceeding down the Lachine Canal to Montreal and she had passed through basin no. 1 into lock no. 1 where she was duly moored to the side. While the water in the lock was being lowered to enable her to pass out, the gates between the basin and the lock, being closed, were subjected to increasing pressure as the water below receded and they gave way releasing the water in the basin and causing the steamer to part her moorings and to break through the lower gates. While the J.B.K. was thus out of control, she came into contact with the respondent's tug V., causing damages for the recovery of which action was taken against the Crown. The trial judge held that, as it appeared upon the evidence that the breaking of the gates could only have occurred if they were not properly mitred by the servants of the Crown in charge thereof, the court should draw that inference of fact and find liability of the Crown for negligence under s. 20, subs. *c* of the *Exchequer Court Act.*—*Held* that, upon the evidence, there was a preponderance of probability which constituted sufficient ground for the finding of the trial judge; there was ample evidence that a faulty bevel- or mitre-joint would be a not improbable cause of the accident and there was no proof of any competing cause.—Judgment of the Exchequer Court ([1926] Ex. C.R. 150) aff. THE KING *v.* SINCENNES—MCNAUGHTON LINE LTD..... **84**

2 —— *"Space" charter-party—Stevedores—Engagement by charterer—Liability of owners of vessels—Principal and agent—*

SHIPPING—*Concluded*

Actual agency—Ostensible agency.] The appellants entered into a "space" charter-party with the Southern Alberta Lumber Company under which the latter agreed to load lumber on appellants' ships. Afterwards the Southern Alberta Lumber Company, as charterer, engaged the respondent to do the stevedoring work. Owing to the bankruptcy of the charterer before the respondent was paid, the latter sued, not the charterer who engaged it but the appellants who owned the ships, alleging agency. Clause 15 and addendum C of the charter-party read as follows: "15. (Printed) Cargo to be stowed under the master's supervision and direction, and the stevedore to be employed by the steamer for loading and discharging, to be nominated by the charterers or their agents, at current rates. "C" (typewritten) In connection with clause 15, charterers agree to load and stow cargo for one dollar seventy cents ($1.70) per thousand board feet or its equivalent * * *." The court of appeal construed the charter-party as constituting agency in fact.—*Held,* reversing the judgment of the Court of Appeal ([1928] 1 W.W.R. 308), that, although clause 15 without the addendum may support actual agency, the stipulation in the addendum "charterers to load and stow the cargo, etc.," excludes any actual agency of the charterer to engage a stevedore on behalf of the owners of the vessels and thus to render them liable to such stevedore for the cost of the loading and stowing of cargo.—*Held,* also, that, upon the evidence, there was no ostensible agency of the charterer entailing the same result. When actual authority of an alleged agent has been negatived, a plaintiff seeking to hold the alleged principal liable on the basis of ostensible authority either must shew a holding out by the principal of the alleged agent as such or must give proof of some custom on which ostensible agency can be predicated. ROBIN LINE S.S. CO. *v.* CAN. STEVEDORING CO.. **423**

SOLICITOR AND CLIENT
See BARRISTERS AND SOLICITORS.

STATUTE — *Eligibility of women — Senate*..... **276**
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(*Imp.*) *B.N.A. Act,* 1867, *ss.* 23, 24.. **276**
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2——*R.S.C.* [1906] *c.* 139, *s.* 2 (*Supreme Court Act*)..... **405**
See APPEAL 10.

3——*R.S.C.* [1906] *c.* 139, *s.* 39 (*Supreme Court Act*).....**154, 396, 432**
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4——*R.S.C.* [1906] *c.* 139, *s.* 40 (*Supreme Court Act*)..... **154, 396**
See APPEAL 4, 8.

5——*R.S.C.* [1906] *c.* 139, *s.* 41 (*Supreme Court Act*)..... **192, 428**
See APPEAL 12.

6——*R.S.C.* [1906] *c.* 139, *s.* 54 (*Supreme Court Act*)..... **559**
See HABEAS CORPUS.

7——*R.S.C.* [1906] *c.* 140, *s.* 20 (*Exchequer Court Act*)..... **84**
See CROWN 2.

8——*R.S.C.* [1906] *c.* 140, *ss.* 38, 82 (*Exchequer Court Act*)..... **65**
See CROWN 1.

