REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1913

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION FOR CANADA:

The Hon. Charles Joseph Doherty, K.C.

ERRATA et ADDENDA.

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

Page 187, line 7, for *"Geuest"* read *"Genest."*
" 205, add foot-note reference "46 N.S. Rep. 156."
" 313, line 10, after *"s."* add "39."
" 631, line 32, delete "a" before "matter."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 47 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

In re British Columbia Fisheries (47 Can. S.C.R. 493). Leave to appeal to Privy Council granted, 21st April, 1913.

Nova Scotia Car Works v. *City of Halifax* (47 Can. S.C.R. 406). Leave to appeal to Privy Council granted, 13th June, 1913.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

FRITZ EBERTS .....APPELLANT; 1912

AND *Oct. 2.

HIS MAJESTY THE KING.....RESPONDENT. *Oct. 7.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF ALBERTA.

Criminal law—Indictment for murder—Trial—Evidence—Criminal intent—Provocation—"Heat of passion"—Charge to jury—Misdirection—Reducing charge to manslaughter—New trial—"Substantial wrong"—Criminal Code, ss. 261, 1019—Appeal—Questions to be reviewed.

On a trial for the murder of a police officer there was evidence that E. and J. had set out from their home, during the night when the deceased was killed, with the intention of committing theft; J. and his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret-police constable, had pointed a pistol at him and told him to "go to hell" and that he had shot him. The defence was rested entirely upon *alibi* and the accused testified on his own behalf stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge the trial judge reviewed the evidence, in a general way, and told the jury that, upon the evidence adduced, they

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

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must either convict or acquit of the crime of murder, that they could not return a verdict of manslaughter, that if they believed J.'s account of what happened to be substantially true they should convict of murder; and he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. E. was convicted of murder.

Held, Duff J. dissenting, that, on the evidence, the charge of the trial judge was right, and that the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial.

Per Fitzpatrick C.J. and Idington J.—In a criminal appeal, it is doubtful whether any question except that upon which there was a dissent in the court below could be reviewed on an appeal to the Supreme Court of Canada.

Per Duff J., dissenting.—In the circumstances of the case, the effect of the charge was to withdraw from the jury some evidence which ought to have been considered by them and which, if considered by them, might have influenced them favourably towards the accused in arriving at their verdict; consequently, some substantial wrong was thereby occasioned on the trial and the conviction should not be permitted to stand.

APPEAL from the judgment of the Supreme Court for the Province of Alberta(1), which affirmed the conviction of the appellant of the crime of murder, Beck J. dissenting.

At the trial, in April, 1912, before Mr. Justice Simmons and a jury, the appellant was convicted of the murder of a Royal North-West Mounted police constable, at Frank, in Alberta, on the night of the 12th of April, 1908, and was sentenced to death. An application for a reserved case was refused by the trial judge. Upon application to the court *in banco*, an appeal was heard, the notice of appeal raising the following questions:—

"(1) As to whether the said learned judge erred in directing the jury that there were only two possible conclusions they could come to, a verdict of guilty

(1) 2 West. W.R. 542.

of murder or a verdict of not guilty and that they could not consider the question of manslaughter at all.

"(2) As to whether the said learned judge erred in refusing to instruct the jury that if they found that the crime was committed by the accused without malice, they were entitled to bring in a verdict of manslaughter.

"(3) As to whether the said learned judge erred in not instructing the jury as to what elements constituted the crime of murder and what that of manslaughter and the difference between said two offences.

"(4) As to whether the said learned judge erred in not instructing the jury that they might, and under what circumstances they might, on a charge of murder bring in a verdict of manslaughter.

"(5) As to whether the said learned judge erred in instructing the jury that the evidence of witnesses as to seeing a flash and hearing a noise at a certain hour was corroborative of the evidence of the witness Jasbec.

"(6) As to whether the said learned judge erred in instructing the jury that the evidence of the wife of the witness Jasbec was corroborative of the evidence of said Jasbec.

"(7) As to whether the said learned judge erred in not instructing the jury that if they believed the evidence of the witness Jasbec they must believe it wholly."

The Supreme Court for Alberta having dismissed this appeal, Mr. Justice Beck dissenting, on the ground that there had been misdirection at the trial which occasioned substantial wrong or miscarriage

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and that there should be a new trial, the appellant appealed to the Supreme Court of Canada.

The charge to the jury, by Mr. Justice Simmons, was as follows:—

"Gentlemen of the jury:—It is my duty to explain to you the law concerning the offence which is charged against the defendant here, and to explain to you the application of the law governing this offence in relation to the offence which is before you in so far as it may affect the guilt or innocence of the defendant Fritz Eberts. It is not necessary for me to define to you what murder is. You know pretty well what that means. But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect, that when a person goes out to commit some indictable offence, such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof, and death ensues from such injury, that would be murder. So that you see a person might be guilty of murder in that sense, although he may not have a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.

"Now, in the present case the evidence on one branch of this is quite clear — that is, as to the death of the unfortunate young man. That is well localized as to the place and the time. There is the

evidence of Kroning, the brakeman, as to seeing the flash and hearing the report of a gun, and the evidence of two other witnesses who heard the noise sometime during the night — at least after twelve or one o'clock, and Pietro Amicarello being another; all identifying the time as being after twelve or one o'clock, and in the vicinity, according to Pietro Amicarello and Kroning, of between two o'clock and half past two. Kroning says it must have been about that time. The train was due to leave at 2.25 and it took a little time to pull up the slack, they just got under way when he heard the report and saw the flash, and the Italian says it was about twenty minutes after two when he looked at the time in the station. So that part of it seems to be pretty well localized as to the actual time, and that seems to be very important, and I may call your attention to it later on.

"Now, the next circumstances coming to light were the finding of the body by the Chinaman, and by Mr. Steeves and Mr. Haslett, and there was the examination of the body by the sergeant and by Dr. McKenzie and by Mr. Addison. I would like to call your attention particularly to the evidence of Mr. Addison, the undertaker. He described to you very minutely the condition of the body in relation to the wounds that had been received, all corroborative of the evidence of the other witnesses that they were fired at close range, burning the face and around the neck and shoulders and tearing the vital parts around the lungs and heart. Then Mr. Addison also gave evidence that there were bruises — a bruise on the shoulder and one on the fore-arm. Then he took out most of the shot, and one of the witnesses * * * took out the collar button. It is important for you to remember the condition

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of that collar button in regard to the suggestion that this was not ordinary shot. You may, if you wish, look at that collar button again, and that shot, and you may draw any inference therefrom as to the impact of the shot against any solid substance, having in view what happened to that collar button.

"Then the Royal North-West Mounted Police began an investigation around Frank with regard to guns, and apparently made a very full investigation of all the houses and the foreigners there, and visited the house of the accused and found the accused and his wife there and Jasbec and his wife there, and, in response to their request, the two guns are produced — a single barrelled gun produced by the defendant, which Sergeant Piper says was broken, and a Mauser rifle produced by Jasbec — the one which he says he brought up from Taber. Nothing referring particularly to this case seems to happen for some time after that, further than the inquest and the inquiries that may have been made in an attempt to ascertain who the parties were and who were responsible for it. Those seem to be the chief features of the case as regards the happenings with which the defendant here was not closely related.

"And, as you will have to determine upon the truthfulness or untruthfulness of the story told by the Jasbecs, to some extent in the way of corroboration, it is important to observe to what extent the story he tells may correspond with the facts as they have been related by these witnesses, especially in regard to the time of the injury or murder, and as to the manner in which it was inflicted.

"Then we have the evidence of Superintendent Primrose as to the size of the wads, associating them

with the 12-bore gun — and remember, in regard to that, it does not seem that the witness Jasbec had any particular opportunity of knowing that these particular facts would come to light — namely, that Kroning would see a flash at that particular time, or that a 12-bore wad would be found, or that the evidence in regard to the nature of the wound would be given in detail as it has been given by those who examined the bodies, that is, Mr. Addison, Mr. Primrose and the doctor.

"Now, then, the story told by Jasbec has to be examined very closely by you because it implicates himself in the doings of that night, and the Crown have charged him with this crime, and, therefore, I propose, for the purpose of this trial, to treat him as an accomplice. The result of that is, that you will apply a rule of evidence which I have mentioned before and will expect to have this evidence corroborated in material parts, for the very prudent safeguard that he may have an object in view, namely, self-interest, in telling a story that might be very beneficial to himself. The same might very well be applied to his wife's story. Although she is not a party to the unlawful acts of that evening she is Jasbec's wife, and the affection between husband and wife might make, or lead her to make, her evidence as favourable as possible to her husband, and, with that safeguard I have just mentioned, you will apply the rule as ordinarily applied, that there should be corroboration with regard to the death of the man and to the circumstances of the death. You have already had your attention called by me as to corroboration as to the time, which fairly well fits in with the time, if Jasbec's story is true. It was getting on to that time in the

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morning — somewhere around two o'clock. One witness described fairly well where the moon was when he came home about midnight, and the large mountain lies, according to the evidence, to the south and west of Frank, which must necessarily cause the moon to set earlier than it would do on the prairie, for instance.

"Now, another reason for scrutinizing the evidence of Jasbec carefully is that he admits he has been a criminal, and that he has helped to kill cattle, and he admits he was associated with people in Frank who were committing theft. He has told a story here, and has consistently adhered to it, which, if true, would put upon the defendant the onus of at least satisfying you that the story told by Jasbec was not a reliable one. He has been corroborated by his wife, and you may use that evidence for what it is worth, using the rule I have given you. His story is corroborated by Sergeant Piper as to the circumstances under which Piper visited the shacks on the Monday morning. Both families left Frank some time after that, and it would appear that certain things happened in the meantime which caused them some uneasiness, and they have been related to you, and you can draw whatever inference you think proper in that regard.

"I might call your attention to one fact that was referred to by Detective Egan as to the finding of a spot of blood on the window close to the place where the dead man was lying, and a pool of blood, all of which seems to lead to the inference that he must have died almost in his tracks.

"Now, you have those facts, and I propose now to examine them more particularly in relation to the story told by the defendant himself. It has been

pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always under our administration of justice a presumption that a man is innocent until he is proved guilty, that is modified by another rule of evidence:—that there may come a time when the inculpatory facts may be so numerous and so strong in their bearing that the onus shifts on to him, then. That was really the form which this trial took. You had the evidence of a confessed accomplice in the burglary, and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness-box and has told a story, and I must caution you, as to that, that you will apply the rule to his evidence, that it must be carefully scrutinized because of the self-interest he has — he is upon trial for his life — and he has recognized that he should give an explanation of what took place, and he has done so. He has said that, on the night in question, he was drunk; he does not remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife; and his wife says the same thing, but she does not seem to be very clear as to how many nights she and Mrs. Jasbec slept in the bedroom. She said they did sleep there sometimes, and that Jasbec and her husband slept in the kitchen sometimes. So there seems to be very little clashing in their evidence, except as to the place of sleeping, up to the time that Jasbec says they set out. Jasbec and his wife do not deny that

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there was some drinking going on on Saturday, but they do not give any details about it, and they do not pretend to remember anything about it. Now, then, the story told by the defendant would require close scrutiny in regard to his actions in the meantime, in so far as the evidence divulges what they are. The evidence shews that when he was at Trail Creek, Montana, he became quite disturbed because his partner came and brought him news that a man resembling Jasbec had come there, and then he told him of the murder of the policeman — he told Kane — and also that he was afraid that this man purporting to be Jasbec might talk too much; that is Kane's version of it. Eberts gives as a reason for being worried about the big man, purporting to be Jasbec, that he would have a fight with him. You should examine that very closely. You may draw what inference you think fit as to whether he would be worried about Jasbec — the big man coming to Trail Creek — if the story that Eberts has told in the witness box is the true one; namely, that he was at home and asleep and had no knowledge of the murder other than what he might have heard afterwards. Then there is his statement when the policeman Collins and the policeman Gorman went to arrest him. He denies that *in toto,* and also the statement of Sergeant Piper as to what he said to him after Piper cautioned him. So you see that the defendant has put himself into this position — that he has placed his word against that of Constable Collins, and he has placed his word against that of Sergeant Piper, and he has given an explanation as to his uneasiness about Jasbec coming to Trail Creek, which you may draw an inference from such as you think proper. You have heard the whole of the evi-

dence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shot gun of Jasbec's was taken with them, and that that was the instrument which caused the death of the policeman, Willmett, then you will consider that in relation to the explanation I have given you as to the law which applies to people who go out to commit an indictable offence and take firearms with them, and kill a man either in effecting the purpose of committing that offence, or in trying to escape.

"I am bound to say to you, and instruct you, that there seem to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty. I cannot see where you could consider the question of manslaughter at all, in view of the statement of Eberts himself. There is this to say also, that Jasbec after his arrest, at least very soon after, made up his mind to tell his story, which is practically the one which he has told to you. In regard to Eberts's wife, there does not seem to be very much in her evidence that contradicts the story of Jasbec and the story of Jasbec's wife, other than the question of where they slept and the question as to whether Eberts spoke to Mrs. Jasbec on the Sunday or not. In other respects, what she has said would largely coincide with the happenings that occurred around the house of Eberts, and around the shack of Jasbec on the Saturday and Sunday in question. It will be your duty, then, having regard to the explanation I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because,

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if it is, there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you; namely, to find a verdict of guilty against him, that is, if Jasbec's story — that they started out and went to the Canadian Pacific Railway freight sheds first, and then went around by P. Burns's store, and then around behind the Imperial Hotel, and that they had a gun with them, and that the accused asked for the gun and got it at the time they saw the shadow, or what they thought was the shadow, of a man and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot then — leaves it in the position that, if Jasbec's story is substantially true in regard to these important features of the happenings that night, then there is no alternative for you but to bring in a verdict of guilty.

"If there is a reasonable doubt in your mind — and the meaning to be attributed to that term 'reasonable doubt' was very well explained by counsel for the Crown, and the reference he gave of a very learned judge — I do not think I can improve on that — if you have a reasonable doubt you are entitled to give Fritz Eberts the benefit of that doubt.

"If there is anything you wish instructions on during your consideration of the matter you are to let me know and you will obtain it. You will also have access to the exhibits, if you wish them, during your consideration. You will now retire to consider your verdict."

MR. MACLEOD:—"Before the jury retires I wish you to instruct them on two or three matters. I wish your Lordship to instruct the jury that if they believe the

story of Jasbec or any part of it they must believe it wholly."

THE COURT:—"No."

MR. MACLEOD:—"I wish to read to your Lordship from Wills on Evidence (1) (reading): 'It is essential to justice that a confessional statement, if it be consistent, probable and uncontradicted should be taken together, and not distorted, or but partially adopted.' 'It is a rule of law,' said Lord Ellenborough, 'that when evidence is given of what a party has said or sworn, all of it is evidence (subject to the consideration of the jury, however, as to its truth), coming, as it does, in one entire form before them; but you may still judge as to what parts of the whole you can give credit; and also whether that part which appears to confirm and fix the charge does not outweight that which contains the exculpation. On the trial of a man for murder committed 24 years before, the principal inculpatory evidence consisted of his confession, which stated in substance that he was present at the murder, but went to the spot without any previous knowledge that a murder was intended and took no part in it. It was urged that the prisoner's concurrence must be presumed from his presence at the murder, but Mr. Justice Littledale held that the statement must be taken as a whole; and that so qualified it did not in fairness amount to an admission of the guilt of murder; and where the prisoner's declaration in which she asserted her innocence, was given in evidence, and there was evidence of other statements confessing guilt, the judge left the whole of the conflicting statements to the jury for their consideration.'"

(1) 6 ed., pp. 116, 117.

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"The point is this, if they believe the statement of Jasbec they must accept his whole statement."

THE COURT:—"With the qualifications, which I have warned them about which applies always to an accomplice, and that is the reason of the rule of evidence requiring corroboration of the evidence of an accomplice, because of the probability of the accomplice making the story favourable to himself."

MR. MACLEOD:—"Your Lordship has the whole statement of Jasbec before you, and I would ask you to address the jury that if they believe the whole statement of Jasbec then they must bring in a verdict of manslaughter."

THE COURT:—"If you wish to argue that after the jury retire you may do so. I have instructed the jury as to the rule of evidence applying as to an accomplice."

MR. NOLAN:—"And in the meantime I wish the jury to retire."

MR. MACLEOD:—"Your Lordship will not instruct the jury on that point?"

THE COURT:—"No."

MR. MACLEOD:—"I will ask you to instruct them, with regard to April 11th, 1908, that the jury must conclusively find that there were four persons in the Eberts house on that afternoon."

THE COURT:—"I have referred to that in my address to them."

MR. MACLEOD:—"Notwithstanding the evidence of Jasbec and the wife they must conclusively find under the evidence that there were four persons there in the afternoon."

THE COURT:—"And what bearing has that upon the case?"

MR. MACLEOD:—"It affects the credibility of the evidence."

THE COURT:—"That is a question within the competence of the jury."

MR. MACLEOD:—"There is a rule of law."

THE COURT:—"It is a question of fact."

MR. MACLEOD:—"But where two persons swear to a negative and two persons swear to a positive the positive must prevail."

MR. NOLAN:—"But I would ask that the jury retire now."

THE COURT:—"Any other application?"

MR. MACLEOD:—"I would like you to direct the jury that the rule may also be considered that, to justify conviction in a criminal case, the evidence of guilt must not only be a balance of probability, but it must also satisfy the jury that the accused is guilty. They cannot balance probabilities. I would ask you to instruct the jury that the evidence must be such as to exclude the hypothesis of innocence; the evidence to convict must be such as to exclude the presumption of innocence or hypothesis of innocence."

THE COURT:—"The rule was well known, and has been explained by me to the jury, that if they believe beyond a reasonable doubt, as reasonable men, using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters — using that common sense — if they as reasonable men believe that the story told by Jasbec is the true one, there is no alternative for them but to bring in the verdict I have indicated — the verdict of guilty; if they have a reasonable doubt as to the truth of that story, so far as it implicates Eberts, they will give Eberts the benefit of that reasonable doubt."

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J. W. McDonald and *Colin MacLeod,* for the appellant. It should have been left to the jury to decide as between manslaughter and murder; these should have been distinguished. *Reg.* v. *Brennan*(1); *Rex* v. *Wong On*(2); *Rex* v. *Scherf*(3); *Rex* v. *Daley*(4). In *Gilbert* v. *The King*(5), there was no evidence whatever to support a verdict of manslaughter; the evidence was that the shooting was an accident. In the present case there is evidence upon which the jury might reasonably have found manslaughter; the circumstances which might have justified a verdict of manslaughter and which are detailed in the judgment of Mr. Justice Beck(6). The trial judge, in his charge, passes over these points, and dismisses the question of manslaughter. It was the right and privilege of the jury to be instructed and directed by the learned trial judge, and it was their duty to follow the explicit instructions which he gave. These instructions made it impossible for them to find a verdict of manslaughter.

The learned judge directs the jury that the possibility of a verdict of manslaughter is wholly excluded by the statement of Eberts himself that he was not present at the killing of Willmett, but in fact that he was at his home on the night in question. He does not say that there is not evidence upon which they could reasonably find Eberts guilty of the reduced crime if they should find him guilty at all, but merely that his own story excluded such finding. The effect of the direction is that though there may be, in the evidence given by other persons, reason to believe the ex-

(1) 4 Can. Cr. Cas. 41.
(2) 8 Can. Cr. Cas. 423.
(3) 13 Can. Cr. Cas. 382.
(4) 39 N.B. Rep. 411.
(5) 38 Can. S.C.R. 284.
(6) 2 West. W.R. 542, at pp. 545 *et seq.*

istence of circumstances justifying a verdict of manslaughter, yet as Eberts said he was at his home that night, these circumstances could not exist. In other words, in this respect he said that the evidence of Eberts must prevail against all other evidence, and for the purpose of excluding the possibility of manslaughter they must give full credence to the story of Eberts in his attempt to prove an *alibi*. The learned Chief Justice, who delivered the judgment of the court *en banc*, apparently does not agree with this view. Whether Eberts swore falsely or not is immaterial on the point of manslaughter. If he were guilty of perjury, he was not, therefore, necessarily, guilty of murder. *Rex* v. *Carr*(1). By modern authority all questions as to motive, intent, heat of blood, etc., must be left to the jury and should not be dealt with as propositions of law. *The Queen* v. *McDowell*(2), at page 115. All such questions were excluded entirely from the consideration of the jury. *Reg.* v. *Brennan*(3), at page 674; *Reg.* v. *Kirkham*(4); *Reg.* v. *Sherwood* (5); *Reg.* v. *Smith*(6).

The learned trial judge directed the jury: "When a person goes out to commit some indictable offence such as burglary or robbery and if he mean to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence such as burglary or robbery or to facilitate the flight of an offender upon the commission or attempted commission thereof, and death ensues from such injury, that would be murder." This is doubtless a correct statement of law as laid down in section 260 of the Criminal Code,

(1) 2 Cohen Cr. App. 317.
(2) 25 U.C.Q.B. 108.
(3) 27 O.R. 659.
(4) 8 C. & P. 115.
(5) 1 C. & K. 556.
(6) 4 F. & F. 1066.

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but it could not but have misled the jury. The learned judge evidently meant the jury to believe that the accused had been attempting to commit burglary, whereas the only evidence is that the accused and Jasbec attempted to gain an entrance to the Canadian Pacific Railway freight shed and the meatshop of P. Burns. This is shop breaking and not burglary, and the accused cannot be brought under section 260, though the judge so directed the jury, and that that section applied. Even if the section did apply, the judge should have asked the jury to find whether or not the shot was fired with a view to facilitate flight.

There were other circumstances which might have reduced the crime to manslaughter that were not referred to by the judge and which the jury were not asked to pass upon. If the accused had abandoned his criminal intent and was on the way home, and Willmett, who was not in uniform, attempted to arrest him, the arrest was unlawful and accused would not be guilty of murder. *Rex* v. *Addis*(1); *Reg.* v. *Carey*(2); *Reg.* v. *Chapman*(3).

The judge was in error in instructing the jury as to corroboration: in instructing them that Jasbec was corroborated by his wife: *Rex* v. *Neal*(4); and in instructing them that the evidence of Kroning and Amicarello was corroborative: Taylor on Evidence (10 ed.), secs. 969-970. It is immaterial that there may have been other evidence of corroboration. It is impossible to say what effect such a direction may have had in bringing the jury to their conclusion: *Rex* v. *Everest*(5); *Allen* v. *The King*(6).

(1) 6 C. & P. 388.
(2) 14 Cox C.C. 214.
(3) 12 Cox C.C. 4.
(4) 7 C. & P. 168.
(5) 2 Cohen Cr. App. 130.
(6) 44 Can. S.C.R. 331.

We also refer to *Rex* v. *Blythe*(1); *Rex* v. *Ellson* (2); *Rex* v. *Stoddart*(3).

E. F. B. Johnston K.C. and *W. M. Campbell* for the respondent, argued that the objections now urged had not been taken in the courts below; that the only questions open on an appeal to the Supreme Court of Canada were such as related to the dissent in the provincial court of appeal, and that, on a defence rested entirely on *alibi* at the trial, the appellant could not assume the position that there ought to have been a conviction for manslaughter only.

The following authorities were cited on behalf of the respondent: Criminal Code, secs. 53, 261, 1019; *Rex* v. *Philpot*(4); *Rex* v. *Barrett*(5); *Reg.* v. *Fitzgibbon*(6); *Gilbert* v. *The King*(7); *Rex* v. *Scholey* (8).

THE CHIEF JUSTICE.—I concur in the opinion stated by Mr. Justice Idington.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Alberta, sitting *en banc*, refusing, Mr. Justice Beck dissenting, to grant a new trial to the prisoner who had been tried and convicted of murder.

The application for a new trial was based upon the contention that the trial judge should have instructed the jury that if they believed Jasbec's account of the

(1) 19 Ont. L.R. 386, at p. 391.
(2) 28 Times L.R. 1.
(3) 2 Cohen Cr. App. 217.
(4) 7 Cohen Cr. App. 140.
(5) 14 Can. Cr. Cas. 465.
(6) 7 Cohen Cr. Cas. 264.
(7) 38 Can. S.C.R. 284.
(8) 3 Cohen Cr. App. 183.

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shooting as detailed to him by the prisoner immediately after it took place, it was open to them to find the prisoner guilty of manslaughter only, and that the trial judge had charged the jury they were bound either to acquit the prisoner altogether or find him guilty of murder.

Section 261 of the Code reads as follows:—

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

The question argued before us and which we are asked by the prisoner's counsel to decide in the affirmative, is whether or not, under the evidence given by Jasbec of the conversation he had with the prisoner immediately after the latter shot the deceased, it was open to the jury to reduce the crime with which the prisoner was charged from murder to manslaughter.

No such contention was made with respect to the conversation given in evidence by Jasbec's wife. From her version one of two conclusions would have to be drawn, either that in shooting the deceased as and when he did the prisoner was guilty of murder, or that he shot deceased in self-defence and should be acquitted. It would not be possible for counsel successfully to contend, under Mrs. Jasbec's version of the prisoner's statement of the shooting, that a verdict of manslaughter could be rendered.

But counsel did contend that, on Jasbec's version of prisoner's statement, the jury might have found him guilty of manslaughter only. I do not think so. I do not think, in the first place, that it was open to the jury, on the evidence, to find that the prisoner had abandoned the criminal intent to steal with which he started out that night. It might be possible for some

such finding to be made with regard to Jasbec himself. Both during the unsuccessful attempt to break into Burns's store, and afterwards while they were standing in the street in the rear of the bank, Jasbec suggested to the prisoner the abandonment of the criminal enterprise which they had jointly entered upon and a return home. He further said that when the prisoner took the gun from him and went away with it, with the object of meeting the man whose shadow they had seen, he, Jasbec, had made up his mind to return home. But there was no evidence justifying any such finding as regards the prisoner.

Then as to the fact of the deceased who was shot being a secret-police officer, and believed by the prisoner to have been such when he shot him, I cannot see where there can be any doubt. The prisoner said to Jasbec just after the shooting, and while they were returning to their shack, that he guessed the man he shot was one of the secret-police, but was not sure of it. Probably not; absolute certain knowledge he hardly could have had; but he *believed* the man was a secret-police officer.

The only "provocation" suggested was that stated by the prisoner to Jasbec that the man who, he guessed, was one of the secret-police, having found him at the time of night and in the place he did, pointed a pistol towards him told him to "go to hell." Nothing at all is said about the prisoner being aroused to a "heat of passion" by the action of the police officer. Not a word from which any such state of mind could be inferred. On the contrary, the prisoner told Jasbec that he raised the gun he carried and shot the man dead. Looking at all the circumstances and facts surrounding the unfortunate shooting of the

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officer, as detailed in the evidence, I am not able to bring myself to the conclusion that any jury of reasonable men could fairly find that the prisoner shot the deceased while "in the heat of passion caused by sudden provocation."

I think, reading the charge of the trial judge as a whole and in the light of all the facts given in evidence, it cannot be said that his direction to the jury that they must either acquit the prisoner or find him guilty of murder, occasioned such a substantial wrong or miscarriage on the trial as would give us jurisdiction to set aside the conviction or direct a new trial.

I think the judgment of the court below was right and that the appeal should be dismissed.

IDINGTON J.—The appellant and one Jasbec being engaged about one or two o'clock a.m., in a joint expedition for purposes of stealing in Frank, in Alberta, at a time when the miners there were on strike, carried with them a gun, and having tried several places unsuccessfully, saw a man, or shadow of one, at some distance. The appellant got the gun from Jasbec and started with it to find out who the man was, suggesting it was possibly an acquaintance come to scare them. He went one route or direction and Jasbec another, as agreed between them. Jasbec tells this story and proceeds to say he concluded to go home and had gone some short distance when he heard a shot fired, and in a few minutes heard running behind him the appellant with the gun. Then both ran till near appellant's shack.

The following evidence of Jasbec contains the story as there and then recited by appellant:—

Q. Did you have any talk with him ?

A. And then I asked him: "What is the matter?" And he said: "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and he pointed a revolver at me and said, 'What are you doing here, go to hell,' and I thought he drawed his gun and fired at him."

Q. Who did?

A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it? What was next said by either of you after that? What was next said? Did you ask him anything then? He said he drew his gun and fired at him? He said he drew his gun up and fired at the man?

A. And I said: "What became of him?" and he said he shot him — he shot the fellow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time?

A. Yes.

Q. What did he say?

A. He said: "I guess it is one of the secret-police, but I am not sure about it." That is what he said.

The appellant gave evidence on his own behalf and denied this whole story of Jasbec and declared he had never been out of his house on the night in question.

The story of Jasbec so fitted into the surrounding facts and circumstances as to corroborate it and was so supported by evidence of others that there could be no doubt of appellant having shot one of the secret-police found dead next morning with a pistol near his dead hand.

The contention set up is that it might have been the result of a quarrel or such other facts and circumstances as would in law have reduced the culpable homicide from murder to manslaughter.

The learned trial judge refused to countenance this claim when counsel for the accused asked him to direct the jury that under such facts as in evidence the offence *must,* if committed, be taken to be manslaughter. He directed the jury that there did not

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seem to be any ground for a verdict of manslaughter and it seemed as if there must be a verdict of guilty of murder, or not guilty.

The court of appeal dismissed an application made to it on this and other grounds. Mr. Justice Beck dissented, holding that the jury ought to have been directed as to what would constitute manslaughter, and to consider whether or not, if the accused were guilty of anything, a verdict of manslaughter might not be the proper verdict.

It seems to me the learned trial judge and the majority of the court were right in the view taken by them.

To reduce culpable homicide to manslaughter requires, in the class of manslaughter cases suggested herein, evidence of roused passions.

The man, whose passions we are asked to find might have been so aroused, has by his own oath denied the fact and left in his unsworn story nothing to rest such a finding upon. Moreover, his remarkable career as told by himself seemed to demonstrate that he was hardly the sort of man to be roused to passion by the sight of a revolver or the sound of rough language. Indeed, the language he used in relating this incident now in question to Mrs. Jasbec slightly varies from above and indicates he felt bound to shoot or was proud of having shot first.

There is nothing but mere surmise or conjecture on which to rest such a finding as is claimed to have been legally possible.

The discarding or overlooking such a defence to a charge of killing a man he knew or believed to be a policeman, properly armed to deal with midnight prowlers carrying guns, is hardly a case where we

can, in the language of section 1019, of the Criminal Code, find that "substantial wrong or miscarriage of justice" entitling us to interfere.

A verdict of that kind in such a case would have been a travesty of justice and made of the administration of the law a farce.

No jury could properly return such a verdict. It would, therefore, have been idle or worse for the learned trial judge to have entered upon an exposition of the law bearing on manslaughter and thus needlessly perplexed the jury.

It might have been argued in such a case, but it was not in this, that a man faced with a revolver was put in fear of his life, and, therefore, shooting first, was entitled to an acquittal. But where a case of manslaughter, which is supposed to fall within what section 261 of the Criminal Code defines, can find place under the very peculiar circumstances of this case, I am at a loss to understand.

If the learned trial judge had been asked to direct an acquittal on the ground that the man, having reasonable apprehension of death or grievous bodily harm, had taken the life of another, he should have explained the law bearing on the subject and left that to the jury.

True, the circumstances would not have seemed a very promising foundation to dwell upon such an issue, but it was the only possible issue that could have been raised on such facts as put in evidence.

The appeal should be dismissed.

As a matter of courtesy due to a man on an appeal for his life we heard argument about want of corroboration, which, I submit, needs no further observation than this: The gun found with the pri-

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soner, the wad fitted for it found in and with the body of the deceased and a mass of evidence that connected appellant therewith (quite independent of Jasbec and his story), if well marshalled and fitted together and carefully considered might have spared us that argument.

But I may add that it is doubtful if anything except the only point upon which a judicial dissent in the court below appeared in judgment can be brought here.

DUFF J. (dissenting).—I think there should be a new trial. It appears to me that the effect of the learned trial judge's charge was to withdraw from the jury evidence which ought to have been considered by them and which if considered by them might not improperly have given rise to real doubts as to whether the prisoner was guilty of the offence of which he was convicted in arriving at their verdict.

The main facts are stated in the judgments in the court below and I shall refer to them only in so far as is necessary to a clear statement of the ground upon which I think the verdict should not be permitted to stand. The prisoner was convicted of murder. The homicide occurred at Frank, Alberta, on the 12th April, 1908. The trial took place four years afterwards, in April, 1912. The chief witnesses as against the accused were one Jasbec and Jasbec's wife. Jasbec says that, on the night in question, he and Eberts set out from a shack on the outskirts of Frank intending to get food by stealing; and that, abandoning a projected attempt on the Canadian Pacific Railway freight sheds and a partly executed plan of entering Burns's butcher shop, they gave up the expe-

dition and started for home. On the way home noticing the outlines of a man near the Imperial Hotel who seemed to disappear "behind the buildings" Eberts (so Jasbec's story runs) said, "that I bet you is Jan" (meaning a common companion Jabusick with whom they had been abroad before on similar expeditions), "give me the gun and I will go and see who it is;" and they separated, Eberts taking Jasbec's shot-gun and setting out towards the figure they had observed, while Jasbec proceeded on his way homewards. Shortly afterwards Jasbec says he heard a shot fired, the sound appearing to come from the direction in which Eberts had gone. Later Eberts joined him and they reached their shack together. The next day the unfortunate deceased, a constable of the Royal North-West Mounted Police, was found in the vicinity indicated by this evidence obviously killed by a discharge from a shot-gun. These facts and the evidence given by Jasbec and Jasbec's wife of statements made by Eberts constitute the substance of the case made by the Crown against the accused. The accused gave evidence in his own behalf and his defence was an *alibi*. The learned trial judge in effect instructed the jury that if they believed Jasbec's story (in certain features of it which he specified), then they had no alternative but to convict him of murder.

The following passages give the substance of the charge so far as material:—

But there are some specific definitions given which may possibly widen the meaning of the term murder from its common interpretation, and they are to this effect, *that when a person goes out to commit some indictable offences, such as burglary or robbery, and if he means to inflict grievous bodily harm for the purpose of facilitating the commission of any such offence, such as burglary or robbery, or to facilitate the flight of an offender upon the commission or attempted commission thereof and death ensues from such injury, that would be*

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murder. So that you see a person might be guilty of murder in that sense, although he may not have had a murderous intention in the common ordinary conception of that term. He may have started out to commit a common indictable offence and may have armed himself for that purpose, in order to assist in committing the offence or to assist in his escape.

* * * * *

It has been pointed out to you in the address by counsel for the Crown, and quite properly, that while there is always under our administration of justice a presumption that a man is innocent until he is proved guilty, that is modified by another rule of evidence — *that there may come a time when the inculpatory facts, may be so numerous and so strong in their hearing that the onus shifts on to him, then. That was really the form which this trial took.* You had the evidence of a confessed accomplice in the burglary and who was with him at the time of the shooting, if true, and you have a complete history given of their proceedings that night at the time they left the shack, and the defendant has recognized that, and he has gone into the witness box and has told a story.

* * * * *

He has said that on the night in question he was drunk; he does not remember when he went to bed. He corroborates Jasbec in the fact that he, Jasbec, and his wife were at his house that night. He does not say that he slept with Jasbec in the kitchen, but he says that in the morning he was in his bedroom with his wife, and his wife says the same thing.

* * * * *

You have heard the whole of the evidence, and if you come to the conclusion he did go out, as Jasbec says, that night and that that 12-bore double-barrelled shotgun of Jasbec's was taken with them and that that was the instrument which caused the death of the policeman, Willmett, then you will consider that, in relation to the explanation I have given you as to the law which applies to people who go out and commit an indictable offence and take firearms with them and kill a man either in effecting the purpose of committing that offence, or in trying to escape.

I am bound to say to you and instruct you that there seem to be only two conclusions you can come to, that is, a verdict of guilty of murder or a verdict of not guilty. I cannot see where you could consider the question of manslaughter at all in view of the statement of Eberts himself.

* * * * *

It will be your duty then, having regard to the explanation I have given of the law and the way in which you will proceed to treat the evidence, to come to a conclusion as to whether Jasbec's story of the happenings of that night, from the time they left the shack until the time they got back is substantially the true story, because if it is

there is then no explanation from the defendant that would enable me to give you any other instructions than what I have given you, namely, to find a verdict of guilty against him, that is, *if Jasbec's story, that they started out and went to the Canadian Pacific Railway freight sheds first and then went around by P. Burns's store, and then around behind the Imperial Hotel, and that they had a gun with them and that the accused asked for the gun and got it at the time they saw the shadow, or what they thought was the shadow of a man, and Jasbec heard the shot, and the other evidence given by these other people, that they heard a shot* then — leaves it in the position that, if Jasbec's story is substantially true in regard *to these important features of the happenings that night — then there is no alternative for you but to bring in a verdict of guilty.*

* * * * *

THE COURT:—The rule was well known, and has been explained by me to the jury that if they believe beyond a reasonable doubt, as reasonable men using the common sense and intellect that reasonable men use in the affairs of life, especially in relation to serious matters — using that common sense, — if they, *as reasonable men, believe that the story told by Jasbec is the true one, there is no alternative for them but to bring in the verdict I have indicated — the verdict of guilty:* if they have a reasonable doubt *as to the truth of that story, so far as it implicates Eberts, they will give Eberts the benefit of that reasonable doubt.*

It cannot be doubted that, from these passages, the jury would take the view that their sole task was to decide whether they should believe Jasbec's story in respect of the incidents specified by the learned judge himself, and, if they did so, it was their duty to find a verdict of guilty.

I shall presently call attention to the passages in the evidence of Jasbec and his wife which I think the jury ought to have been asked to consider but, in the meantime, it is convenient to observe that the charge of the learned trial judge seems calculated to mislead the jury in the important point of the burden of proof. The onus was on the Crown to establish the guilt of the prisoner, to produce evidence, that is to say, which should satisfy the jury beyond any real doubt that the prisoner was guilty of murder. It is

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quite true that the proof of homicide alone by the prisoner might constitute a *primâ facie* case, and a very strong *primâ facie* case against him. But if, in proving the homicide, evidence of its circumstances and incidents was given of such a character as properly to raise in the minds of the jury a real doubt as to the prisoner's guilt, it would then be their duty to acquit. In criminal cases (it is needless to observe) the degree of certitude at which a jury ought to arrive before finding the issue of guilty or not guilty against the accused is higher than that which is measured by the criterion of the preponderance of evidence or balance of probability applied in civil cases. In *Rex* v. *Stoddart*(1), at pages 243 and 244, the principles governing the incidence of the burden of proof in criminal trials are stated in these words:—

> It seems to the court that the jury ought to have been told that the prosecution having given *primâ facie* evidence from which the guilt of the defendant might be presumed, and which, therefore, called for explanation by the defendant, the jury ought to consider the evidence upon both sides, and if, upon a review of the whole of the evidence, they were satisfied that the prosecution had made out the case that the defendant Stoddart was a party to the conspiracy, they should convict him, but that, if their minds were left in a state of doubt, they ought to acquit him, as the burden of proving the defendant's guilt was still upon the prosecution. The passages which have been cited at length are the only passages in the summing-up which bear directly upon the question of the onus of proof. The concluding words of caution at the end of the summing-up cannot be said to qualify the specific direction to which attention has been called. In the opinion of the court the jury may have thought that if Stoddart had not proved that he had supplied moneys in every case they must convict him, whereas the direction ought to have been that they must be satisfied, after consideration of all the evidence, that the Crown had proved that Stoddart was a party to the conspiracy, and, if in doubt, they ought to acquit him. It is in failing to adequately explain this that the court is of opinion that there was a substantial misdirection.

(1) 2 Cohen Cr. App. 217.

The learned trial judge seems, (as appears from the extracts quoted from his charge,) to have thought that if the jury were once convinced that the prisoner was the author of the homicide that was the end of the case, because evidence of facts justifying his act or reducing his crime to manslaughter must come from the prisoner alone. That, of course, was equivalent to withdrawing from the jury all the circumstances disclosed by the evidence of Jasbec or Jasbec's wife bearing upon the degree of culpability which ought to be attached to the prisoner's act, assuming the homicide to have been his act.

Before going into that evidence, (of Jasbec and his wife,) there are two material observations.

1st. The prisoner's statements to these two witnesses having been put in evidence by the Crown they became evidence in his favour as well as against him. In *Rex* v. *Higgins*(1), Parke J. said:—

> Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

It was for the jury to say how much of the prisoner's statement they accepted as true, but the Crown having offered the statement and got it before the jury it was the duty of the jury to consider the statement as a whole, and the consideration of it as a whole could not properly be withdrawn from them; 2ndly. It was for the jury to say how much they were to believe of the accounts which Jasbec and his wife gave of the prisoner's statements to them. They

(1) 3 C. & P. 603.

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might believe parts of those accounts, reject other parts.

The jurors are not bound to believe the evidence of any witness; they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him. *Per* Lord Blackburn, in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1), at page 1201.

The point I have to discuss is whether, on any reasonable view of the evidence of Jasbec and his wife, (bearing in mind these principles,) the minds of the jury might, under proper instruction from the court, have been brought into a real state of doubt as to the guilt of the prisoner. Mrs. Jasbec's account of Eberts's statement is as follows:—

Fritz Eberts said he was out with my husband that night, but he got bad luck; *when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, "Go to hell," but he came before and he shoot.*

Q. Who shoot ?

A. Fritz Eberts shoot.

Q. Shoot who ?

A. Shoot the policeman.

Q. Do you remember anything else ?

A. He says, "Good I kill him right away — it is good that I kill him." He said that, too.

Q. Is there anything else you remember ? I know it is a long time ago. Did you have any other conversation with Eberts and his wife, when they were together, or was that the only time ?

A. That was the only time.

Q. That was the only time Eberts spoke to you about the policeman ?

A. Yes.

Q. That was on *the Sunday that you heard of it ?*

A. *Yes.*

Q. And had you *already heard that the policeman was killed at that time or not ?*

A. *Yes; I heard it all right.*

(1) 3 App. Cas. 1155.

Jasbec's account is this:—

Q. Did you have any talk with him ?

A. And then I asked him what is the matter. And he said: "When I came around that corner first I saw nothing; all at once a fellow standing in front of me and *he pointed a revolver at me and said: What are you doing here, go to hell,' and I thought he drawed his gun up and fired at him.*"

Q. Who did ?

A. Eberts took his gun up and fired at the fellow who pointed the revolver at him.

Q. Did you say anything more to him about it ? What was next said by either of you after that ? What was next said ? Did you ask him anything then ? He said he drew his gun and fired at him ? He said he drew his gun up and fired at the man ?

A. And I said: "What became of him ?" and he said he shot him — he shot the follow and he must be dead because he sank down as soon as the shot was fired, without a sound.

Q. Did he say anything else about that man to you at that time ?

A. Yes.

Q. What did he say ?

A. He said: "I guess it is one of the secret-police, but I am not sure about it." That is what he said.

I shall assume for the moment that this evidence was evidence which the jury ought to have considered. On that assumption the trial judge would, of course, have instructed the jury that the first question to which they ought to apply their minds was how much of these two conversations really occurred; how far are the statements attributed to Eberts to be ascribed to him ? Both witnesses were speaking of conversations which had occurred four years before. Jasbec himself had been under arrest for five months and having regard to the suspicions attaching to him, (it was his gun, it will be remembered, from which the shot was alleged to have been fired,) a jury would be acting wisely in examining his testimony with critical care, even with suspicion, and no lawyer would, of course, dispute that the question of what Eberts did really say in the course of these conversations was a

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question exclusively within the province of the jury. Did Eberts, for example, say to Jasbec, "I guess it is one of the secret-police ?" Did he, in talking to Mrs. Jasbec, express satisfaction in having killed a police officer ? At the preliminary hearing Mrs. Jasbec had not recalled this part of the conversation. It is quite within the bounds of reasonable possibility that the jury might have rejected this part of the story altogether; or may have felt it to be of too doubtful credit to be acted on with safety. Assuming them to have reached that conclusion, let us examine the effect of these statements, in the light of the other evidence placed before the jury by the Crown, to see if there is any substantial foundation in them for the suggestion that the prisoner acted under such provocation or such reasonable fear of harm as to make it proper that the jury's attention should be directed to them.

There was, I may repeat, abundance of evidence from which the jury might have reached the conclusion that, when they saw the figure of the man who was shot, they had abandoned their criminal project and were on their way home. However little such a conclusion may commend itself to one's own judgment, Jasbec's own evidence is perfectly clear upon the point; and Jasbec had been put forward by the Crown as a credible witness. In his cross-examination, he says:—

Q. When you told Eberts that you had better go home Eberts agreed to go ?
A. Yes.
Q. And he put the screw back in the door ?
A. Yes.
Q. And you started for home ?
A. Yes.
Q. And he agreed to do that ?
A. Yes.

This is entirely consistent with the testimony given by him on his examination in chief. Again, his evidence is precise to the effect that Eberts thought the man they had seen was their friend Jan. If the jury accepted this part of Jasbec's testimony the situation they would have to consider was this — Eberts in these circumstances setting out to accost his friend Jan. suddenly meeting a stranger who, to use the language of the wife, "takes a revolver and put it right in his face," and Eberts shooting. These are the bald facts presented by this story. But there is another, and a most important piece of evidence, touching the state of Eberts's mind, furnished by Eberts's statement to Mrs. Jasbec, as repeated by her. Her report of Eberts's words is this:—

> Fritz Eberts said he was out with my husband that night, but he got bad luck; when he came round the corner the policeman standing right before him and the policeman takes a revolver and put it right in his face and say, *"Go to hell," but he come before and he shoot.*

There can be no possible doubt that if the jury believed these words to have been used by Eberts they were entitled to regard them as indicating that Eberts acted in response to and in defence against a sudden assault with a pistol. A good deal was made on the argument of the exclamation, "Go to hell." But the effect of such an exclamation upon a man in Eberts's position would depend wholly upon the attitude of the person uttering it, and it is to be observed, moreover, that Jasbec admitted upon cross-examination that it was not until after he had told his story to the police that he recalled the use of this expression. The jury might, in the circumstances, consider this part of the evidence to be negli-

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gible. The fact, it may be added, that there were lawless, not to say desperate, men about is a circumstance which weighs as much at least in favour of the suggestions made on behalf of the prisoner as against him.

Weighing all the relevant considerations I am unable to convince myself that a jury properly instructed might not reasonably have taken a view of this evidence which would afford a foundation for real doubt as to the propriety of convicting the prisoner of the capital offence. I take it to be indisputable that, where a homicide follows instantaneously upon acts which may be a sufficient provocation to take the act of the accused out of the category of murder, it is a question of fact for the jury whether in the particular case there was such provocation. Criminal Code, sec. 261. It is said that there is no evidence here of passion; but, where provocation is proved, is it to be said that a jury is bound to convict of murder, as a matter of law, in the absence of express evidence of passion outside of the act of homicide itself? That is an impossible proposition. If the circumstances are such as legitimately to raise in the minds of the jury a real doubt as to the presence of malice, in the legal sense, then it is the duty of the jury not to convict of murder. Is it to be laid down as a proposition of law that the presenting of a pistol, in such circumstances as those we are considering, cannot properly afford a foundation for such a doubt? The case is perhaps stronger in support of the suggestion that the appellant acted in reasonable fear of bodily harm. A court of appeal would, however, be assuming a very grave responsibility, if, finding in the record, evidence of circum-

stances which ought to have been considered by the jury as bearing upon the question whether the accused had acted in self-defence in response to a sudden assault, it should say, as a matter of law, that these circumstances could afford no basis for a defence on the ground of provocation. To draw the line between the effect of acts and words such as those attributed to the unfortunate victim in producing such a state of passion as would constitute provocation within the meaning of the law and their effect in producing a reasonable fear of bodily harm such as would afford a ground for justification would be a feat of some difficulty, and one which a court of appeal could rarely attempt with safety.

I suppose, indeed, that no one would argue that these circumstances ought not to have been considered by the jury had it not been for the fact that Eberts himself went into the witness box and denied all knowledge of the facts alleged against him. That he did so is undoubtedly a circumstance which would tell powerfully with any tribunal, and properly so, of course, against the defence now suggested. But I am quite unable to bring my mind to the conclusion that the weight to be attributed to that circumstance was not altogether a matter for the consideration of the jury.

Two points remain. As to the suggestion that Eberts's statements point to action in self-defence and not to action as a result of provocation and that, since the learned judge was asked to reserve a case only on the latter point, it is not open to us to afford any relief, even assuming the prisoner to have been deprived of the benefit of a defence fairly open on the evidence — it will be unnecessary to repeat what I

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have said as to the bearing of the circumstances in question upon the defence of manslaughter. But there is a further observation to be made. The learned judge, as we have seen, ruled in the most unmistakeable way that if the jury found the prisoner was the author of the homicide then it was their duty to convict of murder; and the necessary effect of that ruling was to withdraw from the jury all considerations arising upon the prisoner's statements to Jasbec and his wife. He did not tell the jury that, on the whole case they must convict of murder or acquit. He told them in effect that if they found the prisoner had killed the deceased it was their duty to convict of murder. The statement of a case then, with regard to manslaughter, in effect would raise the substantial question I have been discussing, namely, whether assuming the prisoner to be the author of the homicide there was any ground upon which a jury might reasonably entertain a doubt as to whether he was guilty of murder.

The remaining question is whether it appears, in the language of section 1019 of the Criminal Code, that there was any "substantial wrong or miscarriage of justice." It is contended by Mr. Johnson that the prisoner having deliberately elected to stand upon an *alibi* cannot avail himself of a defence which is open upon the evidence adduced by the Crown, but which assumes his complicity in the homicide. In civil cases it is a rule generally acted upon that, in order to prevent litigation going on forever, a party who deliberately elects at the trial to fight his case out upon one issue and gets beaten upon it cannot raise on appeal a new and totally different issue, (which he did not put before the jury,) although it should be open upon both the pleadings and the evidence;

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Browne v. *Dunn*(1). I should desire to consider the question long and carefully before committing myself to such a proposition as applied to prosecutions for criminal and especially for capital offences. It is not easy to reconcile this contention with the rule laid down in *Reg.* v. *Gibson*(2), *per* Mathew J., at p. 543:—

> We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not,

In any case it has no application here. It was stated in the argument by counsel for the prisoner and not disputed that the issue of manslaughter was fully placed before the jury by counsel, and, indeed, the suggestion that it was not would be incredible. Then it is said that the evidence, as a whole, as it appears upon the record is convincing of the prisoner's guilt, and that, since we can see that he was rightly convicted, we are bound to hold that there had been no "substantial wrong or miscarriage." I cannot agree. The construction of these words was authoritatively settled eighteen years ago by the Privy Council in *Makin* v. *Attorney-General for New South Wales*(3). Apart altogether from the binding force of the decision as an authority, the reasoning of Lord Herschell at pages 69 and 70 is complete and conclusive. This is the passage:—

> The point of law involved is, whether where the judge who tries a case reserves for the opinion of the court the question whether evidence was improperly admitted, and the court comes to the conclusion that it was not legally admissible, the court can, nevertheless, affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.
>
> It was admitted that it would not be competent for the court

(1) 6 R. 67.
(2) 18 Q.B.D. 537.
(3) [1894] A.C. 57.

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to take this course at common law, but it was contended that section 423 of the "Criminal Law (Amendment) Act, 1883," (46 Vict. No. 17) empowered, if even it did not compel the court to do so. That section is in these terms:—

"The judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the judges of the Supreme Court, who shall determine the questions and may affirm, amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires. Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

Reliance was, of course, placed upon the language of the proviso. It was said that if, without the inadmissible evidence, there were evidence sufficient to sustain the verdict, and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence — that is to say, what the law regards as evidence — established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are, in truth, substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much-cherished right of trial by jury in criminal cases. 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 in view of the demeanour of the witnesses. Yet the court might, under such circumstances, be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend, in their Lordship's opinion, to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there

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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. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

His Lordship is here dealing, of course, only with the case in which inadmissible evidence has been admitted and has gone before the jury. His observations, however, seem to apply with equal force to the case of a misdirection in consequence of which relevant evidence has been withdrawn from the consideration of the jury which might, under a proper instruction and not unreasonably, bring their minds into a state of doubt as to the propriety of the verdict at which they ultimately arrived. Such a misdirection is error that, (since it deprives the accused of his constitutional right to have submitted to the decision of a jury all the defences open to him on any reasonable view of the evidence,) can only be corrected by setting aside the verdict.

ANGLIN and BRODEUR JJ. concurred in the opinion stated by Mr. Justice Davies.

Appeal dismissed.

Solicitors for the appellant: *Macleod & Gray.*
Solicitor for the respondent: *W. M. Campbell.*

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*March 4, 5.
*Oct 7.

LÉOPOLD MASSON AND OTHERS.....APPELLANTS;

AND

MARGUERITE MASSON AND OTHERS ..... } RESPONDENTS;

AND

LOUIS DE LOTBINIÈRE HARWOOD, MIS-EN-CAUSE ..... } RESPONDENT.

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

Construction of will—Substitution—Trust—Death of grevé—Accretion—Partition—Apportionment in aliquot shares—Distribution of estate—Partial intestacy—Devolution.

By his will, in 1845, M. devised his estate to trustees charging them with its administration in a manner intended to secure the enjoyment of the revenues by his surviving children and their descendants so long as the law would permit; he provided for the division of his estate into as many equal parts as he should leave children him surviving: "pour chacune de ces parts ou portions de mes biens representer les biens mobiliers et immobiliers dont chacun de mes dits enfants aura seulement la moitié des revenus sa vie durante, ainsi que ci-après pourvu, et pour les revenus de chacune de ces parts ou portions de mes biens être réversibles après le décès de chacun de mes dits enfants aux enfants nés en légitimes mariages d'eux, mes dits enfants, respectivement, et être substitué de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi, en observant que je veux et entends que lors de chaque succession ou transmission de mes biens il en soit fait partage, autant que possible, entre chacun de mes descendants de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus sa vie durante."—At the time of his death, in 1847, eight of his children survived the testator and his estate was,

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

accordingly, apportioned so far as then possible, the residue, not then conveniently divisible, being held in suspense as a ninth share to be subsequently divided from time to time as it became possible to do so. Of the eight shares, that attributable to L. M., one of the children, was enjoyed by him up to the time of his death, in 1887, intestate as to the share in question and without issue.

Held, Brodeur J. dissenting.—That, as the will did not give the children and grandchildren of the testator any rights as proprietors in his estate, there was no substitution created by its provisions.

Held, also, Davies and Brodeur JJ. dissenting.—That, on the death of L.M. without issue, the share allotted to him remained vested in the trustees subject to distribution among the children of the testator and their descendants in the same manner and upon the same conditions as if L.M. had pre-deceased the testator and the estate had been originally apportioned into seven instead of into eight parts.

Per Davies J.—As there was no provision in the will in respect to children dying without issue, and as there was no collateral substitution, there was intestacy resulting, on the death of L.M. without issue, in regard to the share allotted to him; consequently, it remained vested in the trustees for the benefit of and to be distributed amongst the heirs of the testator living at that date.

Per Brodeur J. dissenting.—The will had the effect of creating a direct and collateral substitution. At the death of L.M. his brothers and sisters became substitutes and their descendants are *appelés*.

Judgment appealed from (Q.R. 20 K.B. 1) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of Mr. Justice Charbonneau(2), in the Superior Court for the District of Montreal.

The circumstances of the case are shortly stated in the head-note and are fully set out in the judgments now reported. In construing the will, the judgment of the Superior Court adopted the theory of accretion with its practical consequences, holding that the

(1) Q.R. 20 K.B. 1. (2) Q.R. 33 S.C. 108.

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share of Louis Masson had accreted on his death to the seven other branches without forming a degree of substitutions. This judgment was reversed by the Court of King's Bench, which decided that there had been a transmission on Louis Masson's death, counting as a degree of substitution.

Hon. A. R. Angers K.C. for the appellant Léopold Masson. The will in question created a substitution by a joint disposition to co-legatees, directing that the same be reversible from the testator's children to their children respectively, and substituted from descendants to descendants, and this indefinitely or as far as allowed by law. This means, under art. 932 C.C. and in conformity with the jurisprudence anterior to the Code, that the children of the testator are the first institutes, the grandchildren the second institutes, and the great-grandchildren the final substitutes. *Mitchell* v. *Moreau*(1). The testator bequeathed his estate to trustees, and disposed of it by joint disposition in the manner and form indicated by art. 868 C.C. which gives rise to accretion in favour of co-legatees in the event of one of them dying without issue, thus permitting the testator's estate to reach his great-grandchildren. By art. 868 C.C. accretion takes place in favour of the legatees in the case of lapsed legacies, when such legacies are made in favour of several persons jointly, and by art. 901 C.C. every testamentary disposition made under a condition which depends on an uncertain event lapses if the legatee die before the fulfilment of the condition. The nature and the terms of the will constituted a legacy of the universality of

(1) 13 R.L. 684.

his estate, with substitution to several jointly,—to his surviving children by one and the same disposition,— without assigning the share of each co-legatee in the thing bequeathed, but only indicating equal aliquot shares in the thing bequeathed, and, consequently, the share of which Louis Masson, deceased without issue, received one-half of the revenue passed by accretion to the bulk of the estate for the benefit of the other co-legatees, as if he, Louis Masson, had never existed and the estate of Joseph Masson had originally been divided into 7 aliquot shares instead of 8. We refer to *Joseph* v. *Castonguay* (1), where Lafontaine C.J. and Aylwin, Duval, Meredith and Mondelet JJ. held, that the *usufruit* usually created by the same deed of donation accrued to the surviving usufructuaries. This is acknowledging the right of accretion when the legacy is created by one and the same disposition. See also *Denis* v. *Cloutier* (2); Coin-Delisle "Donations et Testaments," pp. 512, 516.

In counting the degrees of substitution, care must be taken not to adopt the mode indicated by the Ordinance of 1747, posterior to the establishment of the Superior Council of Quebec, which was not registered in the province, and never was in force therein. We must revert to the Ordinance of 1629, which, by article 124, declares:—

"Voulons que dorénavant que les degrés des dites substitutions et fidéicommis par toute Notre Royaume soient comptés par tête et non par souches et générations. C'est-à-dire chacun de ceux qui auront appréhendé et recueilli le dit fidéicommis fasse un degré, *sinon que plusieurs d'eux eussent succédé en concur-*

(1) 3 L.C. Jur. 141; 8 L.C. Jur. 62.

(2) 14 Q.L.R. 115.

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rence comme une seule tête, auquel cas ne seront comptés que pour un seul degré."

This article 124 of the Ordinance of 1629 is the source of article 868 of our Civil Code, which decrees that there is accretion to the benefit of co-legatees in the case of lapsed legacies, when such legacies are made in favour of several persons jointly by one and the same disposition, and the testator has not assigned the share of each co-legatee in the thing bequeathed. Directions given to divide the thing jointly disposed of into equal aliquot shares do not prevent accretion from taking place. In other words it is repeating the exception contained in article 124 of the Ordinance and expressed by the words, "Sinon que plusieurs d'eux eussent succédé en concurrence comme une seule tête, auquel cas ne seront comptés, que pour un seul degré." Our article 868 is not new law. Our Code is declaratory of what the law was in the Province of Quebec before its promulgation. See Bourjon (2 ed., 1770), Questions de Droits, 293.

The Ordinance of 1747, which was never in force in the Province of Quebec, provides a different mode of counting the degrees. The Chancellor d'Aguesseau is of opinion that the exception of article 124 of the Ordinance of 1629 expressed by the words, "Sinon que plusieurs d'eux succédé en concurrence comme une seule tête," is in compliance with the ancient law of the Custom of Paris. In the questions by him submitted to the courts and parliaments, preparatory to the Ordinance of 1747, is the following:—

"10ième question: "Si ceux qui sont appelés conjointment à une substitution doivent être comptés

pour un seul degré ou pour plusieurs ?" *Jones* v. *Cuthbert*(1).

Le Procureur-Général de Paris répond:—

"Cette question toute unie n'en est pas une; en effet, si plusieurs appelés successivement forment plusieurs degrés, la même raison veut que plusieurs appelés conjointement ne forment qu'un degré; aussi, tous les auteurs, les parlements, l'Ordonnance de 1629, les arrêts de M. le Président de Lamoignon, tout se réunit pour cette décision.

"On pourrait, peut-être, pour lever toute l'équivoque, ajouter le mot *concurremment* qui se trouve dans l'article 44 de ces arrêtes; on pourrait même y ajouter pour lever encore un autre doute, ce que le parlement d'Aix a ajouté, soit que les substitués acquièrent de leur chef, ou caducité, ou par accroissement, quoique on croie ces expressions surabondantes."

Pothier teaches that, notwithstanding the Ordinance of 1747, accretion takes place in the case of joint disposition (Traités des Donations et Testaments, No. 342, Bibliothèque du Code C. de Lorimier, vol. 7, p. 46, on article 868).