9——*R.S.C.* [1927] *c.* 11, *s.* 2, *subs.* 1; *s.* 4, *subs.* 4b; *s.* 63, *subs.* 1d.; *s.* 64, subs. 5 (*Bankruptcy Act*)..... **182**
See BANKRUPTCY 2.

10——*R.S.C.* [1927] *c.* 11, *s.* 64 (*Bankruptcy Act*)..... **333**
See HYPOTHECARY ACTION.

11——(*D.*) 4-5 *Geo. V., c.* 8, *ss.* 7*a*, 18 (*Fisheries Act*)..... **457**
See CONSTITUTIONAL LAW 2.

12——(*D.*) 5 *Geo. V., c.* 8, *s.* 19*BBB* (*Special War Revenue Act*)..... **54**
See SALES TAX.

13——(*D.*) 9-10 *Geo. V., c.* 36, *ss.* 60, 74 (3) (*Bankruptcy Act*)..... **419**
See APPEAL 11.

14——*R.S.O.* [1914] *c.* 71, *s.* 8 (*Libel and Slander Act*)..... **258**
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15——*R.S.O.* [1914] *c.* 75, *ss.* 5, 24 (*Limitations Act*)..... **213**
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16——*R.S.O.* [1914] *c.* 136, *s.* 3 (*Conditional Sales Act*)..... **200**
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17——*R.S.O.* [1914] *c.* 141, *s.* 6 (2) (*Woodman's Lien for Wages Act*).... **203**
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18——(*Ont.*) 5 *Geo. V., c.* 22, *ss.* 2, 3, 4 (*Mortgagers and Purchasers Relief Acts*) **213**
See LIMITATION OF ACTIONS 1.

19——(*Ont.*) 10-11 *Geo. V., c.* 38, *s.* 2 (*Mortgagors and Purchasers Relief Act*) **213**
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20——(*Ont.*) 12-13 *Geo. V., c.* 72, *s.* 460 (*Municipal Act*)..... **309**
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21——*R.S.Q.* [1909] *s.* 5775 (*Cities and Towns Act*)..... **187**
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22——*R.S.Q.* [1909] *ss.* 5936, 5937, 7532, 7533..... **96**
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23——*R.S.Q.* [1909] *s.* 7321..... **165**
See WORKMEN'S COMPENSATION ACT.

24——*R.S.Q.* [1925] *c.* 35, *s.* 53 (2) (*Motor Vehicles Act*)..... **416**
See NEGLIGENCE 5.

25——*R.S.Q.* [1925] *c.* 274, *s.* 2..... **165**
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26——(*Que.*) 3 *Geo. V., c.* 54, *s.* 43... **384**
See MUNICIPAL CORPORATION 7.

27——(*Alta.*) 2-3 *Geo. V., s.* 290 (*Rural Municipality Act*)..... **487**
See MUNICIPAL CORPORATION 8.

28——(*B.C.*) 16 *Geo. V., c.* 32 (*Male Minimum Wage Act*)..... **564**
See MASTER AND SERVANT.

29——*R.S.M.* [1913] *c.* 66, *ss.* 29, 34 (*Executors Act*)..... **26**
See HUSBAND AND WIFE.

30 —— *R.S.M.* [1913] *c.* 116, *s.* 24 (1) (*Real Property Limitation Act*)..... **440**
See LIMITATIONS OF ACTIONS 3.

31——*R.S.M.* [1913] *c.* 123, *ss.* 2 (*b*), 5, 14 (*Married Women's Property Act*).. **26**
See HUSBAND AND WIFE.

32——*R.S.M.* [1913] *c.* 133, *ss.* 634, 684 (*Municipal Act*)..... **304**
See MUNICIPAL CORPORATION 4.

33——*R.S.M.* [1913] *c.* 171, *s.* 79 (*Real Property Act*)..... **26**
See HUSBAND AND WIFE.

34——(*Man.*) 4-5 *Geo. V., c.* 42 (*Good Roads Act*)..... **304**
See MUNICIPAL CORPORATION 4.

35——*R.S.S.* [1920] *c.* 89 (*Rural Municipality Act*)..... **264**
See GUARANTEE 2.