In *Page* v. *McLennan*(2), there was assignation of shares, and accretion could not take place; it was so likewise in *McDonald* v. *Dodd*(3). In *Perrault* v. *Masson*(4), Pagnuelo J. has erred in counting the degrees and his opinion is *obiter*. We refer to *Taschereau* v. *Masson*(5) for the learned discussion by Loranger J., and the authorities cited by him. See also *Prévost* v. *Lamarche*(6); *De Hertel* v. *Goddard*

(1) M.L.R. 2 Q.B. 44, at p. 55.
(2) Q.R. 7 S.C. 368.
(3) 30 L.C. Jur. 69.
(4) Q.R. 15 S.C. 166.
(5) M.L.R. 7 S.C. 207.
(6) 38 Can. S.C.R. 1; [1908] A.C. 541.

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(1), affirmed by the Privy Council(2); *Fraser* v. *Fraser*(3).

As to the case of Léon Masson, great-grandchild of the testator, representing his father Léon Masson, who pre-deceased Rodrigue Masson, we refer to art. 937 C.C.; in substitutions representation exists when the testator has bequeathed his property in the order of legitimate successions, or his intention to that effect is otherwise manifest. Art. 980 C.C. enacts that when the terms, "children" or "grandchildren" are made use of, without qualification, they apply to all the descendants. Articles 937 and 980 of the Civil Code do not contradict each other. The rule that in substitution there is no representation does not apply where the institutes are designated by a term thus interpreted by art. 980 C.C. This confirms the contention that Léon Masson, great-grandchild of the testator comes to the estate as second substitute in the place of his father, Léon, at the death of Rodrigue Masson. *Marcotte* v. *Noël*(4), *per* Meredith, Stuart and Casault JJ.

Bastien K.C. for the appellants Henri Masson, and others. The executors and trustees, under the will, have not only the seizin provided by art. 918 of the Civil Code, but also the seizin decreed by article 981*b* in favour of trustees. They have the powers of trustees and administrators, they are vested with the seizin of all the property, without reserve or exception, they can revendicate the possession thereof even against the legatees, and the powers given them allow

(1) Q.R. 8 S.C. 72.
(2) 66 L.J.P.C. 90.
(3) Q.R. 16 K.B 304
(4) 6 Q.L.R. 245.

them, without the intervention of the legatees, to manage the property entrusted to them in the most ample manner possible, and they can claim application of the dispositions of articles 981*b*, 981*j*, and 981*k* of the Civil Code.

According to the terms of the will the partition directed was to determine the property from which revenues were to be received by the substitutes in the first degree. In the partition actually made, the estate was divided into eight equal parts, and the sub-partitions, to be subsequently made were, in the same manner, definitely to determine what property was to be enjoyed by the substitutes in the second degree. As the children of the testator received only a moiety of the revenues, upon their death, the property was transmitted, through the testamentary executors, by a partition which was the necessary consequence of the transmission. Why should the testator order partitions upon each of such transmissions if the first partition was not of a permanent character, and why partition property which is not to be transmitted in full ownership to those finally called to receive it ? The will, in speaking of the partition with which we are concerned, reveals the intention of the testator with regard to the successive partitions. The share assigned to each child attributes to such child a moiety of its revenues, and the whole revenue to the grandchildren and remoter descendants of the testator. This partition prevented indivision both as regards the revenues and as regards the capital of the estate. The legatees did not have to submit to a partition, but accepted that ordered by the testator, in such a way as to divide the revenues of his property between all his children and all his descendants. But

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it does not follow that the late Louis Masson became absolute owner of the share of which he had a moiety of the revenues, and, even had he become the owner thereof, it was only subject to a resolutory condition.

Testamentary executors are what Thevenot d'Essaule calls charged administrators simply, who do not take the property if the legacy fails through failing of legatees, but are simply ordered to deliver according to the wishes and intention of the testator. (Thevenot d'Essaule, ed. Mathieu, 538, 539.) In the present case, the persons benefited are beyond doubt the children and descendants of the testator; and it is in an exclusive manner that the *de cujus* wished to transmit his property for the greater advantage of his children and descendants. By this will the testator created a trust. Rolland de Villargues, *vo.* "Fiducie." Trusts have been recognized and consecrated by the Civil Code in arts. 981*a et seq.* But this species of disposition, authorized by the Roman law, was recognized by and practiced under the ancient law, and was never prohibited by the Civil Code. See Merlin, Répertoire, *vo.* "Fiduciaire héritier." Even to-day trusts may be constituted, although article 896 of the Code Napoléon, again prohibiting substitutions, declares null any disposition by which the donor, the instituted heir, or the legatee, is ordered to deliver to a third party. The same must *a fortiori* be true under a system of law which recognizes substitutions and favours them. Whether or not the will creates a simple trust is always a question of interpreting the wish of the testator. In *Re Réné Masson* Mr. Justice Jetté (28th of June, 1889) found in the testamentary dispositions now in issue all the elements of a trust:—

"Considering that this disposition creates an actual trust limited by the testator to the degrees permitted in substitutions, that is to say, two degrees beyond the person first called, in conformity with the Ordinance de Moulins in force in this country before the promulgation of the Civil Code, article 869 of which is a reproduction of the said Ordinance in that respect, and that, in consequence, the property so entrusted by the testator to his fiduciary legatees could not be delivered in whole or in part to any other than to those actually called to possess them in full ownership;—Considering, moreover, that even supposing that the will of the said Joseph Masson created only a simple substitution, it results from that that the intention of the testator, in any event, was that the property of which he died possessed, as well as that purchased with the accumulating moiety of the revenues thereof, would be transmitted *to his great-grandchildren,* and to bequeath to his children only one-half of the revenues." See art. 981*a* C.C.

Considering the dispositions of the will, the ample powers conferred on the testamentary executors, and the lapse of time intervening between the death of the testator and the first delivery of the *revenues* to the children appointed to receive them, we find all the elements of a trust as defined by the Code and the jurists. The estate is transmitted, without reserve or exception, to the executors as trustees for the benefit of the children, for the greater advantage of the children and descendants, and in favour of the said children to whom the testator could validly bequeath his property. In *Freligh* v. *Seymour*(1), it was held

(1) 5 L.C.R. 492.

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that a fiduciary bequest was valid in Lower Canada, and the dispositions concerning trusts, reproducing the old law, apply to the executors in this case, because they have received from the testator wider powers than are usually conferred upon testamentary executors. Arts. 921, 964 C.C.

Can the will be interpreted as containing a mutual trust, or an accretion ? The trust may be mutual or reciprocal when two persons are mutually charged, each in favour of the other. According to the Roman law, this species of trust might be conjectured; nevertheless the authors, without other rules than the Roman law to follow, have taught that a reciprocal trust could not be admitted without necessary proof. Thevenot d'Essaule, Nos. 408, 409, 413. Under our law substitution cannot be assumed, and conjectural substitutions are abolished. Article 937 C.C. lays down that representation does not take place in substitutions, unless the testator has ordered that the property shall devolve in the order of legitimate successions, or his intention to that effect be otherwise manifested.

Article 868 C.C. provides for accretion in favour of legatees, in the event of any part of the bequest failing, where the whole bequest is made to several persons jointly. This disposition is based upon the presumed intention of the testator. If the late Louis Masson did not take the legacy in the sense of this article, and if, his right being limited to the reception of the one-half the revenues of his share, his decease without issue rendered the bequest to him void, the property from which he derived his revenue did not thereby escape the operation of the trust. But the rules mentioned in art. 868 may nevertheless be ap-

plied by analogy, even when the legatees have come into the property. The testator could manifest his intention of providing for accretion, even when the legatee has come into the property. The indication of sharing share and share alike in the partition of the thing bequeathed by a joint disposition does not prevent accretion, and this axiom may guide us where it is evident, under the terms of the will, that the testator wished to stipulate accretion, even when his legatees have taken the succession in the legal sense.

In *Denis* v. *Cloutier* (1) it was held that, over and above the accretion provided for by articles 868 *et seq.* C.C., there may be accretion, if the testator so intended. See *Taschereau* v. *Masson* (2); 4 Marcadé, 141, No. IV. of art. 1044; 14 Laurent 300; Coin-Delisle, "Donations and Wills," page 512, No. 3 and page 516.

The joinder of issue is confined to the question whether the share of which the late Louis Masson enjoyed one-half the revenues should come to the descendants of the testator by way of accretion or substitution. If he had had issue, the revenues of his share would have been transmitted to his children, there would have been a transmission of property to them. But he had no issue and, therefore, his share must be partitioned among the descendants of the testator.

Must the share of Louis Masson be taken and divided into seven equal and distinct shares to add each of these subdivisions to the other shares; in other words, must share No. 2 be made to disappear and be spread over the other shares, as if share No. 2 had never existed? Must each of the other

(1) 14 Q.L.R. 115. (2) M.L.R. 7 S.C. 207.

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shares be increased by the addition of a seventh of share No. 2 in order that this share may be taken by the descendants of the testator called to come into the other shares? Is there an obligation, even under the terms of the will, of merging the shares? Does not the transmission of share No. 2 to the descendants of the testator take place irrespective of the other shares forming part of the estate? Do not the descendants of the testator, being jointly called by the will to take the succession or transmission of share No. 2, of which Louis Masson was the legatee in so far as one-half the revenues were concerned, constitute a degree, each for the share he is to take, charged with the obligation of re-delivering it to their posterity, since they are to receive only the revenues thereof? If the possibility of adding to the share of each of the legatees one-seventh of share No. 2, by way of accretion, as if the late Louis Masson had never existed and as if that share had always formed part of the other shares, what would be the result? In each of the shares, the accretion will reach the great-grandchildren in the same manner as the original share.

In order to hand down the whole estate to the great-grandchildren it is absolutely necessary to admit that, at the death of the late Louis Masson without issue, his share was transmitted by way of accretion to the testator's descendants, just as if Louis Masson had never lived, and as if the succession of the Honourable Joseph Masson had been originally divided into seven equal shares. By the terms of art. 625 C.C. the children or their descendants succeed equally and by heads when they are in the same degree and called personally, and they succeed *par souche* when some or

all of them are called by way of representation. Why should not a co-legatee have his share increased by a certain part of the estate, and why should the children of a co-legatee pre-deceased not come in lieu of the said pre-deceased legatee by right of representation, if the testator so wished, to give effect to his intention, which is that the estate should be handed down to his great-grandchildren ?

In the matter of accretion, it is a constant and well recognized rule that accretion is from share to share. *"Quoniam portio * * * veluti alluvio, portioni adcrescit."* (Papinian.) See, also, Demolombe, No. 390. By adopting the theory of accretion, which seems ordered by the testator in the most formal manner, and which necessarily results from the dispositions of the will, all the administration of the estate becomes well ordered. The intention of the *de cujus* is carried out, his wishes are respected, and the desire of transmitting all his estate without exception or reserve, as far as possible, to his posterity and for the greater advantage of his children and descendants is given effect. In this manner the estate is given definitely to the great-grandchildren in each share, increased by the accretion of shares which fail of their object, without violating the rule which prohibits substitutions taking place more than two degrees beyond the instituted legatee, and nevertheless carrying out to the full the instructions of the testator.

Otherwise an attempt is made to make definitive and final owners, of the property left by Louis Masson, the children of Madame Bossange, Madame Douvreleur, Roderick and John Masson, who are only the grandchildren of the testator, and to exclude from the ownership the only great-grandchildren of the tes-

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tator, the descendants of Henri Masson, issue of the marriage of Dr. Harwood with the late Marie Masson, who had survived her co-legatee Joseph Henri Masson, and took in the second degree the share of the latter in the estate of the late Louis Masson, seeing that the will of the said late Marie Masson instituted her consort universal legatee of her property, while in the share attributed to the late Honourable Edouard Masson, the children of Joseph Edouard Masson, who are the great-grandchildren of the testator, would be only called in the first degree to the share accruing them in the property left by Louis Masson. The only great-grandchildren to come into their share as such in the property left by Louis Masson would be the children of Wilfred Masson and Edouard Masson, sons of Réné Masson.

This latter supposed condition of affairs, as may readily be seen, if legally correct, would, nevertheless, be contrary to the general dispositions of the will. The theory of accretion is surer, more natural, more equitable between the legatees, and especially in greater conformity with the intention of the testator. *Eadem vis est taciti atque expressi.*

It is better to admit this theory of accretion, which seems just, more in conformity with intention of the testator, and which allows the disposition made by him of his property to subsist in its entirety, giving his children one-half of the revenues, to his grandchildren the whole of the revenues, and the ownership to his great-grandchildren.

Mignault K.C. for the respondents. The case is based on the legal proposition that on the death of Louis Masson, there was accretion of his share in

favour of the mass of the estate just as if Louis Masson never had existed. The respondents submit that this share passed by transmission to the other descendants of the testator by roots, such transmission counting as a degree of substitution. All parties admit that the will created a substitution, in favour of the children of the testator and their descendants, extending as far as allowed by law. Therefore, it is contended that there was accretion. The respondents submit that such accretion was juridically impossible, and that the only conclusion that can be adopted is that Louis Masson's share was transmitted, this transmission exhausting one degree of the substitution.

The only article of the Civil Code which treats of accretion is 868. It may be compared with arts. 1044 and 1045 of the French Code. Are these provisions in conformity with the law as it existed before the Code? The will was made and the testator died before the codification of our civil laws. None of the articles of our Civil Code define accretion. Let us define accretion by giving an example. Thus, A. bequeaths his house jointly to B. and to C. Each legatee receives a title to the whole house, but as they are two, if both accept the legacy, they will have to divide the house: *concursu partes fiant.* But if B. dies before the testator, or if he refuses the legacy, there is no conflict of title, and C. whose title extends to the whole house takes it in its entirety. It is in this sense that it is said that accretion takes place from B. to C. The authors observe that instead of the word *"accroissement"* it would be more apt to say that there is *"non-décroissement."* What characterizes *accretion* and distinguishes it from *transmission,* is that C. receives nothing from B. or

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through B. His title to the whole house exists in the will. The pre-decease of B., or his refusal to accept the legacy, rids him of a competitor and that is all.

But few authors have attempted to define *accretion,* and it really seems unnecessary to do so for its nature and effects are well known and are clearly shewn by the example given above. Reference, however, may be had to the definitions given by Fuzier-Herman, *vo.* "Accroissement," No. 1; Pandectes Françaises and Ferrière, "Dictionnaire de droit, eodem verbo." Pothier, vol. 8 (Bugnet) "donations testamenaires," No. 340, thus indicates the nature of the right of accretion: "Les colégataires d'une même chose, ou d'une même somme, sont légataires du total de la chose, ou de la somme léguée, ce n'est que par leur concours que la chose léguée, quoique léguée à chacun d'eux en total, ne pouvant pas néanmoins appartenir à chacun d'eux pour le total, *cum duo pluresve unius rei in solidum domini esse non possint,* se partage entre eux.

"De là il suit que, *si quelqu'un des colégataires ne recueille pas le legs,* soit par son prédécès, soit par son incapacité, soit parce qu'il lui plait de le répudier, la part qu'il aurait eue dans dans cette chose doit accroître à ses colégataires *jure accrescendi,* ou plutôt, *jure non decrescendi:* car chacun des colégataires, étant légataire du total de la chose léguée, n'y ayant que le concours de deux ou plusieurs légataires qui la partagent entre eux, lorsque l'un d'eux ne concourt pas, le total demeure de plein droit à l'autre."

In order that accretion may be said to exist, it is necessary that one or more of the legatees fail to take the legacy. Once they are vested, accretion is abso-

lutely impossible. This is well shewn by the last paragraph of art. 868 C.C., which says that the right to accretion applies to gifts *inter vivos* made in favour of several persons jointly, *when some of the donees do not accept.* A legacy cannot be said to have lapsed when all the legatees have accepted it as in the present case. See also Coin-Delisle, "Donations et Testaments," on art. 1044 C.N., No. 9. Even where a testator directs that if one of his legatees die without children, after having been vested with the legacy, his share shall accrue to the other legatees, the authors say that this is not accretion, but a transmission creating a substitution. See Demolombe, vol. 18, No. 113: Dalloz, Rép. *vo.* "Substitution." No. 220 *et seq.*; Fuzier-Herman, Rép. *vo.* "Substitution" No. 279; Baudry-Lacantinerie "Donation et Testaments" Nos. 3152, 3153, 3154.

The lapsing of the provision in favour of the substitute in a substitution (*i.e.* of *la charge de rendre*), can never give rise to accretion. The only question then is to ascertain to whom the property devolves, since there are no substitutes who can take it. If we find in the will expressions which shew that the testator intended that the property should remain in his family notwithstanding the death of one of his legatees, as in the present instance, the property will not go out of the estate of the testator to form part of the estate of the institute, but will be transmitted to the other descendants of the testator, and this without effacing the person of the institute, who will be considered as a first degree of the substitution with respect to the testator's other descendants as he would have been a first degree as to his own children. This is the only way to prevent the property from falling

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into the estate of the institute, thus defeating the substitution, accretion being impossible.

Mr. Justice Charbonneau seems to have confounded two essentially different things, *accretion* (art. 868 C.C.) and the *right of return* (art. 779 C.C.), for the species of accretion to which he refers, an accretion which would bring back to the general mass property which had been taken out of it, and this from the death of the legatee who had received the property, would be nothing else than a right of return or of taking back, rather than a substitution. When the right of return is stipulated, the thing received by the donee returns to the donor or to the persons indicated by him. In the case of a substitution, the thing passes from the donee or institute who had received it to the persons who are to take it after him. Any right, whether it be termed a right of return, a substitution, or even (but incorrectly) an accretion, whereby the thing passes from the beneficiary to a person other than the donor, or from the legatee to the general mass of the estate, is nothing else than a substitution. (See Demolombe, vol. 18, Nos. 110 and 111).

Moreover, real accretion differs essentially from the right of return or of substitution. The former exists by virtue of a legal presumption and without an express stipulation, provided, of course, that the required conditions exist; the latter must be stipulated. The first supposes that the donee or legatee has not been seized of the thing given; the second requires a vesting in the donee or legatee, since the thing *comes* or *returns* from him. Accretion confers no right, it merely prevents a right already given from being diminished or shared by another; the right of return, on the contrary, when it operates in favour

of the donor's heirs, and the right of substitution are attributive of right, and although this right comes from the donor it is transmitted through the person of the first beneficiary, *obliquo modo.*

We find a conclusive answer in the judgment of the Superior Court. Since Louis Masson's share *returns* to the general mass, since it *returns* to the seven other branches of the estate, and *from the day of the death of Louis Masson,* it follows that there is a transmission from Louis Masson, who had been seized, to the general mass, and this is precisely the effect of a substitution, so that we find that accretion as defined by the judgment is really a transmission by means of substitution. It seems more in accordance with the testator's intention to conclude that this substitution exists than to imagine a return to the general mass which would have the strange effect of placing properties, which were at the first degree in the person of Louis Masson, in the same degree in the case of Rodrigue Masson, and in the third and final degree in the person of the plaintiff.

Another condition of the right of accretion is that the legacy be made jointly to several legatees. There is no joint legacy here. According to the direction of the testator, the executors made a partition, on the 11th April, 1848, forming eight shares which they attributed to the eight children, and plaintiff alleges that this partition is final. The result is that there was, not a legacy of the whole estate to the children jointly, as held by the Superior Court, but a legacy to each child of a separate and specific portion of the estate which the testator ordered to be set aside and separated from the other shares immediately after his death. In other

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words, there was not, in favour of each legatee, a bequest of the whole estate, which would be essential to give rise to accretion, but a bequest of certain determinate property, which was to be set aside by the partition ordered by the will. Moreover the direction to divide the estate into equal shares is not made in order to carry out a joint legacy, but it bears on the title itself of the legatees, who receive nothing more than certain specific properties, and this also excludes any possibility of accretion. There is no joint legacy nor universal legatees in Mr. Masson's will. On the contrary, the legacy to each legatee is only of certain properties to be set aside by the partition, that is to say a legacy by particular title; or, at the most, a legacy of an aliquot share, or a legacy by general title, and in either case there can be no accretion from one legatee to another. See Dalloz, 1880, 1, 339, and especially the reporter's note. We may add that Mr. Masson expressly excludes any possibility of accretion by pre-decease, for he bequeaths his estate only to such of his children *as survive him.*

The distinction between a universal legacy and a legacy by general title is shewn in a note to Sirey, 1882, 1, 176. It seems clear to us that Mr. Masson intended to definitely limit each legatee (and his descendants) to the property assigned to him by the partition.

There are several conclusive answers to the contention based on the words of art. 868 C.C., "directions given to divide the thing *jointly disposed of* into equal aliquot shares, do not prevent accretion from taking place." In the first place the estate is not *jointly disposed of.* The will was made and the testator died before the Civil Code came into force

and the question as to the existence or non-existence of accretion will have to be determined according to the law then in force, for it is held that articles 1044 and 1045 of the Code Napoléon and, consequently, our own art. 868, changed the old law. See Baudry-Lacantinerie, "Donations et Testatments," vol. 2, Nos. 2, 904 *et seq.;* Demolombe, vol. 22, No. 366.

According to the old law, it is clear that no question of accretion can arise even if the contrary could be contended under art. 868 C.C. See Pothier, ed. Bugnet, vol. 8, "Donations Testamentaires," No. 349; Bourjon, cited by the codifiers under art. 868 C.C. (see DeLorimier, "Bibliothèque du Code Civil," vol. 7, p. 61); Domat (ed. Rémy), vol. 2, p. 609.

It follows, whatever construction may be given to article 868 C.C., that according to the law in force at the time of the will, no question of accretion can arise.

As to the contention by Henri Masson *et al.,* the executors of the Masson estate, that Mr. Masson left to his children and descendants nothing but the revenues of his estate, and that he bequeathed the property to his executors and trustees who alone are seized thereof, it is to be remarked that the words *"je donne et légue"* are used only in the clause concerning the executors. This construction of the will cannot be sustained. The testator, it is true, bequeathed his property to his executors, but only *"à titre de fidéicommis."* In other words, he named them as trustees of his estate, adding that he did so *"pour faciliter l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la réversion des revenus de mes biens à mes dits enfants et descendants."* The executors have undoubtedly *"la saisine de fait"* but they have not *"la saisine de droit."* Moreover, if on

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the one hand the children only receive a legacy of revenues, and if on the other hand the executors are not left the property itself as owners subject to the payment of the revenues, then the property or the title of ownership is left to no one. It is clear that the executors are not owners, they are seized merely as administrators, and in the event of the legacy lapsing as to the children, they could not claim the benefit thereof (art. 964 C.C.). This being the case, the only possible conclusion is that the ownership vested in the children subject to the substitution in favour of their children and grandchildren, for the ownership or the title can never remain in suspense.

It is immaterial that the children get only half of the revenues of their shares, for the testator could have left the naked ownership to them and the whole enjoyment or usufruct to another, and, in that case, there could be no doubt that they were vested with the ownership. What is important is that, unless it is admitted that the children received the ownership, subject to the substitution, then no other owner can be discovered. Consequently the construction which the executors put on the will would lead to an obvious absurdity, leaving, as it does, the ownership in suspense. It is immaterial that the executors have fiduciary powers, since it is certain, as found by all the courts, that the trust is merely an ancillary trust created by the testator to carry out the substitution of his property.

As to some decisions on which the appellants rely: In *Joseph* v. *Castonguay*(1), the head-note says: "*Accroissement* takes place in a donation of the usufruct

(1) 3 L.C. Jur. 141.

even by *acte entre vifs,* if such deed, by its disposition and by its clear expression, create a *substitution réciproque.*" But all that was really decided was that there was in the case a reciprocal substitution. The decision was reversed in appeal(1), and in the reversing judgment there is no mention of accretion.

In *McDonald* v. *Dodd*(2), the Court of Appeal declared that no accretion was possible where the testator had assigned to each legatee a share in the thing bequeathed.

In *Denis* v. *Cloutier*(3), the testator directed that, in the event of the death of one of his children without issue, the share of usufruct of the deceased should go to the survivors. The court gave effect to this clause, expressing the opinion that the testator could order accretion in other cases than those mentioned by the law.

Prévost v. *Lamarche*(4), was reversed by the Privy Council(5). The question of accretion was discussed by Mr. Justice Girouard, but the opinions of the other judges are not given. In the Privy Council this question was duly considered and it was held that there was nothing in the will which would justify the court in deciding that the testator intended that there should be accretion on the death of one of his children without issue. The Prévost will differs in essential points from the Masson will. In the former there was a real joint legacy; the grandchildren were expressly named universal legatees, and the immovables were to be transmitted to them *en nature.* In the Masson will the legacy is neither joint nor universal and the

(1) 8 L.C. Jur. 62.
(2) 30 L.C. Jur. 69.
(3) 14 Q.L.R. 115.
(4) 38 Can. S.C.R. 1.
(5) [1908] A.C. 541.

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property does not go *en nature* to the final substitutes. In each case, however, the partition between the children was final. This point is very important and was so considered by the Privy Council in the *Prévost Case*(1). The partition directed by the testator in order to separate forever the shares of his children was final. This partition produced with regard to Louis Masson and his brothers and sisters all the effect given by art. 746 C.C. The partition being final, property which fell into Louis Masson's lot, and which, by the presumption of article 746, must be held to have never belonged to his brothers and sisters, cannot pass to the latter otherwise than by transmission of the nature of a substitution.

On the death of Louis Masson without issue, the property which formed his share was transmitted by substitution to the other descendants of the testator; this transmission counting as a degree in the substitution as to the property so transmitted. Mr. Masson did not in express terms mention the case of one of his children dying without issue, but he says "Je veux et entends que *lors de chaque succession* ou transmission de mes biens, *il en soit fait partage,* autant que possible, *entre chacun de mes descendants.*" This clause follows the provision wherein the testator substitutes the share of his estate which he leaves to each of his children, from descendants to descendants, and this indefinitely or as far as the law allows. The clear intention of the testator, in case one of his children died without issue, was that the share of the child so dying should be transmitted to his other descendants, as he undoubtedly intended if the deceased left chil-

(1) [1908] A.C. 541.

dren that the latter should be substituted to him in the share so bequeathed. He desired that his estate should be transmitted to his remotest posterity and, because he did not mention the case, easily to be foreseen, of the death of one of his legatees without issue, can it be contended that he was willing that the share of this legatee should escape from the indefinite and perpetual substitution which he desired to establish? And there is no other alternative, accretion being juridically impossible. Since all parties admit that the testator desired to transmit his property to his remotest posterity, they must also admit that he intended that the share of a child dying without children should be transmitted to his other children. The only way in which it can be transmitted is by means of a substitution in favour of his other children. Such a substitution does not rest on suppositions or on conjectures, but it is clearly based on the intention of the testator. (Art. 928 C.C.). Therefore, the share of Louis Masson was transmitted to the descendants of the testator above named, and by virtue of this substitution, which transmission counts as a degree in the substitution. Pothier, vol. 8, "Substitution," No. 224.

At the time of Hon. Mr. Masson's death (1847) the jurisprudence of the Parliament of Paris was binding in Lower Canada, and it is important to remark that, in confirming this jurisprudence, the "Ordonnance des Substitutions," art. 34, title 1 (which was not registered here), merely expressed the law as it existed under the Custom of Paris.

See also Ricard, "Donations," vol. 2, pp. 420, 421 and 422, Nos. 826 and following, and the foot-note at page 422.

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Thevenot d'Essaule, "Substitutions" (ed. Mathieu) note on art. 34, tit. 1, of the Ordonnance, p. 441. This doctrine was followed in *Jones* v. *Cuthbert*(1).

Jones v. *Cuthbert*(1), was decisive as to the effect of art. 124 of the Ordonnance of 1629 (Code Michaud).

The Ordonnance of 1629 never was followed and has been held to have fallen into disuse. *Jones* v. *Cuthbert*(1); *Stewart* v. *Molsons Bank*(2), *per* Blanchet, J. We also cite: *Page* v. *McLennan*(3); *DeHertel* v. *Roe* (*DeHertel* v. *Godard*)(4). We may refer summarily to two judgments of the Superior Court construing the Masson will. *Taschereau* v. *Masson*(5), holds that the share of Louis Masson went to the general mass by accretion and also that the partition was not final. *Perrault* v. *Masson*(6) decides that the share of Joseph Henri Masson, who died without children, was taken by his sister Madame Harwood by transmission and not by accretion, this transmission counting as a degree of the substitution. These judgments were rendered on actions brought by certain interested parties. It is not claimed that they constitute *res judicata* and we submit that the second judgment is well founded.

In substitutions made by collective terms, to which the family or the descendants are called, it is presumed that the testator intended to call the one after the other, the nearest coming first, the proximity of degree being understood of those who are nearest to the institute who has last possessed. Thus, Louis Masson dying without issue, the testator's descendants who

(1) M.L.R. 2 Q.B. 44.
(2) Q.R. 4 Q.B. 11.
(3) Q.R. 7 S.C. 368.
(4) Q.R. 6 S.C. 101; Q.R. 8 S.C. 72; 66 L.J.P.C. 90.
(5) M.L.R. 7 S.C. 207.
(6) Q.R. 15 C.S. 166.

are nearest to Louis Masson are called to the substitution, the order of legitimate succession being followed. See Thevenot D'Essaule, "Substitutions," Nos. 364, 365, 366, 367, 941, 942, 943, 946, 952, 961, 964, 983, 985, 987, 988, 991, 994.

THE CHIEF JUSTICE.—This action is brought by the appellant, Léopold Masson, against the defendants as fiduciary legatees of the estate of his great-grandfather, the Honourable Joseph Masson. The plaintiff (appellant here) asks for the final partition of that share in the estate which had been assigned to his grand-uncle, Louis Masson, a son of the testator, under a clause in the will recited at length hereafter. I use the word "assigned" because of the very special language of that clause. The respondent, Mrs. Burroughs (Marguerite Masson), daughter of Rodrigue Masson and a granddaughter of the testator, raises another issue by asserting her right to an interest in the same share, on the ground that the will of her grandfather created a substitution in the collateral line of Louis Masson's share, to which substitution she claims to be a final substitute.

The question, therefore, is:—On a true construction of the language used, can we hold with the majority in the court of appeal that the testator created a substitution in the direct or collateral line in favour of his children and grandchildren? Or,—Did he vest his property in fiduciary legatees to be held by them in trust for his heirs as long as the law against perpetuities would permit? (Ordonnances des Substitutions, 1747). Which latter I understand to be the construction put upon the will by the trial judge.

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The facts are: The Honourable Joseph Masson died, in 1847, leaving eight children him surviving. At his death the legatees, as directed by his will, divided his estate into eight shares, and a ninth share was made up of assets of the estate which at the time it was considered difficult to apportion between the eight children. In 1893, this ninth share was, in part, distributed among the other shares; the balance, considerably increased, is still in a state of indivision.

Of the eight shares, No. 2 was assigned to the said Louis Masson, who died, in 1897, without issue and intestate with respect to any interest he might have in his father's estate. The question to be decided is what becomes of that share No. 2 and his (Louis Masson's) interest in the undivided portion of share No. 9. The plaintiff (appellant here) is, as I have already said, the great-grandson of the testator and the grand-nephew of Louis Masson. The *mise-en-cause,* Mrs. Burroughs (respondent here), is the grand-daughter of the testator and the niece of Louis Masson.

I agree in the conclusions reached by Archambeault J., now Chief Justice of the court of appeal, on the issue with Mrs. Burroughs, and would allow the appeal as to her, and dismiss her intervention. I would also allow the appeal on the issue with Léopold Masson; and maintain his action, the whole with costs against the estate.

As to the issue with the grand-daughter, Mrs. Burroughs, I accept the reasoning of the Chief Justice, as well as his conclusion that by his will the testator did not create a substitution in favour of his children and their children, and, in default of grandchildren, in favour of the brothers and sisters reciprocally.

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To succeed, it was necessary for Mrs. Burroughs to establish not only that by his will her grandfather created a substitution in favour of each of his children of a share in his estate, but also that in the case of a child dying without issue that child's share should accrue to his brothers and sisters, children of the testator, as first substitutes. For the reasons given by the Chief Justice of the court of appeal, and to which I can find little useful to add, I have come to the conclusion that the testator did not create a substitution of his estate either direct or collateral. There is no vesting of his property in his children or any of them. There is nowhere in the will to be found the *double libéralité* which is of the essence of a substitution. Dalloz, 1902, 2, 281. Occasionally the word *substitution* is used by the testator, but merely to describe the disposition which he makes of his property. Further, there is nowhere a word which even suggests a substitution in the collateral line. I mean to say that nowhere in the will do I find words which manifest an intention on the part of the testator to give a share of his estate absolutely to one of his children, and, failing issue to that child, then to his or her brothers and sisters. Where in the will *substitution* is mentioned it is in the direct line, from descendants to descendants, and nowhere is reference made to collaterals. It is said that this was an omission on the part of the testator who has otherwise made his intention clear in that he frequently expresses a desire to keep his property intact in his family. But, as has been very lucidly explained by the Chief Justice in the court below, effect may be given to that manifest intention without putting a strained meaning upon the language of the will and inserting in it words which the testator did not use.

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On the main issue, between Léopold Masson and the respondents, fiduciary legatees, I will state my position briefly. Léopold Masson must succeed. In my opinion, Louis Masson, his grand-uncle, took no share, either as institute or otherwise, in his father's estate, except with respect to the revenues as I shall explain hereafter, and, therefore, the appellant takes nothing by or through him. That share in the estate, a portion of the revenues of which Louis Masson, the deceased, enjoyed during his lifetime, remains in the hands of the fiduciary legatees undisposed of, as is the case with share No. 9; and, as the appellant, Léopold Masson, is entitled to the share assigned to his grandfather, so is he, for the same reason, and by virtue of the same title, justified in his demand that the estate of his great-grandfather be disposed of, with respect to him, as if there were originally seven shares instead of eight.

I quite agree that the intention of the testator, clearly expressed, is, to keep his estate in his family indefinitely, or as long as the law would permit, allowing it to increase by the accumulation of all the revenues during the first ten years after his death. At the expiration of that period half of the revenues was to be put to capital account during the lifetime of his children.

In many places in the will, it is also said that none of the testator's children are to have any share or voice in the control or management of his estate, except in so far as they may in time prove qualified for appointment as one of his fiduciary legatees.

Such being his admitted intention, what were the means which, in the then state of the law, the testator could adopt to give effect to it? He might have

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created a fiduciary substitution in favour of his children, or their children and of their grandchildren; beyond that limit he could not go. If this method was adopted, then, in the event of the death of a child or grandchild, without issue, the substitution would be at an end and the share of that child or grandchild might be disposed of to a third party and never reach any of the great grandchildren of the *de cujus*. (Thevenot d'Essaule, (ed. Mathieu,) notes at pp. 164 and 161.) It was, of course, as is argued here, in the power of the testator to provide in that case for a collateral or reciprocal substitution in favour of the brothers and sisters of the child dying without issue, but then the property would not reach the great-grandchildren because there could not be more than three degrees in a substitution and that event happens in the case of Mrs. Burroughs, if the judgment of the court below is affirmed. On the other hand, the Quebec law says that a testator may name legatees who shall be merely fiduciary, or simply trustees for charitable or other lawful purposes within the limit prescribed by law, and by taking advantage of that provision it was open to the testator to vest his estate in the appellants, (fiduciary legatees,) who are merely heirs for a special purpose, and to charge them, as mere trustees, to administer his property and to employ it, or deliver it, in accordance with his will. And that is what, in my opinion, the testator has done. He has by the very simple device of disposing of his estate in favour of his fiduciary legatees and by importing into his will the analogy of a substitution, left it in such a way that it must reach at least as far as his great-grandchildren (although in so doing he has provided apparently abundant material for litigation).

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That this result has been accomplished is to me clear. Louis Masson, the deceased, was merely a creditor of the fiduciary legatees for a share in the revenues of his father's estate and had no share in the property of the estate, either as institute or otherwise. The language of the will makes this abundantly clear. After making provision for his children and their descendants out of the revenues of his estate, the testator says:—

> Pour faciliter l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la *réversion des revenus de mes biens* à mes dits enfants et descendants suivant mes desirs ci-dessus exprimés, je choisis et nomme pour mes exécuteurs testamentaires et fidéi-commissaires, Joseph Bourret, etc.

Then, after having provided for the appointment of their successors, he proceeds to say in the following paragraph:—

> Auxquels dits fidécommissaires, remplaçants ou successeurs *je donne et lègue, à titre fidéi-commis*, tous mes dits biens meubles et immeubles, propres, etc., etc.,

that is to say, the universality of his estate. By those words, the whole estate of the deceased — the universality in capital and revenue — was vested in the fiduciary legatees, as such, to administer and hold indefinitely, or as long as the law will permit; so that, on the death of the testator, they were seized alone of the property, rights and actions of the deceased. Mr. Mignault's contention at the argument here was that, by reason of the division which the fiduciary legatees are directed by the testator to make, each child became entitled, as the institute to a substitution, to that share in the estate which was then assigned to him. In other words, according to this argument, the effect of that partition would be to create a substitution with respect to each share of the estate. I can find no

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words in the will to justify such a conclusion. To create a fiduciary substitution is to vest a title in the institute who holds the property as proprietor. Where is the provision in the will which enables the legatees to part with any share in the capital of the estate for any such purposes ? When speaking of the partition of the estate, here are the words which the testator uses:—

Et quant aux biens meubles, etc. * * * je veux et entends qu'il en soit fait autant de parts égales que j'aurai d'enfants au temps de mon décès nés de mon mariage avec ma dite épouse, *pour chacune de ces parts ou portions de mes biens représenter les biens mobiliers et immobilies dont chacun de mes dits enfants aura seulement la moitié des revenus, sa vie durant.*

How can it be said that a partition of the estate, made for a purpose so clearly expressed in the underlined words, could be construed as divesting the legatees, or vesting the children ? Moreover, it is to be observed that, after having disposed of his estate in favour of the legatees, the testator proceeds to say what is to be done with the revenues after this division. I quote his words:—

Je veux et entends qu'après dix ans du jour de mon décès, il soit fait *délivrance* tous les ans, à mes dits enfants, alors majeurs, et à ceux qui seront mineurs, à compter de leur majorité, et ce, leur vie durant, de moitié des revenus, rentes, loyers et intérêts (toutes dépenses préalablement déduites) de tous les biens mobiliers et immobiliers qui, composeront le lot de chacun d'eux, mes dits enfants, d'après le partage qui aura été fait de mes biens en autant de parts égales que j'aurai d'enfants lors de mon décès, ainsi que ci-dessus pourvus, et aussi de moitié des revenus, loyers et intérêts (aussi toutes dépenses préalablement déduites) de tous les biens mobiliers et immobiliers qui, auront été acquis par mes dits fidéi-commissaires, remplaçants ou successeurs, avec les revenus, rentes, loyers et intérêts annuels qui auront été retirés et employés par eux pendant les dix ans du jour de mon décès et de ceux qui seront acquis du vivant de mes dits enfants par eux, les dits fidéi-commissaires, remplaçants ou successeurs, avec l'autre moitié des revenus, rentes, loyers et intérêts annuels des biens de ma dite succession et qui doivent rester à la

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disposition de ces derniers, pour en être fait emploi ainsi que susdit, *pourvu et à condition toutefois que la moitié des dits revenus*, rentes, loyers et intérêts dont délivrance doive être faites à mes dits enfants comme susdit, *ne donnent pas moins de cinq cents livres*, cours actuels, à chacun d'eux, mes dits enfants, par chaque année.

This disposition clearly contemplates acquisition of property and additions to the estate, subsequent to the partition, and also creates an obligation on the trustees in favour of the children, each of whom is entitled to receive out of the revenues of the estate at least £500 currency. That is to say, each child at the expiration of the lean period of ten years is a creditor of the estate for at least £500, whatever may be the revenues, and although a partition may have been made in the meantime. They have no title in the estate, nor have they any claim to any partition of the revenues, but they are creditors to the extent of their annual allowance, which must be taken out of capital if the revenues are insufficient. This is wholly inconsistent with the idea of a final division of the estate. Read with all the other clauses of the will, I fail to see how it can be successfully argued that this partition is final, or intended for any other purpose of the will, I fail to see how it can be successfully argued that this partition is final or intended for any other purpose than to give the children a sentimental interest in the estate of their father, which was being administered for them and their children by strangers. Their claim to a share of the revenues was only for life and, as I have already said, they and their descendants had no share in the management, except as possible members of the board of legatees. The will is explicit as to this. After providing for the appointment of new legatees in cases of vacancy caused by death or resignation, the testator says

pourvu et à condition que ceux de mes enfants et descendants mâles qui seront jugés être capables, qualifiés et compétents à remplir cette charge y soient choisis et nommés de préférence à toutes autres personnes.

This is one of the many provisions which one does not expect to find in a will creating a substitution.

It is quite true that the word substitution is used in many places in the will, but the rule is that:—

In general, the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words in order to determine whether there is substitution or not. Art. 928 C.C.

In his comment on art. 964 C.C., Sir François Langelier gives very clearly the distinction between substitution and fiduciary legateeship. He says:—

Pour qu'il y ait une vraie substitution, il faut donc que les biens *soient donnés en propriété* à quelqu'un pour lui-même, avec charge de les restituer à un autre, et il n'y a pas de substitution lorsqu'il est évident que le testateur n'a pas légué les biens à son légataire pour celui-ci, mais ne s'est servi de lui que comme d'un instrument, ou d'un intermédiaire, pour faire parvenir ces biens à une autre personne.

On the whole, I am of the opinion that the share of Louis Masson is to be distributed among the children of the testator and their descendants in the same way and subject to the same conditions as if Louis Masson had pre-deceased the testator and the estate of the latter had been divided originally in seven instead of eight shares, the ninth share having been made for a special purpose. To make my meaning clear, I hold that the share of Louis Masson goes to increase share No. 9, so as to be dealt with by the fiduciary legatees in the same way, that is as if no disposition had been made of it by them or, to repeat myself, as if there never had been a share No. 2, and that all it contained formed part of share No. 9.

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By adopting practically the same construction of the will as the Chief Justice in the court below, I reach a different conclusion because he deals with the share in question as if it was really substituted, in which case the appellant's father and grandfather having pre-deceased the institute, Louis Masson, he, the appellant, would only be the second degree in the substitution; and the property might be substituted to the fourth or fifth generation. Whereas, on my construction, there never was a substitution and the share must be dealt with on the assumption that the testator intended his property to vest in his fiduciary legatees under an obligation on their part to hand it over to his descendants when they would be entitled to receive it, if by his will he had created a substitution. In this way, the property reaches the third generation, but does not go beyond, and the law against perpetuities is not defeated.

DAVIES J.—The questions to be determined upon this appeal depend entirely upon the proper construction of the will of the late Honourable Joseph Masson, made in 1847.

I agree with Chief Justice Fitzpatrick that, by his will,

> the testator did not create any substitution in favour of his children and their children, and failing the latter, in favour of the brothers and sisters reciprocally.

There is not a word in the will from beginning to end suggesting a substitution in the collateral line. Where in the will substitution is mentioned, it is in the direct line from descendants to descendants. Nowhere is reference made to collaterals.

A great deal of argument was addressed to us as to

the intention of the testator to keep his property in his family, but, while that intention is clearly expressed so far as direct descendants of each of his children exist, I have not been able to find a word shewing any intention on the part of the testator, in the event of there being a failure of descendants of any one of his children, to deal with the share of the child so dying in any way.

My construction, therefore, of the will is that whenever any child of the testator died without leaving issue, the share of that child lapsed, and as to it there was an intestacy.

When, therefore, the late Louis Masson died without leaving any issue, his share of the estate remained vested in the trustees for the benefit of, and to be distributed amongst the heirs of the testator living at the time of Louis Masson's death.

The simple fact is, as I construe the will, that the testator made no provision whatever for the share allotted to any one of his children in the event of such child dying without issue. That there was no collateral substitution seems to be the opinion of the majority of this court, and I cannot escape from the conclusion that in such case, where special and elaborate provision is made by the will for the enjoyment by each of the children of the testator during his or her lifetime, and by such child's issue afterwards, "indefinitely or as far as allowed by law," and no provision whatever is made for the contingency of a child dying without issue, if and when such a contingency happens, there arises an intestacy as regards such share.

In the case before us such a contingency has occurred; Louis Masson, one of the testator's children, has

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died without issue, and in my judgment there has been an intestacy as to his share.

I would, therefore, allow the appeal in part, refer the case back to the Superior Court to deal with this share of Louis Masson in the estate on the basis of there having been an intestacy with regard to it when he died.

DUFF J.—I concur in the opinion stated by the Chief Justice.

ANGLIN J.—Upon the pleadings it is the common case of all the parties represented on this appeal that on a proper construction of the will of the late Honourable Joseph Masson he created a substitution of his entire estate or a substitution of each of the eight shares into which he directed that his estate should, for certain purposes, be divided. The learned judges in the Superior Court and in the court of appeal, probably because the case was so submitted by all parties, have proceeded on the assumption that the will provides for substitution. The same view appears to have been taken by Pagnuelo J. in *Perrault* v. *Masson*(1), but was not accepted, as I read their opinions, by Loranger J. in *Taschereau* v. *Masson*(2), or by Jetté J. in *Masson* v. *Masson* (28th June, 1889).

The present contest concerns the aliquot share of the estate of which Louis Masson, a son of the testator who died without issue, had enjoyed one-half of the income, and the one-eighth interest in a ninth lot, held undivided for reasons of convenience, of which he also had received one-half of the income.

(1) Q.R. 15 S.C. 166. (2) M.L.R. 7 S.C. 207.

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The plaintiff, Léopold Masson, claims that as a great-grandchild of the testator he takes an interest in this property as a second substitute and, therefore, as absolute owner (art. 932 C.C.). The grandfather and father of Léopold Masson both predeceased Louis Masson. He, therefore, acquired whatever interest he may have (if any) in the property in question immediately on the death of Louis Masson without any intervening interest having vested in either his grandfather or his father. He was, nevertheless, held by the learned trial judge to be absolute and unconditional owner of the property which he here claims, probably as a second substitute, although the learned judge does not say so. In the Court of King's Bench he was held to be the first substitute in respect of such property and merely entitled for life to the revenues which it produces and bound to deliver over the corpus to his children. From this part of the judgment the plaintiff appeals to this court.

On the assumption that a substitution was created, which the testator directed should subsist "indefinitely or as long as permitted by law," and that a collateral or subsidiary substitution may be implied, I should respectfully concur in the conclusion reached by the court of appeal in regard to the plaintiff's interest here in question.

The defendant Dame Marguerite Masson (Mrs. Burroughs), who is a grand-daughter of the testator and the daughter of Honourable L. F. R. Masson, who survived his brother Louis, also asserts that an interest in the property which had been set aside as the source of income for Louis Masson and his children is now vested in her as a second substitute, her father

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having been, she alleges, the first substitute in respect of such property. She, therefore, claims it as absolute owner. On the other hand, the defendant-executors and the plaintiff insist that on the death of Louis Masson, who they say was seized as an institute, his surviving brothers and sisters acquired his interest in their father's estate by accretion; that the seizin of Honourable L. F. R. Masson of his share in that interest was not as a substitute, but as an institute; and that his daughter, therefore, holds not as second, but as first substitute. This latter view prevailed in the Superior Court. But Dame Marguerite Masson succeeded in convincing a majority of the learned judges in the court of appeal that her contention was well founded. Against the judgment declaring her to be entitled as absolute and unconditional owner of the interest which she claims, the executors and Léopold Masson have appealed. If the will of the Honourable Joseph Masson had created a substitution in favour of the descendants and also a collateral or subsidiary substitution under which a one-seventh interest in the share of which his brother Louis would in that case have been institute and *grevé,* passed to the Honourable L. F. R. Masson, and on his death to his children, I should incline to the view that the judgment in appeal must be maintained. *Jones* v. *Cuthbert*(1); 8 Pothier, "Des Substitutions," No. 224, p. 533.

If, however, the testator created a substitution, and if, in respect of the share of which he had the income, Louis Masson was an institute *grevé de substitution,* the only substitution provided for is in favour of his descendants. There is no direction for subsidiary substitution in favour of collaterals, and I am respect-

(1) M.L.R. 2 Q.B. 44.

fully of the opinion that none may be implied. Thévenot D'Essaule (Mathieu), No. 262, p. 98. The obligation to deliver the substituted property does not exist, where the condition upon which that obligation is to arise has not been fulfilled. The institute in that case is discharged from the obligation. He holds with an absolute title. On Louis Masson's death, therefore, if he held as institute under a substitution, his heirs, in default of testamentary disposition by him, took an absolute title to his share.

But with great diffidence, due to the fact that all the parties have treated the case as one of substitution and that the provincial courts have accepted that view of it, after a very careful study of the will of the late Honourable Joseph Masson, I have become convinced that he did not create either a single substitution or several substitutions of his property. He vests his entire estate (*je donne et lègue*) in his testamentary executors *à titre de fidéi-commis*. (I incline to agree with Mr. Mignault that had he said *à titre de fiducie* his language would have been more exact. But see 11 Baudry-Lacantinerie, No. 3050. To his children and grandchildren he gives no interest whatever in any part of his property. The sole right of his children is to receive from his executors and trustees one-half of the income derived from the several lots into which he directed that his estate should for that purpose be divided. Even this limited right he postpones until ten years after his decease. That his children should have no interest in any part of the corpus of the estate, but merely a right to receive defined portions of its revenues as alimentary allowances he makes abundantly clear. The rights conferred on the grandchildren are precisely the same, except that they ex-

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tend to the whole revenue. The intention of the testator that the entire title to and control of his property should be vested in his *fidéi-commissaires,* and that his children and grandchildren should have no rights except to demand and enforce payment to themselves by the fiduciary legatees of the revenues which the testator directed they should receive is too clearly expressed to admit of the slightest doubt and, in my opinion, makes the existence of any substitution impossible.

It is of the essence of a substitution that the institute should hold the property as proprietor. Art. 944 C.C.

L'héritier, ou autre grevé de substitution est, avant l'ouverture, seul propriétaire des biens substitués.

Le grevé de substitution étant, avant l'ouverture de la substitution, le vrai et seul propriétaire des biens substitués, il suit de la que les actions actives et passives de la succession résident en sa seule personne: *ipsi et in ipsum competunt.*

Pothier gives this as the first principle of a substitution and its corollary, "Des Substitutions," 153-4.

Neither the children nor the grandchildren of the testator ever became in any sense proprietors of the property of which it is claimed there is substitution. They never were *grevés* in respect of it. It is not the subject of the two or more *libéralités* which must be found in every *substitution fidéi-commissaire.* 11 Baudry-Lacantinerie, No. 3065.

It is no doubt true that the testator speaks of the disposition which he had made as a substitution. He so refers to it many times in the course of his will—sometimes as a substitution of revenues and again as a substitution of property. Indeed, it seems clear that he was under the impression that it was properly designated as a substitution. But his mistaken idea that

the disposition which he actually made might with propriety be called a substitution does not make it such.

Bien entendu qu'il doit y avoir des termes dispositifs et non pas simplement énonciatifs.

Ce ne serait pas assez, par exemple, qu'un testator eût parlé dans son codicile, d'une substitution par lui faite dans son testament, s'il n'y avait, ni dans le testament, ni dans le codicile, des termes emportant disposition présente et actuelle. Thévenot D'Essaule, para. 180, ed. annoté par M. Mathieu, p. 62.

Pressed by the difficulties arising from the absence from the will of any words vesting the corpus of the estate in the testator's children or grandchildren and the presence of directions incompatible with either the children or the grandchildren having any title to, or any control of, any part of the testator's property, Mr. Mignault invoked the provisions directing partition as necessarily implying that, upon the executors making the division directed, title to the share allocated to him as a source of revenue would vest in each child as institute subject to the obligation of transmitting it to his descendants in due course. But the testator in directing this division has been careful to state that its purpose is to enable his children and their descendants to know the particular properties from which their revenues are derived and that the parts or portions are to *represent* the property of which each shall enjoy the income. I find nothing in such a division which would have the effect of divesting the fiduciary legatees and vesting the property in the testator's children and grandchildren, notwithstanding the express directions elsewhere given that they are merely to receive, and that it shall be the duty of the fiduciary legatees to pay, during their respective lives, to each of the former one-half and to each of the latter the

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whole of the revenue derived from the particular parts of the estate allocated for that purpose, but held, managed and administered by the fiduciary legatees. The original division and the subsequent sub-divisions are ordered solely for the purpose of ear-marking the sources of the revenue which is to be paid to each member of each branch of the family. Although when made they should be final and unchangeable (many considerations support the view that they should be so held), they have not, in my opinion, the effect for which the respondent contends. Notwithstanding the division and sub-divisions, the title to the entire succession as a single entity remained in the fiduciary legatees with the result that on the failure, through his death without issue, of the charge in favour of the chiildren of Louis Masson and their descendants the reason for maintaining the identity of the share allocated to that branch of the testator's family ceased and the part of the estate or *hereditas* in the hands of the fiduciary legatees from which Louis Masson had derived his income became available to satisfy the charges in favour of the other branches of the family imposed by the testator upon his succession. If the testator intended a bequest to Louis's more remote descendants of the property from which Louis had derived his revenue, or if such a bequest would be the legal result of his dispositions, that bequest simply lapsed. The direction to divide the estate into equal aliquot shares would not prevent the accretion (if that be the correct term to apply) of the aliquot part assigned as a source of revenue for Louis to the mass of the estate for the benefit of the ultimate legatees of the corpus (art. 868 C.C.). On the death of Louis Masson without issue, unless we are to assume that

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as to the share allocated to his branch of the family the testator was in that event intestate, which seems contrary to the spirit, if not to the letter, of art. 868 C.C., and to the scheme of his will as a whole and would defeat his apparent object, namely, to keep his property as long as possible in his family, that share remained in the mass from which it had not been separated except for the identification of the revenues derived from it. It augmented the corpus available for the other branches of the family and, as an incident, the revenues derived from that corpus were also increased. The share of each of the other branches of the testator's family was augmented by one-seventh of the share which it had become unnecessary to hold for the descendants of Louis. Such one-seventh as an accretion or accession was absorbed in the share which it thus augmented and became subject to the provisions of the will applicable to that share and must, I think, be dealt with and disposed of, both as to corpus and revenue, as an integral part of such share.

It being clear that neither a substitution nor a series of substitutions had been created, we have a devise of the testator's entire estate to fiduciary legatees, the only trust declared being that they shall manage the property, collect the revenues and pay them to the testator's children, grandchildren and their descendants, indefinitely or as long as the law will permit.

It has been suggested that the testator has himself indicated that this *fiducie* or trust is to be subject, as to its duration, to the rules which govern substitutions—that this intention is to be gathered from his

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repeated references to substitution. I am, with respect, unable to concur in this view.

I think there is no doubt that the testator was under the impression that his bequests were, or partook of the nature of, substitutions. He very probably thought that they would, therefore, be subject to the restrictions imposed by law on that form of disposition, and he may have had in mind the limitation now enunciated in art. 932 C.C., but not then so certain or well defined, when he directed that the revenues of each share of his estate should pass from his children to their descendants *indéfiniment, ou autant que permis par la loi,* and provided for succession in the trusteeship, for tutorships and for payment of such revenues to his children, grandchildren and great-grandchildren (see clause No. 3 providing for receipts to be given by married women) "as long as the substitution hereby created shall last." But his expressed intention is that his fiduciary legatees shall hold the property and shall pay its revenues to his descendants perpetually (*indéfiniment*) unless the law prevents that being done. I do not read the references to substitution in the will as indicating that the testator intended that, although his dispositions should not in fact be substitutions, or be so much in the nature of substitutions as to be subject to the provisions of the law now embodied in art. 932 C.C., but should constitute a *fiducie* or trust in favour of his children and their descendants, the rules and restrictions which govern substitutions should, nevertheless, apply to the administration and duration of the *fiducie* or trust thus created. On the contrary, the words *et ce indéfiniment, ou autant que permis par la loi* seem to me to make it clear that he intended

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that the duration of the *fidéi-commis,* as he styles it, which he created should be subject only to such legal restrictions (if any) as such a disposition of property could not escape.

We have, therefore, to deal with a disposition in the nature of a trust of property intended by the testator to be perpetual if the law will permit, and, if not, to endure as long as the law will allow, with a provision for a succession of trustees for the expressed purpose of ensuring the enjoyment of the revenues of his succession by the testator's descendants to the most remote degree possible and with the manifest intention that, if and when the law requires that such a trust shall come to an end, the testator's descendants shall receive the corpus of his property in the shares which he has indicated. That the ultimate beneficial ownership of the property is in that case devised to persons not *in esse,* does not invalidate the disposition, because, by virtue of art. 838 C.C., the capacity to receive is, in the case of suspended legacies, to be considered relatively to the time when the right comes into effect. That the fiduciary legatees can never become entitled to any part of the testator's property except the compensation which he has fixed for their services is unquestionable (art. 964 C.C.). The purpose of the testator was that, as long as the law would permit, his fiduciary legatees should hold the corpus of his estate and should pay the revenues to his children and their descendants. Only when the legal limit had been reached did he wish the corpus to pass from his trustees, and then, clearly, not as on an intestacy, but under his will to those whom he intends to benefit as his legatees — the most remote of his descendants for whom the law

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will allow him to require that his property shall be held, if it may not, under the law, be held by his trustees indefinitely for the purpose of providing a perpetual revenue for his descendants.

Such being the testator's intention, and that intention being supreme within legal limits, it becomes necessary to inquire what restriction, if any, the law imposes upon the duration of such a trust.

The policy of the law upon which the rule in regard to substitutions enunciated in art. 932 C.C. is based, would seem to require that a similar restriction should be placed upon such a *fiducie* or trust as that with which we are now dealing. By the application of such a rule the beneficiary who, if the duration of the trust were unlimited, would actually come into the enjoyment of a portion of the revenue after two other beneficiaries had successively received revenue derived from the same fund or property, would become the absolute owner of that part of such fund or property from which the portion of revenue, which he would otherwise enjoy, would be derived. Although to apply such a rule to *fiducies* or trusts without express statutory authority may savour of judicial legislation, it seems necessary to do so unless we are prepared to hold that the purpose of the limitation advisedly placed upon the duration of substitutions may be frustrated by the very obvious device of creating a *fiducie* or trust of property which is either perpetual or postpones beneficial ownership of the corpus for a period longer than is permitted under the law of substitutions.

Applying the rule which I have indicated, the plaintiff, Léopold Masson, on the death of his father, Joseph Edouard Masson, who survived his father

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Isidore Candide Masson, a son of the testator, became entitled, as absolute owner of an interest in it, to a partition of the share allocated to the family of his grandfather. The defendant, Dame Marguerite Masson, on the other hand, as a daughter of the Honourable L. F. R. Masson, also a son of the testator, is only the second person to enjoy the revenue from the property, forming the part of the share allocated to her father's family, of which she receives the income. She is not entitled to that property as absolute owner.

The shares allocated to the respective families of Isidore Candide Masson and of Honourable L. F. R. Masson have each been augmented by one-seventh of the property which would have gone to the family of Louis had he left descendants. The property by which the original shares of the other branches of the family were augmented on the death of Louis without issue was simply absorbed in such shares. Had the grandfather and the father of Leopold Masson survived Louis, their respective incomes would have been accordingly increased. Assuming that Léopold Masson has already obtained, in full beneficial ownership, his interest in the property which originally constituted the share of his grandfather, Isidore Candide Masson, he is, in my opinion, entitled to the partition of the property in question in this action because his right to the interest which he claims in it is precisely the same as that by which he enjoys the ownership of a portion of the share originally allotted to the family of his grandfather. The accidental circumstance that this right accrued in respect of the property now in question after he had become entitled to his interest in the share of his grandfather's family as originally constituted, and

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without the revenue of such property having been received by his grandfather and his father, does not in my opinion affect it. It is as an integral part of the share of his branch of the family, which must be regarded as a single *lot,* that he is entitled to share in the property by which that *lot* has been augmented. On the other hand the claim of Dame Marguerite Masson must fail because she is not entitled to the absolute ownership of the portion of the share allocated to her father's family of the revenue of which she has been in receipt since his death. The ownership of the property by which that share or *lot* has been augmented will belong to those who may become entitled to the ownership of the *lot* or share itself.

I do not express any opinion upon the various rights, under the partition to which the plaintiff is held entitled, of the several parties as set forth in the declaration in this action. Those rights should be worked out in the provincial courts following the lines indicated in the judgment of this court, so far as it may be found proper at present to determine them.

The appeal should be allowed and the conclusions of the learned trial judge should be restored. In view of the very serious difficulties created by the peculiar and unusual dispositions of his property made by the testator the costs of all parties should come out of the estate.

BRODEUR, J. (dissident).—La première question qui se présente dans cette cause est de savoir si par son testament fait en 1847, peu de temps avant sa mort, l'honorable Joseph Masson a créé une substitution.

La clause principale du testament est la clause 4, qui se lit comme suit:—

Et *quant aux biens meubles et immeubles*, propres, acquêts et conquêts, argent monnayé et non monnayé, dettes actives, droits et actions mobiliers et immobiliers et tout ce que je délaisserai lors de mon décès, quelles qu'en soient la nature, consistance, qualité, valeur et situation, sans aucune exception ni réserve, *je veux et entends qu'il en soit fait autant de parts égales que j'aurai d'enfants* au temps de mon décès, nés de mon mariage avec ma dite épouse, pour chacune de ces parts ou portions de mes biens, représenter les biens mobiliers et immobiliers, dont chacun de mes dits enfants auront seulement la moitié des revenus, sa vie durante, ainsi que ci-après pourvu, et *pour les revenus de chacune de ces parts* ou portions de mes biens *être réversibles*, après le décès de chacun de mes dits enfants, *aux enfants nés en létigimes mariages d'eux*, mes dits enfants, respectivement et *être substitués de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi*, en observant que *je veux et entends que lors de chaque succession ou transmission de mes biens, il en soit fait partage, autant que possible, entre chacun de mes descendants*, de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus, sa vie durant, le tout sous les clauses et conditions ci-après mentionnées.

Par la clause 5, il nomme certaines personnes ses exécuteurs testamentaires et fidéi-commissaires "pour faciliter," dit-il,

l'exécution de mes dispositions testamentaires et pour d'autant mieux garantir la réversion des revenus de mes biens à mes dits enfants et descendants suivant mes désirs ci-après exprimés,

et il pourvoit à ce qu'ils soient remplacés "tant et aussi long temps," dit-il, "que la substitution créée par mon présent testament subsistera," et il ajoute:—

Auxquels dits fidéi-commissaires, remplaçants ou successeurs *je donne et lègue à titre de fidéi-commis tous mes dits biens* meubles et immeubles, propres, acquêts et conquêts, argent monnayé et non monnayé, dettes actives, droits et actions mobiliers et immobiliers et tout ce que je délaisserai lors de mon décès, sans aucune réserve ni exception, *pour le tout être géré et administré*, les revenus, rentes, loyers et intérêts de mes dits biens mobiliers et immobiliers retirés et perçus, mes dettes actives réalisées et mes biens meubles et effets convertis en deniers par mes dits fidéi-commissaires, remplaçants, ou successeurs, et pour les deniers qui seront réalisés de ma suc-

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cession, après les affaires d'icelle liquidées et mes dettes payées, être employés avec les revenus de mes autres biens mobiliers et immobiliers en achats de propriétés foncières, en parts ou actions de banques, en fonds provinciaux ou publics, "débentures," ou de toute autre manière qui pourra être jugée avantageuse ou profitable, et pour les revenus, rentes, loyers et intérêts de toute ces biens ou emplois mobiliers et immobiliers être de temps à autre et autant que possible au fur et à la mésure qu'ils seront retirés et perçus convertis et employés de la même manière pendant et aussi longtemps qu'il sera nécessaire pour la plus grand avantage de mes dits enfants et descendants, et selon mes dispositions ci-dessus et celles ci-après mentionnées.

Il procède ensuite à exprimer dans six autres paragraphes ses dernières volontés. Au paragraphe deuxième il déclare que les revenus des enfants seront incessibles et insaisissables et qu'ils ne pourront être vendus

tant et aussi longtemps que la substitution créée par mon présent testament subsistera.

Au paragraphe troisième, il dit là encore

tant que la substitution créée par icelui (mon présent testament) subsistera.

L'avant dernier paragraphe de son testament se lit comme suit:

Je veux et entends que dans le cas où il serait nécessaire, pour mettre à exécution mes présentes dispositions, de faire nommer en justice un tuteur ou des tuteurs à la substitution et aux substitutions créées par mon présent testament, les personnes par moi nommées ci-dessus pour mes exécuteurs testamentaires et fidéi-commissaires, leurs remplaçants ou successeurs, soient, en autant que faire se peut, nommés ainsi tuteurs à la dite substitution ou aux dites substitutions et en nombre égal à celui que j'ai ci-dessus fixé pour mes dits exécuteurs et fidéi-commissaires.

Les uns prétendent que le testateur a créé une fiducie avec obligation de payer la moitié des revenus aux enfants et la totalité des revenus aux petits-enfant et de remettre le capital à ceux qui viondront en troisième lieu.

D'autres disent, au contraire, que le testament crée une substitution tout en donnant en même temps aux exécuteurs ou fidei-commissaires l'administration des biens et d'autres pouvoirs très étendus.

Dans les testaments nous devons toujours rechercher l'intention du testateur; et, même si parfois les textes semblaient énoncer un certain ordre d'idées, nous devons cependant examiner l'ensemble du document pour rechercher d'une manière exacte ce que le testateur a eu le désir et la volonté de faire avec ses biens.

Il me paraît évident que dans le cas actuel M. Masson, tout en créant une substitution, n'a pas voulu confier aux grevés, ses enfants et ses petits-enfants, l'administration et la jouissance complète de ses biens; mais son désir est assez formellement exprimé dans les extraits que je viens de faire de son testament pour démontrer que sa volonté était qu'il y aurait substitution de ses biens. Il n'a jamais voulu considérer ses executeurs testamentaires comme bénéficiaires; mais il a voulu que ses descendants jouissent de sa fortune.

Sachant que la loi permet de nommer des exécuteurs testamentaires avec des pouvoirs de vendre, de disposer et d'aliéner, il a voulu se choisir des administrateurs qui conserveraient aussi loin que possible parmi les membres de sa famille les biens qu'il avait amassés.

La substitution n'est pas subordonnée à la fiducie. Ce n'est pas celle-ci qui doit dominer. C'est au contraire la substitution qui prévaut et les exécuteurs testamentaires ne sont là que pour sauvegarder les intérêts des grevés qui sont les seuls vrais intéressés.

La question de savoir si ce testament créait une

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substitution a été décidée par l'honorable juge Loranger dans la cause de *Taschereau* v. *Masson*(1), et par l'honorable juge Pagnuelo dans la cause de *Perrault* v. *Masson,* en 1898(2).

Dans ces deux causes, ainsi que dans la cause actuelle, les exécuteurs testamentaires étaient partie au procès et ont reconnu qu'il y avait substitution. Décider le contraire serait bouleverser toute l'administration de cette succession et amener des complications des plus sérieuses. Il vaut mieux respecter l'intention évidente du testateur et maintenir l'interprétation que les exécuteurs, dans les soixante dernières années, ont faite de ce testament. Il est bon de remarquer que parmi ces administrateurs se trouvaient des amis intimes du défunt et quelques-uns de ses enfants, qui devaient connaître les idées du *de cujus.*

Dans une cause jugée par l'honorable juge Jetté, en 1889, qui n'est pas rapportée, une action avait été prise par l'un des neveux de Louis Masson pour faire déclarer que la part de ce dernier appartenait à ses héritiers légitimes, vu que la substitution s'était ouverte par sa mort sans enfants.

Le savant magistrat a décidé que le testament constituait une fiducie limitée par le testateur aux degrés permis dans le substitution et que les biens confiés par le testateur à ses légataires fiduciaires ne pourraient être remis qu'aux arrière-petits-enfants. Il ajoutait cependant le considérant suivant qui démontre l'incertitude dans laquelle il se trouvait:—

Considérant en outre que même en appréciant le testament du dit Joseph Masson comme ne créant *qu'une simple substitution,* il en résulte encore que l'intention du testateur a été de faire parvenir à

(1) M.L.R. 7 S.C. 207. (2) Q.R. 15 S.C. 166.

tout événement les biens composant sa succession à son décès et ceux à acquérir avec la moitié des revenus accumulés à ses arrière-petits-enfants et de ne laisser à ses enfants et petits-enfants qu'une moitié des revenus.

Il est bien évident par cette citation que le jugement ne va pas aussi loin qu'on le dit. Il n'était pas nécessaire, d'ailleurs, dans cette cause, de décider ce point. Il suffisait de démontrer que la part de Louis Masson, qu'il y aît substitution ou non, doit, suivant les dispositions du testament, passer aux enfants du testateur et non pas aux héritiers de Louis Masson.

On peut donc conclure qu'il y a eu unanimité presque complête chez les magistrats, chez les administrateurs, et chez les héritiers pour reconnaître qu'il y a substitution.

Je croirais que ce serait une profonde erreur de modifier l'interprétation qui a été faite et qui constitue, sinon chose jugée, du moins un contrat judiciaire que nous devrions reconnaître.

Pothier, dans son "Traité des Substitutions," No. 45, dit:—

Comme c'est la volonté qui forme la substitution fidéi-commissaire, quoiqu'elle ne soit pas exprimée, il suffit qu'on puisse tirer des conséquences de ce qui est contenu au testament, que le testateur a eu effectivement volonté de la faire, pour que la substitution soit aussi valable que si elle était exprimée.

La substitution de la part de Louis Masson, est-elle devenue ouverte par son décès ?

J'aurais été enclin à répondre "oui" à cette question.

Sa part aurait passé à ses heritiers légaux et serait devenue leur propriété à toutes fins que de droit. Lors de l'argument, j'ai suggéré cette hypothèse aux parties. Mais ni les appelants ni les intimés n'ont voulu prendre cette position.

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L'intimée aurait eu apparemment intérêt à soutenir cette prétention. Mais elle a préféré s'en tenir aux termes de son plaidoyes, c'est-à-dire, que les revenus de la part de Louis Masson sont réversibles aux descendants du testateur.

Les appelés à la substitution ont intérêt, eux à ce que la plus grande somme de biens leur échoit, maintenant si les héritiers, comme Mde. Burroughs, qui auraient pu jouir de la part de Louis Masson comme héritiers, ne désirent pas prendre cette qualité mais préfèrent, au contraire, considérer cette part comme substituée et n'être eux-mêmes que des grevés ou des appelés de cette part, cela constitue de la part des interessés une admission qui a toute la force d'un contrat judiciaire et que les tibunaux doivent accepter.

La part de Louis Masson reste donc soumise aux dispositions du testament et nous devons la traiter comme étant substituée.

Qui devait recueillir la part de Louis à sa mort du moment que le substitution n'était pas ouverte ? Ce sont les descendants du testateur. Le testateur déclare en effet que son désir est de voir ses biens rester dans sa famille, et il ajoute que lors de chaque succession ou transmission de ses biens il veut qu'il en soit fait partage autant que possible entre chacun de *ses descendants.*

Que signifie là le mot descendants ? Veut-il dire tous les enfants, petits-enfants, arrière-petits-enfants du testateur ? Non. Pothier, dans son "Traité des Substitutions," No. 77 (ed. Bugnet, vol. 8, p. 480), discute l'interprétation qui doit être donnée au mot "famille" quand il se rencontre ainsi dans un testament et il termine en disant:

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Lors de l'ouverture de la substitution à laquelle une famille est appelée, ce ne sont pas indistinctement tous ceux de la famille qui doivent la recueillir. Si l'auteur de la substitution a prescrit lui-même l'ordre dans lequel elle serait recueillie, et nommé ceux qu'il entendait préférer aux autres, on doit suivre ce qu'il a ordonné, sinon ce sont ceux de la famille qui sont en plus proche degré, qui doivent la recueillir.

Ayant disposé du point qui avait soulevé dans mon esprit, au moins, un doute très sérieux, sinon une conviction, j'ai maintenant à considérer si à la mort de Louis Masson sa part est accrue à ses frères et neveux; ou bien si la transmission a créé un degré dans la jouissance de sa part. S'il y a eu accroissement, alors les frères et neveux de Louis Masson jouissent de sa part comme grevés au premier degré. Si, au contraire, il y a eu transmission de Louis à ses frères et neveux, alors ces derniers jouiront des biens comme grevés au deuxième degré et leurs héritiers seront alors les appelés définitifs de cette part; l'intimée, Madame Marguerite Masson, qui est l'une des enfants de l'honorable Rodrigue Masson, aura alors, avec ses frères et sœurs, la jouissance absolue de la partie des biens de Louis Masson qui est échue à leur père.

DROIT D'ACCROISSEMENT.

L'accroissement est le privilège qu'une personne possède de jouir de toute la chose léguée dans le cas où son colégataire ne recueille.

Ainsi A. donne une propriété à B. et C.; C. décède ou bien refuse de se porter acquéreur; alors B. a le droit de prendre toute la propriété.

Mais si C. accepte le legs, entre en possession ou jouisse de la moitié de la propriété, et qu'il meure ensuite sans disposer de ses droits, alors ses représentants recueilleront la moitié de la propriété; et si

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ce représentant était son co-légataire alors ce dernier deviendra l'acquéreur de toute la propriété non pas comme légataire de A. mais comme légataire de A. pour la moitié et comme héritier de C. pour l'autre moitié. Si la propriété avait été substituée alors B. serait grevé au premier degré de la moitié, c'est-à-dire, de celle qu'il aurait eu directement du testateur et grevé au second degré de la moitié qui lui aurait été transmise par C.

C'est, je crois, la position qui se présente dans le cas du testament de M. Joseph Masson quant à la part de Louis Masson. Si ce dernier était mort avant son père, évidemment ses sept frères et sœurs auraient pris la partie que M. Masson, père, lui destinait. Il y aurait eu accroissement. Il en aurait été de même si Louis Masson avait refusé d'accepter le legs.

Mais il a accepté le legs; alors il n'y a pas, d'après les dispositions de la loi, accroissement. Mais, dit-on, le testateur avait le droit de déclarer qu'il y aurait accroissement en faveur de ses descendants si l'un de ses enfants venait à mourir.

Incontestablement il avait le droit de déclarer, dans son testament, qu'advenant le décès d'un de ses enfants, sa part retournerait à ses frères et sœurs. Mais alors cette transmission constitue un degré dans la jouissance des biens substitués.

Le testateur dans une substitution n'a pas le droit de substituer plus loin que deux degrés. La loi ne veut pas permettre que des biens soient infiniment soumis à la volonté d'un testateur. Pas de substitution perpétuelle. Elles existaient autrefois; mais depuis l'ordonnance d'Orléans, en 1560, qui a été confirmée plus tard par l'ordonnance de Moulins, en 1566, elles sont abolies et on n'a permis au testateur d'exer-

cer une maîtrise sur ses biens que pour deux générations; ou, ce qui est plus exact, pour deux degrés de transmission. Le premier qui reçoit les biens peut avoir reçu ordre du testateur de transmettre ses biens à un autre et ce dernier peut avoir reçu aussi les mêmes instructions; mais quant au troisième qui recueillera les biens il est libre d'en disposer comme il l'entendra, que le testateur l'ait voulu ou non. Cette disposition est d'ordre public et le testateur ne saurait y contrevenir. Toute disposition contraire dans un testament serait nulle.

Asini un testateur pourrait bien pourvoir à ce que ses co-héritiers héritent les uns des autres; mais en établissant cet ordre successif il n'aurait pas le droit d'empêcher le troisième qui recueillera les biens d'en devenir le propriétaire absolu. M. Masson, en créant une substitution, pouvait créer Louis Masson premier grevé et lui ordonner de transmettre sa part à ses frères et sœurs; mais ces derniers, en recueillant cette part, n'en jouiront pas comme premiers grevés mais comme grevés au second degré et leurs enfants alors en deviendront les propriétaires absolus.

Pothier, au "Traité des Substitutions," vol. 8, page 470, (ed., Bugnet,) No. 50, nous donne un exemple qui, tiré de la jurisprudence romaine, a beaucoup d'analogie avec le cas qui nous occupe. Voici ce qu'il dit:—

Un héritage avait été donné à deux légataires, et le survivant avait été chargé de le restituer à un tiers * * * Paul décide qu'on doit supposer un premier degré de substitution tacite par lequel le prédécédé aît été chargé de restituer, lorsqu'il mourrait, sa part dans la chose léguée au survivant. Cela est conforme à nos principes; le survivant étant seul chargé de restituer au tiers non-seulement la portion qu'il avait dans l'héritage, mais l'héritage entier, il est nécessaire qu'il aît reçu du testateur l'héritage entier, car autrement il ne pourrait être chargé de le restituer; *cum nemo fidécommisso onerari possit, in plus quam accepit;* or, il ne peut avoir reçu du testateur l'héritage entier qu'en supposant un premier degré de substitution, par lequel son colégataire prédécédé avait été chargé de lui

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restituer sa portion; il est donc nécessaire de supposer ce premier degré de substitution quoiqu'il n'aît pas été exprimé.

Appliquant les principes énoncés dans cet exemple à notre cas, nous voyons d'abord des colégataires. Ils constituent le premier degré de la substitution pour leur part respective. L'un d'eux meurt. Sa part qui passe entre les mains des survivants qui en deviennent les grevés au deuxième degré.

L'honorable Rodrigue Masson, par la mort du testateur, est devenu grevé au premier degré de la part qu'il a eue de son père. Mais pour la part qui autrefois était à son frère il en est devenu le grevé au second degré. Alors ses enfants, parmi lesquels se trouve l'intimée, Dame Marguerite Masson, deviennent les propriétaires définitifs de la part de Louis.

Je suis donc venu à la conclusion que le testament de M. Masson crée une substitution et, qu'en supposant même qu'il n'y aurait pas de substitution directe, il a été constitué une fiducie limitée par le testateur aux degrés permis dans les substitutions. Dans les deux cas, les deux degrés, pour la part de Louis, sont éteints et Madame Marguerite Masson, et ses frères et sœurs qui viennent en troisième lieu, ont droit de jouir de cette part en toute propriété. Pour la part qui vient directement de leur père et de leur grand-père ils sont cependant grevés au deuxième degré.

Je suis donc d'opinion de renvoyer l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant, Léopold Masson:
Augers, deLorimier & Godin.

Solicitors for the appellants, Henri Masson *et al*:
Bastien, Bergeron, Cousineau & Jasmin.

Solicitor for the respondents: *P. B. Mignault.*

HARRY SERLING (PLAINTIFF) ..... APPELLANT. 1912

AND

*May 15, 17.
*Oct. 7.

WILLIAM LEVINE (DEFENDANT) ... RESPONDENT.

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

Action against minor—Exception of minority—Practice—Irregularity in procedure—Waiver after majority—Ratification—Prejudice—Nullity—Review by appellate court—Arts. 246, 250, 304, 320, 323, 324, 987 *C.C.—Arts.* 78, 174, 176, 1039, 1263 *C.P.Q.*

An action for damages *ex delicto* was instituted against a minor without impleading a tutor to assist him, and the exception of minority was set up. Proceedings taken by the plaintiff to have a tutor appointed had not been concluded when the defendant became of age and an order, which was disregarded by the defendant, was then obtained requiring him to plead to the action. On a summons for his examination *sur faits et articles*, defendant appeared and certain objections to questions were made by counsel on his behalf. On an inscription for judgment *ex parte*, subsequently filed, judgment was entered against him.

Held, per Idington, Duff and Brodeur JJ. that irregularities of procedure in a court of first instance are matters to be dealt with by the judges of that court and, unless some prejudice has resulted therefrom, the discretion exercised by such judges in respect thereto ought not to be disturbed by an appellate court.

Per Idington, Duff and Brodeur JJ., Fitzpatrick C.J. and Anglin J. contra. In the circumstances the defendant suffered no prejudice within the meaning of article 174 of the Code of Civil Procedure. The exception resulting from minority is relative merely and may be waived by a defendant, sued during his minority, without the necessary assistance required by law, appearing after attaining majority and taking objections to subsequent

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

(NOTE.—Leave to appeal to the Privy Council was granted, 17th December, 1912.)

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proceedings in the action. He cannot, thereafter, complain of being treated as a defendant properly cited before the court nor of a judgment *ex parte* entered against him therein.

Per Idington, Duff and Brodeur JJ.—Irregularity in inscription for judgment *ex parte* is not a reason for the dismissal of an action.

Per Fitzpatrick C.J. and Anglin J., dissenting.—The fact that the defendant was a minor at the time of the institution and service of the action and that no tutor or curator was made a party to the suit for the purpose of assisting him therein constitutes an absolute bar to the action which could not be validated in consequence of further proceedings therein after the defendant attained the age of majority. The action was a nullity *ab initio* and, consequently, the defendant suffered prejudice within the meaning of art. 174 C.P.Q. *Larue* v. *Poulin* (9 Que. P.R. 157); *Fairbanks* v. *Howley* (10 Que. P.R. 72), and *Robert* v. *Dufresne* (7 Que. P.R. 226), referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, which reversed the judgment of the Superior Court, District of Montreal, and dismissed the plaintiff's action with costs.

The circumstances of the case are stated in the head-note and the questions raised on the appeal are discussed in the judgments now reported.

The judgment appealed from reversed the order by Lafontaine J., made on the 27th September, 1910, requiring the defendant to plead to the action, the order of Charbonneau J., made on the 28th October, 1910, dismissing the defendant's exception, and the final judgment rendered on the 21st of January, 1911, by Demers J., maintaining the plaintiff's action and condemning the defendant to pay the plaintiff $2,000 damages for malicious prosecution.

Aimé Geoffrion K.C. and *A. Rives Hall K.C.* for the appellant.

Surveyer K.C. and *Ledieu* for the respondent.

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THE CHIEF JUSTICE (dissenting).—I am obliged with great reluctance to differ from the conclusion reached by the majority of this court to reverse the unanimous judgment of the Quebec court of appeal.

The question at issue is of first importance, affecting as it does, not merely the practice and procedure of the Quebec courts but the broad question of the rights of minors in that province. The judgment below which is reversed here conforms with what I have always understood to be the settled jurisprudence of Quebec.

This is an action brought by the appellant against the respondent to recover the sum of $2,500 damages. It is unnecessary to state in greater detail the cause of action. Nothing turns upon the merits of the claim. The respondent was a minor when served with the writ but he attained his majority during the course of the proceedings in the Superior Court after the issue of minority had been raised.

The question is: In these circumstances, could the plaintiff, now appellant, ignore the plea of minority and proceed to judgment without a tutor being appointed to the defendant minor and without issuing a new writ of summons? The *ex parte* judgment of the Superior Court proceeds on the assumption that the plaintiff may obtain a condemnation against the minor although not represented by his tutor. The defendant was not represented by counsel at the hearing, and the attention of the trial judge does not appear to have been specially drawn to the plea of minority. In the Court of King's Bench, after very full argument, it was held that the fact of minority was

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an absolute bar to the action; and the judgment of the Superior Court was reversed. I concur in the judgment in appeal.

Minority is an absolute bar to an action, and, even when not set up, may be invoked after judgment rendered, on a petition in revocation. Art. 1177 C.P.Q., par. 9. The general effect of articles 246, 304, 320, 323, 324 and 987 of the Civil Code, and of articles 1039 and 1263 of the Code of Civil Procedure of Quebec is that, except in special circumstances and for very limited purposes, a minor is not capable of performing any civil act, or of assuming an enforceable civil obligation. On the other hand the Code of Civil Procedure (articles 78 and 174), when read as they must be with the provisions of the Civil Code, make it quite clear that no person can be a party to an action either as plaintiff or defendant, or in any form whatever, unless he has the free exercise of his rights; those who have not the free exercise of their rights must be assisted, authorized or represented in the manner prescribed by law. Since this case was decided in the Superior Court, the question we are now considering came up again for consideration in *Paquette* v. *Auclair*(1), and in a foot-note to the report of that case will be found a long series of decisions, dating from 1819, in all of which the law is laid down as decided by the court of appeal. I see no reason to innovate.

I do not, of course, dispute the right of the plaintiff, in a suit like this, upon production of the plea of minority, to take such steps as are necessary to have a tutor appointed who could be brought into the case

(1) 12 Que. P.R. 402.

by a new writ when the proceedings are continued as if the tutor had been a defendant *ab initio*. Such is the practice in Quebec. But nothing of that sort was done here and I hold that the service of the writ of summons on the minor was a nullity which could not be cured except, if at all, in the way that I have just indicated. At the time the minor became of age he was not properly before the court and he was careful not to acquiesce in any of the subsequent proceedings.

Demolombe's dictum "On ne confirme pas le néant" (vol. 24, par. 382, page 367) will, I am convinced, continue to be acted upon by the Quebec courts even after this judgment is rendered and until this important point is settled by the Privy Council.

I refer to the following French and Canadian text writers:—

1o. Roy, "Droit de Plaider," No. 89;
2o. 2 Mignault, "Droit Civil," p. 215;
3o. Sirios, "Tutelles et Curatelles," No. 242;
4o. 1 Langelier, "Droit Civil," p. 403;
5o. Laurent, vol. 4, No. 365;
6o. 1 Boitard, "Procédure Civile," No. 215.

In answer to the argument that the respondent was not prejudiced, I refer to the following cases in all of which it was held, that, whenever there is a nullity, there is a prejudice:—*Larue* v. *Poulin*(1); *Fairbanks* v. *Howley*(2); *Robert* v. *Dufresne*(3).

I would dismiss with costs.

(1) 9 Que. P.R. 157. (2) 10 Que. P.R. 72.
(3) 7 Que. P.R. 226.

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IDINGTON and DUFF JJ. concurred in the opinion stated by Brodeur J.

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ANGLIN J. (dissenting) agreed with the Chief Justice.

BRODEUR J.—Le défendeur intimé a été poursuivi en dommages pour avoir fait venir sous de faux pretextes le demandeur dans la Province de Québec afin qu'il y fut arrêté sur capias.

Il a produit une exception à la forme plaidant minorité.

Il n'a jamais produit de plaidoyer au mérite quoiqu'il ait reçu ordre de le faire après qu'il fut devenu majeur.

Son exception à la forme ayant été renvoyée, il y eut ensuite jugement *ex parte* contre lui et il fut condamné à payer $2,000 de dommages au demandeur.

Ayant appelé de ce jugement ainsi que de celui qui avait été rendu sur l'exception à la forme il eut gain de cause devant la cour d'appel qui décida que, vu sa minorité, il avait été illégalement assigné et, qu'a raison de cela, la poursuite prise contre lui aurait du être renvoyée.

Le demandeur appelle de ce jugement.

La question que nous avons à décider est de savoir si cette exception à la forme aurait dû être maintenue.

Il me semble d'abord que la conduite de la procédure dans une cause doit être laissée au tribunal de première instance. Or pas moins de cinq juges de la cour supérieure savoir; les honorables juges Davidson, Fortin, Martineau, Lafontaine et Charbonneau

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ont eu à rendre des jugements interlocutoires en cette cause où cette question d'assignation se présentait et tous ont été d'avis que les fins de la justice seraient absolument sauvegardées non pas en renvoyant l'action mais en lui faisant nommer un tuteur au defendeur lorsqu'il était mineur ou en le forçant de plaider au mérite quand il fut devenu majeur. Ces jugements interlocutoires étaient d'ailleurs conformes à la décision du juge Pagnuelo dans la cause de *Gareau* v. *Denis*(1).

Il ne faut pas oublier que l'intimé avait été assigné au nom du Souverain et qu'en obéissance à ce bref il avait comparu et avait produit d'abord une exception dilatoire pour demander cautionnement pour frais.

Mais quand par la suite il a, par son exception à la forme, dénoncé sa minorité la cour a décidé de lui faire nommer un tuteur pour le représenter et l'assister, et à cette fin ordonna le convocation du conseil de famille. Ses parents, dans le but évident d'empêcher le bras de la justice de le frapper et de le punir comme il le méritait pour son délit si répréhensible, ont refusé de se rendre aux ordres de la cour. Quand dix mois après il devenait majeur, les procédures pour l'assignation du conseil de famille furent discontinuées et le défendeur reçut ordre de plaider au mérite.

Pour réussir sur son exception à la forme l'intimé était tenu d'établir qu'il y avait préjudice. L'art. 174 du Code de Procédure Civile dit:

> Le défendeur peut invoquer par exception à la forme, *lorsqu'ils lui causent un préjudice*, les moyens résultant: * * * 2. de l'incapacité du demandeur ou du défendeur.

(1) 2 Que. Pr. Rep. 389.

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Où est le préjudice pour le défendeur dans le cas actuel? Il a prétendu qu'il était incapable de se défendre parce qu'il était mineur. La cour répond en lui disant nous allons vous donner un tuteur et quand il est devenu majeur elle lui intime d'avoir à se défendre lui-même.

L'incapacité des mineurs est relative, elle n'est pas absolue. Ils sont responsables de leurs délits, dit l'art. 1053 du Code Civil.

Ils peuvent demander aux tribunaux la nomination d'un tuteur et peuvent ester en justice dans certains cas (art. 250 et 323 C.C.). Ils peuvent également poursuivre pour leur salaire et pour les obligations résultant du contrat de louage de leurs services personnels. (Art. 304 C.C.).

S'ils sont réputés majeurs et peuvent engager leur responsabilité dans le cas d'un délit qu'ils auraient commis, ne pourraient-ils pas comme les mineurs commerçants être amenés devant les tribunaux? La question peut être posée mais il n'est pas nécessaire de la décider dans cette cause-ci.

L'article 174 du Code de Procédure est de droit nouveau; c'était autrefois l'article 116 qui régissait la matière et il se lisait comme suit:—

> Sont invoqués par exception à la forme les moyens résultant: 1. Des informalités dans l'assignation; 2. Des informalités de la demande lorsqu'elle est en contavention avec les dispositions contenues dans les articles 14, 19, 50, 52 et 53.

Il faut donc maintenant, pour réussir sur une exception à la forme, éprouver un préjudice. C'est là une question de fait qui doit être laissée à la discrétion des juges de première instance. Et si, comme dans le cas actuel, on a pris les mesures nécessaires

pour faire disparaître le préjudice il n'y a pas lieu pour les tribunaux d'appel d'intervenir.

Même sous l'empire de l'ancien code l'assignation d'un mineur n'était pas radicalement nulle. Aussi Pigeau vol. 1er, p. 79 disait:—

Deux choses sont nécessaires pour qu'on puisse intenter une action contre une personne; la première qu'elle soit soumise au droit d'où procède l'action; la seconde, *qu'elle ait le discernement nécessaire pour se défendre.*

Guyot, *vo.* "Mineurs," p. 526, n'est pas moins explicite.

Les mineurs, (dit-il,) ne peuvent ester en jugement sans l'assistance d'un tuteur ou d'un curateur; mais comment doit-on entendre cette maxime générale ? La demande formée par le mineur seul sera-t-elle nulle ? Donnera-t-elle seulement lieu à une exception de la part du défendeur, qu'il n'est pas tenu de répondre à l'assignation jusqu'à ce que le mineur ait été pourvu d'un curateur ? * * *

Il semble donc qu'une demande formée en justice par un mineur au-dessus de l'age de puberté, ne devroit pas être déclarée nulle, sur le fondement qu'elle auroit été formée par lui seul, sans être assisté de son curateur, parce que cette nullité n'a été établie qu'en sa faveur. * * *

L'incapacité des mineurs n'est donc que relative à eux, afin qu'ils ne puissent se préjudicier.

L'intimé invoque la nullité de son assignation. "En général," dit Solon, "Traité des Nullités," pp. vi., vii.,

les nullités sont odieuses. * * * Que signifie, en effet, dans le for intérieur l'irrégularité d'une demande dans sa forme, si cette demande est juste ? * * * elle doit être repoussée dans tous les cas où le législateur ne s'y oppose pas formellement.

Or où trouvons-nous dans la loi que le législateur a déclaré nulle une procédure comme celle que nous avons à examiner?

L'article 304 du Code Civil dit bien que les actions appartenant au mineur sont portées au nom d'un tuteur et il donne des cas, cependant, où le mineur peut agir seul ou avec l'autorisation du juge. Il n'est nul-

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lement question dans le Code Civil des actions portées contre le mineur. Le Code de Procédure dispose de ce point à l'article 78 qui se lit comme suit:

> Il faut avoir le libre exercise de ses droits pour ester en justice, en demandant ou en défendant sous quelque forme que ce soit sauf dans le cas de dispositions spéciales.
>
> Ceux qui n'ont pas le libre exercise de leurs droits doivent être représentés, assistés ou autorisés de la manière fixée par les lois qui règlent leur état ou leur capacité respective.

Le Code n'a déclaré nulle part que l'assignation d'un mineur était nulle; il appartient donc au juge de décider. Merlin, Répertoire, *vo.* "Mineur," par. 8, dit:

> Il semble donc qu'une demande formée en justice par un mineur au dessus de l'age puberté, ne devrait pas être déclarée nulle sur le fondement qu'elle aurait été formée par lui seul, sans être assisté de son curateur, parce que cette nullité n'a été établie qu'en sa faveur; le défendeur pourrait seulement proposer une exception dilatoire, et soutenir qu'il n'est pas obligé de défendre à la demande formée contre lui, jusqu'à ce que le mineur ait été pourvu d'un curateur.

Si le mineur peut poursuivre, comme le dit Merlin, et si son adversaire peut simplement demander qu'il soit assisté de son tuteur, il me semble que ce droit existe également lorsqu'il s'agit d'une action prise contre le mineur. Dans les deux cas les actions ne doivent pas être renvoyés mais le tribunal peut ordonner la mise-en-cause du tuteur qui doit l'assister et le représenter.

Solon, "De la Nullité," No. 15, dit ceci:

> Il resulte de ce que nous venons de dire qu'il dépend le plus ordinairement du juge d'accueillir ou de rejeter une nullité qui n'est point prononcé de plein droit; au lieu que si elle a ce caractère, il ne peut se dispenser de la pronouncer, car elle repose sur des présomptions légales contre lesquelles aucune preuve n'est admise. (Articles 1350 et 1352 du Code Civil.)

Ces articles 1350 et 1352 du Code Napoléon correspondent à nos. articles 1239 et 1240 du Code Civil.

Notre article 174 C.P.C. bien loin de prononcer la

nullité de l'assignation d'un mineur dit qu'elle ne peut être invoquée *que s'il y a préjudice,* c'est là un fait qui, comme je l'ai dit plus haut, doit être laissé à l'appréciation souveraine du juge au procès. Il ne nous appartient pas en appel d'ignorer la discrétion qu'il a exercé.

Il convient d'ajouter que le défendeur a été assigné sur faits et articles suivant les dispositions des articles 359, et suivants, du Code de Procédure. Il était alors majeur et il était appelé comme défendeur à répondre aux questions dont on lui avait signifié copie. Les objections qu'il a soulevées contre cette dernière assignation sont telles qu'elles constituent un acquiescement de sa part à être traité comme partie défenderesse dans la cause. Art. 176 C.P.C.

La cour d'appel a également trouvé informe l'inscription pour jugement mais cette informalité n'est pas de celle qui devrait justifier le renvoi d'une action. Le défendeur assigné comme témoin et sur faits et articles ne s'est jamais plaint alors de cette informalité dans l'inscription. Il est evident que dans cette cause le defendeur espérait pouvoir se sauver des conséquences de son délit et de sa conduite si répréhensible en invoquant des informalités de procédure. Il devra se convaincre que les règles de la procédure n'ont pas été instituées pour empêcher la justice d'avoir son cours.

L'appel doit être maintenu avec dépens de cette cour et de la cour d'appel et les jugements de la cour supérieure sont confirmés.

Appeal allowed with costs.

Solicitors for the appellant: *Jacobs, Hall & Couture.*
Solicitor for the respondent: *Pierre Ledieu.*

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*Oct. 4, 7.
*Oct. 29.

FREDERICK M. NEWBERRY (DEFENDANT) ..... APPELLANT;

AND

JOHN F. LANGAN, WILLIAM B. RYAN AND HARRY P. SIMPSON (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Vendor and purchaser—Sale of land—Condition dependent—Deferred payment—Disclosure of title—Abstract—Refusal to complete—Lapse of time—Defeasance—Specific performance.

In an agreement for the sale of an interest in land, for a price payable by deferred instalments at specified dates, there was a condition for defeasance, at the option of the vendor, for default in punctual payments, time was of the essence of the contract, and receipt of a deposit on account of the price was acknowledged. Some time before the date fixed for payment of the first deferred instalment the purchasers made requisitions for the production for inspection of the vendor's evidence of title to the interests he was selling and the vendor refused to comply with the requisitions. The payment was not made on the appointed date and the vendor declared the agreement cancelled in consequence of such default. In suit for specific performance, brought by the purchases;

Held, affirming the judgment appealed from (17 B.C. Rep. 88), that the vendor was bound, upon requisition made within a reasonable time by the purchasers, to produce for their inspection the documents under which he claimed the interests he was selling in the lands; until he had complied with such demand the purchasers were not obliged to make payment of deferred instalments of the price and, in the circumstances, their failure to make the payment in question was not an answer to the suit for specific performance. *Cushing* v. *Knight* (46 Can. S.C.R. 555), distinguished.

Per Duff J.—In the absence of any express or implied stipulation to the contrary in an agreement respecting the sale of land in British Columbia, which is not held under a certificate of inde-

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

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feasible title, the purchaser is entitled, according to the rule introduced into that province with the general body of the law of England, to the production of a solicitor's abstract of the vendor's title to the interest in the land which he has agreed to sell.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Clement J., at the trial, and maintaining the plaintiffs' action for specific performance with costs.

The agreement mentioned in the head-note was contained in two receipts, that respecting one of the parcels being as follows:—

"Vancouver, B.C., Nov. 18th, 1910.

"Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of 13.79 acres, lot (15) fifteen, block 15, subdivision 463, Coquitlam, for the sum of $4,830, on the following terms: $500 cash, $2,330 on January 1st, 1911. Balance will assign my agreement Wakefield to myself. The deferred payments to bear interest at the rate of 7% per annum until paid. Net, no commission. Time is the essence of this agreement, and unless payments with interest are punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account thereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be paid by the purchaser. This receipt is given by the undersigned as agent, and subject to the owner's confirmation.

"F. M. NEWBERRY,
"Owner."

(1) 17 B.C. Rep. 88.

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The receipt affecting the other parcel was framed is similar terms, with the exception that it was signed by F. M. Newberry as "Agent for Owner."

Wallace Nesbitt K.C. and *J. Sutherland MacKay,* for the appellant, cited *Kintrea* v. *Preston*(1); *Phipps* v. *Child*(2); Dart, "Vendors and Purchasers" (7 ed.), 315; *Brooke* v. *Garrod*(3); *Lord Ranelagh* v. *Melton*(4); 21 Am. & Eng. Encyc. of Law, *vo.* "Option."

Bodwell K.C., for the respondents, cited Armour on Titles (3 ed.), p. 4; *Townend* v. *Graham*(5); *Cameron* v. *Carter*(6), *per* Boyd C. at p. 431; *McDonald* v. *Murray*(7); *Ogilvie* v. *Foljambe*(8), *per* Grant J. at p. 64; *Souter* v. *Drake*(9); *Ellis* v. *Rogers*(10), *per* Cotton L.J. at p. 670; *Doe d. Gray* v. *Stanion*(11), *per* Parke B., at p. 701; *Armstrong* v. *Nason*(12), *per* Strong C.J. at p. 268; *Brewer* v. *Broadwood*(13), *per* Fry J. at p. 107; *Boustead* v. *Warwick*(14); *Upperton* v. *Nickolson*(15), *per* James L.J. at p. 443; *Foster* v. *Anderson*(16), *per* Moss C.J. at p. 570, and in the court below(17), *per* Boyd C. at pp. 370 and 372, *per* Anglin J. at p. 574; *Cudney* v. *Gives*(18).

THE CHIEF JUSTICE.—I do not entertain any doubt; this appeal should be dismissed with costs.

(1) 25 L.J. Ex. 287.
(2) 106 R.R. 496.
(3) 2 DeG. & J. 62.
(4) 2 Drew. & Sm. 278.
(5) 6 B.C. Rep. 539.
(6) 9 O.R. 427.
(7) 11 Ont. App. R. 101.
(8) 3 Mer. 53.
(9) 5 B. & Ad. 992.
(10) 29 Ch. D. 661.
(11) 1 M. & W. 695.
(12) 25 Can. S.C.R. 263.
(13) 22 Ch. D. 105.
(14) 12 O.R. 488.
(15) 6 Ch. App. 436.
(16) 16 Ont. L.R. 565.
(17) 15 Ont. L.R. 362.
(18) 20 O.R. 500.

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There are two tracts of land in question, and the agreements are identical in terms, except as to the description of the property. There can be no doubt on the evidence that the appellant's offer to sell was accepted by Ryan, and that acceptance made the offer an agreement *inter partes* for the sale and purchase of the tracts of land described in it. The appellant from that moment had a right of action to recover the purchase price and his corresponding obligation to deliver the things sold arose then. It seems to me also clear, on the authorities to which we are referred, that it was incumbent on the vendor to disclose his title before demanding payment and the purchaser, therefore, was justified in his request that this title should be produced before paying the purchase price or any portion of it. If there was any failure on the part of the purchaser to pay within the stipulated delay, it was caused by the wrongful refusal of the appellant to shew his title. I accept the reasons of the judges in the Court of Appeal.

DAVIES J.—This was an action for specific performance of an agreement for the sale of land from appellant to respondents. The trial judge dismissed the plaintiffs' action on the ground that they had failed to make payment of the instalment of the purchase money on the day provided by the contract, that there was no default on the defendant vendor's part excusing such failure, and that time was expressly made the essence of the contract.

The Court of Appeal for British Columbia reversed this judgment, holding, amongst other things, that there was default on the defendant's part in refusing to produce for inspection the agreements under which

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he held the land he agreed to sell, and that this default excused the plaintiffs from the payment of the instalment of the purchase money on the day named.

The question was raised as to the nature and character of the defendant's interest in the land which the agreement professed to sell. At any rate one thing is sure, and that is that the plaintiffs bought and the defendant sold all the title and interest which the latter held in the land. I am of opinion that the plaintiffs were entitled to inspection of such agreements or evidence of title as the defendant had before they could be called upon to pay the instalment in question.

This inspection, although asked for by the plaintiffs a reasonable time before the instalment fell due, was refused by defendant. The defendant thus put himself in default, and his refusal to produce his agreements under which he claimed title excused the plaintiffs from tendering payment of the instalment on the day named.

The defendant, appellant, relied upon *Cushing* v. *Knight*(1), lately decided in this court. That case was a very different one from the present and turned entirely upon the terms of the agreement there in question, the construction of which we held demanded the payment of the instalment of the purchase money contemporaneously with, if not before, the execution of the written contract by the vendors, and that, there having been default in such payment, the obligation on the vendor's part to sell and convey the lands had not been created.

Assuming, therefore, that the contention of the appellant's counsel was correct and that Newberry only agreed to sell whatever rights he had in the lands

(1) 46 Can. S.C.R. 555.

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under his agreement with those from whom he bought, I think he was bound to grant inspection of these agreements to the plaintiffs before requiring payment by them of the substantial instalment of the purchase money and, having refused to do so, put himself in default and was not in a position to take advantage of the non-payment by the purchasers of the instalment and to cancel the agreement for such default.

The appeal should be dismissed with costs.

IDINGTON J.—The contention that the contracts here in question were mere options to purchase is hardly tenable in face of the express terms of the receipts evidencing same.

The relation of vendor and purchaser was created between the parties thereto in each case by the payment of the deposit and the delivery of the receipt fully in accord with the conversation had between, and fully disclosing the purposes of the parties.

The vendor became absolutely bound to sell. The vendee might, in law, have set up against him the statute of frauds.

If the vendee had chosen to forfeit the money paid and so plead that statute, if sued on his contract, the vendor was helpless.

In a colloquial sense descriptive of that situation it may, therefore, be that the parties who referred to these contracts as options were not far astray.

But, in the strict, technical sense, in law, of what an option means, as illustrated in the cases appellant's counsel referrred to, such is not the nature of either of the transactions in question; but that of a selling and buying of an interest in real estate. The nature of the interest so sold is here quite immaterial, for the title asked to be shewn was that which the vendor had.

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The appellant saw fit to maintain silence, when applied to by those entitled to claim, on behalf of the respondents, his attention to a request to shew title. He chose to ignore what common courtesy and a straightforward mode of dealing required at his hands.

I think he must take the consequence of failure in these regards and abide by the judgment of the Court of Appeal.

This appeal should be dismissed with costs.

DUFF J.—The appeal is from the judgment of the Court of Appeal for British Columbia in an action for specific performance of two agreements entered into between the appellant, Newberry, and the respondent, Ryan, relating to two separate parcels of land; one parcel being part of district lot 382, group 1, New Westminster District, and the other part of lot 463 in the same group. The first of these parcels is referred to as the "Kendal" and the second as the "Wakefield" lot. The two agreements were entered into on the same day. The terms of the first (relating to the "Kendal" parcel) were set out in a receipt for the first instalment of the purchase money given by Ryan to Newberry, which reads as follows:—

INTERIM RECEIPT. Vancouver, B.C., Nov. 18th, 1910.

Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of dist. lot 382, westerly 54 7/100 Block, Coquitlam, subdivision * * * for the sum of $10,940, on the following terms; $500 cash, balance, $5,440 in January, 1911, balance will assign my agreement Kendall to myself. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net. No commission.

Time is the essence of this agreement, and unless payments with interest are punctually made at the times appointed this sale shall be (at the option of the vendor), absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be

paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

$500. F. M. NEWBERRY
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The same amount ($500) was also paid as a first instalment of the purchase of the "Wakefield" parcel, and a receipt given identical in terms with that set out, except as to the price and the description of the property.

The instalments of purchase money which became respectively payable under these agreements on the 1st of January, 1911, were not paid. The appellant, thereupon, notified the respondents that because of their failure to make these payments he would treat the agreements as having come to an end; and, on the 13th of January, the respondents commenced their action. The position taken by the respondents was this. They said that it was the duty of the appellant to disclose his title to the property he had undertaken to sell, that the provision requiring payment of an instalment of the purchase money on the 1st of January, though absolute in form, must be read as subject to the implied condition that the vendor must first perform his obligation to satisfy the reasonable demands of the purchaser with respect to disclosure of title, and this the vendor had refused to do.

The first question is: What was the vendor's duty in respect of the disclosure of title?

The appellant contends that the agreements in question created options to purchase merely. The appellant, it is said, bound himself in each case, in consideration of the cash payment of $500, to an offer in terms of the receipt which was irrevocable up to the 1st of January, and which, in the meantime, could be ac-

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cepted in one way only; namely, by the payment of the sum stipulated in their receipt to be paid on that date. If this were truly the nature of the contract between the parties—that the relation of vendor and purchaser was not to be constituted until the January payment should be made — then no obligation to disclose his title would, of course, rest upon the appellant until that payment had been made.

But the language of the instrument manifestly cannot be reconciled with any such view of the character of the bargain; and the learned trial judge has explicitly found that

> the agreements were that the defendant sold and Ryan bought the properties for a certain sum.

Then it is said that the subject-matter of the purchases was not the fee simple in the parcels respectively described in the receipts, but certain agreements for the sale of these lands to the appellant. It was, in point of fact, understood by both parties at the time of the transactions in question that the appellant was not the holder of the fee in either parcel, but that, in respect of one of them, he had an agreement for the purchase of it with one Kendall, whose name appears in the receipt transcribed above, and, in respect of the other, with one Wakefield. In my view it is not necessary to decide, and I do not commit myself to any opinion upon the question whether or not the documents, read by the light of the facts in evidence, justify the conclusion that the subject-matter of the transactions was not the land, but these agreements for the sale of the land. There is, certainly, not a little to be said for the view that the parties were buying and selling the fee simple in the land; but I will assume that the other view, which is the view of the

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learned trial judge, is the better one. What, then, in this view of these transactions, was the obligation of the vendor in respect of disclosing his title? If the law of British Columbia touching this matter is the law of England, then the rule to be applied seems to be stated by an eminent equity judge, (Fry J., in *Brewer* v. *Broadword*(1), at p. 107,) in this passage:—

> The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shewn either from the surrounding circumstances or by direct evidence that the intention of the agreement is to sell only such interest, if any, as the vendor may have: and, in such a case as that, the purchaser has no right to require a title to be shewn by the vendor; but, in the absence of such evidence, the view which I take of such an agreement is that it requires the vendor to shew that he has a title to a valid agreement. The law of England in the case of a sale of land in fee simple requires the vendor to shew that he has the fee simple of the land. In the case of a sale of a lease, it requires the vendor to shew that he has a valid title to the lease or to the term granted by the lease. Likewise, in the case of an agreement to lease, I hold that the vendor is bound to shew that there is a subsisting valid agreement to lease.

Assuming that these agreements were the subject-matter of the respondent's purchase, the respondents were then entitled to have valid and subsisting agreements for the sale of these parcels by the vendors vested in them, on the 1st of January, on payment of the stipulated sums. And they were entitled to something more; there were entitled, in each case, to have an agreement vested in them under which the sums remaining at that date to be paid to the original vendor should not exceed the residue of the purchase money stipulated for in the agreement between the appellant and Ryan after the payment to the appellant of the January instalment. It was, consequently, their right to have it shewn, within a reasonable time before the 1st of January, that the appellant was in

(1) 22 Ch. D. 105.

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a position to discharge his obligation in that respect. As I will presently explain more fully, I think the evidence shews that the appellant refused to make any disclosure whatever; but another question of law must first be disposed of. The learned trial judge took the view that the law of England, (with regard to this matter of the obligation of the vendor of land under an open contract to disclose his title) is not, in its entirety, the law of British Columbia, and that there was, in this case, no duty on the part of the vendor to furnish the information demanded by the purchaser.

I quite agree with the learned trial judge to this extent, — that the establishment of a statutory system of title to land, (such as prevails, for example, in the Province of Saskatchewan,) by which the title is not completely constituted by documents and transactions *inter partes*, but rests upon registration by a public officer, may have the effect of rendering obsolete some of the specific rules governing the reciprocal rights of vendor and purchaser touching the matter in hand. Some of these rules have had their origin in the practice of conveyancers in England and others are based upon considerations of convenience or necessity which may cease to apply when the system of titles has been fundamentally changed. Moreover, the rule entitling the purchaser to demand a solicitor's abstract is a rule of comparatively modern origin, (Sugden on Vendors and Purchasers, 9 ed., p. 447,) and I can conceive circumstances, (having no special relation to the system of land titles,) in which an over-punctilious deference to the letter of the rule as it would, perhaps, be applied in England would, in British Columbia, have consequences very widely at variance

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with the expectations of the parties. But, on the other hand, the rule that the vendor under a contract for the sale of an interest in land is under an obligation to give a title to that which he is selling, in the absence of express or implied stipulation, (whether it be an obligation resting upon an implied term of the contract, as Baron Parke and Lord St. Leonards seem to think, or an obligation imposed *ab extra,* so to speak, by the law itself,) is a rule which nobody has ever doubted was introduced into British Columbia with the general body of the law of England; and it has, without any specific enactment on the subject, always been regarded as having been introduced in the same connection into the other provinces in which the body of the law has been derived from the same source. If it is the duty of the vendor to give a title, it would seem to follow, in the absence of special circumstances, (since the vendor may be snpposed to know his title,) that the vendor ought to disclose the particulars of the title he proposes to transfer unless he stipulates to the contrary. If the circumstances of the contract are such as to exclude the possibility of the parties to such a contract having contemplated the delivery of a solicitor's abstract, then, in such a case, there could be no difficulty in implying a stipulation of that character. I can quite understand, for example, that a vendor holding land under a certificate of indefeasible title, (and proffering his certificate,) might properly regard a demand for a solicitor's abstract as a purely vexatious demand. But, in the ordinary case of the sale of land held under a registered title, there being nothing in the circumstances of a special character, I do not see why the rule should not take effect. A cer-

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tificate of title under the "British Columbia Land Registry Act," not being a certificate of indefeasible title, is only *primâ facie* evidence of the title of the holder and the documentary evidence upon which the certificate rests is not necessarily disclosed by the register. The view expressed by the learned judge has never, I think, been accepted in British Columbia. The difficulty of accepting that view is enhanced in the case where, as here, the vendor's interest is in whole or in part unregistered.

This brings us to the question of fact.

The Chief Justice of the Court of Appeal says:—

> The two agreements in question in this action, dated 18th November, 1910, are for the sale by the defendant to one Ryan, the plaintiff's assignor, of two parcels of land. They are practically identical in terms, the one with respect to one parcel and the other to the other. One parcel may be conveniently designated the "Wakefield" lot, and the other the "Kendall" lot. The defendant, prior *to said 18th November*, agreed with Kendall to purchase his lot on deferred payments. He had paid a deposit of $50 and received a receipt therefor. Defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase which was registered, at all events, before the commencement of this action. It also appears that the defendant had an assignment of Clark's interest, which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for $50. On the 19th of November, defendant procured a formal agreement from Kendall, which was not shewn to Ryan. * * *
>
> Early in December, plaintiffs requested defendant to shew them the agreements under which he held the property and, I think, the inference from the evidence is *irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on 27th December, formally notified the defendant that they intended to proceed with the purchase, and demanded a solicitor's abstract of title.* This demand was ignored.

I think the evidence fully supports this; and I entirely agree with it.

There was, therefore, not only a disregard of the request for a solicitor's abstract, but a refusal to permit inspection of the documents evidencing the agree-

ments which the appellant was professing to sell. Such inspection was necessary to enable the respondents to ascertain whether those agreements were of such a character and so vested in the appellant that the appellant was entitled to assign them and whether the conditions on which the appellant's rights must rest had been observed; and it would have been folly for them to proceed with the payment of the purchase money without first having obtained it.

I think the appeal should be dismissed.

ANGLIN J.—On the true construction of the receipts which evidence the transactions here under consideration, I have no doubt that the agreements between the appellant and the respondent Ryan were for the sale and purchase of the lands in question, or at least of the appellants' interest in them. Punctuality in payment was made of the essence of the bargains and provision was made, in the nature of a condition subsequent, for rescission by the vendor upon default of prompt payment. Payment on an instalment due on the first of January was not made on that day. The vendor relies upon this as a default which entitled him to exercise his option to cancel and rescind. The purchasers answer that the vendor had already refused a legitimate demand for production of his title, — namely, in the case of one parcel, the agreement from the registered owner under which he held, and, in the case of the other, the transfer of the interest of his co-purchaser from the registered owner,—and that the failure to make the January payment was, therefore, not a default entitling the vendor to rescind. The learned Chief Justice of the Court of Appeal finds that

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early in December, plaintiffs requested defendant to shew them the agreements under which he held the property, and I think the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on the 27th of December, formally notified the defendant that they intended to proceed with the purchase and demanded a solicitor's abstract of title. This demand was ignored and the plaintiffs did not make the January payments. When they took the matter up with the defendant, within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on the first of January.

The letter of the 27th of December has been criticized on the ground that it is open to the construction that it calls upon the vendor to furnish an abstract of the titles of the registered owners of the land, and not merely an abstract of his own title from such owners. The language is

> in the meantime you will please furnish Whiteside and Edmonds at once with an abstract of your title.

For the respondents it is contended that the purpose of this letter was merely to put in writing the demand already made verbally for the production of the agreements from the registered owners under which the vendor claimed and that an abstract of those agreements only was called for. Whatever may be the proper construction of the letter, and whether the respondents were or were not entitled to an abstract of the titles of the registered owners, they were, at all events, in my opinion, entitled to production and inspection of the documents under which their vendor claimed the interests in the lands of which he was disposing. The evidence abundantly justifies the holding of the learned Chief Justice that production of these documents had been refused and has convinced me of the accuracy of the inference drawn by Mr. Justice Irving that

> the defendant was then (on the 3rd of January), and had been at the time when he was requested to shew title endeavouring to bring

about a deadlock with a view to preventing this contract being carried out.

This case is entirely distinguishable from the case of *Cushing* v. *Knight*(1), much relied upon by the appellant. We have here a contract of sale with a provision in the nature of a condition subsequent for defeasance in the event of non-payment at the stipulated times; whereas, in *Cushing* v. *Knight*(1) it was held that, on the true construction of the contract there in question, the relationship of vendor and purchaser, with its incidental rights, would not come into existence until actual payment of the money in respect of which there had been default. The refusal of the appellant to produce the agreements evidencing the interests which he was selling I think put him in default and prevents him from claiming that, while such default continued, the respondents were under obligation to make further payments. There was, in my opinion, therefore, no default on their part which entitled the vendor to rescind, and the judgment for specific performance against him was right and should be maintained.

I would dismiss this appeal with costs.

BRODEUR J.—This appeal should be dismissed, and I concur with the views expressed by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Gwillim, Crisp & Mackay.*
Solicitors for the respondents: *Bodwell & Lawson.*

(1) 46 Can. S.C.R. 555.

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*Oct. 14, 15.
*Oct. 29.

THE FOSS LUMBER COMPANY (CLAIMANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT;

AND

THE BRITISH COLUMBIA LUMBER AND SHINGLE MANUFACTURERS, LIMITED (INTERVENANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Customs duty—Canadian Tariff, 1907, *items* 503-506—*Importation of lumber*—*"Sawn planks"*—*"Dressed on one side only"*—*"Not further manufactured"—Sizing by saw—Free entry.*

Under item 504 of the "Customs Tariff, 1907," the importation into Canada is permitted free of duty of lumber described as "planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured."

Held, reversing the judgment appealed from, (14 Ex. C.R. 53), Duff and Anglin JJ. dissenting, that sawn boards or planks which have been "dressed on one side only" by a machine which not only dresses them on one side but, at the time of such operation, reduces them to uniform widths, by means of another sawing process which has the effect of "sizing" the lumber, have not thereby been subjected to such "further manufacture" as would bring them within the exception from free entry under item 504.

APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the appellants' claim with costs.

In April, 1912, at the Customs Port of Entry of the City of Winnipeg, in Manitoba, the appellants pre-

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

(1) 14 Ex. C.R. 53.

sented a free entry for a carload of fir lumber described as "being lumber of wood, sawn and dressed on one side only, but not further manufactured." The lumber in question consisted of planks and boards which had been sawn in the mill by circular or gang saws and, afterwards, planed or "dressed" on one side in a planing-mill which was fitted with machinery that not only dressed one side of the plank or board but, during that operation, performed also the function of "sizing" the lumber, reducing the planks and boards to uniform widths by means of another saw, called a "side-head," attached to the planer. The Collector of Customs, at Winnipeg, refused to pass the free entry and levied duty on the lumber at the rate of 25 per cent. *ad valorem* under item 506 of the "Customs Tariff, 1907." The appellants claimed to have a rebate of the duty so collected and their claim was referred, under section 38 of chapter 140, of the Revised Statutes of Canada, 1906, ("The Exchequer Court Act,") by the Minister of Customs, to the Exchequer Court of Canada for adjudication thereon.

In the Exchequer Court, Mr. Justice Cassels decided that the lumber in question, after having been first sawn, went through another process of manufacture and, therefore, was not entitled to free admission on importation into Canada under tariff item 504. The judgment appealed from ordered that the claimants should recover nothing and that they should pay the costs.

On the appeal to the Supreme Court of Canada, the British Columbia Lumber and Shingle Manufacturers, Limited, were, by order of a judge, permitted to intervene, as respondents, with liberty to file a factum and to be represented and heard by counsel, upon

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the argument of the appeal, under the provisions of Rule 60 of the Rules of Practice of the Supreme Court of Canada.

W. D. Hogg K.C. and *R. C. Smith K.C.* for the appellants.

Upon the proper interpretation of item 504 of the tariff the lumber in question should have been admitted free. It consists of planks sawn on three sides or surfaces and dressed on one surface, and fits the exact language of the item in that respect. There is no other or further manufacture appearing on the planks than that of sawing on three sides and dressing on one side. If, by ingeniously constructed machinery, a plank, after it is taken from the sawmill, may be planed on one side and sawed to a uniform width on the same machinery, this does not alter the character of the lumber as planks or boards sawn on three sides and planed on one side. When the planks came for examination to the Customs Officer they were in fact planks of wood sawn and dressed on one side; the fair and reasonable interpretation of tariff item 504 is that planks, boards and lumber not further manufactured than sawn on three sides and dressed on one side are free.

The judge of the Exchequer Court has endeavoured to distinguish between the first sawing in the mill and some subsequent sawing upon the plank which may be done by another saw or at another time. It is quite possible that planks in their rough state, as taken from the mill, would come under item 503, but even under that section, assuming that no other manufacture could be applied to it than sawing or splitting, there is nothing which would prohibit a further saw-

ing or splitting than the original first sawing or splitting of the wood, nor can it be said that under item 504 the sawing must be that of the first or original sawing of the plank in the mill. The word "sawn" simply means that the plank has been made by the operation of a saw, as opposed to the operation of some other method of producing a plank, and if the plank or board is sawn on three sides when it is produced to the collector for entry it is impossible and absurd to say that because a plank has been reduced by sawing to a uniform width it is anything more than, or exhibits any difference from, a plank or board not further manufactured than sawn on three sides and dressed on one.