36——*R.S.S.* [1920] *c.* 128, *ss.* 19, 31 (*Farm Implement Act*)..... **62**
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37——*R.S.S.* [1920] *c.* 169 (*Open Wells Act*)..... **208**
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38——(*Sask.*) 15 *Geo. V., c.* 43 (*Open Wells Act*)..... **208**
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39——*R.S.N.S.* [1923] *c.* 130 (*Power Commission Act*)..... **586**
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40——*R.S.N.S.* [1923] *c.* 202 (*Bulk Sales Act*)..... **419**
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41——*R.S.N.S.* [1923] *c.* 206, *s.* 35, *sub.* 2 (*Sale of Goods Act*)..... **319**
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42——(*N.S.*) 9 *Geo. V., c.* 5 (*Water Act*) **586**
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See HIGHWAY.

SURETY
See GUARANTEE.

TAXATION
See ASSESSMENT AND TAXATION.

TIMBER — *Crown lands — Timber limits — License — Expiration—Duration —Fire — Damages—Rights of holders.*] On the 12th of September, 1918, M. & O. acquired from the province of Quebec a license to cut timber on the line of the Transcontinental Railway Company, which license expired on the 30th of April, 1919. The license, transferred in December, 1918, to O. & D., the appellants, was not renewed until the 11th of December, 1919. Such a license could only be granted under s. 3598, R.S.Q. (1909), for a period of 12 months. The appellants claim damages for destruction of timber on the limit covered by the license, arising from a fire, in June, 1919, alleged to have incurred owing to the negligence of the servants of the railway company.—*Held* that the appellants cannot recover from the Crown the damages claimed. They had no title to the timber at the time it was destroyed by fire and there is no evidence that they were then in possession of the limit nor is such possession alleged. Therefore no retroactive effect can be given to the license subsequently issued in December in such a way as to confer upon the appellants rights as against the railway company.—Judgment of the Exchequer Court of Canada ([1927] Ex. C.R. 154) aff. O'BRIEN *v.* THE KING..... **99**

2——*Lien—Woodman's Lien for Wages Act, R.S.O.* 1914, *c.* 141, *s.* 6 (2)—*Claim of lien by sub-contractor.*] Subs. 2 of 2. 6 of *The Woodman's Lien for Wages Act*, R.S.O. 1914, c. 141, which, in effect, gives a lien to a "contractor," applies only in favour of a person who has made a contract directly with the owner of the timber, and does not give a lien to a sub-contractor for moneys owing to him under a contract made by him with the person who contracted with the owner.—Judgment of the Appellate Division of the Supreme Court of Ontario (32 O W.N. 407) reversed. KEENAN BROS. LTD. *v* LANGDON..... **203**

TRADE-MARK — *Prior user—Expunging from register.* GOLD MEDAL CAMP FURNITURE MFG. CO. *v.* GOLD MEDAL FURNITURE MFG. CO..... **575**

2 —— *Grant of exclusive license for Canada as to inventions and trade-mark—Alleged breach of license agreement—Construction of agreement—Licensor's covenant as to proceedings to prevent infringement—Licensee's agreement to operate under the letters patent —Liability for royalties.*] CHANNELL LTD. *v.* O'CEDAR CORPORATION..... **542**
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TRANSFER OF SHARES **225**
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TREATY OF PEACE OF VERSAILLES **242**
See ALIEN.

TRESPASS — *Real property — Action for trespass by cutting timber—Plaintiff's title to the land—Construction of deed—Plaintiff's possession as ground of action.* THE PINDER LUMBER & MILLING CO. LTD. *v.* MUNRO..... **177**

TRUSTS AND TRUSTEES—*Order to trustee—Trustee directed to give notice of assignment of moneys — Discretionary nature of the order—Appeal—Jurisdiction —Pecuniary value attached to the order— Supreme Court Act, s.* 39. AMERICAN SECURITIES CORPORATION, LIMITED *v.* WOLDSON..... **432**