The rule to be applied in the application of a tariff item is that the form of the material at the time of importation into Canada should form the discriminating test for duty. To depart from this rule would necessarily lead to confusion and want of uniformity in the application of the tariff. Compare *The Queen* v. *The J. C. Ayer Co.*(1); *Magann* v. *The Queen*(2). See also the "Customs Act," R.S.C. 1906, ch. 48, sec. 2, sub-sec. 2; *Cox* v. *Rabbits*(3); *Partington* v. *Attorney-General*(4), and Elmes, Laws of Customs, p. 22, sec. 49.

The imposing of duty on this lumber was contrary to the practice which had prevailed for many years in regard to the lumber of the kind in question. Ever since the enactment of the "Customs Tariff, 1894," lumber dressed on one side only and sawn on three sides has been admitted free of duty. The tariff provisions and

(1) 1 Ex. C.R. 232, at p, 271.
(2) 2 Ex. C.R. 64.
(3) 3 App. Cas. 473, at p. 478.
(4) L.R. 4 H.L. 100, at p. 122.

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changes in this class of lumber, since 1894, have been as follows:—Customs Tariff, 1894—free list—item 739; "Sawed boards, planks, deals, and other lumber undressed or dressed on one side only, free." This was repealed by "Customs Tariff, 1897," and the item relating to the number corresponding to this, (item 611) was "Sawn or split boards, planks, deals and other lumber when not further manufactured than dressed on one side only, or creosoted, vulcanized or treated by any preserving process, free." This again was repealed by "Customs Tariff, 1907," and the item 504 now in question was substituted.

It will thus be seen that lumber dressed on one side only and sawn on three sides has long been the subject of free admission; and where the executive department of the Government having charge of the matter has continued, unbroken, a certain interpretation of a statute the courts will confirm that interpretation as being the proper construction to be placed upon the statute. In *United States* v. *The Alabama Great Southern Railroad Co.*(1), the rule was there laid down by Mr. Justice Brown; a similar opinion was given by Mr. Richard Olney, Attorney-General, in 1894, (20, Opinions of Attys.-Gen., p. 719, Op. 246), and in *Merritt* v. *Cameron*(2), and *Robertson* v. *Downing*(3).

Travers Lewis K.C. for the respondent. The court has granted leave to the British Columbia Lumber and Shingle Manufacturers, Limited, to intervene and, as they are now represented by counsel, who will support the judgment of the Exchequer Court, it has become unnecessary on the appeal in this test case for the

(1) 142 U.S.R. 615, at p. 621. (2) 137 U.S.R. 542.
(3) 127 U.S.R. 607.

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Crown to do more than to submit the question in controversy, as it is only desired to administer the law in accordance with the construction the court may place upon the tariff item in dispute.

Lafleur K.C. for the intervenants. The planer by means of which the dressing was done, contained additional machinery which sized the lumber, reducing it to a uniform width. This uniformity in width could not be obtained by means of the saws in the saw-mill, for it is impossible to get machinery running rigidly enough or regularly enough to produce these results with a saw-mill equipment. The machinery of a saw-mill is operated rapidly and the devices for carrying the logs to the saw are such that it is impossible to get the machinery to run without some lateral movement, and it is, consequently, impossible to get a number of pieces of uniform width in the edgers. It was conceded, at the hearing, by counsel for the appellants that there is no such thing as a saw-mill with a "sizing" equipment. The secondary machinery, which in this case was added to the planer, and which forms no necessary part of the planing or dressing equipment, consisted in a guide or straight-edge with rollers and spring guides, or some equivalent device, to hold the plank up to the straight-edge and to carry it through straight to a small saw. By means of this machinery the planks which had been sawn in the mill and afterwards dressed on one side, were equalized in width, and it is this further process which was contended by the Crown and by the intervenants to be a "further manufacture" within the meaning of item 504 of the tariff. It is contended that, because this additional operation was done by means of a saw, the article is

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not dutiable upon the proper construction of item 504. It is proved that it would have been cheaper to do both the dressing and the edging by means of a planer, that is, by means of cutting instruments, than to do the dressing by a cutting instrument and the sizing by the saw attachment and, consequently, as one of the witnesses puts it, the saw attachment increases the cost and no one does it except for the purpose of evading the tariff.

The judge in the Exchequer Court finds as a fact that the planks, after being sawn and dressed on one side, went through a further process of manufacture. No other finding could have been made upon the evidence. If the contention be admitted that item 504 should be construed so that lumber may be sawn, split or cut any number of times, so as to produce a fully manufactured article, provided it is dressed on one side only, that would permit of practically exhausting every process to which lumber may be subjected for manufacturing purposes and nothing would remain which could fall within the operation of item 506, "manufactures of wood not otherwise provided for." The words "sawn, split, or cut," in item 504, obviously refer to the sawing, splitting or cutting which produces the plank or board, and not to any subsequent sawing, splitting or cutting which might completely alter the form and utility of the article. That the words "sawn, split or cut" are intended to refer to the original sawing, splitting or cutting, by means of which the plank or board is produced, is very manifest from a comparison of item 504 with item 503, which reads as follows: "Planks, boards, clap-boards, laths, plain pickets and other timber or lumber of wood, not further manufactured than sawn or split, whether creosoted, vulcanized, or treated by any other

preserving process, or not: Free." The words "sawn or split" in item 503 evidently refer to the sawing or splitting by means of which the planks, boards, clapboards, laths and pickets are manufactured. As applied to planks, it means the rough planks as they leave the saw, and no further manufacture or treatment is permitted except the creosoting, vulcanizing or preserving by some other process. Then item 504 goes a step further and allows the plank, whether sawn, split or cut, to be dressed on one side only, but not further manufactured. It is evident that the words "sawn, split or cut" in item 504 are adjectival terms qualifying the substantives "planks, boards or other lumber." The same idea might have been appropriately expressed with regard to a plank by saying that a sawn plank could be dressed on one side, but not further manufactured, and this excludes the idea that, after having produced a plank by sawing and then dressed it on one side, the manufacturer is at liberty to apply other sawing machinery to that plank for the purpose of modifying it and further fitting it for the market. The words "not further manufactured," in item 504, cannot mean not further manufactured simply by way of dressing, but must also exclude further manufacture by way of sawing, splitting or cutting. To confine the expression to further manufacturing by way of dressing would be redundant, for the language already clearly indicates that the dressing must be on one side only. Then, as the learned judge of the Exchequer Court shews, if one takes the different steps which occurred in this very case in their chronological order, one is forced to the conclusion that the "sizing," which was done last of all and by special machinery, must be considered as a process

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of further manufacture upon a plank which has already been dressed on one side only.

The decision in *Magann* v. *The Queen*(1), has no application because, in that case, the item of the tariff provided that the following articles should be admitted into Canada free of duty: "Lumber and timber, planks and boards, sawn, or box-wood, cherry, walnut, chestnut, gumwood, mahogany, pitch-pine, rosewood, sandal-wood, Spanish-cedar, oak, hickory, and white wood, not shaped, planed, or otherwise manufactured, and saw-dust of the same, and hickory lumber, sawn to shape for spokes of wheels but not further manufactured." The plaintiff had entered into a contract to supply white-oak planks and boards of specified thicknesses, widths and lengths, and arranged with millmen in Michigan to saw these planks and boards from the log, and they were in fact sawn to such thicknesses, widths and lengths as to admit of their being used in the construction of cars and railway trucks without a waste of material. It was held, upon these facts, that the planks and boards in the form in which they were imported were not *shaped* within the meaning of the statute, and were not dutiable. The sawing in that case was done at the saw-mill and no further manufacturing process took place after the lumber left the saw-mill. In the present case, after everything had been done that could be done in the saw-mill to convert the wood into planks and after the dressing on one side permitted by the tariff had also been performed, the planks were then subjected to the operation of special and different machinery for the purpose of producing a result which could not have been

(1) 2 Ex. C.R. 64.

obtained by any means at the disposal of the saw-millman.

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THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court given on a reference by the Minister of Customs, arising out of these facts:

A carload of fir lumber was entered at the Custom House at Winnipeg, on the 2nd of April last (1912), by the appellants, on the value of which duty at the rate of 25 per cent. was collected. The question referred is: Was that lumber subject to the duty levied upon it? The judge of the Exchequer Court held that it was.

The value of the lumber is admitted at $308, and the amount of duty paid at $77. The several pieces of planks, produced at the trial and here, were taken from the carload in dispute, and are accepted as fair samples of the kind and quality of lumber which is the object of this reference. The answer to the question must largely depend upon the meaning and effect to be given to the word "sawn" in item 504 of schedule "A" of the Customs Tariff of 1907. That item reads as follows:—

> Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured. Free.

On the evidence it appears that the lumber in question was cut, from the original log, in the mill where it was sawn on four sides; it was then removed to the planing mill and there dressed on one side, and again sawn on another side. So that, on one side, the lumber was sawn twice,—once in the saw-mill and a second time in the planing-mill,—and the whole question is: Does that second sawing in the planing-mill constitute

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a "further manufacture" within the meaning of the item of the Customs Tariff above quoted?

Speaking of the way in which the revenue laws are to be interpreted, Sir William Ritchie said, in *The Queen* v. *The J. C. Ayer Company*(1), at pages 270 and 271:—

> In the first place let us see how the revenue laws are to be interpreted. There is a general provision in the "Customs Act," 1883, that all the terms of that Act, or of any Customs law, shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which that Act, or such law, was made, according to its true meaning, intent and spirit. But I do not understand from this that laws imposing duties are to be construed beyond the natural import of their language, or that duties or taxes are to be imposed upon terms of vague or doubtful interpretation.

And he adds later, quoting Lord Cairns in *Cox* v. *Rabbits*(2), and *Partington* v. *The Attorney-General*(3):

> But it is clear that the intention of the legislature, in the imposition of duties, must be clearly expressed and, in cases of doubtful interpretation, the construction should be in favour of the importer.

To this I would add what Lord Taunton said, when speaking of the "Stamp Duty":

> The stamp law is *positivi juris*. It imports nothing of principle or reason, but depends entirely upon the language of the legislature.

Taken literally and giving to each word used its natural meaning the section we are asked to construe says that planks of lumber "sawn" on three sides and dressed on the fourth side, (not further manufactured) should be admitted free of duty. The planks in question come, if we are to judge from their physical appearance, in all respects within that description. It is, however, argued on behalf of the Crown that, not-

(1) 1 Ex. C.R. 232. (2) 3 App. Cas. 473.
(3) L.R. 4 H.L. 100, at p. 122.

withstanding their outward aspect, the planks having been sawn a second time, with a special saw in the planing-mill, at the same time as they were dressed for the special purpose of what is called "sizing," this second sawing for that purpose constitutes a "further manufacture" within the meaning of those words in item 504, and takes the lumber out of the operation of that item. I understand that "sizing" is admitted, by both sides, to be a process by which the lumber is reduced to a uniform width and thickness.

I cannot agree that the second sawing is, in the circumstances, a further manufacture. Whatever may be the object or purpose of those who subject the plank to the process of a second sawing in the planing-mill, the effect is to produce a piece of plank sawn on three sides. If this second sawing had been done in the saw-mill, when the log was originally sliced into lumber, for the same purpose, viz., "sizing"—assuming that I have given to this word its accepted meaning,—would, or could any question of further manufacture arise? I fail to understand how the second sawing, if done in the planing-mill, makes a difference; the result of that operation, in whichever mill executed, is the same in so far as the outward physical appearance of the plank produced is concerned. Perhaps my meaning may be more clearly expressed in these words: The second sawing process to which the plank is subjected is not the less a sawing because it is done in a planing-mill to which the plank was admittedly properly taken for the purpose of being dressed. And, when put through that process, the only way in which the plank can be accurately described is to call it a plank sawn on three sides and dressed on a fourth. The colloquial as well as the dictionary meaning of the verb "to saw" is "to

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cut with a saw". One can, of course, imagine, as argued by the respondent, a variety of ways in which, by the aid of a saw, the process of manufacture might be very considerably advanced, but we are now called upon to ascertain the intention of Parliament from the words used in this item, as applied to the facts in this case, and we are not concerned with interesting speculations as to the possibility of that intention being defeated by ingenious devices. "Words, like certain insects, take their colour from their surroundings." Here the word "sawn" is used in the adjectival sense and must be read in connection with the noun "plank" of which it expresses a quality. The dictionary meaning of the word "plank" is "a broad piece of sawn lumber", and, in familiar speech, a plank may fairly be said to be a more or less regularly shaped oblong board; and a "sawn plank" is a board reduced to that shape by the aid of a saw. A piece of ornamented wood produced by a fret-saw may be a piece of furniture or wood for decorative purposes, but it would not be described as a "plank".

In conclusion, I am of opinion that the particular carload of lumber with which we are concerned, when presented for entry to the Customs official, was made up of "planks" which came, in so far as he could gather from their outward form and appearance, within the words of description contained in the section of the tariff item 504; and it was no part of his duty to inquire into the purposes or uses to which those planks might subsequently be applied.

If I had any doubt, which I have not, I would adopt the principle of construction laid down by Elmes, in his Law of Customs, page 26, section 60.

In cases of serious ambiguity in the language of an Act, or in cases of doubtful classification of articles, the construction should be in favour of the importer, for duties and taxes are never imposed on the citizen upon vague or doubtful interpretation.

The appeal is maintained with the usual recommendation as to costs.

IDINGTON J.—The questions which are involved in this appeal must be determined by the interpretation and construction of item No. 504 of the tariff, which reads as follows:—

Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured.

The literal meaning of these words in their plain grammatical and ordinary sense, which is said to be the golden rule of interpretation, is to my mind just what appellants contend for; that is, planks sawn on three sides and dressed on one side. And, when we go beyond such literal meaning, we depart from the long established mode of reading a taxing or revenue Act.

The interpretation clause of the "Customs Act," subdivision 2 of section 2, does not seem to me to carry us any further.

If I could read the Act as the learned trial judge does when, in the passage quoted from his judgment in the respondent's factum, he says

I think the whole scope of the statute and the tariff is to prevent completely manufactured articles being entered free of duty,

then I might see my way to a different reading, first of the said interpretation clause, and next, as a consequence thereof, of the above quoted item of the tariff.

With the greatest respect for the learned judge, I submit that lumber in any shape is clearly, for the greater part of its uses, a completely manufactured article and yet is admitted free.

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Whether quite as large as ninety per cent. of the whole importation of lumber, as one witness states, is so or not I cannot say, but obviously a very large percentage thereof goes into consumption without being dressed on one side. This latter work preparatory to use of the lumber which may be so treated widens the field wherein it can be used as completely manufactured.

Evidence put forward by the Crown shews that usually saw-mills do not contain the machinery that would enable the sawing to be done so evenly as to produce as straight an edge as appears in one of the edges of each of the pieces put in evidence as exhibits herein. Indeed, some of the witnesses go very far and seem to state no saw-mill does, but that is, as some of these witnesses point out, an obvious error as a statement of what no witness can be likely to know.

Counsel for the intervenants put the matter fairly that, even if a saw-mill did contain such machinery and appliances as would enable this to be done, then, according to the claim made herein by the Crown, it must be held in using same to be engaged in a process of manufacture within the meaning of the words "but not further manufactured".

That view presents the case and the claim in its fairest light. If that contention is right, then and not otherwise can the claim of the Crown be made good.

Let us test that. How many times has a piece of timber to be turned round and set and then to be passed through by a saw before it is fit to fill the commercial uses and demands for lumber of various lengths and dimensions and yet be clearly duty free?

The first cutting admittedly is to be free of duty. But that will not fit for the market all that which is

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just as clearly duty free as that dropped from a first cut. Indeed, a second or even third cutting of the same saw may be involved in the production of what admittedly is duty free. Nay, more, much of it, but not of necessity all, has to go to the edger and be trimmed by that saw. It is admitted an edger can properly be used without rendering the produce thereof dutiable. But why? Surely it is only to produce out of boards that sort of lumber the other saw would not produce, yet by a wasteful process could have produced, and to make by a sawing process a more completely manufactured article.

Two different kinds of saws can thus, it is admitted, be used in succession on the same material in a variety of ways to put it through a process of completely manufacturing it and yet leave it free of duty. Why permit two saws to be thus used when planks could be turned out with one? Better work, greater economy, cheaper production are the objects sought by the use of two saws. And, if a third can produce in a higher degree such results, or like thereto, wherein lies the objection? So far as I can see the objection might as well be made to the use of the edger and supported by the like train of reasoning as to a third saw. And, if you say, "Oh! an edger has been used for ever so long", I answer, "there is no satisfactory evidence that the use of the third saw was not in actual operation long before this tariff item was framed, and, possibly, it was so framed to meet such possibilities of production."

But again, if the necessary clamps, clutches, levers and other devices that would hold the board first sawn were used to hold it in place to apply an improved edging saw to the work, then that sawing cannot be

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permitted if this claim of the Crown is well founded. Yet, in my humble judgment, such a thing is physically possible and, according to the reasoning of the Crown, a legitimate proceeding to produce what item No. 504 admits free of duty.

It has often been said that a protective tariff tends to lessen the mechanical ingenuity likely to be applied to cheapen production, but I never heard imputed to it that such mechanical ingenuity as it might accidentally develop cheapening production was not only to be despised and set aside but also, when discovered, declared unlawful.

If the saw-mill can conceivably be equipped in the way I suggest to produce the sawing desired with two saws, then I hardly think it was intended to prevent the use of three or more saws. If that was the purpose of this legislation, then it can easily be enacted that only one saw can be used in the process of manufacture, or if two, then only two, and thus make the item clear.

If the third sawing is, as I think, permissible, then the accidental circumstance of its taking place under the same roof or on the same table as the permissible dressing is of no consequence.

I think the appeal should be allowed with costs.

The order made on the consent of all parties to the record permitting the intervention of third parties but reserving for the full court the question of its validity or propriety I do not think should be treated as a precedent to be followed hereafter under our rule No. 60.

DUFF J. (dissenting).—The question is whether a certain carload of lumber imported by the ap-

pellants from the United States is liable to Customs duty. This lumber admittedly falls within the item of the Customs Tariff, (the Schedule to the "Customs Act" of 1907), numbered 506 unless it is embraced within the exemption created by the item numbered 504. For convenience I set out in full these two items as well as the items numbered respectively 503 and 505 which are *in pari materia.*

503. Planks, boards, clap-boards, laths, plain pickets and other timber or lumber of wood, not further manufactured than sawn or split, whether creosoted, vulcanized, or treated by any other preserving process, or not. * * * Free.

504. Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured. Free.

505. Sawn boards, planks and deals planed or dressed on one side or both sides, when the edges thereof are jointed or tongued and grooved. * * * 25 per cent.

506. Manufactures of wood, n.o.p. * * * 25 per cent.

The appellants' contention is that the lumber in question consisted of "planks" and "boards sawn * * * * and dressed on one side only but not further manufactured". This is disputed on behalf of the Crown.

The facts bearing on the question are really not in dispute. The shipment with which we are concerned comprised several parcels of what is known in the lumber trade as "sized lumber" suitable for use in the construction of buildings as "joisting" and "studding." To fit them for this purpose it is essential that the pieces in any given parcel should be of uniform width and it was admitted at the trial that the required uniformity of width cannot be secured by any machinery which is part of the ordinary equipment of a saw-mill. It was further admitted that

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machinery adapted to secure that uniformity—machinery, that is to say, for performing the operation of "sizing"—is never found in a saw-mill.

The cutting instrument commonly used in "sizing" is a knife. The instrument used in this case was a saw. The ingenuity at the command of the persons engaged in manufacturing lumber for export from the United States into Canada has produced a machine which not only does the office of dressing on one side by planing but performs also the function of "sizing". As in this latter process the cutting is done by saws alone it was supposed that the lumber subjected to it would fall within the category of "planks sawn" and "dressed on one side only" and thus, by way of the exemption provided for in item 504, would escape the incidence of the duty imposed by item 506. This method of reducing a parcel of lumber to a uniform width is in itself more expensive than the methods usually employed; but the additional expense so incurred would be more than offset by the advantage of free admission to the Canadian market.

In these circumstances, have the appellants established the proposition upon which they base their appeal that this carload of lumber falls within the description "planks, boards, * * * sawn, split or cut * * * and dressed on one side only, but not further manufactured"? I think they have not. Each one of the parcels in question comprises, it is true, only pieces of lumber which answer the description "planks or boards * * * sawn * * * and dressed on one side only", but it cannot, I think, be affirmed of these pieces of lumber that they are "not further manufactured". After having been completely manufactured as "planks" or "boards" they have been subjected to a

further process—a process which forms no part of the procedure by which "planks" and "boards" as such are produced from timber and which is a special process that is designed to fit the "planks" and "boards" so produced for certain special purposes; and did, in fact, fit them for those purposes. It is true that this special process consisted in part in applying a saw to each of these pieces. But that was not the whole of the process; in addition to that there was manipulation by special devices which reduced the pieces comprised in any parcel to the uniformity of dimensions which was necessary to make them suitable and did, in fact, make them suitable for use as "joisting" and "studding" and by which they were converted into a commercial commodity having, in the lumber trade, a distinctive designation. Before they were subjected to this process they were "sawn" boards and planks simply; but I see no escape from the conclusion that by the operation of "sizing" they were "further manufactured" and, consequently, were excluded from the category of articles falling within the exception which the appellants invoke.

ANGLIN J. (dissenting).—The simple question before us is whether sawn planks and boards which, in addition to being dressed on one side, have also been "sized" by a sawing process are "further manufactured" so as to exclude them from the exemption allowed by item No. 504 of the Canadian Customs Tariff of 1907. It was conceded at bar that if the lumber in question had been "sized," as was formerly the custom, by the use of a knife or plane that process would have been such a further manufacture. The planks or boards would then be sawn *and* cut—not sawn *or* cut.

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The evidence is conclusive that the sizing now accomplished by the use of fine saws run comparatively slowly and attached to the planing machinery used to dress the planks or boards on one side is equally effective and answers the same purpose as that formerly done by the use of the knife or plane—the "side-head" of the planing machine. In both cases it is essential to the operation that the board or plank which is to be sized should be held firmly in place by such devices as spring-guides, a straight-edge and rollers. A rigidity unattainable in ordinary saw-mill machinery is required. The board or plank produced by the saw-mill is only approximately uniform in width throughout its own length and with the other boards or planks with which it is classed as assorted dimension lumber. The exact uniformity necessary for some purposes can be obtained only by subjecting these planks or boards to the further process of "sizing". Solely because this latter result has been attained, in the case now before us, by the use of saws the appellants insist that the board or plank is still merely "sawn" and is, therefore, "not further manufactured" within the meaning of that phrase in item No. 504. If that position were tenable it would follow that a piece of lumber which has been subjected only to sawing processes, however numerous or varied, would not be so "further manufactured" so long as it might still properly be described as a plank or board. It seems to me to be only necessary to state this proposition to demonstrate its fallacy.

If an order were given to a lumber manufacturer for sawn boards or planks of certain dimensions he would deliver the product of the saw-mill—not sized lumber. The latter is a different and a more expensive product and is supplied only when specially ordered. The evi-

dence makes it clear not merely that it is the ordinary practice to "size" lumber in the planing-mill after it has left the saw-mill, but that "sizing" cannot be performed by the machinery of the saw-mill. The sawn plank or board produced by the latter, known as an article of commerce to the lumber and building trades, must be subjected to a further manufacturing process before it will answer the description of a sized board or plank—equally well known as a distinct article of commerce to the lumber and building trades. The uses to which the latter may be put are different from those for which the former is employed. The difference in cost is material. The articles are distinct in fact and are so recognized as articles of commerce—and that is the result of a further process of manufacture to which one of them has been subjected. The sawn board or plank has been "further manufactured" and it is, in my opinion, immaterial whether, in effecting such further manufacture, saws or knives have been employed.

I would dismiss the appeal.

BRODEUR J.—We are called upon to decide whether the "sizing" process on planks and boards exempts them from duty under item 504 of the Customs Tariff. That article reads as follows:—

> Planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured. Free.

It is stated on behalf of the respondent that the process in question constitutes a manufacturing process more advanced than the sawing operation.

On the other hand, it is contended by the appellants that sizing is simply a sawing process and that the

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planks and boards so manufactured do not lose their qualification of sawn wood.

What is that "sizing" process? It consists in giving the planks a uniform size. Of course, that result could be reached through the saws of the edging machine with which all saw-mills of some importance are equipped. But some planks might not have the same width. Then they are passed through the saws of a sizing machine that renders the planks absolutely uniform.

After that sizing process is through the planks are put on the planer to be dressed, sometimes on three sides and sometimes only on one side. It is the usual process followed in Canadian mills.

In the United States a new machine has been found by which the dressing of the planks on one side and the sawing or sizing of the edges is all done at the same time. It is a cheaper process.

The honourable judge of the Exchequer Court decided that the item of the tariff in question contemplated pieces of lumber that had been simply sawn once and that the sizing of the lumber which required the plank to pass through a second sawing process constituted an article "further manufactured" than what the legislature had in view. He stated also that the sizing machine not forming part of the ordinary equipment of a saw-mill constituted the further manufacturing process contemplated by the statute.

His conclusions are based on two grounds; First, that the law contemplates one single sawing process; and, secondly, that the work should be done in a saw-mill. I am unable to agree with those conclusions. As to the second sawing operation I may say that the gang-saw or circular saw that cuts the logs is not the

only one that is used in the saw-mills, as every one is aware. The planks, after having been converted as such by the gang-saw, have to pass through the butt-saws and edge-saws. By the latter process the edges of the planks are removed in order to give them the same width.

So several sawing processes are made in order to manufacture the plank and, if you are not satisfied with the width of your planks, if you find them too wide, you can also pass them through the saws of the sizing machine and have an absolute uniform width.

Of course, that uniformity could be reached by simply passing the planks through the saws of the edging machines.

It appears that, generally speaking, this sizing process is made in the planing-mills and the sizing machine is not very often found under the roof of the saw-mill. Nothing prevents it, however, from being part of the saw-mill equipment; quite the reverse. It is a sawing process all the same and the plank, when it has passed through the operation, should be called a sawn plank. The fact that the size is absolutely accurate in one case and that the same uniformity would not exist in the other does not alter the nature of the plank. It is a piece of wood having the dimensions of a plank and which has been sawn purely and simply.

Then—What is the meaning of the words "not further manufactured"? It means that a plank that is further manufactured than sawn on three sides and dressed on one side is subject to duty.

If it is dressed on two sides; if the edges are dressed also, or if they are grooved or bored, then they become "further manufactured,"—and must pay the duty.

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It has already been decided that pieces of oak which had been cut and so could be used more easily in a certain manufacturing process than if imported in the ordinary length should not be taxed under a statute that required that oak to be duty free should not be shaped. *Magann* v. *The Queen*(1).

We should take into consideration also the fact that a statute imposing a tax should always be strictly construed and that, in case of doubt, the tax should not be levied. Maxwell, "Interpretation of Statutes," (5 ed.), p. 461; *The Queen* v. *The J. C. Ayer Co.*(2); *Cox* v. *Rabbits*(3).

I do not find in this case very grave doubts. But if our interpretation is not in accordance with the intention of the legislature, if the sizing process was to be eliminated in its intention, then it should have said so. But as the sizing process is, after all, simply a sawing process, and as it does not constitute any difference with the edging process, I am unable to come to any other conclusion than that this appeal should be allowed, with a recommendation that the Crown should pay the costs of this appeal and of the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Hogg & Hogg.*
Solicitor for the respondent: *E. L. Newcombe.*
Solicitor for the intervenants: *George H. Cowan.*

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(1) 2 Ex. C.R. 64. (2) 1 Ex. C.R. 232, at p. 276.
(3) 3 App. Cas. 473.

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THE CANADIAN PACIFIC RAILWAY COMPANY AND THE GRAND TRUNK RAILWAY COMPANY ..... } APPELLANTS;

*April 1, 2.
*June 4.

AND

THE CANADIAN OIL COMPANIES LIMITED ..... } RESPONDENTS.

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } APPELLANTS;

AND

THE BRITISH AMERICAN OIL COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Joint tariff—Power to supersede—Declaratory decree—Jurisdiction.

In January, 1907, certain railway companies in the United States, in connection with the appellant companies, filed through freight tariffs ("joint tariffs") with the Board of Railway Commissioners for Canada fixing the rates of carriage for shipments of goods from the United States into Canada. The tariffs so filed for the first time established a fixed rate for the carriage of petroleum and its products. In October, 1907, and in May, 1908, supplementary tariffs were filed by the foreign companies and concurred in by the Canadian carriers, but they were not sanctioned by the Board. These substituted for the fixed rate on petroleum

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

[NOTE.—Leave to appeal to the Privy Council was granted, 13th December, 1912.]

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a variable rate made up of the sum of the local rates on each side of the border. The respondent companies, in 1910, applied to the Canadian Board for an order declaring that the appellants had overcharged them by exacting the variable rate for carriage of petroleum, and an order was made by the Board declaring that the rates chargeable were those fixed by the "joint tariff" of January, 1907. The Canadian carriers appealed from this order to the Supreme Court of Canada by leave of the Board on the question of law whether or not this order was right and by leave of a judge on a question of jurisdiction claiming that the Board could not make a declaratory order and grant no consequential relief, and that it could not declare in force a tariff which had ceased to exist.

Held, that sections 26 and 318 of the "Railway Act" authorized the Board to make an order merely declaratory.

Held, also, that the tariff of January, 1907, had not ceased to exist, but was still in force, never having been superseded.

Held, per Davies and Duff JJ., that if the initiating company, or the companies jointly, had power to supersede a joint tariff duly filed they had not in this case taken the proper steps to effect that purpose.

Per Idington and Anglin JJ., that such a tariff could only be superseded by the action, or with the sanction, of the Board.

The order appealed from was, therefore, affirmed.

APPEAL from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an overcharge in rates for carrying petroleum from the United States into Canada.

The Board decided, on application of the oil companies, that the tariff filed in Jan., 1907, was still in force and made an order declaring that the legal rates chargeable on petroleum and its products, in carloads, from shipping points in Ohio and Pennsylvania to Toronto were the fifth-class joint through rates in effect at the time the shipments moved as shewn in the joint through tariffs published and filed with the Board. The railway companies were granted leave by the Board to appeal to the Supreme Court

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of Canada on a question of law, namely, — Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter ? Mr. Justice Idington gave them leave to appeal also on a question of jurisdiction.

Chrysler K.C. and *Aimé Geoffrion K.C.* for the appellants.

W. N. Tilley for the respondents.

DAVIES J.—This is an appeal from an order of the Board of Railway Commissioners made on a complaint filed by the respondents whereby it was alleged that the appellants from and after the first of January, 1907, charged excessive tolls for the transportation of petroleum and its products when shipped from certain points in the United States to Toronto and other Canadian points.

The complaint was heard by the Railway Board on May 16th, 1911. The respondents contended and the appellants denied that from and after the date mentioned fifth-class rating applied to petroleum and its products in carloads. The appellants charged the sum of the local rates to and from the Canadian gateways.

The Board's reasons for judgment were given by the Chief Commissioner. The conclusion reached as stated in the last paragraph of the reasons was as follows:—

Official Classification No. 29 was used by the respondents without any order or direction of the Board, as provided by subsection 4 of section 321. It was, therefore, binding upon them; and the provisions of that classification would apply upon petroleum and its products to points in Canada, unless they have taken some steps within the provisions of the statute to prevent its application. We

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are compelled to conclude that they have not succeeded in so doing, and that petroleum and its products should have carried fifth-class rating at the time the shipments in question moved.

The Board accordingly made an order, dated the 16th of May, 1911, declaring:—

That the legal rates chargeable on petroleum and its products in carloads from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved as shewn in the joint through tariff published and filed with the Board, and in accordance with the Official Classification No. 29 and subsequent issues thereof.

The Board granted leave to the appellants to prosecute an appeal on the question of law as follows:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

Mr. Justice Idington also allowed an appeal on the question of jurisdiction.

The contention of the appellants as I understand it on the question of jurisdiction is that when the complaint was heard by the Railway Board on the 16th May, 1911, the Board had no jurisdiction because the wrong complained of had then been remedied and the order made was and could only be declaratory and could not give the applicant any relief.

The question of the Board's jurisdiction depends largely upon the construction placed upon section 338 of the "Railway Act." In the case of the *Grand Trunk Railway Co.* v. *British American Oil Co.*(1), this court held that joint tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory to be carried by continuous routes to destinations in Canada are effective and binding upon

(1) 43 Can. S.C.R. 311.

Canadian companies participating in the transportation until either superseded or disallowed.

Such joint tariffs had been filed by the foreign companies initiating the carriage of the oil as to the tolls for the carriage of which the complaint was made. If the tariffs had been "superseded" under the 338th section of the Act as contended by the appellants by another tariff justifying the tolls charged that would be a good answer to the complaint.

Mr. Tilley, for the respondents, contended that once a joint tariff for a continuous route from a foreign country to a point in Canada was filed under the 336th section of the Act it remained in force until superseded or disallowed *by the Board,* and that admittedly there had not been any such action by the Board in this case, and further contended that assuming there was power in the company or companies by which the joint tariff was filed to supersede it nothing had been done which could be construed as supersession. The appellants contended that the superseding was something to be done by the foreign company which initiated the joint tariff and that there had been such supersession in the amendments to and alterations of that initial joint tariff subsequently filed by the companies.

Of course if section 338 vests in the Board alone as contended by respondents the power of superseding or disallowing an initial joint tariff then, admittedly that not having been done, no question could arise with respect to the Board's jurisdiction to make the order.

Assuming, however, that the appellants' contention is correct with respect to the company's power to supersede an initial joint tariff after it had been filed then I am of opinion that they had not done so up to the time the complaint was filed.

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On the question of jurisdiction I do not entertain any doubt. The Board (section 10) is made a court of record. Section 26 confers upon it power

> to inquire into, hear and determine any application by or on behalf of any party interested

complaining (*inter alia*)

> that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, etc.

The Board has clearly the power to determine all disputes arising as to whether a shipper or a carrier has violated any of the provisions of the Act. It is not necessary for us to consider the extent of the relief the Board may grant in cases where it finds either shipper or carrier guilty of such violation. In the present case it finds in accordance with respondents' contention that the legal rate at the times of the shipments and carriage complained of was the fifth-class rate. Any charge above or beyond that was an overcharge. But the Board did not assume to direct any refund. It left the parties to their legal remedies if they decided to recover such overcharges.

The appellants contend that some limitation must be read into the 26th section of the Act, because if read literally it would confer power upon the Board to determine every complaint of any violation of the Act either of commission or omission and that we might have in cases of railway accidents in which passengers or others were injured the absurdity reached of the Board sitting to determine whether a bell had been rung at a crossing or a whistle blown at the times and places required by the Act.

I venture to think, however, that upon a proper construction of the section no such absurd results could happen. What Parliament conferred upon the Board

was power to determine complaints of failure on the part of a company, *quâ* company, to discharge or obey some statutory duty or obligation either positive or negative imposed upon it *as such company,* not complaints that some subordinate or employee of the company had failed to discharge a duty which the company charged him with and for the neglect to discharge which the company might be liable to the party suffering. That is, in my judgment, the meaning of the language used in section 26, and when so read it carries out fully the underlying idea of the Act, namely, that with private ownership there should be public effective control. Construed as I construe section 26 there does not appear to be either justification or excuse for the courts to read any limitation into the section. The Board has jurisdiction to hear and determine any complaint from an interested party that a company has failed to discharge or obey some statutory duty or obligation binding upon it as a company or violated some prohibition of the Act or they might, under the 49th section, make an interim *ex parte* order as to such failure or violation of their own mere motion and without complaint. Such jurisdiction, however, does not extend to the failure on the part of an employee to discharge a duty with which he was charged by the company alike to it and to the public. It is true that the section speaks of a company or person, but that word person as used in the section does not embrace or include employees of the company who fail in the discharge of the duties with which they are charged by the company. Different considerations would apply where the "Railway Act" or the "special Act" or a regulation of the Board imposed directly upon an individual person or official, as

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distinct from the company he represented, a duty or obligation to do or abstain from doing some act or thing. Beyond that the Act does not profess to go. Nor do I attach any weight to the contention that the order complained of does not profess to give any relief and that the Board had no power to give relief under the circumstances. In my opinion the determination of the facts as to the legal tariff in operation during the period the order covers is one peculiarly fitting for the Board. The mere fact of the company desisting from the violation complained of before the hearing of the complaint does not oust the Board's jurisdiction. Whether they could have supplemented their order with another directing a refund I am not called upon to determine. That question would probably have called for a wider inquiry and a great deal of evidence as to the overcharges paid by different individuals more suitable for the ordinary courts of the land to hear and decide. But that this Board, experienced men on the subject before it, advised by trained experts and possessing in its records at first hand all the evidence necessary to determine the subject-matter of this complaint as to whether in the first place there had been a joint tariff established for the carriage of this oil from the United States to Canada, and secondly, whether that tariff had been superseded by another at the time the complaint was filed, or was then still in force, and lastly, whether the complaint in whole or in part as to overcharges on the oil was well founded, was the proper tribunal to make such determination I have no doubt.

With the results which may follow their finding and order I am not at present concerned. Whether their finding on the facts as expressed in their order

will be binding and conclusive on the ordinary courts of the land in the event of suits being brought to recover the overcharges it would not be proper for me to express any opinion now.

It is sufficient for me to say that in my judgment the Board had jurisdiction to make the order appealed from.

As to the question of law whether the Board placed the proper legal construction on the documents referred to in the reasons for judgment of the Chief Commissioner I can only say that I think it did.

The joint tariff filed by the foreign company gave the Board jurisdiction as determined by us in the *Stoy Case*(1). Whether it was superseded or not by the amended tariffs filed by the foreign company is a question of law, and has been referred in this appeal to us. In my opinion this question of law was properly determined by the Board and therefore having jurisdiction on the subject-matter and having properly determined it the appeal fails.

It is not necessary for us to determine whether the Board has the sole jurisdiction to supersede any such joint tariff so filed or whether the company filing it can supersede it.

If the Board alone had the power to supersede such joint tariff such supersession has admittedly not taken place. If the company has the power it has not expressed it properly and the joint tariff remained in force when the complaint was laid.

I cannot put the argument as to the supplementary tariffs filed and their effect as superseding the joint tariffs more clearly or concisely than it is put by the Chief Commissioner in the following remarks:—

(1) 43 Can. S.C.R. 311.

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We do not see how a tariff, changeable as to tolls, at the will of either, without reference to the other, can be said to be a joint tariff. This must mean a tariff that all participating carriers are interested in jointly; not interested jointly in part only, but in the entire tariff; including not only the through or continuous route, but also the through rate or toll. In the case in hand the attempt is not to destroy the entire joint tariff; the continuous route, through billing, accounting, etc., are preserved, but the partnership is attempted to be, in part, dissolved by saying all our other arrangements regarding the carriage of this traffic shall remain, but hereafter each carrier shall fix its own local, and the through rate shall be the sum, or combination of those locals that may be in effect when and as shipments move.

It seems to me that this is just what section 338 was designed to prevent, and this is particularly so with reference to traffic falling under section 336, where Parliament has said such a tariff shall be filed, but has no means of compelling the foreign carrier to comply with its direction. That carrier complying, it seems reasonable to say, unless the Board disallows that joint tariff those shall be the tolls to be charged until you file another joint tariff shewing other or different tolls; when, unless disallowed, those latter shall be the only lawful tolls until again superseded by another joint tariff.

I agree that the appeal should be dismissed with costs.

IDINGTON J.—The question raised by the appeal herein relative to the jurisdiction of the Board of Railway Commissioners for Canada, seems to me after it has been thoroughly argued out to be without foundation.

The respondents' complaint having been lodged against the appellants whilst they persisted in maintaining a rate of tolls found by the Board to have been unjustifiable, the Board would have been derelict in duty if it had refused to continue the hearing simply because the appellants had abandoned the unfounded claims to rates. Not only had the Board the admitted power to have adjudged costs of the inquiry if it had found it just to award same, but also the

power and duty to make a ruling that would guide such like parties in a future dispute of the like kind and enable them to avoid such positions as the Board could not justify. Appellants no doubt felt this, when they appeared before the Board and, without protest, contested the matter on its merits.

It is not necessary to deal with long arguments founded on the hopes or fears of such uses as may or may not be made of the ruling in future or pending litigation, further than to say I think that we cannot here properly pass upon the questions of whether the ruling is or is not a declaration within section 318. I have no opinion thereon.

A question of law which the Board submitted is stated as follows:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

The complaints lodged by respondents against each appellant were identical, were heard together and the judgment of the Chief Commissioner deals with both as founded on the like conditions of fact.

The questions raised therein must turn on the construction to be given sections 336 and 338 of the "Railway Act" supported or illuminated by sections 314, 321, sub-section 4, and other sections of the Act.

As pointed out in the case of *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1), the "Railway Act" does not profess to confer any jurisdiction over foreign railway companies, but recognizes that relations may exist between those companies and the Canadian railway companies which so far as the latter are concerned may, as regards shippers over

(1) 43 Can. S.C.R. 311.

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their roads, become the subject of administrative or judicial control in Canada.

The foreign companies, within a recognized area, associate together for the purpose of determining, amongst other things, their dealing with the subject of freight rates, classifications of freight, and through routes and rates; and the appellants have representatives in this association or relations therewith, relative to such subjects, so far as a common purpose may require.

These foreign companies, or the association on behalf of them, had filed joint tariffs with the Board, and then in the month of January, 1907, filed also an official classification, No. 29, which placed the commodities now in question in the fifth class and thereby constituted a common through route and joint tariff and continuous through routes and joint tariffs within the meaning of section 336 of the Act, which reads as follows:—

> 336. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

These several through routes seem to have been continued and operated, over the period in question, by the foreign railway company and the respondents respectively. Neither of the appellants, however, whilst availing themselves thereof adhered to the joint tariff thus constituted in January, 1907, but it is said later on charged the respondent higher tolls than could have been legally collected under such joint tariff or joint tariffs as settled by the filing of No. 29, Official Classification.

They allege in justification that any joint tariff so constituted was subject to variations to be made therein by the foreign companies, or any of them, by means of supplements to the Official Classification.

On the other hand it is urged and has been ruled by the Board that such an official classification coupled with the through rate then existent constituted a joint tariff, or joint tariffs, relative to the commodities in question that could not within the "Railway Act" be departed from by the Canadian companies in such an irregular manner. In other words, the Board holds that the latter cannot abandon the joint tariff and yet continue the through route.

Section 338 of the "Railway Act" is the only means it gives for terminating a joint tariff. It is as follows:

338. Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.

2. The Board may require to be informed by the company of the proportion of toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

One interpretation of this section contended for is that the plain grammatical meaning thereof is just what the words "superseded or disallowed by the Board" imply, and that, therefore, no departure from a joint tariff can be made by a Canadian company without the sanction of the Board.

It is urged, however, that other sections dealing with the subject of joint tariffs indicate that such is not the intention.

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There are three other joint tariffs dealt with by the Act — one the passenger specially excepted from the section 338 if the Board says so — another the joint tariff for freight originating in Canada and going to a foreign country, and a third for exclusively Canadian routes, and indirectly, as it were, a fourth which I need not refer to.

The joint tariff for exclusively Canadian routes is in its formation liable to be either the product of the action of the companies or to be imposed by the Board. It is, however, whether directly or indirectly, apt to be so much the creation of the Board that I do not see how the provisions relative thereto or to the ordinary tariff charges on wholly Canadian roads, can help us much to interpret section 338.

There certainly is a degree of liberty given all companies relative to changes of their own tariffs that does not seem in terms extended to the joint tariffs which any of them may take a part in forming. To my mind that fact itself is more instructive than anything which may be drawn from similarity of expression relative to the superseding or of the disallowance by the Board, as, for example, in section 328, sub-section 4, so much dwelt upon. The apparent liberty to change a tariff does not apply to a changing of route such as is the foundation of a joint tariff. In Canada the Board can make or unmake this foundation.

One thing is quite clear in this Act and that is that it was the intention of the legislature to give the Board as effective control as it possibly could over the tolls.

And even if the word "superseded" in section 338 is to imply that the companies concerned may have some liberty of action or some say relative to the

changing of a joint tariff, it does not seem to me consistent with such purpose of control by the Board that the Canadian companies were ever intended to be parties to any scheme that in fact was not, or did not include in it, the actual creation of a joint tariff in any substitution intended to supersede a joint tariff which must be presumed to have received its sanction by the act of filing with, and fact of non-rejection by, the Board. In that way and sense the words of section 338 now in question can each be given effect to.

It does not appear quite clear, on the material before us, how the obvious purpose of the Act, that each change should have the Board's approval, is supposed to have been in any case brought about.

It may arise from regulations that are not in the case or from practice.

It nowhere appears that a change of through route is permissible to the companies without being accompanied by a joint tariff.

The Canadian companies seem bound to have a joint tariff corresponding to each through route over a combination of roads, or parts of roads, and their own, and that of either joining with the foreign companies to constitute it. I have no doubt the objects of section 318 can best be attained by thus holding a check over such combinations.

And even if it be implied that those furnishing a through route may change or supersede the tariff, it must be by means of a joint tariff. The departures herein were not joint tariffs. So the Board has found, and I think, correctly. We must assume, I think, that the freight classification (such as No. 29) in the United States referred to in sub-section 4 of section 321, was the basis of all the Board had impliedly

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sanctioned, and that partial departures therefrom were not within their recognition.

The possible hardship of having to account for tolls collected by the respective appellants in cases not conforming with the preceding principles and accounted for to the foreign companies, is no argument. The Canadian companies must in all such cases conform to Canadian law, and clearly when making a through route be sure they have a corresponding joint tariff, or ask the Board for relief.

Hence this appeal should be dismissed with costs and the question of law submitted be answered in the affirmative.

Canadian Pacific Railway Co. v. *British American Oil Co.*—The question of the jurisdiction of the Board herein raised is somewhat more arguable than in the case of the joint appeal of this appellant and the Grand Trunk Railway Company against the Canadian Oil Companies heard just before this.

It seems clear that a formal complaint, such as I presume the rules of the Board require, was not made until the continuation of the offences in question had been abandoned.

There was, however, a clear complaint in writing to the Board before the appellant abandoned what was objected to and there was, so far as I can see, nothing to prevent the Board acting thereon and for the time being to waive its own regulation I have presumed to exist. The jurisdiction exists, therefore, for reasons I gave in the other case.

The ground respondent's counsel takes under section 318 may be good, but I do not desire to pass upon

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that section till I have to. Nor yet do I desire to cast any doubt upon what support it may or may not give and which respondent may need elsewhere. I have no opinion.

The question of law herein submitted by the Board seems pretty much what I had supposed was disposed of in the case *The Grand Trunk Railway Co.* v. *The British American Oil Co.*(1).

What I said in that case, and have said in the other case above mentioned, will furnish my reasons herein and I need not repeat them here. The consequence thereof seems to me to be that the supplements, which are said not to have been dealt with therein and are shewn more fully herein, cannot affect the rights of the parties. The answer to the question submitted ought to be that the filing of the supplements had no legal effect on the joint through rate established 25th of January, 1907, and the appeal ought to be dismissed with costs.

DUFF J.—By the order out of which these appeals arise, (dated the 16th of May, 1911,) the Board of Railway Commissioners for Canada declared that the "legal rates chargeable upon petroleum and its products, in carloads," in respect of certain shipments from certain "shipping points in Pennsylvania and Ohio to Toronto were the fifth-class joint through rates, etc., thereof." From this order both of the railway companies appeal by leave of the Board upon a question of law and upon a question of jurisdiction, by leave under an order made by Mr. Justice Idington.

The question of law, (with which I shall first deal,) is stated in these terms:—

(1) 43 Can. S.C.R. 311.

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Duff J.

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

It was agreed on both sides that the point which it was intended to refer was that which was the real point in controversy before the Board, namely, whether the legal effect of the documents mentioned was correctly stated in the declaration I have just quoted.

The complaint of the respondents, the Canadian Oil Co., was that the railway companies had unjustly discriminated against certain shipments of crude oil, (from the shipping points mentioned to Toronto,) by refusing to carry that commodity at the rates prescribed in the tariffs filed. The shipments in question were made between the first of January, 1907, and the thirty-first of December, 1910, and the contention of the applicants, which the Board upheld, was that during the whole of that period the rates legally chargeable on such shipments were the rates referred to in the order of the Board, the rates, that is to say, which were legally chargeable at the dates of the shipments as "joint through rates" for commodities of the fifth class according to the classification mentioned and according to the "joint through tariffs" published and filed with the Board.

For the purposes of the argument on this appeal it was admitted that in consequence of the filing of "Official Classification No. 29," by which "petroleum and its products" were for the first time classified as commodities of the fifth class, the "joint through" rate for commodities of that class must be taken to have become applicable to crude oil, on January 1st,

1907. That point was determined adversely to the railway companies by the judgment of this court in *The Grand Trunk Railway Company* v. *The British American Oil Company*(1), confirming a ruling of the Board.

The contention of the railway companies is that by a series of tariffs filed subsequent to that date "petroleum and its products" were taken out of the category of commodities of the fifth class so far as regards shipments into Canada from the shipping points in question. By these various tariffs the railway companies concerned endeavoured to abrogate the "joint through rate" in force for these commodities in respect of such shipments and to substitute therefor a rate which should be made up of the sum of the local rates (1) from the point of origin to the Canadian gateway, and (2) from the Canadian gateway to the point of destination, which should be in force when the shipment should move. The question referred by the Board is, in substance, the question whether the railway companies have succeeded in accomplishing this. The tariffs upon which the appellants rely are very numerous, but it will be found on examination, (as pointed out in the appellants' factum,) that the methods adopted by the carriers to attain the object they had in view may be classified as follows:—

(1) By a supplement to a joint tariff concurred in by the carriers, providing that the rates to points in Canada shall be the local rates to the frontier plus the local rate beyond.

(2) By providing by joint freight tariffs, containing so-called exceptions to the Official Classification that the Official Classification basis shall not apply to

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points in Canada, but that these rates shall be made on the sum of the totals.

(3) By providing by joint freight tariffs or supplements thereto, that the through rates to points in Canada shall not apply.

(4) By providing by such supplements that no through rates are in effect.

All these methods, if effective, would result in the same thing, namely: — the rate for shipments of the commodities affected from the shipping points in question into Canada would be a variable rate made up of the sum of the local rates in force from time to time, first, from the point of shipment to the Canadian gateway, and secondly, from the Canadian gateway to the terminus of the route. These tariffs were concurred in by all the carriers concerned, but none of them had the sanction of the Board.

The Board has held that these methods were ineffective for the purpose the railway companies had in view. I concur in that opinion and I agree, moreover, with the reasons which were given in support of it by the distinguished and lamented judge who then filled the office of Chief Commissioner.

Each of the shipments in question, it is, of course, admitted, passed over a "continuous route" in part "operated" by one of the appellant companies. In such a case, by section 336 of the "Railway Act," a *"joint tariff for such continuous route"* must be filed, (according to the decision in the case already mentioned,) and the "company or companies" operating the route are required, by section 338, to charge the toll or tolls specified therein "until such tariff is superseded or disallowed by the Board." There has been in this case no action by the Board. It is not strictly

necessary to pass upon the point, but the view I am disposed to take is that the language of the section does not require us to hold that every "joint tariff" is only subject to alteration by the action of the Board; I think there is no satisfactory ground for drawing such a sharp distinction between a "joint tariff" and other freight tariffs. It would not, of course, necessarily follow that every "joint tariff" would be subject to alteration at the will of the parties. It may be, for example, that on the true construction of section 334 a "joint tariff" framed pursuant to an order of the Board under that section remains in force until displaced by the Board itself.

However that may be, the Act plainly contemplates that for a "continuous route" to which section 336 applies there shall be a "joint tariff." That being so, then, (assuming the companies operating such route to have in some cases the power to "supersede" by their own action a "joint tariff" once established without invoking the sanction of the Board,) it must be taken, conformably to the principle declared by section 336, that such supersession necessarily involves the establishment of another tariff which itself falls within the category of "joint tariff," within the meaning of that phrase as used in the sections referred to. I agree with the late Chief Commissioner that a tariff of rates made up of variable local rates does not fulfil that condition.

The question of jurisdiction remains. I confess I can entertain no doubt that each of the several orders of the Board of the 16th of May, 1911, records and was intended to record an adjudication by the Board in its judicial capacity upon an issue between the complainants and the company or companies respectively

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against which the complaints were lodged; and I have come to the conclusion that the Board had, under section 26, jurisdiction to make the declarations contained in those orders.

The contention on behalf of the appellants is that the jurisdiction of the Board to adjudicate *inter partes* upon questions of law or of fact is confined to cases in which the Board has jurisdiction to give some consequential relief. The answer to the contention appears to be that sub-section (*a*) of section 26 confers the broadest jurisdiction to decide upon complaints with respect to past offences of omission or commission and the form of the sub-sections (*a*) and (*b*) suggests that the jurisdiction to pass upon such complaints is intended to be exercisable independently of the jurisdiction under sub-section (*b*). There are, obviously, many reasons of good sense and policy why such a jurisdiction should be exercisable by the Board; and I think there is no ground upon which the restriction contended for can be sustained.

ANGLIN J.—The Board of Railway Commissioners, on the application of the Canadian Oil Companies, Limited, made an order in which, following an introductory recital of facts,

> it is declared that the legal rates chargeable on petroleum and its products, in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved, as shewn in the joint through tariffs published and filed with the Board, and in accordance with the Official Classification No. 29, and subsequent issues thereof.

By leave of the Board the railway companies appeal from this order on a question of law formulated by it in this form:—

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Anglin J.

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

By leave of my brother Idington they also appeal on the ground that in making the above order the Board acted without jurisdiction. On this branch of the appeal two points are urged:—

(1) That before the Board heard the application the use of the combined local rates complained of had been discontinued and the joint tariff demanded by the applicants had been restored, or brought into force, and the Board was, therefore, not called upon and was not in a position to afford any relief, and should not have proceeded to pronounce a merely declaratory order.

(2) That the order purports to declare illegal rates charged by the United States railways from the points of shipment to the Canadian border.

The substantial grievance of the appellants is that they anticipate that in prospective actions by the Canadian oil companies to recover from them the sums paid for freight on shipments of petroleum from the United States shipping points to Toronto (the freight charges for the entire continuous routes were collected by the Canadian railway companies on delivery to the consignees) in excess of the joint tariff rates which the order of the Board declares to have been in force, that order will, under section 54 of the "Railway Act," be used to establish conclusively their liability to refund.

I shall deal first with the questions of jurisdiction.

By the "Railway Act," notably by sections 26 and 318, the Board is empowered to "inquire, hear and determine" and to "determine" (which involves inquiry, if not hearing) complaints in respect of any-

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thing which a railway company "has done or is doing" in contravention of that statute, etc. While ordinarily such an inquiry and determination will be had for the purpose of deciding the right of an applicant to some relief and will, in proper cases, result in an order affording such relief, there may arise many cases in which, although the particular practice complained of has ceased, it may be desirable to institute, or to pursue, an investigation and to reach and formulate a determination for the future guidance of the railway company against which complaint has been made and of other railway companies and of the general public in regard to matters kindred to that which forms the subject of inquiry. What the Board may do under section 26 at the instance of a complainant, it may do under section 28 "of its own motion." While I more than gravely doubt that it was the intention of Parliament to constitute the Railway Board a tribunal for the determination of facts in cases of alleged contraventions of the "Railway Act" or of regulations made under that statute or of orders of the Board, etc., merely as a step towards, and to facilitate the prosecution of civil actions brought or to be brought against railway companies by aggrieved persons to obtain relief in damages or otherwise, I entertain no doubt that for the other purposes above indicated the Board possesses the jurisdiction which it has exercised in the present case. There is nothing before us to suggest that its object in making the order appealed from was to enable the respondents to use it under section 54 as a foundation for proceedings in the civil courts. If this order may be so used that is merely an incidental consequence which does not displace the jurisdiction of the Board

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to make it and is a phase of the matter with which we are not presently concerned.

The order as drawn affects only the Canadian railways which were before the Board. It does not purport to declare illegal any charges made by the foreign railways which operated those parts of the continuous routes beyond the Canadian gateways. It necessarily deals with the joint tariff which the Board (rightly, having regard to the decision of this court in the *Stoy Case*(1)) holds had been established for the continuous routes operated by the Canadian and foreign railways. It merely declares that, because that joint tariff had not been "superseded or disallowed" in accordance with the provisions of the "Railway Act," it is still binding on the Canadian railways for the entire continuous routes. Whether the effect of this order will be to enable the respondents to recover from the appellant companies the whole amount paid them in excess of the joint tariff rates for the entire continuous routes is a question not now before us. I cannot see in an order which does nothing more than declare that as to the Canadian railways which were before the Board the joint tariff to which they became parties continues to bind them, anything in excess of the jurisdiction conferred by Parliament on the Railway Board.

On the question of law submitted to us I am also of the opinion that the appeal fails. The respondents maintain that if it were competent for the railway companies by their own joint act to "supersede" the joint tariff which became effective on the 1st of January, 1907, under the application of Official Classifica-

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tion No. 29, adopted pursuant to sub-section 4 of section 321 of the "Railway Act," they did not take effective steps for that purpose. I find it difficult to understand why, having regard to the terms of the consents filed by the Canadian railway companies, (especially that of the Canadian Pacific Railway Company,) in virtue of which the tariffs filed only by the American railway companies have been held to be joint tariffs (1), the filing by the same companies of supplements or amendments to such joint tariffs should not be deemed joint acts of the American and Canadian companies, and, if railway companies had the power of superseding joint tariffs, should not be effective for that purpose. (See section 323, sub-section 3.) But if the railway companies had the power of supersession in regard to a joint tariff I incline to the view that it would properly be exercised only by an amendment or supplementing of the tariff itself and not by filing an exception to a freight classification used under the authority of section 321, sub-section 4. It is, in my opinion, not competent for a railway company operating the Canadian section of a continuous route to or from a point in the United States to use a freight classification in use in the United States subject to a special exception in regard to goods to be carried to or from Canada. The "freight classification in use in the United States," of which the use is authorized by sub-section 4 of section 321, means a freight classification in general use in that country under which goods of the same kind will be treated as in the same class when shipped for carriage to or from Canada as when shipped for local carriage in the United States. I am, therefore, of the

(1) 43 Can. S.C.R. 311.

opinion that if railway companies had the right by their own action to supersede joint tariffs, they could not do so in the case of a joint tariff for a continuous route, partly in Canada and partly in the United States, by specially excepting from a classification in use in the United States, either when adopting it or afterwards, all goods, or any particular kind of goods destined for or shipped from Canadian points. If a railway company sees fit to adopt for such a route a freight classification in use in the United States which contains such an exception, it will, I think, be bound by the classification without the exception. But in the view which I take it is not necessary to dwell further upon, or to definitely determine these questions.

In my opinion upon the proper construction of section 338 of the "Railway Act," it is not competent for two railway companies, one foreign and the other Canadian, which have filed or concurred in the filing of a joint tariff, themselves to "supersede" it. It can be "superseded or disallowed (only) by the Board." Section 338 does not itself confer powers of supersession and disallowance. These powers are given to the Board by section 323, and to the powers so conferred section 338 refers. Domestic "special" tariffs may be superseded within defined limits (section 323, sub-section 3; section 328, sub-section 3; section 328, sub-section 4; section 332, sub-section 3) by the railway company itself filing a new "special" tariff. But section 338 appears to preclude the supersession of joint tariffs, whether purely domestic or partly domestic and partly foreign, by the railway companies, inasmuch as it enacts that such tariffs when duly filed shall bind them until "superseded or disallowed by the Board."

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In section 328, sub-section 4, and again in section 332, sub-section 3, the supersession of domestic special tariffs by the filing of new special tariffs is provided for. The language used is:—

> Upon any such (special freight) tariff being so (duly) filed, the company shall, until such tariff is superseded, or *is* disallowed by the Board, charge the toll or tolls as specified therein; *and such (special freight) tariff shall supersede any preceding tariff or tariffs or any portion or portions thereof, so far as it reduces or advances the tolls therein.*

In sub-section 3, of section 332, the comma, found after the word "superseded" in sub-section 4, of section 328, is omitted; and for the semi-colon after the word "therein," where it first occurs, a comma is substituted. These differences I regard as purely accidental. But in section 338 the word "is" is dropped before the word "disallowed," and the clause which I have italicized, found in sections 328 and 332, is wholly omitted. These changes were, in my opinion, deliberate. The important clause in section 338 reads:—

> And upon any such joint tariff being so duly filed with the Board, the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls specified therein.

Grammatically, the words "by the Board" apply equally to the two verbs "is superseded or disallowed." Not only do I find no ground for discarding the grammatical construction, but there appear to be several reasons for adhering to it. Comparison with sections 328 and 332 makes it reasonably clear that the departure from the language of those sections was intentional. Under section 323 the Board has a power of supersession in the sense of replacing. "Remplacé" is the translation of "superseded" in the French version of section 338.