WATERCOURSES — *Drainage—Upper and lower riparian owners—Rights of drainage by upper owner—Pollution of water—Drainage of streets by municipality through sewer into watercourse.*] Plaintiffs claimed an injunction and damages against defendant city for polluting the waters flowing through a ravine which traversed or bounded their land. They recovered judgment at trial in respect of various acts complained of, but this judgment was modified by the Appellate Division, Alta. (22 Alta. L.R. 457), which held that the city was not liable for alleged pollution caused by certain storm sewers. Against this holding the plaintiffs appealed. The city had constructed a large storm sewer having its outlet in an arm of the ravine above plaintiffs' land. Its purpose was primarily to carry off the surplus water from streets in the vicinity, but (as found on the evidence) through it discharged into the stream in the ravine, not only surface water, but all filth from the streets; also a mass of dirt was allowed to form and accumulate during the winter in the sewer, and in the spring the rush of water washed this into the stream.—*Held* (reversing the judgment of the Appellate Division, Smith J. dissenting), that the operation of the sewer as aforesaid violated plaintiffs' riparian rights; and they were entitled to

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an injunction (failing abatement of the nuisance within the delay allowed) and to damages.—*Per* Anglin C.J.C. and Rinfret J.: The common law right of a riparian owner to drain his land into a natural stream affords no defence to an action for polluting the water in the stream; pollution is always unlawful and, in itself, constitutes a nuisance. *Broughton* v. *Township of Grey* (27 Can. S.C.R. 495) and *In re Townships of Oxford and Howard* (18 Ont. A.R. 496) distinguished.—Whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals" (*Atty. Gen.* v. *Birmingham*, 4 K. & J. 528, cited).—The Edmonton charter, which conferred the relevant powers on the city, did not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its natural state, in flow, quantity and quality" (*Chasemore* v. *Richards*, 7 H.L.C. 349, at p. 382), except when necessary, and then upon payment of adequate compensation.—Statutory powers should not be understood as authorizing the creation of a private nuisance, unless the statute expressly so states.—*Per* Duff J.: The existence of a nuisance in fact was established; and the city failed to justify its acts as acts done under its charter powers; nor could they be justified as an exercise of the common law rights of a riparian owner.—While the making of streets by macadamizing or paving, etc., is a natural use of the land owned by the city, and it is under no duty to intercept rain water which, having fallen from the clouds, is pursuing its way under the impulsion of gravity or other natural forces towards a watercourse, it is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a watercourse, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparian owners.—*Per* Lamont J.: The city had the right to develop its lands in the way cities ordinarily do by constructing and paving streets and lanes, and if, as a result of such user, an increased quantity of street sweepings, horse droppings and other impurities accumulated on its land, and these were washed down by the rain through a natural watercourse to the stream, the plaintiffs, as lower riparian owners, had no ground of complaint; but, apart from statutory authority so to do, the city could not by flushing its streets collect these impurities and by means of a storm sewer pour them into a stream the

WATERCOURSES—*Continued*

waters of which the plaintiffs had a right to take for domestic or other purposes; under English law an upper riparian owner "must not discharge his filth on his neighbour's land" (principles laid down in *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.*, [1918] A.C. 485; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *John Young & Co.* v. *Bankier Distillery Co.*, [1893] A.C. 691, applied; *In re Townships of Oxford and Howard*, 18 Ont. A.R. 496, at p. 505; *Gibbons* v. *Lenfestey*, 84 L.J.P.C. 158, at p. 160, distinguished). The city's charter did not limit plaintiff's right of action, as the city had taken no statutory proceedings to acquire a right to pour the polluted output of its sewer into the stream.—Smith J. dissented, holding that the city had a right to drain the surface water from its streets into the storm sewer and through it to the natural watercourse; that there was no evidence of any pollution from this surface drainage other than what would occur in a state of nature; the only kind of pollution shown was such as would naturally be found in any similar stream draining an area where animals were kept.—The sewer, as originally constructed, had been cut to provide drainage facilities for a certain district, thus creating a diversion of drainage, causing, as plaintiffs complained, a substantial decrease in the quantity of water that would otherwise have gone into the ravine, and thus, by reason of less dilution of the dirt and filth, increasing the dangers of pollution. Dealing with this point, Anglin C.J.C. and Rinfret J. held that the diversion gave plaintiffs no right of action; they had no right to the drainage water collected by the sewer; in complaining against the diversion they were really claiming a right to compel the city to drain into the ravine; diversion of drainage is quite a different thing from diversion of a stream; and, while riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth; and though riparian owners above them may be entitled to drain their lands into the stream, they are not obliged to do so.—As to certain smaller storm sewers discharging into the stream, it was held (sustaining, in this respect, the judgment of the Appellate Division) that, on the evidence as to their operation and the waters discharged thereby, the plaintiffs had no right of action.—Duff and Lamont JJ. pointed out that they had not dealt with the provisions of the *Irrigation Act* (R.S.C., 1906, c. 61), no question thereon having been raised in the argument. GROAT *v.* CITY OF EDMONTON..... **52 2**

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2 —— *Power development — Nova Scotia Water Act—Nova Scotia Power Commission Act—expropriation of land by Power Commission for water power development purposes—Amount of compensation—Finding of jury—Insufficient direction to jury—Factors to be taken into account—New trial.*] Plaintiff was incorporated by c. 181 of 1914, N.S., with comprehensive powers for its purposes of developing water power and producing and selling electric power. It acquired, for $500, about 31½ acres of land at Marshall Falls, on East River, Sheet Harbour, Nova Scotia. In 1919 (c. 5) the Nova Scotia legislature passed the *Nova Scotia Water Act* which, among other things, declared that every watercourse and the sole and exclusive right to use, divert and appropriate any and all water in any watercourse was vested forever in the Crown in the right of the Province. There was provision for the Governor in Council authorizing persons to use any watercourse and any water therein on such terms and conditions as the Governor in Council might deem proper. The legislature also passed the *Power Commission Act* (1919, c. 6; subsequently, with amendments, consolidated as c. 130, R.S.N.S., 1923) by which defendant was incorporated. Under its powers given by that Act, the defendant proceeded to develop East River, Sheet Harbour, for power purposes; it contracted to supply electrical power to the Pictou County Power Board (incorporated by c. 165 of 1920); constructed storage dams above Marshall Falls; and expropriated land, including plaintiff's said land. Plaintiff filed its claim for compensation, and (as authorized under the *Power Commission Act,* defendant not having instituted action within the time prescribed) sued in the Supreme Court of Nova Scotia for a declaration that it was entitled to $80,000 as compensation. At the trial a special jury found the compensation to be $32,000. On appeal by defendant, the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 524) set aside the finding and directed a new trial. Plaintiff appealed.—*Held,* that the direction for a new trial should be affirmed; there was no evidence that the land's agricultural value had increased, or that it had any special suitability except in relation to the development of power at Marshall Falls; and the jury had not been sufficiently directed so as clearly to apprehend the effect of the *Nova Scotia Water Act* and the *Power Commission Act,* and of what had been done pursuant thereto, and of the resultant situation which prevailed, as affecting the plaintiff's rights and prospects, at the time its land was expropriated.—It was pointed out that unless the owner of the land constituting the dam-site had a right or privilege to use or divert the watercourse or the water, the dam-site was of no utility or value for the manufacture of power, and that subs. 2 of s. 4 of the *Nova Scotia Water Act,* as enacted by c. 75 of 1920, whereby the Governor in Council is empowered to authorize any person to use any watercourse or any water therein for such purposes and on such terms and conditions as are deemed proper or advisable, is not expressed in a manner which points to the grant of a heritable or assignable right; that the use which may be authorized is not a use which goes with the land, and that it was upon the exercise of this power by the Governor in Council that the plaintiff's claim to a value for special adaptability must depend.—The *Nova Scotia Water Act* discussed and construed, in its bearing on the matters in question. CANADIAN PROVINCIAL POWER CO. *v.* THE NOVA SCOTIA POWER COMMISSION 586

WILL — *Construction of bequest—Ascertainment of class benefited—Time as at which class to be ascertained.*] J. W. Forbes by his will left property upon trust, after the death of a brother, "to pay the one-half of the interest arising from said investments yearly to my brothers and sisters then living * * * and to the survivors or survivor of them so long as any one of my said brothers and sisters shall live and upon the death of the survivor of my said brothers and sisters to pay the whole of the principal * * * and the interest remaining to my next of kin, of the name 'Forbes' then living." The testator died a bachelor leaving as next of kin brothers and sisters, who all died leaving no descendants except one brother who left two daughters who survived the last surviving brother or sister of the testator. These daughters were living at the testator's death, but subsequently, and before the death of the testator's last surviving brother or sister, had married and become Mrs. P. and Mrs. R. respectively.—*Held,* (reversing judgment of the Supreme Court of Nova Scotia *en banc,* [1927] 3 D.L.R. 70, and restoring judgment of Mellish J.) that the persons who took the principal and remaining interest under said bequest were the testator's nearest of kin in equal degree who bore the name "Forbes" at the time of the death of the testator's last surviving brother or sister; the class was to be ascertained as at the period of distribution, and not as at the time of the testator's death; Mrs. P. and Mrs. R., not bearing the name "Forbes" at the period of distribution, could not take. The principles of construction approved in *Hutchinson* v. *National Refuges for Homeless and Destitute Children,* [1920] A.C.