The Board's jurisdiction probably does not extend to requiring a foreign company and a domestic company to unite in filing a joint tariff under section 336. (Compare section 335 and note the difference in form.) It apparently has not the power, if a joint tariff once filed has been disallowed or has been withdrawn with its approval, subsequently to require the filing of another joint tariff to take its place. The only means by which it can deal with such cases appears to be to prevent Canadian companies from participating in the operation of continuous international routes until satisfactory joint tariffs are duly filed. But it seems to be the scheme of the Act to enable the Board to retain control once acquired by providing that if a joint tariff has been filed it shall remain operative and binding at least upon Canadian companies interested until the Board sees fit to supersede or disallow it, and by denying to the railway companies in respect of joint tariffs the power, which is given in respect of special domestic tariffs, of superseding or abrogating them by merely filing new special tariffs to replace them.

For these reasons, bowing to the decision of this court in the *Stoy Case*(1), while respectfully adhering to the dissenting opinion which I there expressed, I am of opinion that this appeal should be dismissed with costs.

Canadian Pacific Railway Co. v. *British American Oil Co.* What I have said in regard to the *Canadian Oil Companies Case* applies to this appeal, which should likewise be dismissed with costs.

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Brodeur J.

BRODEUR J.—I am of opinion that the appeal in each case should be dismissed.

Appeals dismissed with costs.

Solicitor for the appellants, The Canadian Pacific Railway Company: *E. W. Beatty.*

Solicitor for the appellants, The Grand Trunk Railway Co.: *W. H. Biggar.*

Solicitors for the respondents: *Thompson, Tilley & Johnston.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF TWO MOUNTAINS.

SAMUEL FAUTEUX (PETITIONER) ... APPELLANT;

AND

JOSEPH ARTHUR CALIXTE ETHIER *et al.* (RESPONDENTS) .... } RESPONDENTS.

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*Oct. 1.
*Oct. 29.

ON APPEAL FROM THE DECISION OF ROBIDOUX AND LAUDENDEAU JJ.

Election law—Nomination—Irregularities—Omission of additions—Identification of candidate—Technical objections—Receipt for deposit—Validating effect—Evidence—Construction of statute—R.S.C., 1906, *c.* 6, *"Dominion Elections Act"—R.S.C.*, 1906, *c.* 7, *"Dominion Controverted Elections Act."*

Per Fitzpatrick C.J. and Davies, Anglin and Brodeur JJ.—Technical objections to the form of nomination papers filed with the returning officer at an election of a member of the House of Commons, under the provisions of the "Dominion Elections Act," R.S.C., 1906, ch. 6, should not be permitted to defeat the manifest purpose of the statute. The omission in nomination papers to mention the residence, addition or description of the candidate proposed in such a manner as sufficiently to identify him constitutes a patent and substantial failure to comply with the essential requirements of section 94 of the Act; on the objection in this respect taken by the only opposing candidate it is the duty of he returning officer to reject a nomination so irregularly made and to declare such opposing candidate elected by acclamation. Such rejection and declaration of election by acclamation may properly be made by the returning officer after the expiration of the time limited for the nomination of candidates by section 100 of the Act.

Per Fitzpatrick C.J., and Davies, Anglin and Brodeur JJ. (Idington and Duff JJ. contra).—The receipt for the required deposit of $200, accompanying the nomination papers, given by the return-

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

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ing officer under the provisions of section 97 of the "Dominion Elections Act," is evidence merely of the production of the papers and payment of the deposit and not of the validity of the nomination.

Per Idington and Duff JJ. (dissenting).—The receipt so given for the required deposit constitutes a legal assurance that the candidate has been duly and properly nominated; it cannot be revoked nor the nomination papers rejected by the returning officer after the expiration of the time limited by section 100 of the Act for the nomination of candidates; when that time has passed all questions touching the statutory sufficiency of the papers are concluded in so far as it is within the province of the returning officer to deal with such matters.

Per Duff J. (dissenting).—Where the returning officer has received papers professing to nominate a proposed candidate with the consent of the candidate to such nomination and given his receipt for the required deposit pursuant to section 97 of the Act, and the time limited for the nomination of candidates at the election has expired, the status of such candidate becomes finally determined *quoad* proceedings under the control of the returning officer and it is then the duty of that official to grant a poll for taking the votes of the electors.

Per Duff J. (dissenting).—In view of the limited jurisdiction conferred upon judges in respect to election trials under the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, where the returning officer has exceeded his legal powers by improperly returning a candidate as having been elected by acclamation the judgment should declare that the election was not according to law.

The judgment appealed from (Q.R. 42 S.C. 235) was affirmed, Idington and Duff JJ. dissenting.

APPEAL from the judgment by Robidoux and Laurendeau JJ. in the Controverted Elections Court (1) in the matter of the controverted election of a member for the Electoral District of Two Mountains in the House of Commons of Canada, dismissing the petition with costs.

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

Hon. A. W. Atwater K.C. and *Mignault K.C.* for the appellant, cited *Ex parte Baird*(2); *In re Ellis*

(1) Q.R. 42 S.C. 235. (2) 29 N.B. Rep. 162.

(1); *Bannerman* v. *McDougall*(2); *Gledhill* v. *Crowther*(3); *Marton* v. *Gorrill*(4); *Northcote* v. *Pulsford*(5); *Queen's Co. Election Case; Queen's (P.E.I.) Election; Jenkins* v. *Brecken*(6); *Bothwell Election Case; Hawkins* v. *Smith*(7); and Fraser's Parliamentary Elections, p. 20.

Perron K.C. and *Geuest,* for the respondent, cited *The Queen* v. *Deighton*(8); *Mather* v. *Brown*(9); *Gothard* v. *Clarke*(10); *The Queen* v. *Coward*(11); *Woollett* v. *Davis*(12); *The Queen* v. *Tugwell*(13); *Harmon* v. *Park*(14).

THE CHIEF JUSTICE concurred in the opinion stated by Davies J.

DAVIES J.—This is an appeal from the judgment of the Superior Court for the District of Terrebonne dismissing with costs the appellant's contestation of the election of the respondent Ethier.

On the nomination day two persons put in nomination papers, the respondent, Mr. Ethier, and Mr. Guillaume André Fauteux. Fauteux's nomination paper consisted of two large double-sheets of paper, the first page of each double-sheet containing a printed form of the nomination of some person as a candidate,

(1) 27 N.B. Rep. 99.
(2) 11 Can. L.J. 47.
(3) 23 Q.B.D. 136.
(4) 23 Q.B.D. 139.
(5) L.R. 10 C.P. 476.
(6) 7 Can. S.C.R. 247.
(7) 8 Can. S.C.R. 676.
(8) 5 Q.B. 896; 13 L.J.Q.B. 241.
(9) 1 C.P.D. 596.
(10) 5 C.P.D. 253.
(11) 20 L.J.Q.B. 359.
(12) 4 C.B. 115.
(13) L.R. 3 Q.B. 704.
(14) 7 Q.B.D. 369.

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with blank spaces to fill in the nominee's name, residence and occupation, and with spaces below for the nominating electors to sign their names, professions and residences. At the foot of the page, below where the electors' signatures are to be placed, was a clause also printed with blanks to be signed by a witness to the electors' signatures, and also a printed form of acceptance, by the person nominated, of the nomination, with an attesting clause by a witness.

On the inside of each of these double-sheets was printed the form of "oath of attestation of the nomination paper."

These forms were in accordance with those required by the statute (Forms H and I).

One of these large double-sheets, with the form of nomination at the top not filled in, containing thirteen names of electors had a witness's name attached at the foot of the names, with residence and addition certifying that the paper had been signed by *the said electors* in his presence and also had, at the foot of the same page, the form of acceptance by the person nominated filled up and signed. On this double-sheet the form "I" of the oath of attestation of the nomination paper was filled up by a witness and contained the names not only of the thirteen electors whose names appeared on the front page of that large double-sheet, but also the names of nineteen electors whose names appeared on another double-sheet of the same kind and character as that containing the thirteen names.

On this latter double-sheet the form of the oath of attestation was printed in blank and was not filled up and the form at the foot of the nominating electors' names providing for the witness to their signatures

and also that for the acceptance by the candidate of his nomination, were both struck out.

On the other hand, this double-sheet containing the nineteen names had the blank at the top of the first page filled up nominating Mr. Guillaume André Fauteux as a candidate, *but without any residence or addition or description of him.*

These two double-sheets were not in any way attached or fastened together though they were handed in together and, some of the witnesses at the trial said, folded together.

A written objection was fyled by Mr. Ethier, the respondent, who had also been nominated as a candidate, to the reception of these papers as a valid nomination of Mr. Fauteux on the grounds: 1st. That they did not mention his domicile or his occupation; and 2ndly. That they were not signed by 25 electors conformably to the law. He demanded in consequence that he should be declared elected by acclamation.

The returning officer, after taking time to consider and consult counsel, acceded to Mr. Ethier's objection and demand, and returned him by acclamation accordingly.

It was against this return that the election petition was fyled. The learned judges upheld both objections.

In the view I take of this case, it is unnecessary for us to express any opinion whether the two double-sheets, unattached to each other, but delivered to the returning officer on the nomination day in the manner I have described, should have been accepted by him as a valid nomination paper.

Assuming, therefore, without deciding, that the returning officer should have treated both sheets as

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really one nominating paper and that the candidate's acceptance and the witnesses' attestation were all right and should have been treated as applying to both double-sheets, the question still remains, did they together contain the essential requisites of a valid nomination ?

To determine this we must have recourse to the "Dominion Elections Act" (R.S.C., 1906, ch. 6), but before setting out the relevant and controlling sections of that Act I desire to point out that neither in the body of the nomination paper itself, in which section 94 and form "H" require "the name, residence and addition or description" of each person proposed, nor in the witnesses' "oath of attestation of the nomination paper," nor in the candidate's acceptance of the nomination, was there any attempt made to comply with the statute's requirements as to the nominee's residence, addition or description, and so make up as it were for the defect in the nomination paper itself. On the face of the nomination papers, including the candidate's acceptance and the attesting witnesses' oath, these requirements were entirely absent.

The sections of the Act which, on the particular point I am discussing, are controlling, are the 94th, 97th, 107th, and 314th. They are as follows:—

94. Any twenty-five electors, except in the Provinces of Saskatchewan and Alberta and the Yukon Territory, may nominate a candidate, or as many candidates as are required to be elected for the electoral district for which the election is held, by signing a nomination paper in form "H," stating therein the name, residence and addition or description of each person proposed, in such manner as sufficiently to identify such candidate and by causing such nomination paper to be produced to the returning officer at the time and place indicated in the proclamation, or to be filed with the returning officer at any other place, and at any time between the date of the proclamation and the day of nomination.

97. The returning officer shall give to the candidate or his agent a receipt for such deposit which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

107. On a poll being granted, the returning officer shall cause to be posted up notices of his having granted such poll, indicating the names, residences and occupations of the candidates nominated, in the order in which they are to be printed on the ballot papers.

2. Except in the Yukon Territory, such notices shall, as soon as possible after the nomination, be placarded at all the places where the proclamation for the election was posted up.

3. Such notices shall be in form "K," except in the Provinces of Saskatchewan and Alberta, where they shall be in form "L."

4. In Prince Edward Island, the returning officer shall, in addition to such notices, cause to be placarded at the same time and places such notice or advertisement regarding the qualification of voters as is required under the provincial law to be posted.

314. No election shall be declared invalid by reason of non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the returning officer under the provisions of this Act, or of any mistake in the use of the forms contained in schedule one of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.

The contentions on the part of the petitioner (appellant) are: 1st. That section 94 is directory only and not imperative in its requirements, that the identification called for was for the satisfaction of the returning officer only, and that he knew well who the M. Guillaume André Fauteux really was and, therefore, that the statute was satisfied. 2ndly. That the receipt given by the returning officer for the $200 was conclusive, and that in any event, section 314 prohibited the election from being declared invalid by reason of the alleged non-compliance with the Act.

In construing the sections of such an important public Act as the one under consideration, I think that while we should be careful on the one hand not

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to allow merely technical or formal objections to prevail so as to defeat the manifest purpose and intention of the Act, on the other we should not attempt to re-write the Act or to strain the clear, precise language of its sections so as to render them innocuous.

As Lord Chief Justice Coleridge said in the case of *Mather* v. *Brown*(1), at page 601:—

> It must be remembered that, in dealing with cases under these Acts, we are sitting as a final tribunal of appeal, in the exercise of a duty cast upon us under peculiar circumstances and as a sort of compromise between conflicting parties in the legislature, and, therefore, are more especially bound to keep ourselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law. Therefore, although I yield reluctantly to the objection, conceiving it to be a fair one, I do so without hesitation.

In a later case, *Gothard* v. *Clarke*(2), at page 265, Lopes J. says, line 8:—

> I entirely agree with the Lord Chief Justice when he said in *Mather* v. *Brown*(1), that in construing these Acts it is a duty with which the court is entrusted to keep strictly to the Acts themselves.

Now, applying these rules and principles to the section 94 under consideration, how can this court say that any 25 electors may legally nominate a candidate for an electoral district by signing a nomination paper in form "H," while omitting to state the name, residence and addition or description of the person they nominate in such manner as sufficiently to identify such candidate.

The essential conditions of a legal nomination paper are the signatures of 25 electors as nominators, and the name, residence and addition or description of the person proposed "stated therein."

The court certainly could not declare valid a

(1) 1 C.P.D. 596. (2) 6 C.P.D. 253.

nomination paper with only 24 electors' names attached. If the name of the candidate was incorrectly spelled, or there was some inaccuracy in the residence and addition or description of the person nominated, there might be much room for argument that the language used was sufficient to identify the candidate. The result would depend altogether upon the extent of the inaccuracy of the language used.

But where there is no inaccuracy of language or spelling to construe or give effect to, but a total omission of any residence, addition or description, and this omission extends as well to the acceptance of the nomination and to the oath of attestation of the witness to the signature to the nomination paper, so that, on the face of the papers as delivered, there was absolutely nothing to identify the person nominated, I cannot see how the court can hold such paper a legal nomination paper. It does not "state therein" any of the statutory requisites, and it seems to me, with deference, that to construe such language as directory merely would be to do violence to the expressed intention of the legislature. As well might the court declare that less than 25 nominators' names would suffice or that a paper signed in blank with the name subsequently filled up was good. The "name" may not require the insertion of each and all of the nominee's Christian names in full, but at least there must be a surname and such Christian name or abbreviation as would sufficiently identify the party nominated.

Then as to the receipt. If the nomination is bad the receipt certainly cannot cure it. The nomination paper must stand on its intrinsic merits and the receipt is good just for what the statute says,

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sufficient evidence of the production of the nomination paper, of the consent of the candidate, and of the payment therein mentioned.

Evidence of the production of the nomination paper, not of its validity. If it was the latter, then it would cure the cardinal defect of want of the proper number of nominators.

The importance of the language requiring the name, residence and addition or description of the candidates is seen by the 107th section, which requires the returning officer on a poll being granted to post up notices

indicating the names, residences and occupations of the candidates.

If the nomination paper does not itself give him this essential information, where else can he acquire it? In many small constituencies it is said the candidates are well known. That may be true, but this Act relates to constituencies all over Canada and it is reasonablely certain that no such assumption could be made with respect to the returning officers in many of the larger thinly populated districts.

The returning officer is not authorized to hold any court of inquiry so as to ascertain the identity and the residence and occupation of the candidate. But he is bound to give that information to the electors in the notices he puts up of his having granted a poll. He must find the information on the face of the nomination paper, and to allow him to go outside of such paper and obtain information elsewhere might lead to much gross injustice and defeat the express purpose of the Act that the identical candidate proposed by the 25 electors and no one else shall be published as the candidate.

The defect in these nomination papers is one apparent on their face, and not one requiring any in-

quiry or investigation on the part of the returning officer to ascertain or determine. Being a patent and substantial defect in the omission of a specific statutory requirement it became the duty of the returning officer, when at the proper time his attention was called to it, to give effect to the objection and reject the nomination.

Then with reference to section 314, a most useful section to prevent mere technicalities defeating the expressed will of the electors, the only possible part of the section which could be invoked in this case is that referring to "a mistake in the use of the forms."

But those defects complained of in this nomination paper are in no possible sense mistakes in the use of the forms. The proper form was used. But the essentials necessary to make the form a living and valid nomination paper were wanting.

The decisions in the English courts which I have consulted are chiefly upon statutes relating to municipal elections. They are, nevertheless, of value because they cover analogous cases to the one we have now before us and outline principles which should control courts in deciding upon statutes relating to elections and the distinction between matters of form and those of substance. *Mather* v. *Brown*(1); *Gothard* v. *Clarke*(2); *Harmon* v. *Park*(3); *Marton* v. *Gorrill*(4); *The Queen* v. *Deighton*(5).

The appeal should be dismissed with costs.

(1) 1 C.P.D. 596.
(2) 5 C.P.D. 253.
(3) 7 Q.B.D. 369.
(4) 23 Q.B.D. 139.
(5) 5 Q.B. 896.

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IDINGTON J. (dissenting).—The first duty of a returning officer, on receipt of a nomination paper, is to inspect it and ascertain if it appears to be conformable to law, and if found defective to point out wherein he finds it so; and then if duly rectified, or if originally in appearance correct, to require, pursuant to section 99 of the "Dominion Elections Act," (R.S.C., 1906, ch. 6,) the person or persons presenting it to take before him the oath or oaths of verification required by said section. When that has been duly done and deposit made, his next duty is to give, in obedience to section 97, a receipt for the deposit, which is the assurance the law gives the parties promoting the candidature of any person, that he has been duly and properly nominated.

This section is so comprehensive and complete in its terms that it is, for me, difficult to see how any one who has accepted the office of returning officer, desiring to discharge his duties with fairness to all concerned, could, after complying with its imperative direction, see his way to attempt a revocation of his act.

The section is as follows:—

> 97. The returning officer shall give to the candidate or his agent a receipt for such deposit which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

The officer in question herein did point out certain defects, had them rectified in his presence, and then administered the oath of verification to the agent who had presented the paper or papers.

The signatures of the alleged electors appear on two sheets of paper which, if joined together in an orderly way as the act of the officer in administering

the oath implies to have been done, and the contents of that oath naming the several parties who had signed, clearly demonstrates was intended to be the case, ought to have sufficed for the purpose then in hand. At its best the mode of joining was slovenly. A pin or fastening of some kind to keep these sheets together in their proper order of sequence would have saved a world of trouble.

When separated these papers were misleading.

The evidence of how this separation happened is conflicting, but the officer's acts and their consequence, I submit, must be passed upon in light of the transaction as it must have appeared to him when he administered the oath, and not by weighing this conflict of evidence arising later and elsewhere.

It is to be noted that the Act provides for the presentation of a nomination paper at any time between the date of proclamation and the day of nomination.

Unless the determination of the officer, as evidenced by the receipt for the deposit, is treated as irrevocable, so far as he is concerned, the door would be thrown open for frauds, and worse results than any I can conceive of as possible from holding such determination as irrevocable.

I am much more puzzled as to the proper disposition of the question of costs than I am by the merits of the case.

The appeal, I submit, should be allowed with costs thereof to the appellant against respondents, and the election be set aside; and, as at least a deterrent against such slovenly work hereafter, I think the several parties should be allowed to bear their respective costs of the proceedings in the court below.

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I confess I fear this division of costs may encourage the late taking of such objections as were taken here. The temptation appellant's slovenly work held out was no doubt great. But for the view taken by the learned judges in the court below, I should have been disposed to order the returning officer to pay all costs.

DUFF J. (dissenting).—I have come to the conclusion that the judgment under review cannot be sustained. For the purposes of this judgment I shall assume that the nomination paper is (on one or both of the grounds upon which the respondent's objections rest) defective in some essential requirement of the statute so that if a poll had been held and the appellant had been returned on account of receiving the larger number of votes (and the question had come before an election court in a proper proceeding under the "Controverted Elections Act") the respondent (the now sitting member) must on account of the invalidity of the appellant's nomination have been declared entitled to the seat. The very short ground on which I think the return of Mr. Ethier ought to be declared null is this: The returning officer having received the paper professing to nominate the appellant along with the appellant's consent and the sum required by law to be deposited, and having given his receipt for that sum pursuant to section 97 of the "Dominion Elections Act" (R.S.C., 1906, ch. 6) — and the time for nominating candidates having expired — the status of the appellant as a candidate (for the purpose of all proceedings under the control of the returning officer) was finally determined and it was the duty of that official to proceed with the poll.

For the sake of clearness and convenience of reference I set out here in full the enactments of the "Dominion Elections Act" which are comprised in the fasciculus bearing the title "Nomination Papers" (sections 94 to 103 inclusive).

94. Any twenty-five electors, except in the Provinces of Saskatchewan and Alberta and the Yukon Territory, may nominate a candidate, or as many candidates as are required to be elected for the electoral district for which the election is held, by signing a nomination paper in form "H," stating therein the name, residence and addition or description of each person proposed, in such manner as sufficiently to identify such candidate and by causing such nomination paper to be produced to the returning officer at the time and place indicated in the proclamation, or to be filed with the returning officer at any other place, and at any time between the date of the proclamation and the day of nomination.

95. Each candidate shall be nominated by a separate nomination paper; but the same electors, or any of them, may subscribe as many nomination papers as there are members to be elected.

96. No nomination paper shall be valid or acted upon by the returning officer unless it is accompanied by,—

(*a*) The consent in writing of the person therein nominated, except where such person is absent from the province in which the election is to be held, when such absence shall be stated in the nomination paper; and

(*b*) a deposit of two hundred dollars in legal tender or in the bills of any chartered bank doing business in Canada; or a cheque for that amount drawn upon and accepted by such bank.

97. The returning officer shall give to the candidate or his agent a receipt for such deposit which shall, in every case, be sufficient evidence of the production of the nomination paper, of the consent of the candidate and of the payment therein mentioned.

98. The sum so deposited by any candidate shall be returned to him in the event of his being elected or of his obtaining a number of votes at least equal to one-half the number of votes polled in favour of the candidate elected; otherwise, except in the case hereinafter provided for, it shall belong to His Majesty for the public uses of Canada, and shall be applied by the returning officer towards the payment of the election expenses, and an account thereof shall be rendered by him to the Auditor-General of Canada.

2. The sum so deposited shall, in case of the death of any candidate after being nominated and before the closing of the poll, be returned to the personal representatives of such candidate.

99. The returning officer shall require the person, or one or more of the persons producing or filing as aforesaid any such nomination paper, to make oath before him that he knows or they know that,—

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(*a*) The several persons who have signed such nomination paper are electors duly entitled to vote;

(*b*) they have signed it in his or their presence; and

(*c*) the consent of the candidate was signed in his or their presence, or as the case may be, that the person named as candidate is absent from the province or territory.

2. Such oath may be in form "I," and the fact of its having been taken shall be stated on the back of the nomination paper.

100. At the close of the time for nominating the candidates, the returning officer shall deliver to every candidate or agent of a candidate applying therefor a duly certified list of the names of the several candidates who have been nominated.

101. Any votes given at the election for any other candidates than those nominated in the manner provided by this Act shall be null and void.

102. Whenever only one candidate, or only such a number of candidates as are required by law to be elected to represent the electoral district for which the election is held, have been nominated within the time fixed for that purpose, the returning officer shall forthwith make his return to the Clerk of the Crown in Chancery, in form "J," that such candidate or candidates, as the case may be, is or are duly elected for the said electoral district, of which return he shall send within forty-eight hours a duplicate or certified copy to the person or persons elected.

103. The returning officer shall accompany his return to the Clerk of the Crown in Chancery with a report of his proceedings and of any nomination proposed and rejected for non-compliance with the requirements of this Act.

The "Elections Act" does unquestionably contemplate the possibility of nominations being *"proposed and rejected* for non-compliance with the requirements" of the statute, since section 103 in express terms lays upon the returning officer the duty of making a report upon any such rejected nomination. But the Act does not seem to contemplate the rejection by the returning officer of a nomination paper (verified as required by section 99 and accompanied by the consent and the deposit provided for by section 96) which has been accepted by him and for which he has given a receipt in pursuance of section 97. Once that is done section 98 appears to come into play. The

sum deposited is by the provisions of that section to be returned to the candidate only in one of three specified events: 1st, his election; 2nd, his obtaining a specified proportion of the votes cast; 3rd, his death after being nominated and before the closing of the poll. Otherwise the money deposited is to belong to His Majesty as part of the public funds of Canada. There is nothing to authorize the return of the money in the case in which after having signified his acceptance of the nomination paper by giving the receipt under section 97 the returning officer discovers some defect in it, which had previously escaped his observation. The enactments of section 98 are explicit, the money once deposited is to be the property of His Majesty except in one of the three events enumerated above. From this the inference seems irresistible that the returning officer's authority to reject the nomination paper for non-conformity with the statute is at an end upon the giving of the receipt; for it is inconceivable that the legislature should have conferred upon the returning officer authority to reject the nomination after receiving the deposit and in circumstances in which he is prohibited from returning the deposit. Even if this view of the effect of these proceedings were doubtful and it could fairly be argued that the status of the nominee as candidate is not fixed by them, it still seems hardly open to doubt that his status as such is (as regards the duties of the returning officer) irrevocably fixed when (his nomination having been accepted) the time for nominating candidates has closed. That is made very clear by the provisions of sections 100 and 102. *"At the close of the time"* for nominating candidates the returning officer is, under the provisions of these

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sections, to deliver to *"any candidate"* applying therefor, a list of the names of *"the candidates who have been nominated."* At that point of time — *"at the close of the time for nominations"* — if not before — the number and identity of the candidates are determined, a state of affairs obviously impossible if after that point of time is passed the returning officer has authority to reject a nomination already accepted. Section 102 again provides that when only *"one candidate"* has been *"nominated* within the time fixed for that purpose," the returning officer shall *"forthwith"* make his return to the Clerk of the Crown in Chancery that *"such candidate"* has been duly elected; and by section 103 this return is to be accompanied by a report upon nominations

proposed and rejected for non-compliance with the requirements of this Act.

This return and this report then are to be made *"forthwith"* on expiry of the time fixed for the purpose of nominating candidates; an enactment obviously proceeding upon the assumption that when that time has passed all questions touching the statutory sufficiency of nomination papers have been concluded in so far as it is within the province of the returning officer to deal with such questions.

The inference arising from the language of these sections receives support from that of section 124, which provides that if the number of candidates is greater than two the returning officer shall give effect to any agreement between them that their names shall be arranged on the ballot paper otherwise than in alphabetical order where such agreement is made *"within an hour after the time appointed for the nomination;"* a provision which presupposes all ques-

tions as to what persons are entitled to have their names placed upon the ballot papers to have been at the time mentioned finally determined.

It is argued, however, that the respondent must eventually have been returned since (the appellant's nomination being in point of law inoperative) the respondent was the only candidate for whom ballots could validly be cast; and consequently it is said the respondent has rightfully been elected. I assume, as I have already said, the appellant's nomination to have been invalid by reason of one or both of the objections raised by the respondent. On that hypothesis we are still, it seems to me, (if I am right in the view I have just expressed touching the powers of the returning officer,) under a necessity imposed upon us by law to declare that the respondent was not duly returned and that he is not under the law entitled to the seat. The jurisdiction conferred upon the courts by the "Controverted Elections Act" (R.S.C., 1906, ch. 7, is a very special one. At common law all questions touching the election and return of members to the House of Commons were questions exclusively within the cognizance of the House itself. By the "Controverted Elections Act" the duty of passing upon certain of such questions, when raised by a proceeding authorized by the Act, was imposed upon the courts. But the duties and jurisdiction of the courts are strictly prescribed by the Act; and the Act, as it appears to me, leaves no other course open to us (if the returning officer exceeded his legal powers in returning the respondent as the elected member) but to declare that the return was not according to law.

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The powers vested in the court in such circumstances are to be gathered from two of the sections of the "Controverted Elections Act." These sections are as follows:—

11. The petition presented under this Act may be in any prescribed form; but, if or in so far as no form is prescribed, it need not be in any particular form, but it must complain of the undue election or return of a member or that no return has been made, or that a double return has been made, or of matter contained in any special return made, or of some such unlawful act as aforesaid by a candidate not returned, and it must be signed by the petitioner, or all the petitioners if there are more than one.

58. At the conclusion of the trial, the trial judges shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void, and other matters arising out of the petition, and requiring their determination, and shall, except in the case of appeal hereinafter mentioned, within four days after the expiration of eight days from the day on which they shall so have given their decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of evidence.

2. The determination thus certified shall be final to all intents and purposes.

The petition in this case complains of the undue election of the respondent and asks to have the return made by the returning officer declared a nullity. Under section 58 it was the duty of the trial judges to pass upon these questions and report to the Speaker accordingly. In the view I have expressed these questions are, of course, susceptible of only one answer.

ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitor for the appellant: *P. B. Mignault.*
Solicitor for the respondents: *J. L. Perron.*

SAMUEL E. DUNN AND THE EASTERN TRUST COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

FREDERICK R. EATON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 21, 22.
*Oct. 29.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Final judgment—Reference.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full court and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the "Supreme Court Act"; and that the court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) followed.

APPEAL from a decision of the Supreme Court of Nova Scotia maintaining the judgment at the trial in favour of the plaintiffs and dismissing the defendants' counterclaim.

The action claimed relief in equity and in law. The trial judge held that the plaintiffs were not entitled to equitable relief and dealing with the case

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

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as an action in damages for deceit gave judgment for the plaintiffs with a reference for inquiry as to the action and counterclaim and reserved further consideration of the cause. His judgment was affirmed by the full court and the defendants took an appeal to the Supreme Court of Canada.

L. A. Currey K.C. for the appellants.
T. S. Rogers K.C. for the respondents.

THE CHIEF JUSTICE.—The statement of claim in this action sets out certain agreements for the sale of timber lands and asks as relief rescission of the agreements, re-payment of moneys paid on account, a receiver and an injunction, and, in the alternative, damages for deceit. It is, therefore, framed both as an action in equity and an action at common law. The defence, besides denying the allegations as to misrepresentation, is united with a counterclaim in which the defendant asks for damages for breaches of the agreement with respect to the time within which the lumber was to be cut and for an injunction restraining the plaintiffs from continuing their wrongful acts. The counterclaim contained the usual common law counts to recover the price of goods sold and delivered, for work and labour done and for the values of a steam saw-mill, engine and boiler.

At the trial Mr. Justice Meagher gave reasons for judgment in which he generally found in favour of the plaintiffs, but decided that it was not a case for rescission, but for damages, and the formal judgment of the court ordered, declared and decreed that the agreements in question had been obtained through fraudulent misrepresentations. He refused the

remedy of rescission, but declared that the plaintiffs were entitled to damages, the amount thereof being reserved pending the report of the referee, and referred to the referee a number of matters referred to in the counterclaim above mentioned, and directed the referee to take an account of all moneys paid by the plaintiffs, an inquiry as to liens and incumbrances, an inquiry as to the quantity of timber standing upon the purchased premises within the meaning of the first agreement, such other accounts as the referee might deem proper, and also finally reserved further consideration of the cause.

It would appear, therefore, that the action which was tried, and for which relief was given, was the action for deceit, and it was, therefore, a common law action in which the judge, although determining generally on the question of fraudulent misrepresentation as between the parties did not attempt to assess the damages, but referred these and other matters to a referee and reserved to the court the final judgment which should be given after the referee had made his report.

The case, therefore, would seem to be entirely on all fours with *Wenger* v. *Lamont*(1); *Crown Life Ins. Co.* v. *Skinner*(2); and *Clark* v. *Goodall*(3); and we are without jurisdiction on this branch of the case.

We are also of opinion that the appellant failed completedly to maintain his counterclaim and the appeal is dismissed as to that claim with costs, for the reasons given by the trial judge.

DAVIES, ANGLIN and BRODEUR JJ. concurred.

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 616.
(3) 44 Can. S.C.R. 284.

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DUNN v. EATON.

Idington J.

IDINGTON J.—The individual respondents and the appellant Dunn entered into an agreement, dated the 10th of May, 1909. Then the corporation named The S. E. Dunn Company was created, apparently for the purpose of executing the purposes which the individual respondents had in effecting the first agreement.

On the 18th of January, 1910, an agreement was entered into between Dunn and the said corporation based upon what the first agreement had in view. This action was launched by the individual respondents and said corporation seeking to rescind said first agreement on the ground that it had been induced by fraud of Dunn, but, alternatively, asking for damages if rescission could not be had.

The appellant Dunn, by way of counterclaim, amongst other things asked for a declaration that the agreement of the eighteenth of January, 1910, was not his deed, was never delivered, and to have it set aside.

The learned trial judge could not see his way to rescind the first agreement, but found there had been fraud practised, and, with a view to giving relief in respect thereof, directed a reference embracing numerous inquiries.

By the same judgment he dismissed that part of the counterclaim which sought to have the agreement of the eighteenth of January, 1910, set aside.

An appeal was had by appellants herein to the full court, and a cross-appeal was taken by the present individual respondents, and that court dismissed these appeals.

Therefrom the appellant brought this appeal seeking to have said judgment of reference set aside and to have the judgment reversed so far as it dismissed the counterclaim as to the part of it seeking to set aside the agreement of eighteenth of January, 1910.

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Idington J.

No objection was taken by respondents to the jurisdiction of this court, but, upon its being observed in course of the argument, that it was an appeal involving chiefly the judgment of reference, attention of counsel was called thereto. Nothing urged in support of the jurisdiction save as to one part of the counterclaim can maintain it.

The cases of the *Union Bank of Halifax* v. *Dickie* (1); *Crown Life Ins. Co.* v. *Skinner* (2); and other cases rendered it hopeless to maintain that the judgment of reference was a final judgment within the meaning of the "Supreme Court Act."

That part of the appeal should, therefore, be dismissed for want of jurisdiction with such costs as might have been given on a motion by the respondent at the proper time to quash the appeal.

That part of the judgment dismissing the part of the counterclaim impeaching the agreement of the 18th of January, 1910, is, of course, final and properly appealable, but the evidence given on the trial of the issues raised thereby renders the appeal therefrom apparently hopeless and it should be dismissed with such costs of and incidental to the appeal as would be properly taxable had the appeal been confined to that part of the counterclaim alone.

DUFF J.—The trial judge held that the first of the two agreements was procured by means of representations which were false and which were fraudulent in the sense that they were made recklessly and without care whether they were true or untrue. This finding was affirmed by the full court and it cannot be said

(1) 41 Can. S.C.R. 13. (2) 44 Can. S.C.R. 616.

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Duff J.

that there is not evidence to support it. On this ground I should dismiss the appeal with costs. I express no opinion on the question of jurisdiction because it was not argued and I am by no means satisfied that the facts of the case bring it within the principles upon which this court acted in *Wenger* v. *Lamont*(1); *Crown Life Ins. Co.* v. *Skinner*(2), and *Clarke* v. *Goodall*(3).

Appeal from judgment in action quashed with costs. Appeal from judgment on counterclaim dismissed with costs.

Solicitor for the appellants: *H. W. Sangster.*
Solicitor for the respondents: *W. M. Ferguson.*

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 616.
(3) 44 Can. S.C.R. 284.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF TEMISCOUATA.

1912

*Nov. 6.
*Nov. 11.

LOUIS PLOURDE (PETITIONER) .....APPELLANT;

AND

CHARLES A. GAUVREAU (RESPONDENT) .....} RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE CIMON.

Election law—Appeal—Preliminary objections—Interlocutory motions —Construction of statute—"Dominion Controverted Elections Act," R.S.C., 1906, c. 7, s. 64.

Several of the preliminary objections to a petition against the election of a member of the House of Commons of Canada having remained undisposed of, on the day before the expiration of the six months limited for the commencement of the trial by section 39 of the "Dominion Controverted Elections Act, R.S.C., 1906, ch. 7, the petitioner applied to a judge, by motions, (*a*) to obtain an enlargement of the time for the commencement of the trial, and, (*b*) to have a day fixed for the hearing on such preliminary objections. On appeal from the judgment dismissing the motions,

Held, that the judgment in question was not appealable to the Supreme Court of Canada under the provisions of section 64 of the "Dominion Controverted Elections Act." *L'Assomption Election Case* (14 Can. S.C.R. 429); *King's County Election Case* (8 Can. S.C.R. 192); *Gloucester Election Case* (8 Can. S.C.R. 204), and *Halifax Election Case* (39 Can. S.C.R. 401) referred to.

APPEAL from the judgment of Mr. Justice Cimon, in the Controverted Elections Court, in the matter of the controverted election of a member for the Electoral District of Temiscouata in the House of Commons of Canada, dismissing motions by the petitioner, (*a*) for enlargement of the time for the commence-

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

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ment of the trial, and, (*b*) to fix a day for the hearing of certain preliminary objections.

The circumstances in which the motions were made are stated in the head-note. The judgment appealed from was as follows:—

"CIMON J.—La cour, ayant entendu les parties par leurs avocats sur la motion du pétitionnaire pour faire prolonger le délai pour commencer l'instruction de la pétition d'élection en cette cause, examiné la procédure et délibéré:—

"Considérant qu'il n'y a pas lieu d'accorder la présente motion, car les raisons invoquées à l'appui ne sont pas suffisantes pour la justifier, rejette la dite motion avec dépens.

"La cour, ayant entendu les parties par leurs avocats sur la motion du pétitionnaire aux fins de faire fixer un lieu, un jour et une heure pour preuve et audition sur ce qui reste des objections préliminaires du défendeur, examiné la procédure et délibéré:—

"Considérant que les six mois fixés par la loi pour commencer le procès sur le mérite de la pétition d'élection expirent demain:—

"Considérant que ce délai de six mois n'a pas été prolongé: et considérant que ce délai de six mois n'étant pas prolongé, il deviendrait inutile de fixer un jour pour la production de la preuve sur les objections préliminaires, qui ne pourrait être qu'après l'expiration de six mois alors que la cour n'aurait plus de juridiction, met de côté, pour le moment, la présente motion, sauf à la reprendre si le délai pour le commencement du procès venait d'être prolongé."

T. J. Flynn K.C. for the appellant.

E. Lapointe K.C. for the respondent.

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TEMISCOUATA ELECTION.

The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Superior Court, at Fraserville, District of Kamouraska, dismissing two motions made on behalf of the petitioner; (*a*) to obtain an enlargement of the delay for the commencement of the trial, (*b*) to fix a day for proof and hearing on certain preliminary objections then undisposed of.

We were asked by the appellant's counsel to decide *in limine* the question of jurisdiction raised in the respondent's factum so as to avoid, if that point was decided against him, the necessity of a lengthy argument on the merits of the motions. I was of opinion at the hearing that we were without jurisdiction and in this opinion I am confirmed by subsequent examination of the authorities. Among a host of others I refer to the *L'Assomption Election Case*(1), in which Strong J. said, at page 432:—

> Nothing can be clearer than that appeals in controverted elections are limited to two matters only, viz.: First, an appeal from any decision, rule or order on preliminary objections to an election petition the allowing of which is final and conclusive and puts an end to the petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to the petition; and, secondly, an appeal from the judgment or decision on any question of law or of fact of the judge who has tried the petition. As the appeal is now presented, it is quite clear that it does not fall under either of these heads, and, consequently, this court has no jurisdiction.

See to the same effect the *King's County (N.S.) Election Case*(2), and the *Gloucester Election Case* (3). In the *Halifax Election Case*(4), Sir Louis Davies, speaking for the court, said, at page 404:—

> I do not think it is open to serious argument that every decision given by the trial judges, either before or during the progress of the

(1) 14 Can. S.C.R. 429.
(2) 8 Can. S.C.R. 192.
(3) 8 Can. S.C.R. 204.
(4) 39 Can. S.C.R. 401.

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trial, is at once and before the end of the trial appealable. Such a conclusion would defeat the object of the statute absolutely and make election trials a farce.

We may, therefore, safely say that it is now well settled by authority that this court is not competent to hear this appeal. If we were to hold that we are competent to hear an appeal in an intermediate proceeding like this appeals would be repeated in all election trials to the great oppression of the parties and to the injury of the public which demands that election trials should be speedily disposed of.

Of course we express no opinion on the merits.

The appeal is quashed for want of jurisdiction, costs to be taxed by the registrar as if motion made in accordance with rule.

DAVIES J. concurred with the Chief Justice.

IDINGTON J.—Unless we reverse the view taken of this statute in a long line of decisions in this court, this appeal must be dismissed with costs for the reason that we have no jurisdiction to interfere with the order appealed from.

DUFF J.—It has been pointed out time and again that the jurisdiction of the courts in respect of controverted elections is a very special jurisdiction and is strictly limited by the terms of the "Controverted Elections Act." Section 64 of that Act defines the jurisdiction of this court. There is obviously no jurisdiction under sub-section (*b*). Under sub-section (*a*) an appeal lies only from a

judgment, rule, order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it has been allowed

would have that effect. The order sought to be impugned in the present proceedings is expressed in these terms:—

Met de coté pour le moment la présente motion sauf à la reprendre si le delai pour le commencement du procès venait d'être prolongé.

This is clearly not a "judgment, rule, order or decision" on a preliminary objection within the meaning of the provision quoted above. Consequently no appeal lies from it.

ANGLIN and BRODEUR JJ. concurred with the Chief Justice.

Appeal quashed with costs.

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

Solicitors for the respondent: *Lapointe & Stein.*

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*Oct. 22, 23.
*Dec. 10.

AMEDÉE GUIMOND AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE FIDELITY-PHENIX FIRE INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Insurance on lumber—Conditions—Warranty—Railway on lot—Security to bank—Chattel mortgage.

A policy insuring against loss by fire a quantity of sawn lumber in a specified location contained a warranty by the assured "that no railway passes through the lot on which said lumber is piled, or within 200 feet."

Held, that a railway partly constructed and hauling freight through the said lot, though not authorized to run passenger cars and do general business, is a "railway" within the meaning of the warranty.

A condition of the policy was that "if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage" it should be void.

Held, per Duff J.—A security receipt under the "Bank Act" given to a bank for advances is not a chattel mortgage within the meaning of this condition.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and dismissing the action.

In an action on a policy insuring sawn lumber on the northwest of the Tobique Road in Campbellton, N.B., several defences were raised, namely, fraud and misrepresentation as to quantity and value of lumber;

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non-compliance with a condition requiring statement as to origin of fire and other matters; that the fire was wilfully set by plaintiffs; defective proofs of loss; non-compliance with arbitration condition; breach of condition against encumbrance on lumber; and breach of warranty that no railway passed near it. The plaintiffs recovered at the trial, the jury's findings being all in their favour, among them being findings that the breaches as to encumbrance and the railway were waived. On the trial the defendants abandoned the charge of arson and failed to prove fraud and misrepresentation. The verdict against them was set aside by the full court on grounds of defective proofs, failure to arbitrate before action, breach of warranty as to the railway and breach of condition against encumbrances on the lumber. The plaintiffs appealed to the Supreme Court of Canada.

Hazen K.C. and *F. R. Taylor* for the appellants. The court below was wrong in holding that there was a breach of the arbitration clause. As defendants denied all liability there was nothing to arbitrate. *Margeson* v. *Guardian Fire and Life Assurance Co.* (1); *Morrow* v. *Lancashire Ins. Co.* (2).

The defendants are estopped by their actions from objecting to the proofs of loss as informal. *Western Assur. Co.* v. *Doull* (3).

The International Railway, being only in course of construction, was not a railway within the meaning of the policy. See McGillivray on Insurance, 295; *Wing* v. *Harvey* (4), at page 270.

If it were the company, through their agents, had

(1) 31 N.S. Rep. 359.
(2) 26 Ont. App. R. 173.
(3) 12 Can. S.C.R. 446.
(4) 5 DeG. M. & G. 265.

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full knowledge of its existence and location when they issued the policy and the finding of the jury must stand. See *Crozier* v. *Phœnix Ins. Co.*(1).

The security given to the bank was not a chattel mortgage and, therefore, not within the condition as to encumbrances. See *Hazzard* v. *Canada Agricultural Ins. Co.*(2).

Teed K.C. and *J. H. A. L. Fairweather* for the respondents. The insurance brokers who examined the property were not our agents and the knowledge they obtained as to the railway cannot be imputed to the defendants. The finding of the jury as to waiver was based on such knowledge and cannot stand. *McLachlan* v. *Ætna Ins. Co.*(3).

The security to the bank avoided the policy. *Hunt* v. *Springfield Fire and Marine Ins. Co.*(4).

The policy calls for arbitration before action. See *Guerin* v. *Manchester Fire Assur. Co.* (5), at page 151; *Spurrier* v. *La Cloche*(6).

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J.—This is an appeal from the unanimous judgment of the Supreme Court of New Brunswick setting aside a verdict entered for the plaintiffs, appellants, and directing a verdict to be entered for the defendant company, respondent.

The action was one brought to recover the amount insured by the respondents upon a quantity of sawn lumber of the appellants piled in their lumber yard in or near the Town of Campbellton, N.B.

(1) 13 N.B. Rep. 200.
(2) 39 U.C.Q.B. 419.
(3) 9 N.B. Rep. 173.
(4) 196 U.S.R. 47.
(5) 29 Can. S.C.R. 139.
(6) [1902] A.C. 446.

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A great many questions were submitted by the trial judge to the jury and nearly all were answered by them in the plaintiffs' favour resulting in a verdict being entered by the trial judge for them for $3,875, the full amount claimed.

The reasons given by the Supreme Court for setting side the verdict and directing judgment to be entered for the defendants are set forth by Chief Justice Barker with great clearness and fullness, and were rested upon four distinct grounds.

1. That there was a breach of warranty as to railway track.

2. Non-compliance with the arbitration or appraisement clause.

3. Non-compliance with several conditions precedent in the proofs of loss.

4. That the policy was voided by the security given to the bank on August 15th.

Mr. Justice White, who concurred in the judgment appealed from, expressly refrained from giving any opinion as to the sufficiency of the proofs of loss or as to the questions of waiver and estoppel in respect to the same.

As I have reached the conclusion that the appeal must be dismissed upon the ground that there was a breach of warranty as to the railway track, it will not be necessary for me to touch upon or express any opinion upon any of the other points relied upon by the court below for its judgment.

They were argued before us at great length and the respective contentions of the contesting parties as to non-compliance with the conditions of the policy and the waiver by the insurance company of compliance with such conditions and as to estoppel and al-

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leged over-insurance and as to the effect of the statutory security given to the bank on the lumber, were presented to us very fully.

The property insured, the amount, and certain special conditions of the risk are described in the following passage, which was typewritten, taken from the face of the policy:—

FOUR THOUSAND DOLLARS.

On sawn lumber, piled and lying on northwest of Tobique Road, in the Town of Campbellton, N.B.

Other concurrent insurance permitted without notice until requested.

Loss, if any, payable to La Banque Nationale.

Subject to conditions of average hereto annexed.

It is warranted by the assured in accepting this policy that a clear space of 300 feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or water-power saw-mill, planing mill or other special hazard, and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

It was admitted at the argument that the track of the International Railway was within the prohibited distance when the policy was issued and when the loss occurred, in fact that the jury so found in one of their answers. The jury also found that the insurance company

had either by itself or its duly authorized agent waived performance of the conditions of the policy (*e*) in regard to there being a railway running through the yard where the lumber was piled; that an agent of the company had inspected the plaintiff's lumber yard immediately before and as a preliminary to the placing of the insurance upon the lumber piled therein; that the company or its agents were aware at the time of insuring the lumber that it was within one hundred feet of the railway,

and that the railway was not open for "general business" before the lumber was destroyed by the fire.

The contention put forward by the plaintiffs in their pleadings and at the trial was that the word "railway" in the warranty necessarily means only a

completed railway authorized to be operated for general public traffic, and does not include such a railway as the International Railway here in question which was at the time of the issuance of the policy and also when the fire occurred a railway in course of construction only, and not open for general public traffic. I cannot accept this contention. Although the International Railway Company only began to operate with respect to general *public traffic* a short time after the fire, it had been in operation for all construction purposes and *for freight traffic* for some length of time before the policy issued.

The evidence is clear and was not questioned that this International Railway was so far completed and operated past this lumber yard as to carry freight and that as a fact all the lumber in the plaintiffs' lumber yard covered by the policy sued on had been hauled over this railway from plaintiffs' mills to the yard, a distance of some 12 or 15 miles. It also appeared that large quantities of lumber sold by the plaintiffs to their customers were carried by this railway from the plaintiffs' mill past the lumber yard to Campbellton and to the wharf for shipment and elsewhere, and that this had been going on, if not after the policy issued, at any rate up to within a very short time before it issued. The issues submitted for trial and actually tried did not render necessary any proof of the actual running of trains along the railway past the lumber yard during the time the policy was in existence and neither party offered any evidence on that point.

The only inference to be drawn from the evidence is that the operation of the railway for the purposes of freight traffic was under legal authority. It was

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not suggested by any one that the railway had been illegally operated as regards freight traffic, and we cannot assume that to have been the case.

Mr. Hazen's further submission, however, on this branch of the case was first, that there was sufficient evidence to justify the findings by the jury above referred to as to the waiver by the defendants of the condition or warranty in the policy that "no railway passed through the lot on which the lumber was piled, or within 200 feet," and as to their knowledge when issuing the policy of the existence of this railway; and secondly, that no specific evidence of the actual running of trains along this railway from the time of the issuance of the policy had been given.

On the question of the alleged knowledge of the company of the existence of this railway and of their waiver of the warranty in the policy, I am of the opinion that there was no evidence whatever to justify the findings of the jury.

These could only be upheld on the ground that Frink and Shannon were the agents of the company when the policy issued and that the knowledge they may have obtained from such an inspection of the premises as they made must be imputed to the defendants, their principals, or if only one of them should be held to be such agent, that his knowledge should be so imputed.

I agree with Chief Justice Barker in his conclusion after reviewing the evidence on this point, that there was nothing to sustain the contention that "Frink acted or was in fact the defendants' agent." As he says, "the evidence was all the other way. Neither he nor Shannon had any connection direct or indirect that I can see with the defendants. To attempt under

such circumstances to fix the defendants with knowledge of facts which they had as in any way affecting this insurance seems to me altogether useless." Moreover, there is no evidence that either of them had any knowledge that the railway had been operated for any purpose.

But even if the findings of the jury could be sustained of the company's agents having knowledge of the existence of this railway within the lumber yard, I cannot see how such knowledge on their part could avail to overcome, either on the ground of estoppel or waiver, the express warranty which the company chose to require from plaintiffs as a condition of their insurance contract attaching. There is nothing whatever to indicate that either Frink or Shannon had communicated any information respecting the existence of this railway or its relation to the lumber yard to the defendant company.

I see no essential element of estoppel present in the facts as proved, and I cannot see how the doctrine of waiver can be applied to an express warranty written in the body of the policy and forming part of the contract.

The plaintiffs must be assumed to have read their policy and if they did not read it cannot plead their ignorance of the existence of the warranties on which it is expresssly issued as an answer to evidence of their breach. I understand waiver to mean something said or done, some agreement made or assumed to have been made, subsequent to the condition or warranty, whereby the performance or observance of the condition or warranty need not be carried out, made nor proved.

But that is not the case here. Nothing of the kind

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is alleged respecting this warranty and if there was any question of its waiver there is nothing to shew that the waiver was in writing and attached to the policy as required by its conditions.

As to the suggestion or argument not presented in the pleading nor in the appellants' factum, but advanced here by Mr. Hazen, that because evidence was not given of the actual running of trains over the railway past the lumber yard during the period covered by the policy, therefore there was no breach of the warranty proved, I am unable to accept it.

The warranty was that no railway passed through the lot on which the lumber was piled. The company pleaded this warranty and alleged that the International Railway ran through the lot. The plaintiffs rejoined that when the policy was written and the loss occurred, the said railway was not completed and was not a railway within the meaning of the policy. That was the issue and the evidence admittedly shewed that such a railway did *de facto* exist, and had carried all the lumber insured from the plaintiffs' mills to the lumber yard, and other lumber of the plaintiffs from the mills and the lumber yard to Campbellton, and to the wharf and other places. If the plaintiffs had shewn that neither construction nor freight trains had been run past the lumber yard during the currency of the policy, they might have been in a position at least to argue that the railway had ceased to continue as such within the meaning of the policy.

The warranty was not that no train would pass along the railway during the continuance of the policy, but that no railway passed through the lumber yard. When it was proved that a railway did *de facto* so pass, and that construction and freight trains were in

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the habit of passing over it and that the very lumber insured had been then recently carried by such trains to the lumber yard, and other lumber of plaintiffs to their purchasers past the yard, it seems to me the fact of a railway being there was sufficiently shewn.

It could hardly be said to be arguable that a railway in process of construction, over which construction trains were passing, and which had authority to carry freight and had exercised for a long time that authority, was not a railway within the meaning of such a warranty as that contained in this policy. If the plaintiffs in this case under the issues of fact joined desired to shew that although it had been a railway it had ceased to be one, either because it had been abandoned, or because the company had stopped running trains over this part of the tracks either for construction purposes or for carrying freight or for any other purpose, it was their duty to have given some evidence of the facts. A railway running trains for construction purposes or for carrying freight was as much a railway within the meaning of the term used in the warranty as one having statutory authority to operate for all purposes. The risks against which the warranty was obviously inserted to guard existed as much in the one case as the other.

IDINGTON J.—The appellants sued on a fire insurance policy wherein appeared in the typewritten particulars thereof, amongst other things, the following:

> It is warranted by the assured in accepting this policy that a clear space of three hundred feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or waterpower saw-mill, planing mill or other special hazard; and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

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The verdict obtained was set aside on appeal to the Supreme Court of New Brunswick on the ground, amongst others, that there was a breach of this warranty (which was not observed by the assured, and indeed was broken as soon as made), and thus the right of recovery defeated.

The lumber in fact was piled on a lot within the prohibited two hundred feet from a railway.

This railway had been constructed for twenty miles or more and ran past the place where the lumber in question was piled, but the railway company had not been given the authority of the Railway Commission to run passenger cars and do general business.

It was contended we must, therefore, hold that it was not a railway within the meaning of the words in said warranty.

It had been in use not only for construction purposes, but also for carrying freight, and amongst other freight had carried for appellants this very lumber now in question, and a great deal more.

Having regard to the manifest purpose of such a condition as this warranty in an insurance policy, it seems impossible to read it in the restricted sense asked by the appellants.

The contention that the respondent knew all this has no evidence to support it. The brokers who induced appellants to apply to the respondent for insurance were neither in fact its agents nor held out in any way by it to give them the appearance of agents for it and thus to lead people to believe them such.

The objection thus raised, therefore, seems fatal to recovery herein.

No good purpose can be served so far as I can see by deciding here the validity or invalidity of the several other objections taken.

I may, however, be permitted to observe that some, if not all, of them might by according due weight to some cases cited by appellants, have been overcome had there been in force in New Brunswick legislation dealing with conditions in or upon insurance policies similar to what has existed in Ontario for a great many years and also for some time past in some if not all of the Western provinces.

The appeal should be dismissed with costs.

DUFF J.—On the ground stated in the judgment of my brother Idington I think this appeal should be dismissed. It is strictly unnecessary to discuss any of the other grounds upon which the respondent company supported the judgment of the court below, but one point is relied upon to which, I think, it is right to refer. The policy contained the following clause:—

> This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured * * * or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage * * * or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance.

On the 15th August, 1910, after the risk attached, the appellants gave La Banque Nationale security for loans amounting to $29,133.15 upon part of the personal property which was the subject of the risk under section 88 of the "Bank Act." It is argued that in consequence of giving this security "the subject of insurance" became "encumbered by a chattel mortgage." The proposition upon which the contention rests is, of course, that a security taken by a bank under section 88 of the "Bank Act" is a chattel mortgage within the clause above quoted. I cannot agree with this contention. It is not necessary to say whether or not a secur-

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Duff J.

ity taken under section 88 of the "Bank Act" has such legal effect and such legal incidents as would technically justify one in describing it as a mortgage. The term "chattel mortgage" is a term of common use in those provinces in which the legal system is based upon the law of England. In most, if not all, of those provinces the class of instruments understood to be designated by that term is *eo nomine* the subject of legislation; and that legislation has, of course, nothing whatever to do with securities of the description in question. In the "Bank Act" itself such securities are nowhere alluded to as "chattel mortgages," and in common speech, whether of lawyers or laymen, that term would not be taken to comprehend such securities and I do not think any legal draftsman would regard "chattel mortgage" as an apt term for the purpose of designating them. As the phrase does not necessarily include such a security it seems to follow in accordance with the general rule governing the construction of insurance policies that the insurance company must submit to that construction which accords with the common understanding of the words employed and which is most favourable to the insured. There is here, of course, no suggestion of a controlling context.

ANGLIN J.—I concur in the judgment of Mr. Justice Davies in so far as it is based on the ground that the proximity of the International Railway to the plaintiffs' lumber yard constituted a breach of warranty and on the absence of any evidence that either Mr. Frink or Mr. Shannon was an agent of the defendant company. Beyond this I wish not to express an opinion, which is unnecessary to the decision of this

appeal, on the questions of waiver and estoppel discussed in my learned brother's notes.

BRODEUR J.—This appeal should be dismissed.

It was the duty of the appellants when they received their policy to examine it and see whether the contract as expressed therein was acceptable or not.

There was in the main body of the policy a typewritten clause to the effect that the insured warranted that no railway was passing within 200 feet of the lumber insured.

As it has been decided by this court in the case of *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1), the insured or his agent had opportunity to examine the policy and he cannot now be heard to say that it did not contain the terms of the contract agreed upon and that the warranty stipulated was of no effect.

Appeal dismissed with costs.

Solicitor for the appellants: *F. R. Taylor.*
Solicitor for the respondents: *J. H. A. L. Fairweather.*

(1) 32 Can. S.C.R. 147.

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*Nov. 11.
*Dec. 10.

PHILIP HESSELTINE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

A. J. NELLES AND WILLIAM NEWMAN (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Final judgment—Further directions—Master's report.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract judgment was given for the plaintiffs with reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the Common Pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiff for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together, but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial, having applied without success to the court below for an extension of time to appeal from the latter judgment. See *Nelles* v. *Hesseltine* (27 Ont. L.R. 97).

Held, Brodeur J. dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision, and the Supreme Court being required by statute to give the judgment that the Court of Appeal should have given was likewise debarred from reviewing these earlier decisions.

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

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the trial judge in favour of the plaintiffs.

Though the appeal was decided on the merits it was argued on a question of jurisdiction only, the appellants contending that though the appeal was from a judgment on further directions, the court could review earlier judgments in the cause. The facts are fully stated in the above head-note.

Nesbitt K.C. and *Matthew Wilson K.C.* for the appellants. All the judgments can be reviewed on this appeal. See *Roblee* v. *Rankin*(1); *North Eastern Banking Co.* v. *Royal Trust Co.*(2); *In re Boyd*(3).

Holman K.C. for the respondents referred to *Clarke* v. *Goodall*(4); *Shaw* v. *St. Louis*(5); *The Queen* v. *Clark*(6); *Desaulniers* v. *Payette*(7).

DAVIES J. agreed with Anglin J.

IDINGTON J.—I do not think this court was constituted as counsel urges for the purpose of reviewing upon appeal all that had transpired in any cause in the courts below, but only such possible causes of error as might be found to exist in a final judgment of the court of last resort in any of the several jurisdictions from which appeal here is given.

If, by the law of the jurisdiction in question, such a power of review existed in the appellate court of final resort therein, then in order that we should give effect to the meaning of section 51 of the "Supreme Court

(1) 11 Can. S.C.R. 137.
(2) 41 Can. S.C.R. 1.
(3) [1895] 1 Q.B. 611.
(4) 44 Can. S.C.R. 284.
(5) 8 Can. S.C.R. 385.
(6) 21 Can. S.C.R. 656.
(7) 35 Can. S.C.R. 1.

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Act," we could review what was reviewable by that appellate court.

That not being what appellants claim or admit they are here for, the appeal must be dismissed with costs.

DUFF J.—I agree with Anglin J. One question and one only arises and that is: Are we, in passing upon the appeal from the judgment of the Court of Appeal given in the appeal to that court from the judgment of the Chancellor on the hearing of the action * * * on further directions, bound by the judgments, first of the trial judge, and secondly of the Court of Appeal itself on the appeal from the judgment pronounced by the Chief Justice of the Common Pleas on the motion to vary the Master's report? That the Court of Appeal in determining the appeal from the Chancellor was bound by the Master's report as varied by Meredith C.J., or by itself, on appeal from Meredith C.J., as well as by the judgment of the trial judge, nobody having a competent knowledge of the practice governing such proceedings can entertain a doubt; and, (the duty of this court being to give the judgment which ought to have been pronounced in the court below,) we are governed, of course, on this appeal by the same principles of law, both substantive and adjective, as the Court of Appeal was. The fact that the appeals from the Chancellor and Meredith C.J. were heard by the Court of Appeal together does not affect the matter in the slightest.

ANGLIN J.—A judgment determining the liability of the defendant company was pronounced by the trial judge on the 16th of March, 1907, and was affirmed by

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the Court of Appeal for Ontario on the 21st of April, 1908. Under these judgments a reference took place before the Master at Windsor to ascertain the amount to which the plaintiffs were entitled by way of damages for breach of the defendants' agreement to transfer certain bonds and shares of stock. The Master made his report on the 7th of April, 1909. The defendants appealed from the report and the Chief Justice of the Common Pleas, on the 23rd of January, 1911, varied it by reducing the sums awarded as damages. On the 1st of March, 1911, the Chancellor of Ontario pronounced a formal judgment on further directions awarding the plaintiffs' judgment for the damages allowed them by the Master's report as varied on appeal. The defendant company appealed to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas and also from the judgment of the Chancellor. An order was made for the "consolidation" of the two appeals and the printing of one appeal book in both. Though spoken of as a consolidation, this order in effect merely provided for the hearing of both appeals together. These appeals were dismissed by the Court of Appeal on the 28th of September, 1911, and from the judgments dismissing them the present appeal is brought. The appellants seek on this appeal to have this court review not merely the judgment of the Chancellor on further directions, but also the judgment of the Chief Justice of the Common Pleas varying the report as to damages and the original judgment of the trial judge determining liability, affirmed on appeal as against the company by the Court of Appeal.

At an early stage of the present appeal in this court an application was made to the registrar to affirm its

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jurisdiction. On that application the appeals which had been taken to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas and from the judgment of the Chancellor were treated as two distinct appeals. They had been entertained and disposed of as such by the Court of Appeal and not as consolidated in the technical sense, but merely as joined for convenience at the hearing and to save expense in printing. I have no doubt that they were rightly so dealt with and that the suggestion now made that there was a complete consolidation in the technical sense is ill founded. The mere hearing of the two appeals together would not, of course, enlarge the scope of the appeal from the judgment on further directions. The learned registrar determined that in so far as the appeal was from the judgment on further directions, this court had jurisdiction; that in so far as it was from the judgment affirming the order of the Chief Justice of the Common Pleas varying the Master's report this court had not jurisdiction; and that in so far as it was from the judgment of the Court of Appeal affirming the original judgment determining the liability of the company no appeal would lie. On appeal the registrar's conclusions were affirmed by this court. On the argument counsel for the appellants then insisted, as he now insists, that the action, though in form equitable, was in substance and reality a common law action to recover damages for breach of contract, and the case was dealt with by the court on that footing. See *Clarke* v. *Goodall*(1).

Application for leave to appeal, or to extend the time for appealing to this court from the judgment

(1) 44 Can. S.C.R. 284.

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of the Court of Appeal affirming the original judgment of the trial judge as against the company, was subsequently made to the late Chief Justice of Ontario, who refused it; and on appeal to the Court of Appeal his refusal was affirmed.

The appellants now seek, notwithstanding all that has taken place, to have this court review upon the present appeal, limited as it is to the judgment of the Court of Appeal affirming the judgment of the Chancellor on further directions, the question of the company's liability under the judgments of 1907 and of 1908 and also the question as to the amount of damages to which the plaintiffs are entitled under the judgment of the Chief Justice of the Common Pleas affirmed by the judgment of the Court of Appeal, from which it has already been held that no substantive appeal lies to this court.

It is quite clear that according to the practice of the courts of Ontario on the motion for further directions the learned Chancellor could not review the original judgment determining the company's liability; and it is equally clear that he could not have entertained anything in the nature of an appeal from the report of the Master as varied by the judgment of the Chief Justice of the Common Pleas. The matters dealt with by those judgments were *res judicatæ*. He might, however, have considered the whole of the evidence both at the trial and before the Master and all the proceedings which had taken place for the purpose of adjudicating upon the question of costs. This latter fact explains the recital in the formal judgment of the Chancellor of the reading of the evidence and

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of all the proceedings. See *Goodall* v. *Clarke*(1); *Gould* v. *Burritt*(2); *Downey* v. *Roaf*(3); *McGill* v. *Courtice* (4). There is here no suggestion that the original judgment was improvidently pronounced or did not correctly express the intention of the court as in *Kelly* v. *McKenzie*(5); *Commercial Bank* v. *Graham* (6), and *Mitchell* v. *Strathy*(7); no contention that the report was improper or unsatisfactory in the sense which caused the court to refuse to act upon reports in *Baldwin* v. *Crawford*(8), and *Taylor* v. *Craven*(9), decisions which may also be ascribed to the undoubted jurisdiction over reserved costs. The learned Chancellor could not on the hearing on further directions take into consideration any matter which was in issue on the original hearing; Daniels' Ch. Pr. (7 ed.), p. 948; nor anything which was, or would properly have been, the subject of an appeal from the report, *ibid.*, p. 946. Neither was it open to the Court of Appeal on the appeal from the judgment on further directions to do what the learned Chancellor might not have done. Our jurisdiction is statutory. By section 51 of the "Supreme Court Act" we are required to give the judgment which the court whose decision is appealed against should have given. In discharging that duty it is not within our power on an appeal from the judgment of the Court of Appeal confirming a judgment on further directions to do anything which the judge who disposed of the motion on further directions in the first instance could not have done. We are, therefore,

(1) 19 Ont. W.R. 944.
(2) 11 Gr. 234.
(3) 6 Ont. P.R. 89.
(4) 17 Gr. 271.
(5) 2 Man. L.R. 203.
(6) 4 Gr. 419.
(7) 28 Gr. 80.
(8) 1 Gr. 202.
(9) 10 Gr. 488.

not in a position on the present appeal to review either the earlier judgment of the Court of Appeal affirming the judgment of the trial judge determining the liability of the defendant company, or the later judgment of the Court of Appeal affirming the judgment of the Chief Justice of the Common Pleas varying the Master's report.

It was strongly pressed on behalf of the appellants that unless these two judgments are open to review on the present appeal from the only final judgment which has been rendered in this action, they are denied any effective recourse to this court. No doubt that is the case, due to the fact that a course of procedure has been followed in this instance with which we have latterly become quite familiar in common law actions. Since the "Judicature Act," and more particularly in recent years, the High Court judges when dealing with such cases have sometimes found it convenient to adopt the procedure of a court of equity and to refer the assessment of damages and similar questions to an officer of the court for determination, reserving further directions. When this court was constituted in 1875 (38 Vict. ch. 11, sec. 17), it was given jurisdiction, subject to certain limitations, to hear appeals

> from all final judgments of the highest court of final resort * * * established in any province of Canada in cases in which the court of original jurisdiction is a superior court.

By the statute 42 Vict. ch. 39, sec. 9, "final judgment" was interpreted to mean

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

This definition is now found in sub-section (*e*) of section 2 of the "Supreme Court Act." By section 1 of the statute 42 Vict. ch. 39, it was also provided that

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an appeal shall lie to the Supreme Court of Canada from any decree, decretal order, or order made in any suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity in any province of Canada, other than the Province of Quebec, and from any decree, decretal order, or order in any action, suit, cause, matter or judicial proceeding in the nature of a suit or proceeding in equity which shall have been originally instituted in any superior court in any province of Canada other than the Province of Quebec.

This provision, slightly altered, now appears in the "Supreme Court Act" as clause (*c*), of section 38. It was made because in equitable procedure it frequently happened that judgments, which did not finally determine and conclude the suit or matter, did finally determine and dispose of substantial rights of litigants. But the procedure followed in common law actions did not require such a provision. Except in the case of a judgment allowing a demurrer to, or otherwise finally disposing of one or more of several distinct claims or grounds of action; *Ville de St. Jean* v. *Molleur*(1); *McDonald* v. *Belcher*(2); and in the case of post-judgment interpleader issues which have been treated as distinct judicial proceedings; *Hovey* v. *Whiting*(3), at page 525, ordinarily the only judgment in an action which, under common law procedure, disposed of the rights of litigants in the subject-matter of the litigation was the final judgment that concluded the action itself. A judgment determining rights and directing a reference to assess damages or to take accounts with a reservation of further directions was not a feature of that procedure. In common law cases, subject to the exceptions which I have mentioned, the right of appeal to this court was, therefore, allowed to remain limited to judgments which concluded the action.

(1) 40 Can. S.C.R. 139. (2) [1904] A.C. 429.
(3) 14 Can. S.C.R. 515.

It would appear to have been thought at first that every appeal to the court of last resort in the province might be deemed "a judicial proceeding" within the statutory definition of 1879, and the judgment rendered in it appealable as a judgment finally disposing of such proceeding. That view was expressed in *Chevalier* v. *Cuvillier*(1), followed in *Shields* v. *Peak*(2), at p. 592. It should be noted, however, that in both these cases the appeals were from judgments allowing demurrers. Under such a construction of "final judgment" as used in the "Supreme Court Act," every judgment of a provincial court of appeal involving a sufficient amount would be appealable to this court. The restriction of the right of appeal to final judgments and the special provisions for appeals in equitable and other cases would be meaningless and useless. The view that every such appeal is in itself "a judicial proceeding," within the meaning of that phrase in the section of the "Supreme Court Act" interpreting "final judgment," was soon found to be so inconsistent with the whole scheme of the statute that it was abandoned. *Ontario and Quebec Railway Co.* v. *Marcheterre*(3), at page 147; *Molson* v. *Barnard*(4); *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.*(5); and it is now well established in the jurisprudence of this court that, except in equitable proceedings and other cases specially provided for, an appeal will not lie from any order or judgment pronounced in the course of an action brought in the courts of a province where the procedure is modelled on the English system, although it may have the effect

(1) 4 Can. S.C.R. 605.
(2) 8 Can. S.C.R. 579.
(3) 17 Can. S.C.R. 141.
(4) 18 Can. S.C.R. 622.
(5) 19 Can. S.C.R. 434.

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of disposing of substantial rights, unless it finally determines and concludes the action itself or some distinct claim or ground of action. *Wenger* v. *Lamont* (1); *Goodall* v. *Clarke* (2); *Crown Life Ins. Co.* v. *Skinner* (3). This harmonizes with the fact that, like an appeal to the English Court of Appeal (O. 58, R. 1), an appeal to a provincial court of appeal under the system established by the judicature Acts is not a distinct judicial proceeding, but is a motion in the cause "by way of re-hearing" (B.C. Rules, O. 58, R. 1, and R.S.B.C. (1911), ch. 51, sections 6 and 13; Man. K.B. Rule 647, and 5 & 6 Edw. VII., ch. 18, sec. 7 (*a*); Ont. Con. R. 798.) By the last-mentioned rule an appeal to the Ontario Court of Appeal is expressly declared to be "a step in the cause."

In considering cases in which this court has entertained appeals from judgments and orders of the Exchequer Court, which would not be deemed final judgments under the statutory definition of that term in the "Supreme Court Act," it must be borne in mind that by section 82 of the "Exchequer Court Act" (R.S.C. 1906, ch. 140) providing for appeals to this court, it is declared that

> a judgment shall be considered final for the purposes of this section if it determines the rights of the parties, except as to the amount of damages or the amount of liability.

Again, in considering cases from the Province of Quebec in which interlocutory judgments have been reviewed by this court, whether on substantive appeals from them, or incidentally when dealing with appeals from judgments finally disposing of actions, it should

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 284.
(3) 44 Can. S.C.R. 616.

be remembered that in the opinion of eminent judges from that province who have been members of this court, some judgments, which lawyers trained in the English system might deem interlocutory at all events under the statutory definition of final judgment in the "Supreme Court Act," should be regarded as wholly or in part final and definitive under the system of jurisprudence which obtains in that province, and as such appealable to this court; while others, as purely interlocutory, are subject to the maxim "l'interlocutoire ne lie pas le juge," and, therefore, reviewable on appeal from the final judgment concluding the action. *Shaw* v. *St. Louis* (1); *Ontario and Quebec Railway Co.* v. *Marcheterre* (2); *Desaulniers* v. *Payette* (3); *Willson* v. *Shawinigan Carbide Co.* (4). Whatever difficulty the definition of "final judgment" in the "Supreme Court Act" may present to the hearing of a substantive appeal from a judgment which, though final in another sense under the Quebec system of jurisprudence, does not finally determine and conclude the action, suit, cause, matter or other judicial proceeding, section 51 of the statute offers no obstacle to the review of an interlocutory judgment to which the maxim quoted applies on appeal from the judgment which finally determines an action in the Province of Quebec.

If it should be thought desirable to give to litigants in other provinces a right of appeal to this court from any judgment which finally determines or disposes of substantial rights, that might be done by substituting for the definition of "final judgment" now in the

(1) 8 Can. S.C.R. 385.
(2) 17 Can. S.C.R. 141.
(3) 35 Can. S.C.R. 1.
(4) 37 Can. S.C.R. 535.

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"Supreme Court Act," a definition similar to that which governs in Exchequer Court cases. To permit the review of interlocutory judgments on appeals from the final judgments in actions brought in provinces in which legal procedure is based on the English system would tend to unduly prolong litigation and to enormously increase its expense. To allow the opening up, on an appeal from a judgment merely on further directions and costs, of the judgment which determined liability and directed a reference to ascertain its amount would probably result in the entire cost of what might have been a very expensive reference being thrown away whenever the original judgment should be reversed by this court or should be so varied that the basis of reference would be substantially altered. But any such change in our jurisdiction must be made by Parliament. We are powerless to effect it.

Since we have jurisdiction over the appeal from the final judgment on further directions the present appeal may not be quashed; but inasmuch as counsel for the appellants has intimated that if he cannot open up the judgment determining their liability or the later judgment on the quantum of damages it would be useless to argue the appeal from the judgment on further directions, in which nothing but the disposition of costs could be dealt with, this appeal should be now dismissed; and I see no reason why the usual result as to costs should not follow. *Desaulniers* v. *Payette*(1).

BRODEUR J. (dissenting).—We are called upon to decide whether on an appeal from a final judgment in

(1) 35 Can. S.C.R. 1.

Ontario we can review the interlocutory orders which have disposed of the real points in dispute.

It is claimed by the respondents that an interlocutory order is *res judicata,* that it cannot be opened by the judge who renders the final judgment, and that the Court of Appeal and this court are bound by that order.

On the other hand, the appellants state that an interlocutory order can be reviewed and that it should not operate so as to bar or prejudice this court from giving such decision as may be just.

It is now the settled jurisprudence of the Supreme Court as evidenced by the following decisions: *Union Bank of Halifax* v. *Dickie*(1); *Clarke* v. *Goodall*(2), and *Crown Life Ins. Co.* v. *Skinner*(3), that the interlocutory judgments similar to the ones in question in this case cannot be formally appealed from.

But it has never been decided whether those interlocutory judgments could be reviewed when the action is brought before us on an appeal from the final judgment.

What are the facts in the present case? First the question of liability of the defendant company, now appellant, was decided in 1908 by the High Court and the Court of Appeal, and a reference was ordered to determine the quantum of damages. It was certainly the most important question to be decided as to whether the defendant company was or was not liable. However, as that judgment was not a final one no formal appeal therefrom on account of the decisions above quoted, could be taken.

The parties then proceeded on the reference and

(1) 41 Can. S.C.R. 13. (2) 44 Can. S.C.R. 284.
(3) 44 Can. S.C.R. 616.

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there also a most important issue was fought. The referee having reported a certain amount of money as representing the quantum of damages that the company should pay, an appeal from his decision was brought before the Chief Justice of the Common Pleas, Sir William Meredith, who varied the report as to the amount. The latter judgment was rendered on the 23rd of January, 1911.

On the 8th of March, 1911, a judgment was rendered by the Honourable Chancellor on the plaintiffs' motion for further directions and for costs. In the formal order of the Chancellor it is stated that;

> Upon hearing read the *pleadings, proceedings, judgment at trial,* certificate of the Court of Appeal, the report of the local Master at Sandwich, the judgment of the Honourable the Chief Justice of the Common Pleas varying the report, *the evidence, orders, certificates, papers and all proceedings* had and taken in the cause and upon hearing counsel as aforesaid—
>
> This court doth order and adjudge that the defendants, The Windsor, Essex and Lake Shore Rapid Railway Company do pay to the plaintiff, A. J. Nelles the sum of $10,648.90 * * * that the defendants, The Windsor, Essex and Lake Shore Rapid Railway Company do pay to the plaintiffs their costs. * * * "

The defendants appealed from the judgment of the Chief Justice of the Common Pleas and from the judgment of the Chancellor and those appeals were dismissed by the Court of Appeal on the 28th of September, 1911.

Notice of appeal was then given to this court and later on a motion was made before the registrar to affirm the jurisdiction of this court to hear the appeals, first from the judgment of 1908, secondly, from the order of Sir William Meredith given on the 23rd of January, 1911, and thirdly, from the judgment of the Chancellor of the 8th March, 1911.

The registrar refused to grant the motion as to the two first orders or judgments relying on section 69 of

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the statute and on the cases above quoted of *Clarke* v. *Goodall*(1), and *Crown Life Ins. Co.* v. *Skinner*(2), but he added:—

> In holding that no appeal lies from this judgment (referring to the judgment of the Chief Justice at the Common Pleas) I am not to be taken as being of the opinion that the Supreme Court may not in dealing with an appeal from the final judgment, open up any interlocutory judgment of the Court of Appeal or any other court below on this matter.

That opinion of the registrar was confirmed later on by the court itself.

The appeal then came up on the merits and the first question that was discussed was whether we could review the interlocutory judgments, first the one rendered in 1908 declaring the liability of the company, and the second rendered in January, 1911, determining the amount of damages.

We did not consider it advisable to hear the parties upon the merits of those two interlocutory judgments until we would decide that preliminary point.

I am strongly of the view that Parliament in giving an appellate jurisdiction to this court intended to give us and has given us the power to hear and determine all the issues in a case.

The formal appeal may be taken only from the final formal judgment, but in considering that judgment we have the right to review all the interlocutory orders which at one time or another have been rendered in the case by the High Court (section 51 "Supreme Court Act").

In general principle an interlocutory order remains, until final judgment, subject to the control of the court and open to reconsideration and revision (Cyc., vol. 11, page 503).

(1) 44 Can. S.C.R. 284. (2) 44 Can. S.C.R. 616.

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That rule is simply the confirmation of the old Roman saying, *judex ab interlocutoris discidere potest.* We find also that principle established in the French law under the well-known phrase *"l'interlocutoire ne lie pas le juge final."*

It is claimed that the practice in Ontario is that in a final judgment the interlocutory orders are never disturbed. I may say that we have in the Province of Quebec an almost similar practice, and it is very seldom that we see a judge reversing the opinion of one of his confreres on demurrer or another incident. They do as the Chancellor did in this case, they examine all the papers, interlocutory judgments and other proceedings and render the final judgment. But in law those interlocutory judgments have no binding effect and they can be reviewed and reconsidered. But supposing that a judge of co-ordinate jurisdiction cannot reconsider the interlocutory order, could that rule be applied as to the appellate courts ? As far as England is concerned that question is disposed of by Order 58, Rule 14, which says:—

> No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just.

In Ontario section 81 of the "Judicature Act" states that on questions of law or practice the Court of Appeal and the High Court are bound by their former decisions until they are overruled by a higher court. Here is what it says:—

> 81 (1) The decision of a Divisional Court or of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher court, be binding on the Court of Appeal and all Divisional Courts thereof, as well as on all other courts and judges, and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision, unless and until so overruled or impugned.

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(2) It shall not be competent for the High Court or any judge thereof in any case arising before such court or judge to disregard or depart from a prior known decision of any court or judge of co-ordinate authority on any question of law or practice without the concurrence of the judges, or judge who gave the decision; but if a court or judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher court, such court or judge may refer the question to such higher court.

We have in British Columbia a decision in the case of *Edison General Electric Co.* v. *Edmonds*(1), almost similar to this one.

The statement of defence has raised an objection in point of law. Judge Drake had decided the point of law in favour of the defendants. Upon appeal the Divisional Court had confirmed Mr. Justice Drake's decision. Upon motion then made to him the action was dismissed by the same judge as the action was substantially disposed of by the decision of the point of law.

Appeal was then made to the full court, which decided that the interlocutory judgment of Mr. Justice Drake and of the Divisional Court could be reviewed. Chief Justice Davie in rendering the judgment of the full court said, at page 379:—

It never, I think, was intended either by our own "Supreme Court Act" or the rules, or by the "Supreme and Exchequer Court Act," that by virtue of an interlocutory tribunal pronouncing what in effect is a final judgment that there the litigant's rights should be concluded. There can, I think, be but one final determination upon the merits of an action, and when you arrive at that stage, and not until then, the right of appeal as from a final judgment arises; and upon the final appeal in determining the merits of the case, the court is not to be barred by any interlocutory decision not brought by appeal to the full court. To this effect, I take it, is Rule 683, which says that no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the full court from giving such decision upon the merits as may be just.

(1) 4 B.C. Rep. 354.

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That Rule 683 is the exact reproduction of the English Order 58, Rule 14, and we find in England the following decisions which enunciate the principle that an interlocutory order will not operate so as to bar the Court of Appeal from giving the decision which is considered just. *Sugden* v. *Lord St. Leonards*(1); see *per Mellish* L.J., page 208; *Laird* v. *Briggs*(2).

Now coming to the examination of the jurisprudence of this court on the point at issue I find that the court in the case of *Magann* v. *Auger*(3) has reviewed an interlocutory judgment and has allowed the appeal and maintained the *exception declinatoire* the object of that interlocutory judgment. The formal appeal was from the final judgment. In 1906 in the case of *Willson* v. *Shawinigan Carbide Co.*(4), there had been a direct appeal from the judgment on an *exception declinatoire*. This court quashed the appeal on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from the final judgment on the merits.

In 1908 in a case of *North Eastern Banking Co.* v. *The Royal Trust Co.*(5) we find facts very much similar to those in this case. It was an Exchequer Court case. Judgment had been rendered on the merits and a reference had been ordered. The report of the referee was brought down and no appeal was taken to the judge from the report within the 14 days mentioned in sections 19 and 20 of the then rules of the court (Exchequer Reports, vol. 6, page 449). The power of the court to vary seemed to be at an end. It

(1) 1 P.D. 154.
(2) 16 Ch. D. 663.
(3) 31 Can. S.C.R. 186.
(4) 37 Can. S.C.R. 535.
(5) 41 Can. S.C.R. 1.

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was held that an appeal will lie to the Supreme Court from an order of the judge confirming the report. It is to be noticed that by section 82 of the "Exchequer Court Act," chapter 140, R.S.C. (1906), some interlocutory judgments of the Exchequer Court may be appealed to this court. Though there was no appeal from the interlocutory I draw the inference that it would, however, be reviewed by this court.

The respondents have referred to three cases decided by this court and which according to them preclude the consideration of interlocutory judgments.

These are the cases of *Shaw* v. *St. Louis,* in 1883 (1); *The Queen* v. *Clarke,* in 1892(2), and *Desaulniers* v. *Payette,* in 1904(3).

Of those three cases the last one seems to have some bearing upon the point at issue.

The two other cases, *Shaw* v. *St. Louis*(1) and *The Queen* v. *Clarke*(2) were decided on an entirely different question since the court declared that the judgments were final though they did not terminate the suit and that some references were ordered.

It was simply decided there might be appeals from interlocutory judgments which terminate a question of law or of fact, but which are not, however, the final judgments of the case.

I may add, however, that in the case of *The Queen* v. *Clarke*(2) the judges, Patterson and Gwynne JJ. who were dissenting gave us their opinion that those interlocutory judgments could be reconsidered on an appeal from the final judgment.

The judgment in *Desaulniers* v. *Payette*(4), upon

(1) 8 Can. S.C.R. 385.
(2) 21 Can. S.C.R. 656.
(3) 35 Can. S.C.R. 1.
(4) 33 Can. S.C.R. 340.

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which was rendered later on the judgment above quoted(1) could hardly be considered as a good precedent as it was practically overruled in the case of *La Ville de St. Jean* v. *Melleur*(2), where it was decided that a judgment depriving the appellant of his right to rely on some of the grounds of his action was a final judgment which could be appealed here.

The contention that this court has no alternative other than to affirm the judgment appealed from because the question of costs alone was then decided seems to me absolutely wrong—and why ? Because it is said the Supreme Court can only reverse the judgment of the Court of Appeal if that court is wrong; but the judgment of the appeal court was right, because how could it have said that the judge below was wrong when he had done no more than conform to its own judgment on the earlier appeal ? And so it happens that the judgment of the trial judge which may have been absolutely wrong can never be reformed by the highest appellate court.

That conclusion so repugnant to my common sense comes about because the rules of practice which have been adopted by the courts below for the purpose of expediting the business of the court are permitted to produce a result which is nothing but a travesty upon the due administration of justice.

The trial judge or the Court of Appeal in the future will have simply, in order to avoid an appeal to this court, to state in their decree that the defendants or the plaintiffs should win on the true issues in the case and reserve the question of costs for further adjudication and those true issues could never be brought up here.

(1) 35 Can. S.C.R. 1. (2) 40 Can. S.C.R. 139.

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When one considers the circumstances under which the Supreme Court was organized, that the bill as introduced in Parliament would have precluded any appeal from this Supreme Court to the Privy Council (R.S.C. (1906), ch. 139, sec. 159) that the Judicial Committee has always refused to be bound by any rule of practice or procedure in the courts below which would prevent it from doing justice, and that the "Supreme Court Act" (section 68) provides that proceedings in appeal shall where not otherwise provided in the Act, be as nearly as possible in conformity with the practice of the Judicial Committee, I, for one, find myself unable to concur in such an important conclusion as it is said the court must arrive at in the present case. In giving to that practice the effect which is asked by the respondents it would be limiting the appeals to the Supreme Court and it is not in the power of the provincial courts any more than of the provincial legislature to circumscribe the appellate jurisdiction granted by the "Supreme Court Act," which was passed pursuant to section 101 of the "British North America Act." (*Crown Grain Co.* v. *Day*(1).

My conclusion is that the interlocutory judgments rendered by the Court of Appeal in 1908 and by the Chief Justice of the Common Pleas in 1911, can be reviewed and reconsidered in this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Wilson, Pike & Stewart.*
Solicitors for the respondents: *Rodd & Wigle.*

(1) [1908] A.C. 504.

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*Nov. 14.
*Dec. 20.

KLINE BROTHERS AND COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE DOMINION FIRE INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Removal of goods—Consent—Binder—Authority of agent.

K. Bros. & Co., through the agents in New York of the respondent company obtained insurance on a stock of tobacco in a certain building in Quincy, Flo., and afterwards obtained the consent of the company to its removal to another building. Later, again, they wished to return it to the original location and an insurance firm in New York was instructed to procure the necessary consent. This firm, on January 14th, 1909, prepared a "binder," a temporary document intended to license the removal until formally authorized by the company, and took it to the firm which had been agents of respondents when the policy issued, but had then ceased to be such where it was initialed by one of their clerks on his own responsibility entirely. On March 19th, 1909, the stock was destroyed by fire in the original location and shortly after a formal consent to its removal back was indorsed on the policy, the respondents then not knowing of the loss. In an action to recover the insurance:—

Held, affirming the judgment of the Court of Appeal (25 Ont. L.R. 534) that the "binder" was issued without authority; that even if the insurance firm by whose clerk it was initialed had been respondents' agents at the time they had, under the terms of the policy, no authority to execute it and authority would not be presumed in favour of the insured as it might be in case of an original application for a policy; and that it was not ratified by the indorsement on the policy as the company could not ratify after the loss.

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

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KLINE BROS. & CO. v. DOMINION FIRE INS. CO.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the defendants.

The defendants pleaded several defences to the action on the policy insuring plaintiffs' tobacco in Quincy, Flo., but the only one dealt with on the appeal was that at the time of the loss the policy only covered goods in another building. The circumstances are sufficiently stated in the head-note.

D. L. McCarthy K.C. for the appellants. The defendants are estopped from denying that the New York firm were their agents. *Montreal Assurance Co.* v. *McGillivray*(2), at p. 121. Being agents they had authority to issue the binder. *Eastern Counties Railway Co.* v. *Broom*(3).

The issue of the binder was ratified. *Lewis* v. *Read*(4); *Williams* v. *North China Ins. Co.*(5).

Even if the New York firm were agents of respondents they could not license a removal of the stock insured without express authority in writing. The policy so provides, and see *Western Assurance Co.* v. *Doull*(6).

The indorsement on the policy after the loss would not have ratified if the respondents had knowledge of the fire: *Grover* v. *Mathews*(7).

Hamilton Cassels K.C. for respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

The action is brought on a policy of fire insurance

(1) 25 Ont. L.R. 534.
(2) 13 Moo. P.C. 87.
(3) 6 Ex. 314.
(4) 13 M. & W. 834.
(5) 1 C.P.D. 757.
(6) 12 Can. S.C.R. 446.
(7) [1910] 2 K.B. 401.

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issued by the respondents through their agents in New York, to cover a stock of tobacco in a warehouse described as situated on the southeast corner of Love and Washington streets in the town of Quincy. The policy is dated 3rd September, 1908, and the fire occurred on the night of the 18th March, 1909; the amount claimed is $2,000. There are several defences, the substantial one being, that, by reason of changes in the contract of insurance previously made at the request of the insured, the goods were not, at the time of the fire, within the protection of the policy.

In December, 1908, it was found necessary by the insured to transfer the tobacco from the warehouse, at the corner of Love and Washington streets, to the Owl warehouse in the suburbs of Quincy, and this was done with the consent of the company, evidenced by the memorandum attached to the policy and dated 14th October, 1909. So that at the moment of the fire the subject of insurance was tobacco stored in the Owl warehouse, whereas the goods actually destroyed and for the value of which this claim was made had been removed from that location several weeks before. There can be no doubt as to the fate of this claim if there was nothing else on this record. And I must confess my inability to understand how the liability of the respondents has been affected by the subsequent happenings upon which the appellants rely. It is useless to insist upon the many reasons which may be urged to support the company's contention, that the location of the goods insured materially affect the risk; they are so obvious as not to require mention. For the better understanding of the appellants' case I will briefly state all the facts.

As I said before the policy was issued by the com-

pany's agents in New York, and the indorsement consenting to the change in the location was given through the same agency. When, however, the appellants were prepared to transfer the tobacco to the corner of Love and Washington Streets the New York agency was closed, a fact which came to the knowledge of the appellants' insurance broker either at the time, or immediately after the application for the consent of the company to the change was made at the office in New York occupied by their former agents. In my view, however, the broker's knowledge of the closing of the agency is not of major importance because of the other facts of this case. Whatever may be the truth as to this, the brokers, when they applied for the consent of the company to the re-transfer, were content to accept from a clerk in the office of the company's former agents, instead of the document which they had prepared, a document known amongst insurance brokers as a "binder," and which it is alleged operates according to the custom of insurance brokers in New York, to bind the company until such time as a more formal agreement is issued. Whatever may be in some circumstances the effect of a "binder" issued by a qualified agent, when the policy is first applied for, I entertain no doubt that it was of no value in the circumstances of this case. Excluding from consideration those cases where the agent is clothed with all the powers of the company itself, and has authority to issue and cancel policies of insurance generally without reference to the head office, I agree fully with the respondents' counsel who, in his very able factum, makes the distinction between the powers to be implied in the case of insurance agents when taking new risks, and their powers when assuming

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to deal with risks already in existence. In the former case a person dealing with the agent is entitled to assume that he has the general powers of an insurance agent, and within the scope of his ostensible authority, has power to bind the company to the extent of the risk accepted by the agent, even though, as a matter of fact, in accepting such risk, the agent is exceeding his authority. But where, after a risk has been accepted, and the terms of the contract are embodied in a policy, the agent is applied to for permission to change the location of the goods insured, or any of the conditions of that policy, the applicant deals with that agent at his peril, and if in fact the agent has no authority, the assent given by him is of no avail, even although the person obtaining the assent has no knowledge of the lack of authority. Here, of course, it cannot be successfully pretended that the agent had any authority to issue the "binder" in view of this condition of the policy which the insured or their agents had at the time in their possession:—

> In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of the company,

and admittedly there was no such writing. It is also provided that the entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if any change takes place in the subject of insurance, unless otherwise provided by agreement indorsed on the policy or added thereto, and there is no such agreement here. As I have already said a change of location in the subject of insurance would, as materially affecting the risk, come within that provision. It may almost be accepted as an axiom in insurance law "that the locality and surroundings of insured property are always con-

sidered material by insurers in accepting and rejecting applications for insurance, is a matter of common information to which the courts cannot be indifferent in the decision of questions of this character." Beach on Insurance, Vol. 2, sec. 623.

But it is said that on application to the company at its head office in Toronto the action of the clerk who issued the "binder" was ratified, and the consent of the company then given operated retroactively to validate the action of the clerk (14 January, 1909). It is impossible to accept this contention. At the time the assent of the company was given, March 26th, 1909, the fire had actually occurred and the subject-matter of the insurance had been destroyed. The company could not insure with the knowledge of the loss, and, of course, there can be no ratification if the principal could not make the contract at the time he is asked to ratify it. Here we have this additional fact which certainly does not help the appellant. At the time the assent of the company was given the insureds' agents knew that the goods were destroyed and, notwithstanding, they carefully kept that fact concealed from the company. It is unnecessary to comment on such lack of candour. The assent could not in any case be referred back to the date of the binder, because it was given without any reference to it; the company appears to have been kept in ignorance of the fact that such a document ever existed. I also agree with Mr. Justice Garrow when he says that in any event the application to the company for its consent to a re-transfer of the goods should not have been delayed from the 14th January to the 26th March. For the neglect which caused the loss the appellant must now bear the consequences; the respondent company is not in any way responsible.

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DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I think this appeal must be dismissed with costs.

DUFF J.—I concur in dismissing this appeal with costs.

BRODEUR J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondents: *Cassels, Brock, Kelly & Falconbridge.*

IN THE MATTER OF ANNIE McNUTT.

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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Nov. 28.
*Dec. 10.

Habeas Corpus—"Supreme Court Act," s. 39(c)—Criminal charge—Prosecution under Provincial Act—Application for writ—Judge's order.

By sec. 39(c), of the "Supreme Court Act" an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * not arising out of a criminal charge.

Held, per Fitzpatrick C.J. and Davies and Anglin JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the "Nova Scotia Temperance Act" are proceedings on a criminal charge and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction. Duff J. contra. Brodeur J. *hesitante.*

By the "Liberty of the Subject Act" of Nova Scotia on an application to the court or a judge for a writ of *habeas corpus* an order may be made calling on the keeper of the gaol or prison to return to the court or judge whether or not the person named is detained therein with the day and cause of his detention. On the return of an order so made, an application for the discharge of the prisoner was refused, and an appeal from this refusal was dismissed by the full court.

Held, per Idington and Brodeur JJ. that such order is not a proceeding for or upon a writ of *habeas corpus* from which an appeal lies under said sec. 39(c).

Per Duff J.—That the judgment of the full court was given in a case of proceedings for a writ of *habeas corpus* within the meaning of sec. 39(c), and that the proceedings did not arise out of a "criminal charge" within the meaning of that provision; but that, on the merits, the appeal ought to be dismissed.

APPEAL from the decision of the Supreme Court of Nova Scotia(1) affirming the judgment of a judge who refused to discharge the appellant from imprison-

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

(1) 46 N.S. Rep. 209.

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ment on a conviction for keeping liquor for sale in violation of the "Nova Scotia Temperance Act."

The appellant having been convicted and sentenced to three months' imprisonment in gaol applied to a judge for a writ of *habeas corpus* on the ground that the magistrate at the trial had inquired into a previous conviction before the offence he was trying had been established. It appeared that on the trial a witness had been asked as to previous convictions and had stated that there were several, and it was alleged that the accused had been interrogated on the same matter. The judge, instead of granting the writ, made an order under the "Liberty of the Subject Act," calling upon the the gaol keeper to return the date and cause of the detention. On return of this order he refused to discharge the prisoner and his refusal was affirmed by the full court. The prisoner then appealed to the Supreme Court of Canada.

Ralston in opposing the appeal claimed that this was not a proceeding for or upon a writ of *habeas corpus* and that the court was without jurisdiction, citing *In re Harris*(1) and *Ex parte Byrne*(2).

Power K.C. and *Vernon* for the appellant. The proceedings were for, if not upon, a writ of *habeas corpus*. See *Rex* v. *Cook*(3).

(The objection was taken from the Bench that the proceedings arose out of a criminal charge which would deprive the court of jurisdiction.)

On the merits counsel cited *Rex* v. *Coote*(4); *Rex* v. *Reid*(5); *Rex* v. *Vanzyl*(6).

(1) 26 N.S. Rep. 508.
(2) 22 N.B. Rep. 427.
(3) 18 Ont. L.R. 415.
(4) 22 Ont. L.R. 269.
(5) 17 Ont. L.R. 578.
(6) 15 Can. Cr. Cas. 212.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that we cannot entertain this appeal.

It was on the appellant to shew that we have jurisdiction, and he referred us to section 39(*c*) of the "Supreme Court Act," which provides for an appeal

from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * *not arising out of a criminal charge.*

In other words, the statute gives an appeal when the petitioner for the writ is detained in custody on a process issued in a civil matter.

Assuming, but without admitting, that the order made in this case, under the "Liberty of the Subject Act," R.S.N.S. (1900) ch. 181, is for the purpose of determining our jurisdiction, the equivalent of a writ of *habeas corpus*, in what aspect can it be said that the commitment under which the petitioner is detained is a civil process or that the order in question arises out of a civil matter ? In my opinion it is clearly in the nature of an order in a criminal proceeding.

The proceedings originated in a complaint by the Inspector, a public official, to the effect that the petitioner

unlawfully did keep intoxicating liquor in his possession for sale contrary to the provisions of the "Nova Scotia Temperance Act," 1910.

That complaint was tried by the stipendiary magistrate under the "Summary Convictions Act" (Canada) and he condemned the petitioner to be imprisoned for three months in the county gaol, without the option of a fine. This petition was made to obtain her discharge from that custody. In what aspect then can the subject of these proceedings be described as a wrong for which there is a remedy by civil process or how can this be said to be a proceeding which

has for its object the recovery of money or other property, or the enforcement of a right for the advantage of the person suing. Halsbury, vol. 9, No. 499.

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The act of keeping liquor in the circumstances of this case is not, in itself, an injury to a private person, nor is it an act forbidden by the statute

in such a way that the person guilty may be liable to a pecuniary penalty which is recoverable as a debt by civil process.

The illegal act with which the petitioner is charged is a violation of the provisions of a statute passed to regulate the sale of liquor in the interests of the inhabitants of the Province of Nova Scotia and the punishment for that illegal act is imprisonment for a definite period. The petitioner is "furnished with no key," it is not in her power in any way to shorten that term; the imprisonment is, therefore, not imposed as a coercive or remedial measure for the benefit of the complainant; it is solely punitive to vindicate the authority of the law. The procedure at the trial was that prescribed by the summary procedure sections of the Criminal Code and the conviction is in the form given by that code. We have, therefore, in this case all the necessary elements of an offence against what has been not inaptly described as a provincial criminal law. But it is impossible to find in the proceedings below any of the distinguishing features of a civil process and to this latter class of case the jurisdiction of this court is, with respect to appeals upon writs of *habeas corpus,* expressly limited by the statute under which it is constituted.

The "Canada Temperance Act" was by decision of the Privy Council upheld on the ground that it might be referred to the general powers of the Dominion Parliament in respect of "the peace, order and good government of Canada." That legislation does not rest upon the execution of Dominion powers with regard to criminal law, although having as stated by

their Lordships *direct relation thereto.* It is to be observed that the general principle and object of the local Act in question here is in a large measure the same as that of the Dominion Act, the prohibition of the sale of intoxicating liquors within municipal divisions. Similar legislation was upheld by the Privy Council in the *Prohibitory Liquor Laws Case*(1) under the authority of the province to make laws for the suppression of the liquor traffic; "British North America Act," section 92(16).

If this subject comes within the powers of the province then the right to impose punishment by imprisonment to enforce its provisions undoubtedly exists. Sec. 92(15). Such legislation if enacted by the Imperial Government would be denominated criminal and fall within the category of criminal law; and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature. At all events it cannot be said to be in any aspect legislation creating or regulating a civil remedy or process.

This appeal is dismissed but without costs.

DAVIES J.—The appellant had been convicted of having

> unlawfully kept intoxicating liquors for sale contrary to the provisions of the "Nova Scotia Temperance Act," 1910.

The conviction was for a second offence, and the punishment imposed was imprisonment for a term of three months.

Applications were first made to the Chief Justice of Nova Scotia and afterwards to the Supreme Court

(1) 24 Can. S.C.R. 170.

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of that province for the prisoner's discharge from imprisonment on the ground that by admitting some general evidence of the appellant's conviction of a previous offence before he had adjudicated upon the second offence for which appellant was being tried, the magistrate had acted illegally and deprived himself of jurisdiction, and that the conviction was therefore bad.

Both applications were dismissed and from the dismissal of the application to the Supreme Court of Nova Scotia an appeal was taken to this court.

Preliminary objections were taken at the hearing in this court to our jurisdiction to hear this appeal, on the ground that it did not come within sub-section (*c*) of section 39 of the "Supreme Court Act," under which alone we can claim jurisdiction.

Section 39 enacts:—

> Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—
>
> (*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge.

These objections were, first, that the order for the prisoner's discharge applied for was one under the "Liberty of the Subject Act," and was not a "proceeding *for or upon a writ* of *habeas corpus*" within the meaning of the sub-section (*c*) and, secondly, that the proceeding impeached did "arise out of a criminal charge," within the meaning of those words in the sub-section, and was, therefore, exempted from our jurisdiction.

I have reached the conclusion that this latter objection is fatal to the maintenance of the appeal.

The question involved is whether the offence for which the appellant was convicted and imprisoned is

covered by the exception forming the closing words of sub-section (*c*) above quoted, "not arising out of a criminal charge." The contention that they are not so excepted is based upon the fact that section 91, sub-section 27, of our "Constitutional Act" assigns the exclusive power to legislate upon criminal law, to the Dominion Parliament, and that the Act under which the appellant was convicted was a provincial one.

These words, no doubt, must be construed, as stated by Lord Halsbury in the reference respecting the validity of the "Lord's Day Act," as embracing criminal law "in its widest extent," but that does not preclude the provincial legislatures, when legislating upon matters strictly within any of those assigned to them by the 92nd section of that Act, from enacting such necessary sanctions for their legislation as are essential to make that legislation effective, in fact sub-section 15 of section 92 expressly confers such necessary powers upon them.

In the case before us no attack was or could successfully be made upon the constitutionality of the "Nova Scotia Temperance Act, 1910." The right of the legislature to pass it was indubitable, and in the legitimate exercise of that right its powers were plenary. The penalties and punishments it prescribed for offences against its provisions, though in a sense criminal legislation, were not unconstitutional because they were necessary to effective legislation on the main subject-matter which the legislature was dealing with and were expressly authorized by sub-section 15 of section 92 of the "British North America Act."

The Act was one dealing with public law and

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order from a provincial standpoint, and not with private wrongs or civil rights.

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this—that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. 4 Bl. Com. p. 5.

As defined in Russell on Crimes, vol. 1, p. 1, crimes are:—

Those acts or omissions involving breach of a duty to which by the law of England a sanction is attached by way of punishment or pecuniary penalty in the public interest.

See also, 1 Austin's Jurisprudence, Lecture 17, p. 405.

In *Russell* v. *The Queen*(1), the Judicial Committee of the Privy Council, in determining the validity of the "Canada Temperance Act, 1898," refer, at page 840, to an argument advanced by counsel for the appellant in that case as follows:—

It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-sec. 15 of sec. 92, viz., "The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." *No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects;* but as far as they have yet gone, their Lordships fail to see that this has been done.

In *Hodge* v. *The Queen*(2), at p. 129, the Judicial Committee adopt with approval the following statement of the law made by their Lordships in *Russell* v. *The Queen*(1), having reference to such legislation as was embodied in the "Canada Temperance Act."

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights.

These words apply with equal aptitude to the provincial "Temperance Act" in question. The nature and object of it and the "Canada Temperance Act" are alike and they each, in their respective spheres, fall within legislation for the promotion of "public order, safety and morals."

I conclude, therefore, that the offence for which the appellant was convicted and imprisoned came within the classification of public wrongs or crimes. The only question remaining is whether Parliament intended, when exempting from our jurisdiction in sub-section (*c*) of section 39 proceedings "not arising out of a criminal charge," to embrace in the exemption cases arising under provincial legislation.

I see no reason for reading any limitation into the general words of the exemption and to confine them either to criminal charges at common law or under Dominion legislation.

It seems to me that the same reasons for withdrawing jurisdiction from this court in proceedings arising out of a criminal charge under Dominion temperance legislation must apply to proceedings under provincial temperance legislation.

Parliament in the one case and the legislature in the other, when so legislating, do so in their respective spheres with plenary powers. The legislation in each case deals with public law and order, safety and morals; the offences created are those of public wrongs or crimes and not civil injuries or private wrongs. The only distinction between the legislation is that one is general, relating to the Dominion at large, and

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passed under the general power given respecting peace, order and good government, and the other provincial,

relating to matters of a local or private nature in the province.

I am unable to find any sufficient reason for excluding from our jurisdiction respecting appeals under the section of the "Supreme Court Act" I have quoted, proceedings for or upon a writ of *habeas corpus* to test the validity of convictions for offences under the "Canada Temperance Act" on the ground that they arise out of a criminal charge, and at the same time including as within that jurisdiction similar proceedings if taken under provincial temperance legislation.

I think they equally come within the exemption and decline to read a limitation into the section which would give us jurisdiction in the one case and exclude it in the other. I do not think we have jurisdiction in either case.

I would, therefore, quash this appeal for want of jurisdiction.

IDINGTON J.—Such jurisdiction as this court has in regard to *habeas corpus* appeals falls entirely within and is defined by the "Supreme Court Act," section 39, sub-section (*c*), which reads as follows:—

Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—

(*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge.

We have not before us the motion paper or other material of that kind, if any, presented to the learned judge who made what may be called an order *nisi*

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when the application was made to him, to shew exactly what was asked. Appellant's affidavit shews she had instructed her solicitor to move for a writ of *habeas corpus*. What he got was an order under an Act known as the "Liberty of the Subject Act," of which the first part of section 3, sub-section 2, provides:—

> Where it would be attended with unnecessary delay, expense or inconvenience to bring in the body of a person illegally restrained of his liberty before the court or judge, the court or judge, upon sufficient cause shewn by or on behalf of any person confined in any jail or prison, may, in the discretion of such court or judge, instead of granting a fiat for the writ of *habeas corpus cum causa* requiring the keeper of such jail, etc.,

and defines the proceeding adopted.

Could anything be more explicit than this to shew that it was not within the language of the section 39 of the "Supreme Court Act" that the proceedings were taken?

The "Habeas Corpus Act" has not been supplanted by this new Act. The former is still in force in Nova Scotia.

This new proceeding for whatever purpose furnished and however much in many of its features and operative results alike to those of what the "Habeas Corpus Act" provides, is certainly not in the language of section 39, "a case of proceedings for or upon a writ of *habeas corpus*."

It is no part of our right or duty to presume to fit the jurisdiction given us to something which we in our wisdom may deem suitable to produce the same results.

We might as well presume it our right or duty to hear appeals from a county court in a province should its legislature enlarge the county court jurisdiction

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therein so as to cover some cases heretofore originating in a court of superior jurisdiction.

The local legislatures might by some such provisions thus subtract from our jurisdiction a large part of the field of litigation which now falls within it; yet we could not thereafter reach out and claim that so incidentally taken away as part of our jurisdiction because in substance it was within the field originally given us.

The "Supreme Court Act" has defined by technical terms the limits of our jurisdiction and we have no right to depart therefrom or go beyond the limits so defined however technical the boundaries may be.

Whatever be said in this case the mode of procedure adopted renders our jurisdiction, to say the least, exceedingly doubtful. The rule properly observed by this court has uniformly been to refuse jurisdiction where it appeared doubtful or by virtue of changes had become doubtful.

I think we have no jurisdiction in this case.

It so happened that not being all agreed in this view after argument on the objection taken by Mr. Ralston, the case was heard upon its merits.

Coming to the conclusion I have, I do not think I have a right to pass any opinion upon the several interesting points discussed in the argument on the merits.

No good purpose can be served by doing so. Even if we were all agreed thereon such result could not establish a precedent or determine any rule of law when we were without jurisdiction.

The appeal should be dismissed without costs.

DUFF J.—Mr. Ralston takes a preliminary objection to the jurisdiction of the court, which is as fol-

lows: He says that section 39(*c*) confers jurisdiction only where the judgment appealed from is

> the judgment in any case of proceedings for or upon a writ of *habeas corpus*,

and that the proceeding, in which the judgment now appealed from was given, was a special statutory proceeding and was not a proceeding either "for nor upon a writ of *habeas corpus*," I do not think this objection can be sustained. The original application was an application for a writ of *habeas corpus*. The proceeding was begun therefore as a proceeding for a writ of *habeas corpus*. It is perfectly true that no writ was issued but that an order was made under the statute requiring the gaoler to return the cause of commitment but dispensing with the production of the body of the prisoner and the judgment refusing the application for the discharge of the prisoner followed upon the return made pursuant to this order. I think that for the purposes of this section the nature of the original application which as I have said was an application for a writ of *habeas corpus* may not unfairly be said to determine the character of the proceedings in which this judgment was given. I think one is not doing violence to the language of the statute in holding that this is a judgment in a "case of proceedings for a writ of *habeas corpus*."

Another point has been raised which was not taken by the counsel for the respondent and which it is necessary to discuss. It is said that the offence with which the appellant was charged was a crime and the proceeding in which she was convicted a criminal proceeding and, consequently, that the judgment appealed from falls within the exception created by section 36(*a*) which is in these words:—

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There shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty.

The phrase "criminal charge" means of course a charge forming the foundation of a judicial proceeding which is criminal proceeding and the point for consideration is whether or not (using the word "criminal" in the sense in which it is used in this context) that word is properly descriptive of the proceeding in which the appellant was convicted.

The first question one naturally asks oneself is whether in the contemplation of the law of Canada such a proceeding is properly designated as a "criminal proceeding."

The law of England from which our criminal law is derived furnishes no infallible test by which for all purposes one can determine whether a given proceeding is civil or criminal.

In the earlier history of the law the point, if it arose, could present little difficulty. A criminal proceeding was a proceeding at the suit of the Crown having for its object the punishment of an offence against the law of the land and speaking generally in the case of a commoner it involved a trial by jury pursuant to indictment, presentment or information. In modern times a vast number of statutes affecting the conduct of people in a great variety of ways have frequently given rise to questions whether the summary proceedings taken with a view to punishing offenders or delinquents are or are not to be regarded as criminal proceedings for the purpose of applying some rule of law or some statutory provision. "It must always be," said Lord Bowen in *Osborne* v.

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Milman(1), at page 475 dealing with one of these questions,

> a question on the construction of the particular statute whether an act is prohibited in the sense that it is rendered criminal, or whether the statute merely affixes certain consequences more or less unpleasant to the doing of the act,

and decisions upon one statute must always be applied with caution as authorities for the construction of another. But these decisions do furnish us with illustrations of the criteria which have been applied by eminent judges in England in determining whether for some particular purpose a given proceeding under one of these modern statutes was to be regarded as a criminal proceeding or not; and where the proceeding is instituted for the punishment of an offence against an Act of the Parliament of the United Kingdom and instituted by the Crown *ad vindicatam publicam* then it has, I think, invariably been held that you have a criminal proceeding unless there is something in the Act to shew that it is not to bear that character. It is characteristic of such proceedings that they are proceedings at the suit of the Crown in the public interest and that the sanctions sought to be enforced cannot be remitted at the discretion of any private person; or, in other words, where the sanction is remissible at all it is remissible at the discretion of the Crown.

When we come to apply these criteria in this country to summary proceedings taken under the authority of a provincial statute for enforcing penalties imposed by such statutes we are confronted with a difficulty. All such criteria contemplate an offence punishable and a proceeding taken under the sanction of

(1) 18 Q.B.D. 471.

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a law-making authority having unfettered jurisdiction to make laws in respect of crimes and criminal proceedings. The language of Lord Bowen quoted above is of course used with reference to the enactments of a Legislature possessing such powers. When Littledale J. in *Mann* v. *Owen*(1), at page 602, says in language often cited that a crime is "an offence for which the law awards punishment" he is not contemplating a rule of conduct which has force as law solely by the enactment of a legislative body that is destitute of all authority over the subject of the criminal law. And it may be added that when Austin asserts the characteristic of the criminal law to be that "its sanctions are enforced at the discretion of the Sovereign," he is not thinking of an authority which, while for some purposes it acts in the name of the Sovereign, has nothing whatever to do with the exercise of the Sovereign's prerogative of pardon in reference to crimes strictly so called.

By section 91, sub-section 27 of the "British North America Act, 1867," exclusive legislative authority upon the subject of the criminal law including the subject of criminal procedure is committed to the Dominion. The prerogative of Parliament in respect of criminal offences is under his instructions exercised in Canada by the Governor-General acting on the advice of His Majesty's Canadian Ministers acting under their responsibility to the Parliament of Canada. It is for the Parliament of Canada alone to say what acts the criminal law shall notice and punish as crimes and in what manner all criminal proceedings in Canada shall be conducted.

(1) 9 B. & C. 595.

In *Attorney-General of Ontario* v. *Hamilton Street Railway Co.*(1), at pages 528-9, the supreme judicial authority for Canada expounded the effect of section 91, sub-section 27 of the "British North America Act;" "The criminal law in its widest sense is," said Lord Halsbury, delivering the judgment of the Privy Council, "reserved for the exclusive authority of the Dominion Parliament." His Lordship added that

> the reservation * * * is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords.

By sub-section 15 of section 92 the provinces are authorized to attach the sanctions of fine and imprisonment to acts or omissions in violation of their enactments; but it seems to be clear that consistently with the views thus expressed by Lord Halsbury acts or omissions struck at by such penal enactments cannot with strict propriety be described as crimes nor can the proceedings taken with a view to enforce the sanctions attached to them be properly described as criminal proceedings. Under a constitutional system such as ours that which the supreme legislative authority declares to be so, is so in contemplation of law; and in face of this declaration in the "British North America Act," construed as it has been construed in the passages quoted, it cannot be said that in the contemplation of the law of Canada an act which is an offence against a provincial statute is for that reason alone a crime; and no definition of the terms "crime" and "criminal proceeding" which fails to take this circumstance into account, can be considered adequate with reference to the law of this country. To put it in another way, the "British North America

(1) [1903] A.C. 524.

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Act," which is the supreme law of this country, says to the provincial legislatures: "Though you may pass statutes creating prohibitions and imposing duties in the public interest and attach to them penal sanctions enforceable and remissible at the instance of the Crown alone, yet you are incompetent to pass any enactment which in itself can have the effect of making a given act or omission a crime in the eye of the law." The limitation upon the powers of the local legislatures respecting public offences may be said to be tacitly recognized in every valid enactment passed by a provincial legislature creating such an offence; and every such enactment may be read as containing an implicit declaration that the offence created by it shall not be deemed to be a crime. In the eye of the law, therefore, the proceeding in question here is not a criminal proceeding. It is true, nevertheless, that the phrases "crime" and "criminal proceeding" may be used by a legislative body in a manner which is not strictly accurate, and it is necessary to consider whether there is anything in the "Supreme Court Act" (or in other enactments of the Parliament of Canada which as being *in pari materiâ* may properly be resorted to for aid in the construction of that Act) justifying the inference that in the instance in question Parliament has used the phrase "criminal charge" in a sense broad enough to include within its scope a charge made under a provincial statute.

It may first be noted that the "Supreme Court Act" is a statute dealing with jurisdiction and procedure and primarily addressed to lawyers—a statute in which one may consequently expect to find that the language of the law will not be employed without due attention to its strict meaning; and the onus, there-

fore, seems to be upon those who argue that the phrase in question is used in a sense different from that which the law of this country in strictness attaches to it. The appellate jurisdiction of this court in criminal matters is referred to in three sections, 35, 36 and 39 (*c*), which are as follows:—

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada.

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court: Provided that,—

(*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus,* arising out of any claim for extradition made under any treaty; and, (*b*) *there shall be no appeal in a criminal case except as provided in the Criminal Code.*

39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court, * * * (*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge.

Sub-section (*b*) of section 36 shews clearly enough that the subject of the appellate jurisdiction of the court in criminal matters is regarded by Parliament as falling within the general subject of criminal procedure which is dealt with in the Criminal Code; and that being the point of view from which the legislature has envisaged the subject, the "Supreme Court Act" may properly, in so far as it deals with criminal matters, be read as an Act *in pari materiâ* with the Criminal Code. Turning now to the Criminal Code we find there that the authors of the Code have used the words "crime" and "criminal" throughout in the strict sense; in the sense, that is to say, in which they are used in the "British North America Act;" and without apparently a suspicion of their possible application to

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offences against provincial penal enactments. There is a striking illustration of this in the group of sections, 10, 11 and 12, bearing the sub-title "Application of the Criminal Law of England." As to Ontario I quote section 10:—

> 10. The criminal law of England as it existed on the seventeenth of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in the Province of Ontario, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the Province of Ontario.

Here indeed is a declaration by the Parliament of Canada—the Legislature entrusted with exclusive authority over the subject of the criminal law—professing to define what in the Province of Ontario is comprised within the body of law known as the "criminal law"; and provincial penal enactments are obviously excluded.

I mention another statute relating to criminal procedure and to that extent *in pari materiâ* with the provisions we are considering, chapter 145, of the Revised Statutes of Canada, 1906, known as the "Canada Evidence Act." In section 2 of that statute the phrase "criminal proceedings" appears and is obviously used in the strict sense. So far as my observation extends I am not aware of any instance in any enactment of the Parliament of Canada in which the word "crime" or "criminal" is used in the broad sense it is suggested we should attach to it in the enactment under consideration.

Coming to the "Supreme Court Act," itself, there is nothing in the language of the Act affording a reason for ascribing to the word "criminal" as used in

section 36 any broader scope than that which the word bears in other enactments passed by the Parliament of Canada dealing with the same subject matter, viz., criminal procedure.

Two reasons I understand are given in justification of the broader construction. First, it is said that the effect of the strict construction would be this: From judgments of the court of last resort in proceedings under provincial penal statutes there would in the case of some of the provinces be an unrestricted right of appeal, while from the judgments of such courts in criminal matters strictly so called which are usually matters of far greater moment, the appeal is by the provisions of the Criminal Code very narrowly restricted. It cannot be supposed, it is argued, that Parliament could have contemplated such a result.

This argument, with great respect, seems to prove too much; for a judgment of the Supreme Court of Nova Scotia in a civil action condemning a litigant to pay the sum of $100 is appealable to this court, even although the court be unanimous; while the unanimous judgment of the same court affirming a conviction for murder is not subject to such appeal. Manifestly the test which Parliament has applied in determining in what cases an appeal shall lie to this court is not the relative gravity of judgments as affecting the interests of the parties. The truth is that in the matter of the appealability of judgments a set of considerations has always been regarded as applicable to criminal proceedings which admittedly has no application or very limited application to proceedings of a different character. The "Supreme Court Act" (accordingly) treats the subject of appeals to the Supreme Court in criminal matters as belonging to and governed by the same considerations as the general

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subject of appeals in such matters (or, in other words, as an integral part of the subject of criminal procedure) and therefore as proper to be dealt with in the Criminal Code; a manner of treatment of course in no wise fitting in respect of appeals from judgments in provincial penal proceedings. It may be noticed in passing that one circumstance which unquestionably has weighed with legislators in dealing with the subject of appeals in criminal matters in an exceptional way is the fact that the prerogative of pardon in itself affords some security against manifest injustice. This prerogative as exercisable by the Governor-General in Council under the advice of Canadian Ministers and under the control of the Dominion Parliament has, of course, nothing to do with judgments given in proceedings taken under the authority of a provincial statute.

Then I understand it is suggested that section 62 of the Act which confers jurisdiction in *habeas corpus* upon the judges of this court in respect of commitments in "criminal cases under any Act of the Parliament of Canada" in some way supports the inference that the phrase "criminal case" as used in section 36 is not used in the strict sense. The suggestion as I understand it is that because the scope of the phrase is restricted by express words in section 62 it must be given the broadest meaning of which it is capable in the other sections. But the truth is that for some reason Parliament when conferring original jurisdiction upon the judges of this court in *habeas corpus* in criminal matters, determined to restrict that jurisdiction to criminal matters of a particular class or to commitments of a particular class, and to give effect to that purpose used appropriate qualifying words. Giving the phrase "criminal case" the narrowest conceivable

interpretation the qualifying words were absolutely essential to give effect to the legislative intention; and one has some difficulty in understanding why the use of such necessary qualifying words can be supposed to have any relevancy touching the construction of this phrase when standing alone. If Parliament had used in section 62 the phrase "criminal case" simply without qualification that language construed in the strictest manner would have given a larger jurisdiction than Parliament intended to give. The restriction, therefore, has really no bearing whatever upon the construction to be given to the same phrase when found in other parts of the Act.