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794, and *Lucas-Tooth*, [1921] 1 A.C. 594, applied. *Pyot* v. *Pyot*, 1 Ves. Sr. 335, and *Carpenter* v. *Bott*, 15 Sim. 606, discussed and distinguished. MACQUARRIE *v.* EASTERN TRUST CO..... **13**

2 —— *Devise — Construction—"Children" —"Sons and daughters * * * per stirpes"—Rule in Shelley's case* (1 *Rep.* 93*b*).] A testator devised his estate to trustees and made, amongst others, the following dispositions: "To my niece * * * I give and devise a life estate in the * * * and after her death to her children in equal shares *per stirpes*"; and also "* * * I direct that * * * the proceeds derived from such sale be divided among the sons and daughters of my brother * * * in equal shares *per stirpes.*"—*Held*, that the words "to her children in equal shares *per stirpes*" are words of designation and denote persons of the first degree of descent only; and that the presence of the words "*per stirpes*" does not impart to the phrase "sons and daughters" a meaning embracing the whole line of descendants capable of inheriting.—No opinion is expressed as to whether or not the rule in *Shelley's case* ((1581) 1 Rep. 93*b*) is in force in the province of Alberta, as, assuming it to be in force, it does not apply to the above provisions.—Judgment of the Appellate Division ([1927] 3 W.W.R. 534) aff. *In re* SIMPSON ESTATE..... **329**

3 —— *Construction — Vesting — Direction to divide at future time.*] A testator's will, after providing for collection and payment of debts and for certain specific legacies, provided for sale of certain property, comprising the residue of his estate, and investment of the proceeds and payment of the interest for the maintenance of his wife and daughter A until A (who, however, predeceased the testator) attained 21 years of age, and, on A attaining 21 years of age or dying, for payment of $400 of interest to his wife annually during her life, and then provided that "any money remaining after the payment of said $400 shall be equally divided among my children * * * the issue of any deceased child to take parent's share. On the death of my wife the whole of my property shall be divided between my children (the issue of any deceased child shall be entitled to parent's share) said division to be in equal shares."—*Held*, that the estate of any deceased child of the testator who died in the lifetime of the testator's

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widow and left no issue him surviving was not entitled to share in the income from the said residue or in the corpus when divided on the widow's death.—The following passage from Williams on Executors, 11th ed., p. 981, quoted with approval: "Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular cicrumstances, a contrary intention is to be collected."—Judgment of the Supreme Court of Nova Scotia *en banc* (59 N.S. Rep. 486) reversed. BUSCH *v.* EASTERN TRUST CO..... **479**

WOMEN—*Eligibility of—Senate*.... **276**
See CONSTITUTIONAL LAW 1.

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"Accessible to stock"..... **208**
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"Select territory"..... **106**
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"Settlements" (in s. 60 of the Bankruptcy Act)..... **419**
See APPEAL 11.

WORKMEN'S COMPENSATION ACT —— *Municipal employee—Cleaning streets and occasionally working in "dangerous" premises—Injury—Compensation —R.S.Q.* (1909) *s.* 7321—*R.S.Q.* (1925), *c.* 274, *s.* 2.] An employee of a municipal corporation, whose main duties are those of cleaning streets and repairing sidewalks, but who occasionally does some work on municipal premises "in which machinery is used, moved by power other than that of men or of animals," is not entitled to claim under the Workmen's Compensation Act, if he be injured while performing his usual work upon the streets of the municipality.—Judgment of the Court of King's Bench (Q.R. 43 K.B. 355) rev. LA VILLE DE JONQUIERES *v.* BRASSARD..... **165**