For these reasons we have, in my judgment, jurisdiction to entertain the appeal before us. On the merits I think the appeal must be dismissed. The statutory provision relied upon was not intended, in my opinion, to exclude any evidence which, if the statute had not passed, would have been lawfully admissible on the issue of the guilt or innocence of the accused in respect of the offence charged. I am unable myself to understand upon what ground it can be disputed that it was open to the prosecution to shew as bearing upon the character of the accused's possession of the liquor found on her premises that she had previously kept liquor on the same premises for the purpose of sale. Nor can I understand upon what principle it can be held that a judgment determining that fact against her in a proceeding to which the Crown and she were parties — I am unable to understand, I say, upon what principle it can be contended that such a judgment would not be admissible evidence for the purpose of proving that fact. But assuming that a previous conviction would not be legal evidence of

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previous possession for the purpose of sale, how far does that carry us? The magistrate permitted the question to be asked in a general way whether or not there had been previous convictions against her in respect of the same premises. He also admitted evidence to the effect that it was the common report that the accused kept liquor for sale on those premises. If the magistrate erred in the first mentioned instance, does not the first mentioned error stand in the same category as the second? Is it anything more than an instance of the improper admission of evidence? The magistrate was not engaged upon any substantive enquiry into the charge that there had been an earlier conviction. He was engaged in taking evidence relevant as he thought upon the trial of the charge before him. I think nothing occurred which amounted to an inquiry into the charge of a former conviction within the meaning of the statute. I express no opinion upon the question whether there being non-compliance with the statutory provision the effect of such non-compliance would or would not be to deprive the magistrate of jurisdiction.

I think the appeal should be dismissed.

ANGLIN J.—In my opinion we have not jurisdiction to entertain this appeal because, assuming that the order of Mr. Justice Graham for a return by the keeper of the common gaol, made under the Revised Statutes of Nova Scotia, 1900, chapter 181, section 3(2), should be deemed the equivalent of a "writ of *habeas corpus*" for the purpose of clause (*c*) of section 39 of the "Supreme Court Act," the judgment appealed from was rendered "in a case of proceedings * * * arising out of a criminal charge" within the meaning of that phrase as used in that clause.

The appellant was convicted of having unlawfully kept intoxicating liquor for sale contrary to the provisions of the "Nova Scotia Temperance Act" of 1910 after a previous conviction for a like offence. Under that Act, and an amendment of 1911, this is made an offence punishable by imprisonment with or without hard labour, without the option of a fine. That the statutory offence thus created constituted a crime, as that term is ordinarily understood in English law, admits of little doubt.

The proper definition of the word "crime" is an offence for which the law awards punishment. *Mann* v. *Owen*(1), at page 602, *per* Littledale J.

See also *The Queen* v. *Tyler and International Commercial Co.*(2), at pages 594-5, *per* Bowen L.J.; and *Easton's Case*(3). The proceedings against the appellant arose out of what would commonly be deemed "a criminal charge," and she is "a criminal prisoner." *Osborne* v. *Millman*(4); *Reg.* v. *Sparham* (5); *Reg.* v. *Roddy*(6); *Reg.* v. *Sullivan*(7).

It has been recognized in several decisions of the Judicial Committee that provincial legislatures in passing statutes of which the principal matter is within one of the classes of subjects assigned to them by the "British North America Act" may include, under the authority of sub-section 15 of section 92 of that Act, provisions of a criminal character without offending against sub-section 27 of section 91, which assigns to the exclusive jurisdiction of the Dominion Parliament the field of "criminal law." *Hodge* v. *The*

(1) 9 B. & C. 595.
(2) [1891] 2 Q.B. 588.
(3) 12 A. & E. 645.
(4) 18 Q.B.D. 471.
(5) 8 O.R. 570.
(6) 41 U.C.Q.B. 291.
(7) Ir. R. 8 C.L. 404.

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Queen(1), at page 133. As put by Ramsay J. in *Pope* v. *Griffith*(2) :—

> In one sense of the word, the act of which appellant is accused (keeping liquors for sale without a license) is a crime; but it is equally plain that it is not a crime in the sense of sub-sec. 27 of sec. 91 of the "British North America Act."

In *Russell* v. *The Queen*(3), at page 840, Sir Montague Smith, in delivering the judgment of the Judicial Committee, appears to endorse Mr. Benjamin's designation of provisions such as that now under consideration as "provincial criminal law." As put by the present Chief Justice of Canada, in *Ouimet* v. *Bazin*(4), at page 505:—

> It must be accepted as settled that "criminal law" in the widest and fullest sense, is reserved for the exclusive legislative authority of the Dominion Parliament, subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty or imprisonment, any of the laws validly made under the "enumerative heads" of sec. 92 of the "British North America Act," 1867.

The facts that the "criminal law" is assigned by the "British North America Act" to the Federal Parliament and that the offence of which the appellant was convicted is the creation of a provincial legislature do not, therefore, involve the conclusion that that offence is not a crime or that the proceedings against the appellant did not arise "out of a criminal charge."

Except a suggestion that section 39(*c*) and section 62 of the "Supreme Court Act" are mutually complementary, and embrace the whole field of *habeas corpus* jurisdiction—an idea which, as I shall presently point out, is based on a misapprehension—I have neither heard nor do I know of anything which would indicate that the words "criminal charge" are used in

(1) 9 App. Cas. 117.
(2) 2 Cart. 291.
(3) 7 App. Cas. 829.
(4) 46 Can. S.C.R. 502.

section 39(*c*) of the "Supreme Court Act" in any restricted sense or with any other than their ordinary legal meaning. That is in itself a sufficient reason for giving that meaning to them. *Vestry of St. John, Hampstead* v. *Cotton*(1), at page 6; *The King* v. *Judge Whitehorne*(2), at page 830. Moreover, I find several indications in the statute itself that these words are intended to have their widest signification. By section 62 every judge of this court is given original jurisdiction to issue

> a writ of *habeas corpus ad subjicidum* for the purpose of inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

The form of this provision indicates two things:—

1. That when Parliament meant to limit the application of the word "criminal," it said so; and

2. That section 62 and section 39(*c*) are not mutually complementary.

When the Supreme Court was established in 1875 the original *habeas corpus* jurisdiction, now provided for by section 62, was conferred. (See section 51 of the Act of 1875.) At that time a great deal of indisputably criminal law, which has since been codified, was not the subject of any Act of the Parliament of Canada. At the present time there remains a body of criminal law of some importance which is not covered by the Criminal Code, or by any other federal statute. (See Criminal Code, sections 10 *et seq.*) It is therefore obvious that in certain criminal cases this court has neither original nor appellate jurisdiction in *habeas corpus* proceedings, and there is no ground for the contention that section 39(*c*) should be given a construction which would extend our appellate jurisdic-

(1) 12 App. Cas. 1. (2) [1904] 1 K.B. 827.

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tion to all cases not within section 62. That is simply impossible. Parliament has in the former provision deliberately omitted the qualifying words "under any Act of the Parliament of Canada," which are found in the latter. Why then should we restrict the meaning of "criminal charge" in section 39(*c*) to a charge of an offence such that only the Dominion Parliament could create or deal with it? The purpose of Parliament would appear to have been to confine our jurisdiction in *habeas corpus* matters of a criminal character to those cases in which jurisdiction is expressly conferred by section 62, which now embraces many cases of crime to which section 51 of the original Act did not apply—to place upon our appellate jurisdiction in *habeas corpus* matters a restriction similar to that imposed on the jurisdiction of the English Court of Appeal by section 47 of the "Judicature Act." *Ex parte Woodhall*(1); *Ex parte Schofield*(2); *Seaman* v. *Burley*(3); *Rex* v. *D'Eyncourt*(4). The word "criminal" is, I think, used in section 39(*c*) in contradistinction to the word "civil" and connotes a proceeding which is not civil in its character. The proceeding against the appellant was of this class. I am therefore, of the opinion that she cannot invoke the jurisdiction conferred by that section.

I base my judgment on this ground rather than on the ground that the order of Graham J. should not be deemed the equivalent of a writ of *habeas corpus* for the purpose of clause (*c*) of section 39, because the strict construction of that clause, which I understand that some of my learned brothers favour, might result in our being deprived of jurisdiction to hear appeals in

(1) 20 Q.B.D. 832.
(2) [1891] 2 Q.B. 428.
(3) [1896] 2 Q.B. 344.
(4) 85 L.T. 501.

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cases of *certiorari* and prohibition from provinces in which writs of *certiorari* and prohibition have been abolished, or are not now in use, having been superseded by the modern "order of the court or a judge." (See Ont. Consolidated Rules, Nos. 1100 and 1101.) Without much further consideration I am not prepared to accept the view that our jurisdiction has been thus curtailed.

It was strongly urged on behalf of the respondent that, since the intent with which the liquor found on the appellant's premises was kept by her is the gist of the offence of which she has been convicted, in order to establish that intent evidence of her having been formerly convicted of a similar offence was admissible and that the casual and incidental introduction of such evidence on behalf of the prosecutor in a general form and without particulars, while the defendant was on trial for a subsequent offence, charged as such, and before she had been convicted of such subsequent offence, was not contrary to the purpose of the legislature in prescribing with notable particularity the procedure to be followed in such cases, and did not vitiate the whole proceeding before the magistrate, rendering the conviction void and the imprisonment under it illegal. I believe one of my learned brothers takes this view. While I wish to refrain from expressing a judicial opinion on the merits of an appeal which I think we have not jurisdiction to entertain, I desire not to be understood to accede to these propositions of the learned counsel for the respondent.

BRODEUR J.—After a great deal of hesitation I have come to the conclusion that the judgment *a quo* has

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not been rendered in a case of proceedings for or upon a writ of *habeas corpus,* and I concur in the views expressed by Mr. Justice Idington.

Some of my colleagues are quashing this appeal on the ground that the proceedings for the discharge of the appellant arose out of a criminal charge though based on a provincial statute.

I do not think it would be advisable to decide this most important point. It was not mentioned in the factums of the parties and it was not discussed at bar, and I would not like to commit myself to such a proposition unless it would be fully argued.

The effect of such a decision might curtail the legislative powers of the provinces, because if all the provincial penal laws are criminal it might mean that the procedure in respect thereto under the provisions of sub-section 27 of section 92 of the "British North America Act" should be made by the Federal Parliament.

At the same time it may be argued that the Federal Parliament in giving us an appellate jurisdiction on writs of *habeas corpus* excluded the criminal cases because it had given original jurisdiction to judges of this court to issue the writ of *habeas corpus* in criminal matters, and in speaking in section 39 of criminal charges it simply referred to the criminal laws that were under its control and not to what has been called criminal provincial laws.

Appeal dismissed without costs.

S. E. PERIARD (PLAINTIFF) .....APPELLANT;

AND

NOEL BERGERON AND WILLIAM RICKSON (DEFENDANTS) .....RESPONDENTS.

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*Oct. 11.
*Nov. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of goods—Condition as to prices—Lost invoices—Secondary evidence—Waiver—Breach of contract—Damages.

The defendants agreed to purchase the plaintiff's stock-in-trade at a valuation to be based upon an advance of 13% on the invoice prices of the goods when taken into stock. On stock being taken by the parties the plaintiff was unable to produce invoices for a large portion of the goods, but insisted that their prices could be ascertained from private markings on the packages which, she alleged, represented the prices taken from the missing invoices. Differences arose between the parties respecting the prices of these goods, but the inventory was closed with the prices. as they had been marked on the packages, carried into the valuation columns. The defendants refused to complete the purchase on account of failure to produce the invoices in question and the action was brought to recover damages for breach of the contract.

Held, reversing the judgment appealed from (2 D.L.R. 293; 1 West. W.R. 1103), Duff J. dissenting, that the consent of the defendants to the closing of the inventory with the prices in question stated according to the information obtained from the private markings constituted satisfactory proof of the fulfilment of the original agreement and, consequently, damages could be recovered for breach of the contract to purchase.

Per Duff J. dissenting.—There could be no contract capable of enforcement until the prices of the whole of the stock had been ascertained in the manner contemplated by the agreement, and the closing of the inventory with prices supplied from the unverified statements of the plaintiff did not constitute a new contract varying the condition in the agreement as to the fixing of the prices to be paid. Therefore, no action could lie to recover damages for breach of the contract to purchase.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Morrison J., at the trial, by which the plaintiff's action was dismissed with costs.

The action was to recover damages for breach of a contract to purchase a stock of merchandise and the trade fixtures in a shop in Vancouver, B.C. The circumstances of the case are stated in the head-note and the questions raised on the appeal are fully discussed in the judgments now reported.

Newcombe K.C. appeared for the appellant.

Ewart K.C. and *W. L. Scott* for the respondents.

DAVIES J.—I think this appeal must be allowed. I agree with the opinion of Chief Justice MacDonald in the Court of Appeal and see no ground for imputing any dishonesty in the transaction in question to the appellant or to those who acted for her.

The appellant was unable, it is true, to produce all the invoices shewing the prices at which she had bought the goods, but she gave the best evidence in her power and the production of these missing invoices was not insisted upon at the stocktaking by the parties. The custom of the appellant had been to mark the boxes containing goods and other packages and parcels with the selling price and also with a private mark representing the cost price. Bergeron, one of the respondents, had been with the appellant in the store for nearly a month before the stocktaking, with every opportunity afforded him of acquiring a thorough knowledge of the business and merchandise

(1) 2 D.L.R. 293; 1 West. W.R. 1103.

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he had contracted to purchase. The inference I draw from the evidence, which I have carefully read, is that in the cases where disputes arose as to the cost price and the invoices could not be produced, these disputes were practically settled either by reference to the private marks on the packages shewing the cost price, or by the decisions of Mr. French, who was called in by both parties to determine what should be allowed. These disputes I gather were, considering the quantity of the goods in question, comparatively few. The conclusion I reached from a perusal of the evidence was that they arose from the fact of Periard having paid more for some classes of her goods than a close and good buyer could have purchased them at.

But this, if true, would not justify the purchasers in repudiating their contract, which was that they would pay Periard for her "merchandise at the rate of one hundred and ten cents on the dollar invoice price." This was subsequently increased to $1.13 to cover freight charges. Whether, therefore, the Periards had purchased skilfully and closely or improvidently and carelessly had nothing to do with the question of prices. The one thing that had to be determined was what had been *bonâ fide* paid by Periard as the purchase price of the goods.

My conclusions were, after considering the whole evidence, that the appellant had, on the stocktaking, given the best evidence she could of the cost prices of the goods and that though there was much wrangling over some of these prices they were adjusted and settled more or less satisfactorily with the aid and assistance, when he was called in, of Mr. French.

I think the true secret of the attempted repudiation by the respondents of their contract to purchase

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this stock of goods lies in the fact that the total amount of the purchase money was found largely to exceed that which was anticipated.

My conclusion is that the question of the non-production of the invoices was only resorted to as an excuse to escape from a bargain the obligations of which were found, after stocktaking, to be much heavier than had been anticipated.

I would allow the appeal and remit the case back for assessment of plaintiff's damages.

IDINGTON J.—Undue importance was attached in the courts below to the evidence of Mr. French. In answer to a question as to how much of the time of stocktaking he was present at, he says:—

> Not a great deal of the time. I was busy attending to my own business. I was sent for, as I say, possibly four or five times. I think the first day I was up there a couple of times, and I don't think any more. I was up in the morning once, and in the afternoon, and possibly the next day about the same. It may have been four or five times that I went up altogether. My man that works with me was up there assisting.

And in answer to a question relative to the substantial quantities of goods he had spoken of, he says:

> Oh, yes — fair quantities — particularly the hosiery, there was a considerable quantity of that there, and the shirts I cannot recollect how many dozens there were of those — and the ties there was a considerable number of them.

When we find that the stocktaking had involved three days of preparatory arrangement of said stock, and then parts of three days thereafter, making in all two full days' work for the staff employed by both parties checking it over and setting down the results in the lists used by each party; that the character of the stock was so varied as to embrace gents' furnish-

ing and boots and shoes, and clothing, and other things which, in the whole, made a total of nearly $18,000 estimated value; that an examination of the stock-lists so made out discloses, when roughly estimated, nearly four thousand entries of different items; that the witness French was only professing to be an expert as to classes of the goods involving, according to his own estimate, one-half of the total stock, and was called upon only in respect of disputed items of such half; that of the half-dozen things he was called to give an opinion upon some were satisfactorily explained; and that as to each and every one of such, according to the evidence of a number of witnesses, including Corderoy, the accountant, called by the respondent, the prices reached after hearing him (Mr. French) were set down in the list as settled, it seems impossible to rightly give much weight to his evidence as a determining factor in support of the judgment in the case.

There was not a single item of the thousands in question in the stocktaking reserved for future consideration, and no mark or note made of remonstrance for want of invoice or objection in that regard or otherwise.

And when we find these occasional appeals to Mr. French resorted to and that coupled with absence of record or note of any sort of objection in other instances, surely it must be concluded that these others had all been satisfactorily adjusted between those engaged in the work.

The calling him in to help to settle differences in half-a-dozen cases demonstrates how the parties concerned had felt and acted at the time relatively to the other items.

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Mr. French denies being a party to any settling or agreement in the result, as to the items regarding which he was called upon to give his opinion, but he cannot and does not swear they were not adjusted.

I pressed respondents' counsel to explain the absence of any record of objectionable items and he frankly and properly admitted he could not and that such a record would be what one might expect if permanent importance were to be attached to the objection relative to the want of invoices.

The erroneous taking of French's opinion on what the legal meaning of so plain and ordinary a phrase as "invoice price" implies seems to have misled the court. This was a purchase on a basis of price ascertainable either by the production of the original invoice, or such satisfactory evidence as would convince fair-minded business men skilled in such business of the truth of what the original invoice had, or of necessity must have, exhibited if correctly made out.

Neither party could be bound by an error in the original or deprived of his bargain because of the destruction of the original piece of paper. The price that appeared or ought to have appeared therein was the basis to be used. If Mr. French had made such a bargain and was deeply impressed with the idea that he had made one which should yield him a profit of ten thousand dollars, for example, and it was found when time arrived for taking stock that a thief had removed all original invoices, or other destruction, of which the vendor was innocent, had overtaken them, and his vendor had been tempted to re-sell the goods at an advance of five thousand dollars and set up the impossibility of producing the invoices as a

defence or reason excusing himself from observing the contract, I must be permitted to think he (Mr. French) would be constrained to see the absurdity of what he so persistently maintained in his evidence. True, he finally, under pressure, lessened his pretension, but that pretension and its sorry consequences seem, I respectfully submit, to have borne fruit.

It is to be observed that the evidence for the appellant shews that the invoice prices were discoverable from the private markings on the goods, or boxes holding them, that the respondent Bergeron had, as agreed, been engaged as a clerk in the shop for a month preceding the stocktaking, had been given every opportunity for acquainting himself with such marks, inspecting the goods, verifying the systems, and invoices, and comparing the latter with these markings, and that Erisman, a fellow clerk, describes very well how he had availed himself of his opportunity and ends his account of what had transpired by saying:—

> Well, really, Mr. Bergeron and I took stock of the whole store before the stocktaking took place.

Bergeron was called for the defence after this witness had given such evidence, but never ventured a word of either denial or explanation of what Erisman says.

It seems, I submit, rather an impudent thing on his part, after such an opportunity for investigation, and that investigation, to impute fraud to the appellant and fail so signally, not only to make no proof, but not even to try, and shew in a single instance, that the private markings in truth had been deliberately made to appear different from the original invoice.

It is absurd to suppose any merchant would in ordinary practice systematically put upon his goods or

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cases a false instead of the true private marking, which is intended only for the use of himself or his servants. It could only deceive himself.

It is conceivable that a systematic fraud of that kind might be resorted to by a man intending to sell his stock, but inconceivable he should invite his purchaser to spend a month in his shop and be given every opportunity to detect it. And there is not a word even from Bergeron, who had such opportunity of discovery to suggest that a single change had been made in such markings. It is sworn by Erisman that Bergeron had, whilst so engaged in his own investigation, gone over "those invoices," meaning, no doubt, those invoices to be had relative to what he had examined. If he could have shewn a false system had been adopted, or even a few instances suggesting it, no doubt he would gladly have done so. He would not then have had to set up such a cry as is made about the palpable mistake of a few shirts put in the wrong box. If there was an intention to commit fraud in the way suggested it was about as easily detected as possible to conceive of.

I go further and submit that it was the duty of the respondents to have exposed the fraud if it existed. If half the energy put by the respondents' solicitors into the fortnight of correspondence that ensued had been applied to investigate such a charge and to demonstrate its truth they could easily have done so if any foundation had existed for it. In the event of failure they ought to have submitted another alternative than this litigation.

I conclude from reading and considering every bit of evidence in this case that the defendants never had any reason to say that they were being unfairly dealt with in the matter of the invoices. Their own conduct

throughout destroys the pretension and makes it sound hollow.

If they had held over any items for production of invoices, had called for account books to verify anything, had specified certain items or varieties of the stock-in-trade and, where invoices were wanting, had insisted on duplicates as means of testing the questions involved, or done in short anything that ordinary business men anxious to complete a bargain would likely have done under the circumstances, then suspicion or surmise as to their motives might have been in order.

On the contrary without, so far as the evidence shews, anything of that kind having influenced the action of the defendants or been present to the mind of Mr. French, he called defendants aside at the close of the stocktaking and said the deal could not go through.

It was he who acted and not they. They knew from hour to hour over three days such, if any, difficulties as want of invoices had created. It had produced no operative effect on their minds.

He, as I have shewn, knew very little of what had transpired. And as to want of any invoice, he had called for them twice, he thinks, and failed once to get them produced; whether one item or what is not explained.

But, to do Mr. French justice, he says it seemed as if they "could not produce the invoices" asked for and not produced, and he shews that he had no proper opportunity of deciding as to the validity of such a contention as is raised. Then he says that, at the close of the stocktaking, he called defendants aside and told

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them "we (meaning, I take it, the firms he represented) could not go on," and then adds:—

> I also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it paying the price they were paying for the stock;

he says also that Periard and his daughter came to see him in his office another day and, though he cannot recall the conversation exactly, believes he told the man at the time

> that I did not care to go on with the thing as long as he was taking the stand he was in regard to prices.

Such was the attitude of French, who had from the inception been the directing mind.

It was not the want of invoices to verify prices, but the prices and the result of a total which he had not expected.

Appellant may have been loaded up with too much old stock at high prices, compared with what French's backers could have supplied such a stock for. And adding 13% to these prices when the total reached nearly $18,000, and a couple of thousand more for fixtures, and thus made the total figures rather high for men who had calculated on, and only provided for, fifteen or sixteen thousand dollars all told.

It is quite clear that that was the true situation and it was a surprise. French had undertaken to acquire for respondents a business on the unusual terms of invoice price plus 13%, which might not be an extravagant thing if applied to a small stock with the purpose of expanding the business after acquisition, but when applied to a large one, probably the safe limit to carry in any case, and not permitting expan-

sion meant, using French's own words, "commercial suicide."

He never ventured, when shewn the result, to challenge Periard to produce evidence of the actual invoice prices and that then he would pay.

And when the matter passed into the hands of the respondents' solicitors they insisted on "invoices or copies of same," a thing probably impossible in many cases, and waived aside appellant's suggestion of verification "in any reasonable way" in cases where invoices could not be produced. This proposal ought to have been accepted.

The appeal should be allowed with costs here and in the courts below and judgment be directed for appellant and the case remitted for assessment of damages with costs thereof to the appellant.

DUFF J. (dissenting).—This appeal is from the judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Morrison J. by which the appellant's action — for the recovery of damages for breach of contract to purchase a stock of goods in Vancouver — was dismissed. The contract upon which the action was brought is contained in three letters, set out in the statement of claim as follows:—

Vancouver, June 1st, 1910.

A. J. Periard,
Attorney for S. Periard,
Vancouver.

Dear Sir,—We, the undersigned, beg to submit the following proposition for the purchase of your stock of merchandise contained in the premises known as 135 Hastings St. East. We will pay you for said merchandise at the rate of one hundred and ten cents on the dollar, invoice price ($1.10). Fixtures to be taken at a valuation. Each party to have them valued. Failing to come to an agreement,

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the matter to be left in the hands of a third party by mutual consent. Terms of sale to be half cash on taking possession of the business, and the balance at the rate of one thousand dollars per month ($1,000), bearing interest at the rate of seven per cent (7%) per annum on approved notes, with the option of paying all cash at the time of taking possession. The date of said possession to be August 1, '10, or sooner, if so desired, or not later than the 15th of August. You to agree to immediately cancel all goods purchased by you for the coming fall, and to reduce the stock in the interval of taking possession as much as possible. One of the purchasers to have the privilege of working in the store during the month of July.

In consideration of this offer, we enclose our marked cheque for one hundred dollars ($100).

Awaiting your reply by letter, we remain,

Yours truly,
NOAH BERGERON.
W. RICKSON.

Witness:
A. French.

Vancouver, June 1st, 1910.

Messrs. Bergeron & Rickson,
Vancouver.

Dear Sirs,—Replying to your letter of this date. I hereby accept your offer for my stock at the rate of $1.10 cents on the dollar, with 3% added for freight. And I further want the sum of $2,000 deposited in any chartered bank as an evidence of good faith on your part. I will also deposit a like sum as an evidence of good faith on my part.

The other conditions of sale mentioned in your letter are quite satisfactory to me.

Yours truly,
S. E. PERIARD.
A. J. PERIARD,
Attorney.

Witness:
A. French.

Vancouver, June 2, 1910.

A. J. Periard,
Attorney of E. S. Periard,
Vancouver.

Dear Sir,—In reply to your letter of the 2nd inst. we beg to say that we accept the terms as laid down by you, viz., the 3% for freight, and we have deposited the sum of two thousand dollars

($2,000) in the Merchants Bank of Canada here to your credit, pending the taking over of the stock by us.

Yours truly,
NOAH BERGERON.
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The learned trial judge held that it was a condition of the contract that the appellant should produce reasonably satisfactory evidence of the prices at which the goods comprising her stock had been purchased by her in time to enable the purchasers to complete the contract and take possession at the date fixed in the first letter; and that the appellant had not produced such evidence and had given the purchasers reasonable grounds for thinking that her husband, who acted for her, was not acting in good faith in the matter of the information furnished by him respecting the prices alleged to have been paid for the goods and consequently that the respondents were justified in terminating the agreement. In the Court of Appeal Irving J. agreed with the trial judge. Galliher J. was unable to say that the trial judge was wrong, and McDonald C.J. thought the judgment of the trial judge ought to be reversed on the ground that, in the last week of July, the goods were gone over by the husband of the appellant and the respondents and that an inventory was made in which were entered the prices which the parties agreed were to be paid for the goods and that this agreement the appellant is entitled to enforce; and the contention in this court was that the appellant is entitled to succeed upon that ground. I think this view cannot be sustained and that the appeal ought to be dismissed.

The prices at which the goods, according to the agreement of June, were purchased were the "invoice prices" plus 10%. Until these prices were ascer-

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tained with sufficient precision to fix the amount to be paid by the respondents in figures there could, of course, be no completion of the contract; and it is quite obvious that the contract contemplated the ascertainment of these prices before the time fixed for completion, the first, or at latest the 15th, of August. The information, moreover, which would be required for this purpose being presumably in the possession of the appellant, the contract further contemplates that it shall be produced by her. It is not necessary to say that she was bound in every case to produce the original invoice, but it is clear that the respondents were, in cases in which invoices could not be obtained, entitled to some reasonable substitute, something which a business man would regard as satisfactory evidence of the price paid for the goods. The respondents were not bound to accept the appellant's own unverified statement; the appellant, on the other hand, was clearly bound to give, in good faith, every reasonable assistance to the respondents to enable them to get at the true facts.

As regards a large portion of the goods (the respondents say 50%, and the appellant admits 25%), it is quite clear that invoices were not produced. Nor is it suggested that in such cases there was any satisfactory evidence of what the prices paid actually were. The appellant must, therefore, succeed, if she can succeed at all, on the ground that the parties had agreed upon some other way of fixing the price of the property sold; and it is, as I have said, argued that this was done by agreement between the parties.

The inventory referred to contained an enumeration of goods and prices set opposite them. It was stated by the appellant's husband, her daughter (and

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by one or two other witnesses who were in her employ at the time) that these prices were assigned only after the parties had agreed to them as the prices the appellant should receive under the contract. This is contradicted by all the witnesses called by the respondents. One of these witnesses, a Mr. French, is a partner in one of the two well-known firms of manufacturers who were financing the respondents, and he was present during part of the time while the inventory was being compiled. The learned trial judge has accepted his evidence as reliable and I do not think there is the slightest ground for casting a doubt upon his candour.

His evidence is as follows:—

I called on Mr. Periard on Saturday, and he said he would be ready to take stock on Monday, and on Monday we went up with Mr. Bergeron and Mr. Rickson and Mr. Corderoy, and Mr. Periard said he would not allow us in the store, as he proposed to take stock himself before we went in, and that consumed three days. On Thursday we were allowed to go in, and we were not there probably more than five minutes before a dispute arose about invoices which were not produced, and this continued throughout the two days, I may say. I was not there all the time, but I was frequently sent for and called up to try and settle disputes that arose between them. This lasted up until Friday afternoon, when they were through. * * * They claim, I believe, that I settled these prices and passed them, and I certainly did not.

Q. By Mr. Reid: What is the last ?

A. They claim, I believe, that I agreed to these prices. I certainly did not, it would have been absurd.

Court: Those are the prices in the stock list ?

Witness: Those are the prices put down in the book — taken down.

Court: And you did not agree to that ?

A. No. There was so much disputing, and so much unpleasantness, that if we had not gone down and got the thing put down in some shape we would probably have been there now, trying to get it settled. I thought when I got through that I would have been able to make some reasonable settlement with Mr. Periard, but the further matters went the worse they were getting, and when they got into other lines

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that I did not know anything about the same disputes were cropping up, but these I can only speak of that I know of.

* * * * * *

Court: And you got them ?

A. No, I only saw the one invoice; that was the underwear, that Mr. Rickson insisted on getting.

Q. Now, what was Miss Periard's attitude on the question of producing invoices ?

A. Well, it appeared to me that they just simply could not produce them.

Q. Now, do you know whether this stock sheet was ever approved of by Rickson & Bergeron ?

A. It certainly was not approved by them. It was not approved when we got through because I said, "We cannot go on."

Mr. Reid: I object. Who did you tell ?

Court: Just wait. — Was Mr. Periard there when you told something to some one ?

Witness: No, I called Rickson and Bergeron to one side, and told them we could not go on, and I also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it, paying the price they were paying for the stock. And Mr. Periard, I believe, took the construction from one of my remarks that these men could not finance it. Well, that was not right. We had $20,000 in sight, and could have got more, if necessary. But I would not have anything to do with it, or would not allow either of the firms I was representing to go into the thing and take over the stock at what it was listed down at.

* * * * * *

Q. Then you thought, Mr. French, that Mr. Periard ought to be compensated in some way ?

A. Yes and no. I did not think that Mr. Periard acted in good faith with us, because, as far as damages are concerned, these other men purchased goods to the extent of several thousand dollars.

Court: That is the defendants ?

A. Yes, they advertised that they were going into business. We ourselves shipped goods to Vancouver for them, and we lost money, because they had to be sold for the cost less the freight. They had made all their arrangements to go into business, and they were acting in good faith and I don't think that Mr. Periard was acting in good faith, and as far as damages are concerned it is horse and horse with them. But I did think, and I do think, as these men were leaving the matter pretty much in my hands——

Court: The defendants ?

A. Yes.

Court: Well, just refer to them as that.

A. Yes. When I took in the situation, and saw the trouble we were going to have, I do think that I make a mistake in not stopping right there — at the very commencement, when the trouble and disputes arose. In the first place, Mr. Periard had no right to close up his store Monday, Tuesday and Wednesday and not allow us to go in; it is a thing I never heard of in the mercantile business before, I never heard of a seller refusing the purchaser the right to go in and take stock with them.

Q. On what ground did you think that an offer should be made to Mr. Periard for compensation ?

A. For the two days that they had him closed. I said: "Give him what he thinks is reasonable," and I suggested this matter of settlement with Mr. Periard, but Mr. Periard had his head full of this $2,000 that was in the bank, and he said he was going to have it and the matter ended there.

Both Bergeron and Rickson also deny that they agreed upon the prices put into the inventory, and this evidence was accepted and acted on by the trial judge. The evidence on behalf of the appellant on the other hand was not accepted and was distinctly discredited by the trial judge, who took the view that the appellant's family (who were really in charge of the business) were not acting in good faith. There are several instances given by French of what would appear to have been rather bold attempts at overcharging in respect of classes of goods with which he was familiar and I agree with Mr. Justice Irving in thinking that the learned judge's view is supported by the evidence as it appears in the record.

The learned trial judge evidently thought that the respondents having made their arrangements to take over the appellant's business and desiring, if possible, not to withdraw from the project (entailing, as such a course would necessarily, not a little loss to themselves), went on with the inventory even after they became aware that the appellant was not living up to the contract in the matter of the verification of prices

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in the hope that a satisfactory arrangement might ultimately be reached; and that neither party entertained the idea that the respondents by the part they took in connection with the inventory were irrevocably committing themselves to purchase at the unverified prices entered in it. That this was so appears to me to be demonstrated by the subsequent conduct of the parties. The appellant's husband and daughter admit that they were informed by French, shortly after the completion of the inventory, that the respondents would not go on with the purchase on account of the absence of invoices. Almost immediately a correspondence ensued between the solicitors for the appellants and the solicitors for the respondents.

The respondents' solicitor at once took the position that the agreement had fallen through because of the failure of the appellant to produce evidence of the cost prices of the goods, and proceeded to discuss a fresh arrangement. To this position he adhered throughout the two weeks during which the correspondence lasted. The appellant's solicitor insisted that she was under no obligation to produce invoices, but nowhere is there a suggestion that the parties have agreed upon the inventory prices. The whole correspondence, indeed, is inexplicable on that assumption. In a letter of August 1st, Mr. Reid, who acted for the appellant, proposes to leave the question of

> what is the invoice price of any goods concerning which the invoice cannot be produced to arbitration,

and proceeds to say that "she contends" not that the invoice price of such goods has been settled by agreement, but that

> the exact invoice price has in all cases been affixed to the articles in question.

On the same day he writes:—

> We deny the inability to produce invoices to carry out the agreement for sale or that the agreement for sale requires the production of invoices.

Not a word about prices having been agreed upon.

Again, on August 4th:—

> Is it necessary to again point out that the production of invoices is not required by the contract? An inventory has been made out, submitted, checked over and verified by your clients, and in a great majority of cases the prices have been verified by invoices. There are some cases where the invoices cannot be found. In these cases, *if your clients think that the prices put by my clients are not the correct invoice prices*, the matter may be verified in any reasonable way.

Not easily reconcilable with the contention that the inventory prices had at that time been accepted by the purchasers.

Then, on August 9th:—

> We find on consultation with our clients that about 75% of the stock can be vouched for by invoices, and that *these were passed by your clients* when stocktaking was done.

This by implication is a distinct admission that the only items "passed" by the respondents were those in respect of which invoices were produced.

These passages are consistent with the general tenor of the letters and they appear to be incompatible with the hypothesis on which the contention I am considering is based. The attitude indicated by these letters was not departed from by the appellant down to the trial. The respondents in their defence set up the failure of the appellant to produce evidence of "invoice price." In reply the appellant dealt specifically with this defence by simply denying the facts alleged; there is no suggestion of an agreement to purchase at the inventory prices nor of waiver of the production of invoices, or evidence of "invoice price." It

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is impossible to believe (if the appellant's husband had really understood the respondents were binding themselves to accept the prices appearing in the inventory), that the appellant's solicitor could have so long remained in ignorance of this crucial point.

All these considerations convince me that the appellant's contention has no substantial basis and I think the appeal should be dismissed.

ANGLIN J.—Although I was, at the close of the argument, inclined to the view that this appeal should be dismissed, after carefully reading the evidence several times I am convinced that the conclusion in the defendants' favour reached by the British Columbia courts was erroneous and that the dissent of the learned Chief Justice of the Court of Appeal was well founded.

Assuming that the defendants were *primâ facie* entitled to have the prices of the stock which they had purchased vouched by the production of invoices, I am satisfied that in cases where such invoices were called for on the stocktaking and were not forthcoming, production of them was waived and either the prices demanded by the plaintiff were accepted or compromise prices were then agreed upon and such prices were thereupon inserted in the stock list. When the stocktaking was completed, on the Saturday afternoon, the prices of the entire stock had been settled and the defendants did not then take the stand that they would require the production of such invoices as the plaintiff had failed to exhibit. Neither did they keep any question of prices open by protest or other step taken for that purpose. It was not until the following Monday, when the defendants and their backer,

French, had determined, for an entirely different reason, to escape from their bargain, that they brought forward the failure to produce certain invoices as a pretext for repudiating the contract. The real difficulty was that it then appeared that the plaintiff's stock would cost much more than the defendants had anticipated or had provided for and that at the unusually high figure they were paying for it — $1.13 on the dollar of invoice prices — the venture was likely to prove unprofitable, or much less profitable than they had expected. French, too, had then realized that with such a stock on the defendants' shelves their orders for his principals, manufacturers and wholesale dealers, could not be as extensive as he had hoped for and he probably began to doubt the wisdom of the latter advancing upwards of $12,000 to enable the defendants to carry out their purchase.

I have no doubt that these were the true reasons why the defendants repudiated the contract. They were not warranted in doing so. Their attitude from the Monday after the stocktaking and their final letter of repudiation on the 16th of August justified the plaintiff in refraining from taking steps towards ascertaining the value of the fixtures by arbitration. The fact that in this letter the failure of the plaintiff to make a deposit of $2,000 — which it is admitted had been waived at an early stage of the negotiations — is put forward as one of the chief grounds for the defendants' withdrawal confirms me in the view that they were looking for excuses and that the objection based upon non-production of invoices to verify prices and that based upon the plaintiff's failure to deposit $2,000 are of the same type — both of them pretexts to escape from an unsatisfactory bargain.

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Anglin J.

I have had the advantage of reading the judgment of my brother Idington. I concur in his views upon the effect of the evidence as a whole, and in his appreciation of the testimony of French, to which I fear the learned trial judge attached quite too much importance.

The appeal should be allowed with costs to the plaintiff throughout and the action should be remitted to the Supreme Court of British Columbia for the assessment of the plaintiff's damages according to the usual practice of that court.

BRODEUR J.—In selling her stock at invoice price, it does not necessarily follow that the appellant was bound to produce the invoices themselves.

The sale of the stock was made under the conditions which have become of a very common practice. No lump sum is stipulated, but the price is fixed at so much as the goods cost. In the cases where a merchant has been in business for many years, it would become absolutely impossible to shew the invoices or to establish their relation to the goods that are in the store.

In this case, however, if the invoices that would cover all the goods that were inventoried were not produced, a large number of them were shewn or could be shewn if they had been asked for. The parties relied evidently upon the cost prices that had been put on the boxes containing the goods.

Some disputes arose as to the value of some of these goods; they seem to have been adjusted during the inventory. And if there is some doubt as to whether the prices mentioned in the inventory were accepted or not, the respondents had the opportunity as shewn

by the correspondence to indicate later on the articles against the value of which they objected.

They refused to accept that proposition and preferred to stay their case on the ground that the invoices should be produced.

That question has already come up before the courts in England and we find a case of *Plank* v. *Gavila*(1), where the agreement provided that the commission of the plaintiff was to be fixed on the invoice price, it was held

that it was competent to the plaintiffs to shew the proximate value of the consignments upon which they claimed commission without producing the invoices.

It is evident to me that the respondents and their indorsers did not want to carry out the agreement after they found that the stock was larger than what they expected.

They at first claimed that the contract was at an end. But later on they saw how weak their position was in that respect and they carried on a correspondence which shewed very clearly their intention to repudiate their obligations. Because if they had been willing to stand by their contract they should have accepted the offer made by the appellant to arbitrate on the value of the goods in cases where they thought they were too high. No, they waited until the date which had been fixed for the delivery of the stock, and they formally declared that the plaintiffs not having put up a deposit and not having produced the invoices, they had to withdraw from the deal.

That claim as to the deposit is only a pretext, for it had been understood that such a deposit would not

(1) 3 C.B. (N.S.) 807.

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be made; and their request for the production of the invoices was not founded in law.

I have come to the conclusion that the action in damages instituted by the appellant for breach of contract ought to be maintained.

The appeal should be allowed with costs of this court and of the courts below and the case sent back to the Supreme Court of British Columbia to assess the plaintiff's damages.

W. H. FRASER (PLAINTIFF) .....APPELLANT; 1912

AND

*Oct. 10.
*Nov. 26.

THE IMPERIAL BANK OF CANADA AND OTHERS (DEFENDANTS) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Banking — Security for advances — Assignment — Chose in action — Moneys to arise out of contract — Unearned funds — Equitable assignment to third party—Notice—Evidence—Priority of claim—Estoppel—Construction of statute—R.S.M., 1902, *c.* 40, *s.* (*e*), *"King's Bench Act"—R.S.C.*, 1906, *c.* 29, *s.* 76, *"Bank Act."*

An assignment of a future chose in action, to arise out of a contract, operates as an agreement binding on the conscience and, when the subject-matter of the assignment comes into existence, creates a trust. *Tailby* v. *The Official Receiver*, (13 App. Cas. 523,) followed.

Where a bank, in order to secure present or future advances to a customer, has taken from him an assignment vesting in it the legal title to a chose in action arising out of a contract and, subsequently, receives notice of another assignment thereof for valuable consideration by the customer to a third person, before moneys have been advanced upon the security held by the bank, the claim of the bank for advances made after notice is postponed to that of the other incumbrancer. *Dearle* v. *Hall* (3 Russ. 1); *Hopkinson* v. *Rolt* (9 H.L. Cas. 514); *Bradford Banking Co.* v. *Briggs* (12 App. Cas. 29), and *West* v. *Williams* ((1899) 1 Ch. 132), applied.

Where an assignee of a chose in action with knowledge that the same chose in action has also been assigned to another person for valuable consideration permits the other assignee to rely upon his security by acting on the faith of his assignment, without giving him notice of the former charge, the claim of the latter is entitled to priority over that of the assignee by whose conduct he has been thus misled. *Russell* v. *Watts* (10 App. Cas. 590), and *Stronge* v. *Hawkes* (4 DeG. M. & G. 186), applied.

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

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Per Fitzpatrick C.J. dissenting.—The circumstances of the case do not justify the finding that there was an equitable assignment of the chose in action to the appellant and there is no sufficient evidence of notice to the bank that there was any assignment to him; consequently, the assignment to the bank, which was duly notified to the debtor, gave the claim of the bank priority in respect of the advances made by it on that security. *Mutual Life Assurance Co.* v. *Langley* (32 Ch. D. 460), referred to.

The judgment appealed from (22 Man. R. 58) was reversed, Fitzpatrick C.J. dissenting.

Quære.—Whether, in consequence of the provisions of section 39(*e*) of "The King's Bench Act," R.S.M., 1902, ch. 40, the rule in *Dearle* v. *Hall* (3 Russ. 1) governs the rights of parties under an assignment taking effect by virtue of the statute?

Quære.—As to the effect of section 76 of "The Bank Act," R.S.C., 1906, ch. 29, on the assignment of moneys not yet earned under a construction contract as security for present or future advances?

REPORTER'S NOTE.—Cf. *Deeley* v. *Lloyds Bank* ((1912) A.C. 756).

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J., at the trial, dismissing the plaintiff's action with costs.

In the circumstances stated in the judgments now reported, the action was brought by the plaintiff, appellant, to recover moneys which he claimed as due to him for work performed and materials for the same furnished by him in the construction of a number of buildings for the Canadian Pacific Railway Company under a contract entered into between one William Garson, deceased, and the railway company, (alleging that the moneys arising out of that contract had been assigned to him by Garson,) and for a declaration that the moneys in question belonged to him and were not affected by an assignment of the same funds made by Garson to the bank. The action was against the

(1) 22 Man. L.R. 58; *sub nom. Fraser* v. *Canadian Pacific Railway Co.*

bank and the railway company for the recovery of $7,830, part of the moneys earned under the contract which had been received and retained by the bank, and for the balance of $8,433.70 still owing by the railway company. The company deposited the latter amount in court to be disposed of in such manner as the judgment might direct. At the trial, the claim against the railway company was abandoned and the case proceeded against the bank alone. The plaintiff's action was dismissed by the learned Chief Justice of the King's Bench, and his judgment was affirmed by the judgment now appealed from.

M. G. Macneil for the appellant. No special form of words is necessary to constitute an equitable assignment, and it is clear that the appellant had such an assignment from Garson. Leake on Contracts (6 Can. ed.) 857; *Hughes* v. *Chambers*(1). A verbal assignment is good against a subsequent written assignment. *Heyd v. Millar*(2); *Molsons Bank* v. *Carscaden*(3); Pollock, Contracts (8 ed.) 232.

The evidence clearly shews that the bank had knowledge of the assignment to Fraser, and notice thereof to the railway company is not necessary. As Garson had previously assigned the moneys to arise out of the Outlook contract, it cannot be said that he intended to assign or could assign the same funds to the bank. The reasons in the court below dealing with the question of non-assignability are quite beside the issue. *Burck* v. *Taylor*(4), and *Re Turcan* (5), have no application. Notice of assignment is

(1) 14 Man. R. 163.
(2) 29 O.R. 735.
(3) 8 Man. R. 451.
(4) 152 U.S.R. 634.
(5) 40 Ch. D. 5.

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necessary only for the protection of the debtor and, where that protection is not required, the date of the assignment prevails. See *In re Miller*(1), *per* Wetmore C.J., at page 96. This decision was under a statute exactly similar to the provisions of sec. 39(*e*) and (*f*) of the Manitoba "King's Bench Act," R.S.M., 1902, ch. 40. In *Newman* v. *Newman*(2), and *Dearle* v. *Hall*(3), there was an element of fraud; consequently, notice affected the priority. The rule in *Dearle* v. *Hall*(3) cannot apply in view of the provisions of the Manitoba "King's Bench Act," referred to. *Gorringe* v. *Irwell India Rubber Works*(4); *Jones* v. *Jones*(5); *Rochard* v. *Fulton*(6); *Scott* v. *Lord Hastings*(7); *In re Richards*(8); *Ward* v. *Duncombe* (9), *per* Herschell L.C., at page 378, and *per* Lord Macnaghten, at pages 391-394.

C. P. Fullerton K.C. for the respondent. We rely upon the reasoning of the judges in the court below (10). There is no evidence of record that there was an equitable assignment by Garson to Fraser and all that took place between them, as well as the conversations and correspondence with the officials of the bank at Winnipeg, are consistent with Fraser being an employee of Garson, or a sub-contractor for the works on the Outlook branch. Indeed, this is the irresistible conclusion to be drawn from all the facts and the absence of any proof whatever of express or implied notice to the bank that there had been an assignment

(1) 1 Sask. L.R. 91.
(2) L.J. 54 Ch. 598.
(3) 3 Russ. 1.
(4) 34 Ch. D. 128.
(5) 8 Sim. 633.
(6) 7 Ir. Eq. 131.
(7) 4 K. & J. 633.
(8) 45 Ch. D. 589.
(9) (1893) A.C. 369.
(10) 22 Man. R. 58.

of any kind by Garson to Fraser. At the same time, to the knowledge of both these parties, the bank had given notice of their assignment to the debtor, the railway company, and obtained its assent thereto, signified in various ways and, particularly, by the actual payment of the amounts of all the progressive estimates, up to the time of Garson's death, by the company directly to the bank. Even assuming the evidence established an equitable assignment, the respondent, by giving notice to the railway company obtained priority. *Dearle* v. *Hall*(1); *Loveridge* v. *Cooper*(2); *Foster* v. *Cockerell*(3); *Re Freshfield's Trust*(4); *Montefiore* v. *Guedalla*(5); 4 Halsbury, Laws of England, p. 379; *In re Lake*(6); Pollock on Torts (5 ed.), p. 209; *Marchant* v. *Morton, Down & Co.*(7).

THE CHIEF JUSTICE (dissenting).—In April, 1910, William Garson had two contracts from the Canadian Pacific Railway Co.; one to build roundhouses at Calgary, and the other, to erect six stations on what is called the "Outlook Branch" of that railway. The appellant's claim is for the price or value of work done by him in and about the erection of these six stations. Both contracts provide, amongst other things, that all the work should be proceeded with

under the personal supervision of Garson until completed,

and that the agreements

should not be assigned or the work sub-contracted without the written assent of the company's engineer.

A short time after the contracts were made, Garson had some conversation with the appellant, as the re-

(1) 3 Russ. 1.
(2) 3 Russ. 32.
(3) 3 Cl. & F. 456.
(4) 11 Ch. D. 198.
(5) [1903] 2 Ch. 26.
(6) [1903] 1 K.B. 151.
(7) [1901] 2 K.B. 829.

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sult of which, it was agreed between them that the latter should take over the building of the six stations on the Outlook Branch. It is admitted on this appeal that the company had no knowledge of that arrangement.

Subsequently, on the 24th June, 1910, Garson, for valuable consideration, assigned in writing and under seal to the respondent bank

> all his claim and demand against the C.P.R. Co. for moneys then due or thereafter to accrue due to him from the said company.

Of this assignment the railway company was duly notified. At the time this action was brought the company had paid (of the moneys earned under the contract) to the respondent, as assignee of Garson, in all the sum of $14,850 and a balance of $8,433 was still owing. The bank made advances to Garson on the faith of the assignment to the extent at least of the amount due under the contract and how much more does not appear. Garson died in February, 1911.

The railway company, sued originally as joint defendant with the bank, denied all knowledge of the arrangement between Garson and the appellant and brought the balance due under the contract into court to be disposed of as the rights of the parties might appear. The company was not made a party to the appeal either below or here. The issue, therefore, is narrowed down to the contest between the appellant and the bank, and the result depends chiefly upon the legal effect of the arrangement made between Garson and the appellant under which the latter built the stations in question.

The appellant's case on the pleadings was novation; his contention then was that by virtue of his arrangement he took the place of Garson on the con-

tract, with the assent of the company, and that the moneys were his from the beginning. On the evidence this position could not be maintained. It was abundantly proved that the railway company only knew Garson in the transaction and dealt with him alone throughout. The moneys paid Fraser as the work progressed were paid by Garson's cheque on the respondent bank in which both Garson and Fraser kept their accounts.

On this appeal two questions arose for consideration; 1st. Did the arrangement between Garson and Fraser under which the latter carried on the work constitute an equitable assignment of the moneys earned ? 2ndly. Did the assignment to the bank, duly signified to the railway company, give the bank priority ? In case the first question is answered in the affirmative, the second becomes important.

It has been assumed throughout the argument here that the trial judge found there was an equitable assignment from Garson to Fraser, as the result of the arrangement made with respect to the stations. I prefer to quote the language of that learned judge; he says(1) :—

> I think it is fairly clear that he (Garson) intended to have the plaintiff take his place under this contract in so far as it was possible for that to be done without the knowledge or consent of the railway company. I think the real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the company. The moneys were Garson's as between him and the railway company and what took place between Garson and the plaintiff at most amounted to an equitable assignment of these moneys to the plaintiff.

In appeal it was held, by Howell C.J.(2) :—

> I think it would be unsafe from the evidence to find as a fact that there was an equitable assignment of this chose in action. For

(1) 22 Man. R., at p. 64. (2) 22 Man. R., at p. 67.

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all that appears in the evidence, the bargain might have been (and indeed it seems to have been) that the plaintiff was to do the work for the deceased for the same sum which the latter had contracted for, and that he would be paid for the same from time to time as the deceased received the money therefor from the company. This would not be an assignment of the chose in action.

The Chief Justice.

The first question, was there an equitable assignment by Garson to Fraser, must, I think, be answered in the negative. The railway company recognized in Garson no right to part with any portion of his contract. He was under an obligation to personally supervise the work contracted for, and no attempt was made to prove that, to the knowledge of the company, Fraser ever occupied with respect to the work any position other than that of an employee of its contractor. The arrangement between Garson and Fraser, said to have been reduced to writing at the time, is not now forthcoming, and we are obliged to rely upon the appellant's recollection of what occurred, Garson having died before these proceedings were instituted. I cannot find in Fraser's evidence an intention on the part of Garson to transfer the money payable under the contract. Fraser's failure to notify the railway company of his agreement, Garson's assignment of the same fund to the bank a few weeks later, the way in which the parties dealt with the money after it was paid over to the bank as assignee, all convince me that Garson never intended, when the agreement was made, to part with his control over the moneys and that Fraser relied for his payment upon Garson's general business credit.

It is quite true that no particular form of words is required to operate an equitable assignment, but there must be proof of an engagement to transfer the right, here the claim to the money, or to provide for the payment of that money out of a particular debt or

fund. A mere agreement to hand over work to be done does not operate an assignment of the money to be earned if the agreement is silent as to this. There must be evidence of an intention to assign the very fund which will be created by the execution of the work or to give a charge upon it. I cannot find any evidence of an intention on Garson's part to assign the money to be earned under the contract, although he undoubtedly undertook to pay Fraser the same price that he was to receive for the work. They are both presumed to have had present to their minds the conditions of the contract with the company; Garson remained liable at all times for its complete and exact fulfilment by Fraser and it does not appear probable that Garson would abandon all control over the payments made on the progress estimates so long as his liability under the contract remained. On the other hand it is not to be lightly assumed that Fraser, if the money as earned was available to him, would have neglected the very elementary precaution of notifying the railway company of his assignment, which he now swears was in writing.

I will briefly examine Fraser's testimony, having in mind his interest, the form in which his claim was first presented, and the finding in appeal that his evidence is "conflicting and unsatisfactory."

In answer to his own counsel Fraser says

> he took over the construction of the six stations from Garson.

Being pressed to tell all that took place between himself and Garson at the time of the arrangement in question, he says

> the latter 'phoned over to him if he would take them off his hands, that he would turn them over to him if they were any good,

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and being pressed repeatedly by his own counsel for a more favourable reply, he says

that he was to do the work at the same price as Garson;

finally he says, in answer to the question,

> Go on and tell us what was said, what took place and what was said ?
>
> A. Well, we arranged to meet, and it was either that day or the next day that he came over, and he brought the plans with him, and the specifications, and I estimated, and I told him that I would take them over at that price, that is, the price that he had for them, and he agreed to it, *and there was nothing more said about it.* So we used to meet occasionally and speak over it.

What does all this mean if not as found in appeal that the appellant undertook to do the work for Garson for the price the latter was to receive for it, without reference to a special fund out of which he was to be paid ?

As I have already said, the case turns entirely upon the effect of Fraser's evidence and I cannot find in it sufficient to justify me in reversing the judgment below. The appellant's version of the agreement with Garson, as I understand it, is at most evidence of a promise by the latter to pay for the work when he received the funds from the railway company, but not to pay over the moneys when and as received. There is no evidence of a distinct unequivocal agreement, such as is necessary to constitute an equitable assignment, that the particular funds received should be appropriated to the payment of Garson's liability to Fraser under the contract. Read in its entirety his evidence points to the conclusion that Fraser relied upon Garson's credit; and I am much impressed by the absence of notice to the company. Such a notice, it is true, was not necessary to complete the arrangement, but it is, in the circumstances, an ingredient in considering the effect of the evidence. If he relied upon

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the payments made under the contract he would have taken steps to protect himself. All the facts of the case point irresistibly to the conclusion that Fraser must have known the money earned was paid when and as due to the bank and he never made any inquiry or protest. He nowhere says that he was to have the benefit of the fund as and when created. When examined as a witness at the trial he tells us that "nothing was said as to who was to pay him," and on discovery he says

> that he did not expect the moneys would be paid to him, but to Garson direct.

I must confess to some doubts on this branch of the case. The law on the subject as Brett J. said,

> is brought to such an exquisite degree of refinement that it is by no means easy to understand it,

but I certainly do not feel justified in reversing the unanimous judgment below.

Dealing now briefly with the second branch, I agree with the learned trial judge, who says: "But if notice was material I could not find that the bank had notice of what the plaintiff's claim to those moneys actually was until after the commencement of this action." The assignment to the bank was made to secure past and future advances to Garson and there is no evidence to justify the assumption that at the time it was made the bank had knowledge of the previous arrangement between its assignor and Fraser. The fact from which we are asked to draw the inference of notice is connected with a conversation that Fraser says he had with two of the bank officials on the subject of advances he required and during the course of which he pretends to have given them a list of his contracts, including the one now in question. He does

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not pretend to say that he intended to give the bank notice of his assignment, but we are asked to draw from this casual conversation the inference that the bank knew of the arrangement between Garson and Fraser and this notwithstanding the positive denial of the two bank officials who were believed by the trial judge. I cannot go that far and I respectfully urge that to do so would be to establish a precedent which would seriously disturb the business of banking so largely dependent upon good faith and plain straightforward dealing. The bank took the assignment, notified the company and made the advances as agreed, and to defeat its claim upon such flimsy evidence as is relied upon here is, I repeat, to create a dangerous precedent. Why did Fraser not say plainly that he had an assignment instead of leaving that fact to be inferred, and further, why, with the knowledge of such an assignment, should the bank have undertaken to make advances to Garson on the credit of the same fund ?

The same observations apply to the subsequent alleged conversation with Garson during the course of which he is supposed to have told the bank officals that money received on the progress estimates belonged to Fraser. If it was Fraser's why not have paid it to him instead of depositing it to Garson's credit to be drawn against for his general liabilities ? I quote Leslie's version of the incident from which we are asked to draw the inference of notice :—

Q. Now, when did you first become aware of the fact *that Mr. Garson had transferred* the Outlook Branch contracts to Mr. Fraser ?

A. Never knew it.

Q. You never knew it ?

A. No.

Q. When did you first become aware of the fact *that Fraser was building* these Outlook Branch stations ?

A. I don't know the date. Mr. Garson and Mr. Fraser came in

and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.

Q. Can you fix the date at all ?

A. No.

Q. You say it would be after the assignment ?

A. Yes, it was some time in the summer.

Q. Some time in the summer ?

A. Yes.

Q. Apart from that, did you know the arrangements, or anything about the arrangements between Garson and Fraser ?

A. None, nothing whatever.

In any event the rights of the parties cannot be affected by anything that happened after the assignment was executed and when advances had actually been made on the faith of it. The law surely is that the subsequent assignee must know of the prior assignment at the time he takes his security. *Mutual Life Assurance Society* v. *Langley* (1886) (1).

This may be in some of its aspects a very hard case, but in the general shipwreck the "Tabula" is, in my opinion, with the bank—*"Durum est sed ita lex scripta est."*

I would dismiss with costs.

DAVIES J.—This was an action brought by the appellant to recover from the bank and the Canadian Pacific Railway Company certain moneys claimed by the appellant as the unpaid balance of the contract price of six railway stations known as the Outlook Branch stations constructed by the appellant.

The contract for the construction of these stations had been entered into on the 11th of April, 1910, between one William Garson and the railway company, and the appellant's case was that some days after entering into the contract Garson offered Fraser that if he would take these stations off his hands he, Gar-

(1) 32 Ch. D. 460.

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son, would turn them over to him. That Fraser after examining the plans and specifications agreed to take them and to take over his contract with the Canadian Pacific Railway Co. for their construction, and that the agreement between them which was verbal only was then settled and concluded. That Fraser afterwards completed the buildings according to contract and became entitled to the contract price.

So far as the railway company was concerned there was practically no contest. They had not received any notice of any assignment of the contract to Fraser, but had been notified by the bank on the 24th of June, 1910, that Garson had assigned to it

> moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Company,

and had in consequence paid over to the bank the different instalments as earned under the contract for the construction of the Outlook stations and some extras amounting in all to the sum of $14,850, leaving a balance of $8,433.07 still owing. This balance the railway company brought into court to be paid over as directed by the court.

So far as the railway company is concerned they practically drop out of the case, and the contest is one between Fraser and the Imperial Bank as to the moneys paid by the railway company for the construction of these Outlook stations.

There seems to be two questions on the determination of which the rights of the contestants rest, first: Whether there was an equitable assignment from Garson to Fraser of the former's contract with the Canadian Pacific Railway Co. for the construction of these stations. If so, was the notice of such assignment given to the bank before they made the advances to Garson which the bank's assignment was intended

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to cover and secure. The trial judge, Chief Justice Mathers, held, as I understand his judgment, that there was such an equitable assignment, but that

> when the bank took its assignment from Garson (on the 24th June, 1910) it had no notice of any interest that the plaintiff had acquired in any Garson contract with the railway company or of any arrangement that had been made between Garson and the plaintiff with respect thereto. That as soon as the bank took its assignment it perfected it by notice to the railway company and thus gained priority over the plaintiff's assignment of which no notice was ever given.

For these reasons he dismissed the plaintiff's action. So far as advances made by the bank to Garson up to the time of the assignment to it are concerned these reasons might be good. I cannot see their application to subsequent advances made by the bank after notice of Fraser's assignment.

The Court of Appeal for Manitoba dismissed the appeal to it on the ground that it

> would be unsafe from the evidence to find as a fact that there was any equitable assignment.

The facts of this case are somewhat unique. There was, of course, at the time of the alleged equitable assignment from Garson to Fraser of the former's contract, no fund in existence to assign, there was simply Garson's contract rights which were as and when he built the stations to receive the contract price as stipulated for. There never was any work done nor materials supplied by Garson under the contract and the work done and the materials supplied were done and supplied by Fraser. There was not any assignment from Garson to the bank of any specific moneys to accrue due to the former under the contract relating to the Outlook stations. It was a general assignment of

> all my claim and demand for moneys due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Co.

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The consideration for the assignment was $1 and its object and purpose as explained by the manager of the bank was to secure the bank for any then existing or future advances made to Garson. So far as advances made by the bank to Garson at the time it took this assignment and before it had notice of the equitable assignment to Fraser are concerned, of course, no question arises. With regard, however, to any subsequent advances made by the bank *after* such notice it would be plainly unjust and inequitable to permit the bank to hold these moneys received from the Canadian Pacific Railway Co. as the price of construction of the Outlook stations as against the equitable assignee who had done the work and notified them of his assignment. And so with regard to the balance due by the Canadian Pacific Railway Co. on the contract and brought into court the bank would, in the event of its being held to have had notice of the equitable assignment from Garson to Fraser, only be entitled to claim this balance to the extent of the advances made prior and up to the receipt of the notice.

I entertain grave doubts whether the words of the assignment to the bank, construed in the light of the manager's evidence as to its object and purpose, cover moneys earned by the assignee of the contract, Fraser, after the bank had notice of his assignment. Technically they may be said to be moneys "accrued due to Garson," in whose name the contract was made and remained, but really and equitably they were not, but accrued due to the assignee who by the expenditure of his time and money had earned them. Assuming the equitable assignment and the notice to the bank as proved, then the bank receiving the money legally enough from the Canadian Pacific Railway Co. would

hold it in trust for its real owner, the assignee. All it could claim would be the right to have any advances made by it, before it received notice, repaid out of the moneys it received.

Now, was there an equitable assignment to Fraser of Garson's Outlook contract ? I agree with the trial judge that there was. No form of words is necessary to create such an assignment. It is always a question of fact and of the intention of the parties to be gathered from what they said and did and from all the surrounding circumstances. Garson died before the suit began and the only direct evidence of what took place between Garson and Fraser is that of the latter. Reading it as I have done several times over and applying it to the admitted facts of this case I cannot doubt that if believed, and the trial judge who saw Fraser and heard his evidence believed it, the intention of both parties was that the entire contract and Garson's rights under it should, as expressed, be "taken over" by Fraser at the price Garson had for the stations to be built and that Fraser should supply all the materials, do all the work and become entitled as between him and Garson to the contract price. As a matter of fact he did supply all the material and did all the work and in equity as between Garson and Fraser no doubt could arise as to his being entitled to the moneys to be paid by the railway company therefor.

We are not left, however, to Fraser's evidence alone on this point. We have the conduct and actions afterwards of Garson before his illness and his conversations and correspondence with and to the bank's officials. Mr. Leslie, the manager of the bank, himself says that Garson and Fraser came in together to see him at one time and that Garson said: —

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I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser,

which stations Mr. Leslie understood as the Outlook stations. If Garson was only subletting to Fraser there would be no reason in his giving the bank notice of it. He gave notice because he was assigning and ceasing to have further interest in it. As to when Garson made this statement Mr. Leslie seems very uncertain and hazy. He seems clear that it was before the $3,000 advance made in November, 1910, but how long before he could not say. It might be, he thought, a month, could not say whether it was two months, and the nearest he could get to the time was that it was *sometime during the summer* after the assignment to the bank. Mr. Leslie evidently did not pay much attention to this statement of Garson's relative to the turning over of the Outlook stations to Fraser, because at the time the bank took the assignment from Garson the only contract that he knew definitely that Garson had with the Canadian Pacific Railway Co. was for the roundhouse at Calgary. While the words of the assignment may be, and doubtless are, large enough to embrace these Outlook stations contract it seems clear alike from Garson's conduct in assigning it over to Fraser and from the bank officials' conduct and attitude towards it that they themselves did not intend the general words of the Garson assignment to include in them moneys becoming due on a contract standing in his name it is true, but which he had turned over to another contractor without investing a dollar either in labour, materials or otherwise, and which moneys only became due at all by the labour and expenditure of his assignee. That was doubtless one of the reasons why the manager of the

bank paid little attention to the express notice Garson gave him in Fraser's presence that he had handed over this contract to Fraser and was unable to fix the time he received it more accurately than that it was sometime during the summer after the assignment. I conclude that as between Garson and Fraser it was not a mere subletting of the Garson contract, but a complete equitable assignment of it and that when Leslie swears that Garson told him he had called to tell him that he had handed over his Outlook contract to Fraser, who was then present, all parties understood that by handing over the contract he meant assigning it over. But the knowledge brought home to the bank of the assignment of this contract does not rest here. Fraser swears, though on this point he is contradicted by Morris, the assistant manager, that some two weeks or so after taking over from Garson these Outlook stations he went to the bank, saw the manager and assistant manager and gave the latter a memo. of the contracts he had, including the six Outlook stations, stating he wanted some financial assistance. He said he was told to call again, that he afterwards did so and was told by Mr. Leslie, the manager, that "perhaps when he got those stations well through" the bank could advance the money. If Fraser's evidence on this point is accepted following Garson's admitted notice to the manager the question of notice to the bank might be well determined in his favour. But apart from this evidence I think the dealings Fraser had with the bank respecting the moneys paid to it by the Canadian Pacific Railway Co. under the Outlook contract, shew clearly that it had full notice of the assignment of the contract to Fraser. It is urged that the conduct of the bank officials is consistent with their belief that

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the work was being done by Fraser as a sub-contractor under Garson merely and not as an assignee. I do not think so. First we have Fraser on August 25th, 1910, going to the bank, as he says, with reference to the payment of the first estimate on his work. The bank had not received the money, but Morris, the assistant manager, filled up a ten day note for $800 which Fraser signed, and received the amount less discount. Fraser swears that this was an advance on the first estimate of $1,620, which was then discussed between them, and that it generally took about 30 days to get the money after the estimate passed. Morris denies that this $800 was advanced on the $1,620 estimate or had anything to do with it and says that he first learned Fraser was building the stations or had taken them over from Garson *when this action first started.* I am not, however, able to reconcile this denial and this statement of Morris's with his actions respecting the cheque for the $1,620 estimate when received by the bank or with his correspondence referring to the subsequent estimates on the same contract.

On August 22nd, 1910, Garson drew a cheque in Fraser's favour on the bank for $1,620, expressing on the face that it was for "payment of first estimate Outlook contract, C.P.R." On the 9th of September the bank received and credited Garson with the amount of the estimate and marked the cheque "Accepted, Sept. 9th, 1910, Imperial Bank of Canada." Fraser indorsed the cheque and the bank put it to his credit. Morris, the assistant manager, initialled the cheque himself, and it would seem idle for him now to say that he *first learned* Fraser was building the stations or had taken them over from Garson

when this action first started. Fraser on the 24th of August drew a cheque for $700 in favour of his foreman, Simmons, who was erecting the stations, and in the body of it stated that it was "A/C stations." He says that he told Morris that it was for the building of these stations that he was sending the money. The bank with Morris's knowledge remitted the money to Simmons at Keeler, where he was erecting one of the stations, and the cheque itself contains a memo. indorsed in Morris's handwriting, "Keeler, Sask." There were other cheques given by Fraser for the same purpose and remitted in the same way. On October 6th the bank received the second instalment of $5,400 on these stations contract. Before that, however, on September 20th, 1910, Garson had written the bank from Calgary, saying:—

As C. P. August estimate is now overdue I enclose a cheque in favour of W. H. Fraser with *amount blank*, which you will oblige by *filling in for the sum returned in the August estimates for the stations he is building and hand same to him* as soon as the cash comes in.

This blank cheque on its face read: "*Aug. estimates Outlook stations,*" and when a few days later the blank was filled in with $1,000, the abbreviation "a/c." was placed before the words "Aug. estimates Outlook stations." Mr. Morris received and, on the 24th, answered this letter, enclosing this blank cheque, as follows:—

Referring to your letter of the 20th instant *re* W. H. Fraser we are advised by Mr. Fraser that *his* August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime. Yours truly, M. Morris, Assistant Manager.

In the face of this correspondence it is clear that Morris's memory must have failed him when he stated that he first learned when this action began that Fraser was building the stations or had taken them over from Garson.

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Fraser swears that he was advised by Garson of his having sent the bank a blank cheque for the second estimate and that he went to the bank, saw Morris, who told him the money had not up to that time been received and asked him to fill in the blank with $1,000. As Morris himself writes Garson that Fraser then advised him that his August estimates amounted to about $5,400, it would seem there was no room for doubt that at that date at any rate the bank had full knowledge not only that Fraser was building the stations, but that he was building them under an arrangement with Garson which entitled him to receive the estimates as they were passed and paid in by the Canadian Pacific Railway Co. On October 8th on another cheque being received by the bank from Garson in favour of Fraser the balance of their estimates, namely, $4,400, was paid by the bank to Fraser's credit and this cheque again on its face expressed that it was "estimate No. 2, Outlook stations."

Later on, in November, Fraser states that he became aware the third estimate for $7,800 had been passed, but not paid and that he and Garson went to the bank to see about getting an advance. Fraser got the advance on a note signed by both Garson and himself on the 21st of November, payable on demand. Morris again denies that this $3,000 was being advanced "in anticipation of the estimate." It is worthy, however, of note that some days previously, namely, on November 9th, Garson wrote a letter to the bank on his general business matters, which contained the following sentence:—

> It is likely the C.P.R. estimate in Outlook work will be paid in shortly. *It belongs to W. H. Fraser.* When it comes let him draw on me at sight for the amount and transfer it to him,

and in another paragraph:—

> Let me know if you approve of my keeping the money in your bank here.

To which letter Mr. Morris signing himself "assistant manager" replies on the 14th November as follows:—

> I am in receipt of your letter of the 9th and *note your advices.* There is no objection to your retaining money in Calgary for your Calgary contracts providing that proceeds of your C.P.R. contract will be sufficient to protect advances in this office.

Not a single word throwing a doubt upon Garson's statement that the November estimate on the Outlook work belonged to W. H. Fraser and was to be transferred to him. Surely if any doubts existed as to the bank's knowledge that Fraser was the real contractor for the Outlook stations and entitled to receive the estimates as they were paid into the bank, this letter should have set them at rest. This third estimate was for $7,800. $3,000 had been advanced on Garson and Fraser's note to the bank and $1,000 of the three forwarded by the bank by express on the same day to Fraser's foreman, Simmons, on Fraser's cheque expressing that its "A/C. Simmons, C.P.R. stations." This cheque was initialled by Morris and indorsed by Fraser with the words, "Glenside, Saskatchewan," indicating the place where the money was to be spent, that being one of the places where he was erecting a station. There were also cheques drawn by Fraser on the bank, one for $1,002.50 on October 18th, 1910, favour of "Dfts. Moose Jaw and Keeler," the other for $1,003.25 on October 28th, favour of "cash," each of which contained in the margin the words and figure "C.P.R. 6 S.," which I conclude meant the 6 Outlook stations being built by Fraser and the amounts of each of which cheques were forwarded by the bank at the places indicated, the latter cheque being accom-

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panied by a requisition from Fraser, "Required a draft on Broderick in favour of J. H. Simmons. Applicant, W. H. Fraser." "Broderick" was the name of one of the stations and Simmons the name of Fraser's foreman building them. Sometime after the 21*st November*, 1910, when the $3,000 were advanced to Garson and Fraser on their note taken "on demand," the $7,800, being amount of the third estimate, was received by the bank. The exact date of its receipt I do not find, but Garson was then ill in the hospital at Calgary and his account at the bank in an unsatisfactory condition. Fraser made repeated applications to the bank for this money, which were rejected and ultimately he went to Calgary and, Garson being sick in the hospital and not able to be seen, obtained from his foreman or manager a cheque for the amount of $7,800 expressed as "Transfer *re* C.P.R. Outlook stations," and signed "pp. Wm. Garson, John Sweeny, attorney." This cheque the bank refused to honour. Garson subsequently died, and this action was brought in which the Canadian Pacific Railway Co. was joined, inasmuch as they had not paid the balance of the contract into the bank. That balance, $8,503, remaining unpaid in respect of the contract for the Outlook stations the railway company brought into court, claiming no interest in it other than for costs and leaving it for the disposal of the court between the contestants Fraser and the bank.

The Canadian Pacific Railway Co. or their interests, are, therefore, in no wise concerned in the result of this case. Their stations were admittedly built for them by Fraser. The money contracted to be paid became due. Whether they had notice or not of the assignment to Fraser by Garson or whether they did or did

not waive the clause in the contract prohibiting its assignment without the written consent of the engineer cannot have anything to do with the issues as between the bank and Fraser. The money had been paid in part, $7,800 to the Imperial Bank, who still claim to hold it presumably for advances due them by Garson, and the $8,503 is in court payable to the bank if their legal contentions are maintainable, and if there is still that amount due them for advances to Garson, or payable to Fraser if he was the equitable assignee of Garson's Outlook contracts and if the bank had notice of such assignment before making the advances.

As I have previously stated I do not myself think there can be any doubt as to what was meant by the parties, Garson and Fraser, when after the former had asked the latter to take over this contract and Fraser having first examined the plans and specifications and made his own estimates told Garson he would take them over at the price he had for them and Garson agreed to it. By "taking over" the contract the parties meant that Fraser should stand with respect to it and its obligations and rights in Garson's shoes. If there was any doubt as to what "taking over" at his tender price meant, the subsequent conduct and actions of the parties sets that doubt at rest. Garson never claimed a cent of the estimate paid on the work by the Canadian Pacific Railway Co., but, on the contrary until his fatal illness occurred, the contract standing in his name, gave Fraser cheques, one of them in blank, for the amount of these estimates as they were paid into the bank and in his letters to the bank used language which could only have one mean-

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ing, and that was that the contract was entirely Fraser's, who did the work, supplied the material and became entitled to the moneys earned under it for his own benefit. As to the bank having notice I think they had full and ample notice in the summer of 1910.

I do not know whether an earlier date than August is necessary to maintain the plaintiff's contentions as the bank's account with Garson is not in evidence and we do not know the dates when they made the advances to Garson, but I see no reason for refusing to accept Fraser's statement that within two weeks after his taking over the contract he was seeking financial assistance from the bank and left the list of the contracts he had, including the one now in question, with them, and that he then gave them the necessary notice. If there is doubt with respect to that then, in my judgment, the evidence of their having had notice in August and the early part of September, when the first estimate was passed to his credit is sufficient to fix the date and the cumulative evidence which follows in the correspondence between the bank and Garson and in the dealings of the bank with Fraser, is overwhelming. I cannot myself see how in the face of this correspondence and these dealings, so corroborative of what Fraser has sworn to, the bank could for a moment seek to appropriate the fruits of Fraser's labours and expenditure towards the payment of advances made by them to Garson, which advances it cannot be seriously contended were in any wise made on the strength of the assigned Outlook contract.

The appeal should be allowed with costs in all courts against the bank. Canadian Pacific Railway Company's costs to be paid out of money in court.

Judgment to be entered for Fraser for $7,830 admitted in the 6th paragraph of the bank's defence to have been received by it, with interest at statutory rate, from the date of its receipt, and also for the moneys paid into court by Canadian Pacific Railway Co., less its costs.

IDINGTON J.—The late Mr. Garson tendered to the Canadian Pacific Railway Co. by separate tenders put in at the same time, for the construction of its round-house at Calgary and also six stations on its Outlook Branch, and was awarded the contracts therefor. The former was a large contract and Garson seems to have thought there was not enough in the latter to render it worth his while distracting thereby his attention from the former and other contracts he had undertaken, and hence offered the appellant to take the latter off his hands, do the work, supply the material and receive the entire amounts named in the tender therefor or accruing under the contract. Appellant accepted his proposal. Garson being alone known to the company had of necessity to sign the contract. As between him and the company he was the contractor responsible for the execution of the work. As between him and the appellant the contract being non-assignable he was bound to appellant to see that he got all moneys accruing thereunder in respect of work done by appellant.

The learned trial judge held rightly that there was thus created an equitable assignment of said moneys.

Two months later and after the appellant had entered upon the work pursuant to this understanding the respondent obtained from Garson an assignment

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dated 24th June, 1910, of which the operative part is as follows:—

Know all men by these presents that William Garson, of the City of Winnipeg, in the Province of Manitoba, for and in consideration of the sum of one dollar paid to the said William Garson by the Imperial Bank of Canada (the receipt whereof is hereby acknowledged) doth hereby sell, assign and transfer unto the said Imperial Bank of Canada all my claim and demand against the Canadian Pacific Railway Company for moneys now due or hereafter to accrue due to the said William Garson from the Canadian Pacific Railway Company.

There follows this a power of attorney to collect the moneys referred to for the use of the bank absolutely as its own forever.

It is to be observed that on its face this assignment is only in consideration of one dollar.

Obviously on the evidence this document does not tell the whole of what it was intended for. The bank manager who witnessed its execution says in his discovery examination

it was given as security for the advances made from time to time to Garson,

and proceeds as follows:—

Q. Was it for advances already made or for future advances ?

A. It was both.

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R. ?

A. No.

Q. What moneys were owing to him ?

A. Not definitely.

Q. Why do you say "not definitely" ?

A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had ?

A. No, not — I knew that he had — nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.

Q. Do you remember him stating that he had contracts for stations and roundhouses ?

A. Not definitely; the only thing I can remember that he had some contract for roundhouses at Calgary; that is the only definite contract that I——

Q. He told you that he had tendered ?

A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouse at Calgary ?

A. Yes, I am pretty sure that that is right. But we never made any inquiry as to the nature of his contracts or where they were.

In his examination-in-chief at the trial to the question put thus: "Q. Under this assignment from Garson to yourselves — the bank — was any money advanced by the bank ?" he answers, "No, not at the time." And later the question was repeated with the added words, "on the strength of this assignment." "A. Why, I can't remember just now. It strengthened Garson's credit." And he continues:—

Q. It was advanced on the strength of Garson's credit ?

A. Yes.

Q. After this assignment was made were moneys advanced to Garson ?

A. Yes; that is my recollection, at least.

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank?

Mr. Elliott: I object to the question.

His Lordship: I will allow it.

A. No.

Q. You say no ?

A. Yes — I am not positive about that. Yes, I think I can say no.

Q. You say no ?

A. Yes; that is the moneys coming from here would not be sufficient.

In other parts of his evidence he indicates inquiries were sometimes made of the Canadian Pacific Railway Co. respecting the amounts due on specific contracts on faith of which or to subserve the purposes of which advances had been asked by Garson.

The bank cannot, therefore, claim that it ever knew of and as result of definite knowledge relied upon this alleged assignment of the Outlook stations contract as security for either past or future advances.

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There appears in the letter of September 20, 1910, from Garson to the bank, which I will deal with presently, a report, as it were, of the progress he was making in his several contracts, and I think it fairly inferable from that and other evidence that the bank from time to time relied upon similar reports from Garson as well as answers of the Canadian Pacific Railway Co.'s officers for information as to the progress of his contracts when making advances either to help out the execution of such contracts or make the money earned therein the basis for further advances or security for past indebtedness.

I cannot find a single instance of such inquiry or report relative to the Outlook stations contract, save when the facts relative thereto were, as I am about to shew in detail, so coupled with respondents' rights as should have put it on inquiry and have destroyed any right to claim reliance on the proceeds from said contract for any advances made to Garson outside of the scope of said contract.

Such is the nature of the claim set up by respondent to deprive the appellant of his equitable assignment and to despoil him of his labour, his money and his property spent in reliance thereon.

Having regard to the express non-assignability of the contract between Garson and the Canadian Pacific Railway Co.; to the want of definiteness in the form of assignment respondent relies upon; to the non-existence, at the date of the assignment, of any debt due or known to the respondent to be accruing due as arising out of this contract now in question; to the want of proof of any debt due from the assignor Garson to the respondent at the said date and remaining due when the assignment could have acquired any con-

ceivable operative effect; and in short to the entire history of legal assignments of choses in action, including the "King's Bench Act" of Manitoba, section 39, and the effect thereof I submit that the said assignment, if anything, cannot be treated as any higher or stronger than an equitable assignment and that the rights of respondent and respective rights of the parties hereto must be determined by the principles of law governing equitable assignments and the equities between them as will be developed presently.

It is said respondent must succeed by virtue of notice to the Canadian Pacific Railway Co. within the rule laid down in *Dearle* v. *Hall*(1), and a long line of cases of a like kind ever since. But I cannot find such a case as this in all that long and varied line.

The only notice given the debtor, the Canadian Pacific Railway Co., was a delivery of the assignment accompanied by a letter as indefinite as the instrument itself.

The language used by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen*(2), at page 506, and quoted with approval by Lord Macnaghten in *Ward* v. *Duncombe*(3), at page 391, is so comprehensive and forceful and expresses so much better than I can exactly what I feel should not be lost sight of in dealing with so remarkable a claim as respondent presents herein, that I cannot forbear quoting the entire passage as presented by Lord Macnaghten. He says:—

> The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen*(2), at p. 506: "A pre-existing equitable

(1) 3 Russ. 1.

(2) L.R. 7 H.L. 496.

(3) [1893] A.C. 369.

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title," said Lord Cairns, "may be defeated by a supervening legal title obtained by transfer" — he was there speaking of an equitable title to shares. Then he goes on: "And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced."

How can such a requirement of the law thus defined be held to have been complied with by the delivery of such an assignment as this now before us ?

The further expressions of Lord Macnaghten himself on pages 392 to 394 of latter case criticizing the expressions so usual as to "perfecting" or "completing the title" of an assignee and constituting the debtor in a contract or the holder of a fund "a trustee" for the assignee and the duties or rights of a trustee in such a position are worthy of note in the same connection.

The assignment if purely voluntary could not acquire, even with notice, priority over an earlier one for valuable consideration. See *Justice* v. *Wynne* (1860) (1), which is the only express authority on the point, cited in the text-books, but I take the principle of law involved therein to be undoubted, when regard is had to the doctrine, speaking generally, that courts of equity will not aid a mere volunteer in any case to enforce a gift failing in anything essential to its completion. I shall advert to this principle later when I come to deal with the respondent's claim as presented

(1) 12 Ir. Ch. R. 289.

on the evidence outside this instrument. I am only concerned here just now with the bare question of the effect of notice when resting on such a foundation as presented here.

This assignment on its face is purely voluntary. How can it be that such notice as that carried should be converted into something higher than it seemed by its terms to express? If it had purported to be by way of security as now claimed, then this might have been of less consequence, but it appears from its contents as if an absolute gift. The alleged basis of the principle upon which notice is given such effect as it has is said by Lord Lyndhurst in *Foster* v. *Cockerell* (1), at page 475, to have been founded on the reason

> that if a contrary doctrine was allowed to prevail, it would enable a *cestui que trust* to commit a fraud, by enabling him to assign his interest, first to one and then to a second incumbrancer, and perhaps, indeed, to a great many more; and these later incumbrancers would have no opportunity of ascertaining, by any communication with the trustees, whether or not there had been a prior assignment of the interest, on the security of which they were relying for provision of their claims.

And he adds later on:—

> In a case of this sort it is necessary that a party claiming advantage from a title, should do everything that is requisite to complete that title before he sets up a claim in respect of it.

Such being the purpose of the rule as to notice, how can it operate when the reason for its application ceases, and it is sought to so extend its application as to enable the assignee in a kind of case without precedent, to rake in not only the whole or part of an ascertained fund, but of one to be created by the prior assignee's own labour and material? When and how does this fraud then appear? And when and how can we find in this notice a doing of everything requisite to complete title?

(1) 3 Cl. & F. 456.

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Giving the doctrine full force and effect one would imagine that a thing so very important should be true and not as false as the notice relied upon herein. Again, in every one of the authorities the respondent sets forth in its factum in this regard the notice given was clear, specific and related to a well-defined claim or fund existent or to arise from another source than at the prior assignee's expense.

In the case of *Marchant* v. *Morton, Down & Co.* (2) the facts suggested to Mr. Justice Channell a feature that might possibly, on a slight variation of fact, have raised a question remotely resembling this relative to sources to feed the fund.

But a somewhat diligent search has failed to discover for me a single authority of an assignment and notice thereof substantially failing in these characteristics yet having been upheld.

In this case there is nothing specific, definite or clear in the notice which is the assignment itself. How could a debtor or trustee of a fund if such had existed be held bound to trouble himself with such a notice of a voluntary assignment? And how much less so in a case where he was not bound to recognize any assignment and had reserved the right to himself to resist and discard any assignment?

Surely the paymaster, or trustee if you will, in such a case had a right to discard as notice that which might have entitled him, if set forth truly and at length, to elect to declare the whole contract, which is to produce the fund assigned, void and ended forever. Of what value, moreover, could a notice be, which neither pointed to one contract nor another? Is it possible to argue this one in question is wide enough

(2) (1901) 2 K.B. 829.

in its terms to cover all past and possible future relations between the assignor and the Canadian Pacific Railway Co. during the entire lifetime of the deceased? I think not.

Let us then examine its terms closely and see if we can find anything definite.

The singular number is used in describing the thing assigned. It is not several claims, but Garson's single claim that is assigned. We know he had more than one claim, but from the evidence of the respondent's manager, who was the witness to this assignment, we find he only knew of one claim and the appellant is not concerned with that. If we must, as the language requires, restrict respondent to one claim, then that of which respondent had some knowledge or notice must be the one, rather than one absolutely unknown. Surely this ought, if the notice is not definite, to end the contentions set up. If not good notice then as appellant's equity is prior respondent must fail.

I wish also to draw attention to the very peculiar language of this assignment.

How did the assignment get its very peculiar wording? It begins in the third person, but when it describes the claim it changes and takes the unusual form in the peculiar phrase, "my claim," etc.

It looks as if Garson had orally or in writing referred to "my claim" in some instructions he had given to distinguish that to be assigned from claims merely standing in his name as trustee in effect, as he did in subsequent letters to respondent, not only in the reference made to the appellant's rights, but as he did in that of the 20th of Septemebr, 1910, when he refers to a Minnedosa account and says,

this really belongs to Snyder. I have sent him a cheque accordingly.

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I think this alleged notice of an equitable assignment held in the courts below as sufficient to give respondent priority fails for the reasons I have given. And I may add that the same reasoning is destructive of the assignment itself as covering the contract in question, whatever other contract it may cover.

I have combatted thus far that line of argument which prevailed below, but incidentally have noted as relative thereto other facts and circumstances which in another light are equally fatal to the respondent's claim.

A perusal of the entire evidence in this case has deeply impressed me with the conviction that Garson never intended by this assignment to pass to respondent, for its own benefit, or deprive appellant of, what he had undoubtedly promised him, and that he had made this clear to some one in such manner as to render respondent's officers indifferent regarding the stations contract in question.

The respondent's manager was applied to by appellant shortly after his agreement with Garson to furnish financial assistance in case of his making further arrangements with Garson for other work, but was refused.

Both are agreed appellant was then asked for a statement of his affairs. Whilst the manager admits he saw such a statement he denies hearing then of this Outlook stations contract. The appellant distinctly says he then told him of his arrangement with Garson for that contract.

It may be that the manager attached so little importance to the contract that he had forgotten it. I see no reason for disbelieving appellant's version which seems highly probable. It was part of the very

business both agree was considered and must have concerned them both in the consideration thereof.

At all events the appellant, who was refused on that occasion, was a short time after given accommodation and later on several occasions further accommodation and each was, curiously enough, connected with the estimates for the work done under the very contract now in question. These estimates were the property of respondent if it ever had a claim; yet its manager and assistant manager let them be so dealt with by the appellant or by him through Garson as if they belonged to appellant.

The documents themselves in these transactions by the very language used therein seem to earmark the first two estimates so dealt with as appellant's property; the figures involved therein seem to fit in with and, as it were, to emphasize these facts, and taken therewith the letter of the 20th September from Garson to the respondent's manager clearly demonstrated appellant's claim to the eyes of respondent's officers; and the letter of the 24th September in reply thereto from the assistant manager to Garson conclusively proves that demonstration of fact had reached him. It must be presumed from all these and other facts, to have so reached the understanding of all concerned on behalf of respondent, that we can safely say these moneys were being treated to their knowledge by both Garson and appellant as the money and the property of the latter.

Then the letter of the 9th November from Garson to the respondent's manager as to the third estimate after dealing with a variety of his contracts and the moneys earned thereon expressly states:—

It is likely the C.P.R. estimate on Outlook work will be paid in shortly. Belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

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The answer to this last letter fails to repudiate such a suggestion, and in the first sentence says:—

> I am in receipt of your letter of the 9th instant, and note your advices,

but makes no remonstrance in answer to such a claim. That claim ought by this time, if the pretension now set up by respondent is well founded, to have been repudiated in no uncertain terms, but it was not. It was acquiesced in.

Throughout the whole of these dealings the respondent never, either to appellant or Garson, disclaimed the grounds for such pretensions as implied therein.

This silence on the part of respondent's officers, and this manner on the part of all concerned of treating the claim of appellant, is consistent with the truth of his statements relative to what had taken place between him and the manager, and hardly consistent with any other theory than its truth; save and except a theory of the entire ignorance of the officers of respondent of any claim it had under the assignment and want of reliance by the respondent on any claim to, or to charge, the fund in question. It is absolutely inconsistent with a proper realization by respondent's officers of the legal and moral duty resting upon them under the circumstances which had transpired under their eyes, if their present pretensions herein were well founded.

I cannot agree with the view of the learned trial judge that what transpired after the date of the assignment can have no effect on the light in which it is to be considered.

Respondent's mode of treating what transpired after that is cogent evidence corroborative of what

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appellant states had taken place relative to his rights in the premises and of the notice he claims respondent had.

Besides it could not be permitted to any one claiming under an equitable title the moneys in question to maintain under such circumstances such silence relative to such a claim, if it ever had existed, and then to try to set up such a claim as now set up by respondent as against him whose labour and money were creating and had at the institution of these proceedings created the fund now claimed by respondent.

But there is another ground yet which to my mind should bar the respondent's claim. It sets up by evidence I have quoted above, that the assignment was in truth not what it expresses, but was taken by way of security for advances to be made as well as for past advances.

No past advance is shewn to have existed unpaid when this suit began, and hence, as already stated, it cannot be held as security for that. No specific advance ever was made on the faith of this security. And no further advance was made before appellant's equity had to the respondent's knowledge, clearly intervened.

If this claim relative to later advances is to be treated, as I think it can well be treated in such case as the like advances were treated in the case of *Hopkinson* v. *Rolt*(1), as between a first and second mortgagee then the claim of what respondent had acquired by reason of its advances on the faith of its bargain and charge must be subject to the claim of the appellant for his labour and expenses which created the fund in dispute.

That was a case as between first and second mort-

(1) 9 H.L. Cas. 514.

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gages in which the first was held good only as to advances made when it was taken, or before the second was acted upon, but as to future advances which the first was intended to secure, they were held, so far as made after the advances on the second mortgage had intervened to be subject thereto. Assuming that by the assignment and notice to the Canadian Pacific Railway Co., the respondent had obtained in form a first mortgage to secure future advances then applying the principle involved in said case it was incumbent on it to have shewn it had made such future advances in priority to those of the appellant. This mode of dealing with equitable claims to secure future advances was followed in the case of the *Bradford Banking Company* v. *Briggs*(2), where the facts were as stated in the head-note as follows:—

> The articles of association of a company registered under the Companies Act, 1862, provided that the company should have "a first and permanent lien and charge, available at law and in equity, upon every share for all debts due from the holder thereof." A shareholder deposited his share certificates with a bank as security for the balance due and to become due on his current account, and the bank gave the company notice of the deposit. The certificates stated that the shares were held subject to the articles of association.

It was held the moneys which became due to the company after notice of the deposit of share certificates could not take priority over the equitable claim of the bank for its advances of which the company got notice.

Holding, as I do, that if the respondent had not before its alleged assignment, it had at least shortly thereafter notice of the appellant's claim, then in any event the appellant obtained priority over it in respect of any later advances.

(2) 29 Ch. D. 149; 12 App. Cas. 29.

It may be said the case was not so treated below as to call for a determination of the exact facts that might have to be investigated if we had to decide on this ground alone.

It was, however, I submit, respondent's own course of dealing with the case and contentions at the trial that led to this situation and hence its own fault.

As I have come to a decided view on the other grounds taken, I need not enlarge on this latter ground. Though it falls in line with the main argument taken to shew, in any view, what a hopeless case respondent in truth had, yet if the case had to turn exactly on this ground alone an opportunity should be given to shew that in fact the future advances were made before what I hold to have been notice.

This I say, however, is only in deference to the finding of fact by the learned trial judge as to anterior notice for my own impression does not quite coincide therewith. I should imagine it is the case of the man having only one thing of the kind to remember and so remembering it as against the man having possibly scores of the same sort to pass upon and dismiss and not quite so sure to remember.

I would allow the appeal with costs throughout and award judgment against the respondent for the moneys in question come to its hands and interest thereon and judgment for the moneys paid into court and direct the costs of the Canadian Pacific Railway Co. to be fixed as between solicitor and client, and to be paid by respondent to the company, or if already deducted to be recouped by the respondent so that appellant get from the funds or moneys what he would have got but for respondent's wrongful interference.

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Since writing foregoing I have agreed to the variation thereof as to costs embodied in memorandum prepared by my brother Mr. Justice Davies.

DUFF J.—This appeal arises out of an action in which the appellant, Fraser, as plaintiff, and the respondent bank, as defendant, each claimed to be the owner of two certain sums of money. These sums had been earned under a contract to which the parties were the Canadian Pacific Railway Company and one Wm. Garson, by which Garson was to build six stations on the "Outlook" Branch of the Canadian Pacific Railway. Under an arrangement with Garson the stations were in fact built in the summer and autumn of 1910 by the appellant Fraser entirely at his own expense and the moneys in question formed part of the price payable under the contract for this work done by Fraser. Fraser's claim is based upon an alleged term of his agreement with Garson by which the moneys paid to Garson under the contract were (it is said) to be paid by him to Fraser as and when they should be received by Garson. The bank's claim rests upon an assignment dated 24th June, 1910, by which Garson professed to assign to the bank

all his claim and demand against the railway company then due or thereafter to accrue due to him from the railway company,

of which assignment the railway company was immediately notified by the bank and by which Garson also appointed the bank his attorney to receive such moneys from the railway company. One of the sums in controversy ($7,830) was paid by the railway company to the bank, the other ($7,020) was paid into court. The trial judge held that:

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The real arrangement was that the plaintiff should construct the stations in the place and stead of Garson and that the latter would turn over to him the progressive payments as and when they were received from the company.

But he held also that the bank having given the railway company notice of its assignment before having any knowledge or notice of the arrangement between Garson and Fraser had the better title to the moneys in question; and allowed the claim of the bank in its entirety. The Court of Appeal held that the appellant must fail on the ground that he had not satisfactorily established an assignment from Garson. I have gone over the evidence repeatedly with care and I am quite satisfied that the appellant has established his title to these moneys as between himself and Garson and that the rival claim of the bank is without substance. The case has been beset with confusion from the beginning of it, but when the facts, either admitted or established almost indisputably, have been grasped the rights of the parties fall to be determined by the easy application of one or two well established principles of law.

It was in April, 1910, that Garson entered into an agreement with the Canadian Pacific Railway Company by which he was to construct for them certain roundhouses at Calgary and the six stations already referred to and to finish them by the 1st September. Shortly afterwards Garson proposed to Fraser that he should take over the contract so far as it related to the stations; to this Fraser agreed and a memorandum signed by Garson and Fraser was indorsed upon a document which Garson had in his possession and which appears to have contained the terms of an intended formal contract between Garson and the railway company providing for the construction of both

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these sets of buildings. This document apparently never went into effect for the reason it seems that the company's engineers wished the contract with respect to each set of buildings to be embodied in a separate instrument. At the trial Fraser was unable to produce the memorandum signed by Garson and himself, and although he proved that the document on which it was written was not to be found at any of Garson's places of business the learned trial judge refused to allow him to state the purport of it. It is, I think, immaterial whether or not this ruling of the trial judge was right. Garson unfortunately died before the action was begun; but it is clear that Garson and Fraser both acted upon the footing that these moneys were Fraser's and that such was the understanding between them; and that on the faith of that understanding the contract was performed by Fraser will abundantly appear from the evidence to which I shall have to refer in discussing the claim of the bank. The appropriate principle of law is stated by Lord Macnaghten in *Tailby* v. *The Official Receiver*(1), at page 546:—

> Long before *Holroyd* v. *Marshall*(2) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" *Legard* v. *Hodges*(3).

This arrangement, therefore, constituted Garson trustee for Fraser of any sums which should be paid to

(1) 13 App. Cas. 523. (2) 10 H.L. Cas. 191.
(3) 1 Ves. 478.

him under the contract in question; and the real point in controversy is whether the bank did or did not by virtue of what subsequently occurred acquire a superior right to them. Before proceeding to discuss the facts specially bearing upon the bank's position it is convenient to refer to one of the provisions of the contract between Garson and the railway company which was the subject of some discussion on the argument here as well as in the courts below. It is as follows:—

(4) This agreement shall not be assigned, nor shall the said work or any part thereof be sub-contracted without the written consent of the engineer to every such assignment or sub-contract.

This conditional prohibition against assignment is susceptible of being read as a prohibition against the assignment of any of Garson's contractual rights arising out of this contract, including, for example, the payment of moneys earned and payable. It is also open to a construction which would disable Garson from vesting in another (without the prescribed consent) the right to perform the obligations which Garson had undertaken and by which such moneys were to be earned, but which would not disable him even in the absence of such consent from vesting in another the right to claim such moneys after they had become due in consequence of Garson by himself or his agents or servants having performed his obligations under the contract. There is something to be said in favour of the first mentioned construction, but it is not necessary to decide the question whether it is or is not the true construction.

I shall assume in favour of the bank that the other view which is the view most favourable to its claim is the correct one. The required consent does not appear to have been obtained to the substitution of Fraser for

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Garson as contractor and, as between the railway company and Garson, Garson continued to be treated as the contractor responsible to it, although the evidence of Simmons makes it clear enough that the officials of the railway on the ground knew the work was being done by Fraser. Under the terms of the contract there was to be an approximate estimate of the value of the work done at the end of each calendar month, the amount of which was to be paid on the 20th of the next ensuing month less 10% which was retained as security. The railway company was apparently not notified of Fraser's title to those moneys (except as to the sum paid into court) and saving that sum all the moneys payable under the contract were paid by the railway company to the bank for the credit of Garson's account under the authority of the assignment to the bank mentioned above, of which notice had been given by the bank. The railway company apparently never disputed its accountability for these moneys either to Garson or to the person who as against Garson should prove to be best entitled to them.

Fraser then having an arrangement with Garson by which the moneys earned under the contract (though payable to Garson as between him and the railway company) were to be subject to a trust in favour of Fraser, we come to consider the effect upon Fraser's rights of Garson's subsequent dealings with the bank.

In discussing this question, I proceed as if the bank were not in respect of any of its transactions with Garson under any of the disabilities affecting a bank deriving its power to carry on business from the provisions of the "Bank Act," but had in respect of these matters all the powers of a natural person who is

sui juris. I do this because an examination of what restrictions such a bank may be subject to by virtue of section 76 of the "Bank Act" in respect of advances upon the security of a transfer of the borrower's contingent right to moneys not yet owing or to moneys owing, but not yet payable under a contract such as that between the railway company and Garson might lead us into the consideration of points of some nicety and considerable practical importance upon which we have not had the benefit of argument; and since in my view of the case it is unnecessary to pass upon any such points it is, I think, altogether desirable to refrain from any discussion of them.

It was argued on behalf of the appellant that by virtue of the Manitoba statute (the "King's Bench Act," R.S.M., 1902, ch. 40, sec. 39, sub-sec. (*e*)) an assignment of a future chose in action by itself vests in the assignee a legal title to the subject of the assignment as soon as it comes into existence and that notice to the debtor is unnecessary to perfect the title of the assignee; and it was said that as a consequence of this the rule in *Dearle* v. *Hall*(1) does not govern the rights of the parties under an assignment taking effect by virtue of the statute. Assuming all this to be true, it can have no application to the arrangement between Garson and Fraser if the real intention of the parties was (as it seems to have been) that the moneys should continue as between the railway company and Garson to be payable to Garson, who was to receive them as trustee for Fraser. On the other hand, the assignment from Garson to the bank appears to have been in conformity with the statute and quite sufficient (in the view of

(1) 3 Russ. 1.

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the statute just indicated) to vest in the bank the legal title to the moneys dealt with as soon as they should become payable and the fact of the bank's notice to the railway company having been given before the moneys were earned (which was pressed upon us in argument) would appear in that view to be beside the question. I shall proceed on the assumption that the appellant's title was an equitable title only, and that on the other hand the bank under its assignment acquired by force of the statute a legal title to the moneys as soon as they were earned, the real point in issue being whether the bank has a title to the beneficial interest in them which is superior to the appellant's.

The bank's contention at the trial was that its assignment had been taken without notice of Fraser's rights and that this circumstance alone gave it priority. The learned trial judge, as I have mentioned, accepted this — holding that the effect of the assignment to the bank followed by notice of it to the railway company was to give the bank a right to intercept the ultimate fruits of the appellant's exertions in performing Garson's contract and that an indefeasible title to appropriate those fruits when realized became forthwith vested in the bank. Early in the trial the learned judge ruled that nothing which occurred after its notice to the railway company could prejudicially affect the position of the bank, and it was by this ruling as a guide that his judgment against the appellant was finally determined.

This ruling might be capable of support if it had appeared that the assignment had been taken as security for debts contracted at the same time or anterior thereto and that these debts to the amount of the

moneys in dispute were still unpaid, and if we leave out of view the effect of the bank's subsequent conduct in giving rise to an equitable estoppel. But assuming at the time the assignment was taken the bank had no notice of the appellant's rights — then the bank's priority must rest on one of two foundations: 1st, the present existence of some debt which was incurred at the time of or prior to the taking of the assignment and for which the assignment was to stand as security, or, 2ndly, the present existence of some debt incurred on the security of the assignment and subsequent to the taking of it without notice of the appellant's rights. And, of course, the limit of the interest in respect of which the bank can in any case maintain its priority must depend upon the extent to which debts belonging to one or other of these classes remain still unpaid. This is so rudimentary that the citation of authorities ought to be superfluous. It may be observed, however, that there is an interesting application of the principle involved in *West* v. *Williams* (1), at page 143.

In this case the facts in evidence seem to be sufficient to establish, 1st, that the bank had notice of Fraser's rights before any debt was incurred for which the assignment was to stand as security and which is still unpaid; and, 2ndly, even if any such debt remained unpaid the conduct of the bank would preclude it from asserting as against Fraser any title to the moneys in question.

The first point to consider is: When did the bank receive notice of an understanding between Fraser and Garson by which Fraser was to build the stations and to be entitled to the proceeds of the contract?

(1) [1899] 1 Ch. 132.

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The learned trial judge found that the bank was aware of such an arrangement as early as the beginning of September and that finding alone seems sufficient to entitle the appellant to judgment in his favour. It seems, however, not open to dispute that they had this knowledge as early as the month of July; and there are certainly powerful considerations in support of the view that they had it before the execution of Garson's assignment to the bank. Fraser himself says that shortly after making his arrangement with Garson he applied to Mr. Leslie, the bank's manager at Winnipeg, for an advance and gave him a list of his contracts. Leslie admits that the application was made and that Fraser gave him a statement of his affairs, but declares that nothing was said of the Outlook contract. There are grave difficulties in the way of accepting Leslie's recollection upon the point. Fraser had been a customer of the bank for some years; he was a man of limited means, and while the Outlook contract was not the only work he had in view for the ensuing season, it is obvious from an inspection of his bank account (which is in evidence) that it must have been by far the most important one. Why, in making an application for financial assistance largely with a view to enable him to carry out this contract, he should have omitted all mention of the contract does not appear to be easily explained.

Evidence of notice, however, at a date not later than July is supplied by the testimony of Leslie himself. Garson had a number of contracts to execute in the summer of 1910 in or in the vicinity of Calgary; and some time in July he left Winnipeg for Calgary and remained there until late in November. It is clear that before Garson left Winnipeg he had a conversation

with Leslie in the presence of Fraser, the substance of which Leslie professes to state. In effect Leslie's account of the interview is that Garson with Fraser called at the office of the bank and said to him, "Mr. Leslie I have come to tell you that I have handed over my stations to Mr. Fraser."

Leslie's evidence on his *vivâ voce* examination for discovery touching this conversation is as follows:—

A. He came in. Oh, I don't know when it was; some time in the fall, or later on, he came in with Mr. Garson and wanted some money and we gave him three thousand dollars, but Garson signed the note.

Q. At that time when the three thousand dollar note was arranged, you conducted the negotiations with the plaintiff ?

A. Yes.

Q. Your assistant took no part in it ?

A. Oh, he may have put it through.

Q. But you had the conversation ?

A. Yes.

Q. And you say at that time that you had *no knowledge of what the indebtedness* of Garson to Fraser was ?

A. No, none whatever. *About that time Fraser and Garson were here, and Garson told me that he had handed over the C.P.R. station work to Fraser.*

Q. *He told you that ?*

A. *That was the first intimation I knew of the connection, just about the time that note went through; it may have been a little before, or it must have been a little before or a little after; it was about that time.*

Q. It was not at the time that this note went through ?

A. No, it isn't at the time. *It may have been a little before that — it must have been a little* before that time.

Q. A little before ?

A. Yes.

Q. Did he say ——

A. He just came in and he said: *"I wish to tell you that the C.P.R. station work is to be handled by Fraser."*

At the trial he said:—

Q. When did you first learn that Mr. Fraser had any business relations with Mr. Garson ?

A. *Well, I can't give you the date definitely, the interview was so short, and there was nothing resulted from it that would lead me up to the time as to when it did take place.*

Q. Do you mean the interview between *Mr. Garson, Mr. Fraser and yourself ?*

A. Yes.

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Q. Do you know when that took place ?

A. No, I don't know.

Q. Was that the occasion when you authorized the discounting of the $3,000 note ?

A. Well, it might have been about that time, and it might have been before.

Q. It might have been before the 21st day of November, 1910 ?

A. Yes.

Q. *Was it an occasion when Mr. Garson was here in the city ?*

A. *Yes.*

Q. *Do you know whether Mr. Garson was here during the summer at all ?*

A. I could not say.

Q. Did you see him during the summer ?

A. *I couldn't swear definitely.*

Q. Could you tell me how long prior to the 21st of November it would be when you had the conversation with Mr. Garson ?

A. The time Mr. Garson and Mr. Fraser were in ?

Q. That was the date the note was discounted, was it ?

A. Well, no, I am not sure that it was. I had a conversation with Mr. Fraser at the time that this note went through, but I think the other conversation *I refer to must have been before that.*

Q. Who would that be with ?

A. *Mr. Garson — and Mr. Fraser was there.*

Q. *Mr. Garson and Mr. Fraser were there ?*

A. *Yes.*

Q. You say you think that would be before *November 21st ?*

A. I think, probably, about that time.

Q. Can you give me any idea how long before November 21st ? Can you give me any idea how long before that — *a month ?*

A. It may be.

Q. Would it be two months ?

A. *Well, I couldn't say; some time during the summer.*

Q. Some time during the *summer ?*

A. Yes.

Q. Was it before or after you had taken this assignment from Garson of the 21st of June ?

A. Oh, I suppose *it would be after that.*

Q. *It would be after that ?*

A. *Yes.*

* * * * * *

Q. When did you first become aware of the fact that Fraser *was building these Outlook Branch stations ?*

A. I don't know the date. *Mr. Garson and Mr. Fraser came in and Mr. Garson said, "I came in, Mr. Leslie, to let you know I have handed over my stations to Mr. Fraser," and that is the only interview or knowledge I have of the matter.*

Q. Can you fix the date at all ?
A. No.
Q. *You say* it would be after the assignment ?
A. *Yes, it was some time in the summer.*
Q. *Some time in the summer ?*
A. *Yes.*

The nature of the conversation alone suggests the improbability of its having occurred in November when the work referred to had been almost, if not entirely, completed; and there can be no doubt that Leslie is quite right in his impression that it took place not later than some time in "the summer." The conversation must, therefore (since Garson was absent from Winnipeg from July until November) have taken place as early at least as July. Morris also says that he knew in August that Fraser was building these stations and that he must have learned of it from conversation with Garson.

It seems probable, indeed, that the conversation between Garson and Leslie took place shortly after Garson's arrangement was made with Fraser. Fraser wishing to obtain financial assistance from the bank, it is natural to suppose that Garson and Fraser would inform the bank of what had occurred between them and do so without delay. Then as we shall see it is clear that Garson never concealed from the bank the fact that he regarded these moneys as Fraser's and it seems unlikely that he would give a formal assignment of moneys coming from the Canadian Pacific Railway Co. without informing Leslie of Fraser's interests in the proceeds of the Outlook contract.

Leslie's evidence upon this point is so vague and hesitating, so self-contradictory even, as to suggest an entire want of such recollection on his part as would entitle him positively to affirm that this con-

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versation occurred at a time subsequent to the assignment rather than anterior to it; and I think it would not be quite fair to read his language as involving such an affirmation. For all these reasons I am far from satisfied that we should not be entitled to disregard the finding of the learned trial judge that the assignment was taken without notice and give effect to the great weight of probability which favours the opposite view. We have, however, the indisputable fact that the conversation occurred at least as early as July, and that is sufficient for my purpose.

That conversation, accepting Leslie's account of it, must, I should have thought, have apprised Leslie as a business man of the fact that Garson had in a practical sense no further interest in the contract for the construction of the stations — at least as between himself and Fraser. I do not suppose the attention of Leslie or Garson or Fraser would be directed to the point of the technical legal position created by the arrangement Garson and Fraser had made; but I should have thought such a statement as that reported by Leslie must have left him with the idea that Fraser was to execute the contract and was also to have the benefit of the payments under it.

The interview was no casual talk. From Leslie's account of it, it appears that Garson and Fraser called upon him with the express purpose of informing him of their arrangement; and one at least of their objects in doing that undoubtedly would be — if the interview took place after the assignment — to instruct Leslie that moneys due under the Outlook contract and paid to the bank under the authority of the assignment were to be treated as Fraser's. But whatever construction might be placed upon Garson's words as re-

ported by Leslie when taken by themselves — their subsequent conduct shews conclusively the view all parties took of Fraser's rights. On Garson's side, his cheques and his letters written to the respondent bank unmistakeably treat the moneys paid under this contract as Fraser's moneys. On the side of the bank, the conduct of Leslie and Morris in respect of transactions either between the bank and Fraser or between the bank and Garson, or between Garson and Fraser themselves taking place directly under the observation of those officers of the bank, during the months of July, August, October and November, establishes, I think, beyond controversy these facts: Leslie and Morris knew that Fraser (whose business, to their knowledge, was that of a contractor) was building the Outlook stations, and that he was providing the means for doing so out of his own resources quite independently of Garson; they knew, moreover, that the moneys received by Garson from the Canadian Pacific Railway Co. on account of Outlook stations were scrupulously treated by Garson as Fraser's moneys. Leslie and Morris, moreover, acquiesced in this treatment of these funds as if in accordance with a course of business perfectly well understood among all parties concerned. Interpreting the conversation between Garson and Leslie by the light of these facts, I see no escape from the conclusion that it conveyed to Leslie's mind the idea that, in the sense I have mentioned, Garson's interest in the contract had passed to Fraser.

Let us look at the evidence a little more closely. The bank became aware in July that Fraser was drawing on his own resources for funds to build the Outlook stations. Fraser remained in Winnipeg and

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early in July sent forward his foreman Simmons to Moose Jaw to begin work on the Outlook Branch. Fraser, as I have mentioned, had for some years been a customer of the respondent bank and kept his account in the Winnipeg branch. From time to time during the months of July, August, October and November remittances were forwarded by or through the bank to Simmons in order to provide him with money to pay wages and other bills requiring payment in cash. The first of these remittances was expressed (in blank bills) to Simmons by Morris on the 30th or 31st July. Morris admits that he assumed these moneys were to be used in connection with the Outlook contract. To provide for one of these remittances (on the 25th August) it was necessary, as appears from the state of Fraser's bank account, to make arrangements for an advance from the bank. The advance was made, the bank taking Fraser's promissory note at ten days. This note was filled in by Morris personally; and the cheque for the amount of the remittance is expressed to be made on "account stations," and was initialled by Morris, who also in a memorandum on the back of the cheque noted the destination of the remittance. Such remittances continued (as I have said) during the ensuing four months in circumstances shewing conclusively to the knowledge of Morris that they were being provided by Fraser from his own capital. There is not a suggestion anywhere in the case that it occurred to anybody that in making these remittances Fraser was acting in any way on behalf of Garson.

Then as to the payments under the Outlook contract. Under the contract "approximate estimates" as they were called, were made at the end of each

calendar month and the amount of each such estimate (less 10% which the company retained as security for the due completion of the work) became payable on the 20th of the next ensuing month. The sum ascertained to be payable under the estimate for July became payable on the 20th of August. This sum was, in fact, paid into the bank on the 9th September. It does not appear in the record whether the railway company's cheque was made payable to the bank or to Garson, but at all events the amount was by the bank placed to Garson's credit. Garson's account with the Winnipeg branch was at that time overdrawn, but the amount of the estimate ($1,620) was immediately transferred to Fraser's credit upon the authority of a cheque drawn by Garson. This cheque was expressed to be in "payment of first estimate Outlook contract" and was initialled by Morris, Garson being at this time in Calgary. It does not clearly appear how the cheque reached the bank, but the bank produced no communication from Garson in the month of August. Either then the bank had some explanation from Garson which is not now forthcoming, or Garson's cheque transferring the estimate to Fraser was honoured as a matter of course in consequence of information the officers of the bank already had touching the title to these moneys. But there is a little more. Garson's cheque is dated 22nd August. That was two days after the day on which the July estimate was due (20th August) under the contract with the railway company, and Garson had been informed as to the amount, for the cheque is drawn for the exact sum afterwards paid. On the 24th, two days later, Fraser applied for an advance. He says he asked for the advance on the strength of this estimate. Leslie,

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in examination for discovery, in effect admitted the advance was made in the expectation of a payment being made under the Garson contract. All this points to the existence at this time of a common understanding among all concerned that these moneys, although nominally Garson's, were really the property of Fraser.

The conduct of the parties in respect of the August estimate is yet more significant. This estimate was, under the terms of the contract, payable on the 20th September. On that date Garson wrote from Calgary the following letter:—

Manager, Imperial Bank,
Winnipeg.

Dear Sir,—Yours of the 17th received O.K. As C. P. August estimate is now overdue, I enclose a cheque in favour of W. H. Fraser with amount blank, which you will oblige by filling in for the sum returned in the August estimate for the stations he is building and hand same to him as soon as the cash comes in. I also enclose a cheque in favour of the Guerney Foundry Co., also in blank, on account Kenora Bank. The balance accruing due to them on this account is $909.80. Fill the cheque out for this or any part of it the Kenora special account will stand and send it to them, the balance of August will keep for a time. I have Kenora practically finished and quite a lot coming yet. I understand a payment has come in on Minnedosa account; this really belongs to Synder. I have sent him a cheque accordingly. I have given a cheque to Ashdown here for $500 on account. Kindly honour it. Work going well. Weather fine. Have broken all records for Calgary in reinforced concrete construction by putting in 152 cubic yards in a 6-inch floor in one run.

Yours truly,
WM. GARSON.

And on the 24th September Morris sent him this reply:—

Dear Sir,—Referring to your letter of the 20th instant *re* W. H. Fraser, we are advised by Mr. Fraser that his August estimates amount to about $5,400. We have filled in your cheque in his favour for one thousand dollars ($1,000) in the meantime.

Yours truly,
M. MORRIS, *Assistant Manager.*

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The cheque referred to as actually filled in by Morris is in the following form:—

Calgary, Alta., Sept. 20, 1910.

IMPERIAL BANK OF CANADA.

Pay W. H. Fraser or order one thousand dollars ($1,000.00).

A/c. Aug. Est. Outlook Stations.

WM. GARSON.

On the 8th October the estimate was received by the bank and on the same day the balance, after deducting the $1,000 already transferred, was transferred to Fraser's account by a cheque of Garson's marked "Estimate No. 2, Outlook stations." In this instance also both on the occasion of the transfer of the first sum of $1,000 and afterwards of the second sum of $4,400, Garson's account at the Winnipeg branch appears to have been overdrawn. Comment upon this transaction seems superfluous. Garson's letter and the action of the bank upon it shew that both parties regarded the estimate for August, whatever might be the amount of it, as belonging to Fraser. Morris's language: "We are advised by Mr. Fraser that *his* August estimates amount to $5,400" is no slip of the pen; it expressed in words the conception of Fraser's rights which, as these transactions shew, was acted upon by everybody.

There is still another exchange of letters. On the 9th of November Garson writes to the bank about the September estimate; and he uses these words:—

It is likely the C.P.R. estimate on Outlook work will be paid in shortly. It belongs to W. H. Fraser. When it comes let him draw on me at sight for the amount and transfer it to him.

Let me know if you approve of my keeping the money in your bank here. I know it would make your account look better if I sent it to Winnipeg, but it looks rather awkward to send you the money one day and have you wire it back the next. As it is, if you

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take the balances of both accounts into consideration I have had my slate cleaned again on this transaction. And will probably repeat the clean up again this month.

Yours truly,

WM. GARSON.

P.S.—I have just been advised that the Strathcona Post Office contract has been awarded to me.

In reply Morris, on the 14th, writes:—

Imperial Bank of Canada,
Winnipeg, Man., 14th November, 1910.

Wm. Garson, Esq.,
Dominion Hotel,
Calgary, Alta.

Dear Sir,—I am in receipt of your letter of the 9th instant, and note your advices.

There is no objection to your retaining money in Calgary for your Calgary contracts, providing that proceeds of your C.P.R. contracts will be sufficient to protect advances in this office.

Yours truly,

M. MORRIS, *Assistant Manager.*

The sum received by the bank under the estimate referred to forms part of the moneys in dispute. To appreciate the significance of these letters it is necessary to recall the fact that the bank had been receiving moneys from the Canadian Pacific Railway Co. for Garson's credit in respect both of the Calgary and Outlook contracts. The latter moneys, as we have seen, had been appropriated to Fraser; the others had been applied in satisfaction of the bank's advances to Garson. Garson's letter was a reminder to the bank that the moneys coming under the Outlook contract were Fraser's; and this statement is accepted without a word of comment by Morris. The phrase "proceeds of your C.P.R. contract" obviously refers to the Calgary contract. The inference seems irresistible. It was understood by everybody that the bank had no interest in or claim upon the Outlook moneys.

From all this I conclude that Leslie and Morris, as well as Fraser and Garson understood, at least from the time of the interview mentioned by Leslie (which must have occurred, as we have seen, not later than July), that under that arrangement Fraser was to build the Outlook stations and was to be entitled to the moneys thereby earned, or in the words of the learned trial judge, in 22 Man. R., at p. 66: "These payments (under the Outlook contract) were to be handed over to the plaintiff."

The bank's knowledge, however, of Fraser's rights would not in itself prejudice its claim to have the moneys assigned applied in liquidation of any debt incurred before that time (for which the assignment was to stand as security) which is still unpaid. The exact particulars regarding the bank's advances to Garson have not been put in evidence. There is, however, sufficient, I think, to enable us to say with confidence that no such debt is now in existence.

It is stated by Leslie that no advance was made on the security of the assignment at the time it was executed; and that his intention in taking it was not to make advances on the security of Canadian Pacific Railway moneys generally, but only from time to time on the security of some specific sum known to have been earned and to be payable at a definite time.

The following passages from Leslie's evidence at the trial make this very clear:—

Q. Under this assignment from Garson to yourselves — the bank — was any money advanced by the bank ——

Mr. Elliott: I object to that. It is not an issue here.

Mr. Fullerton (continuing the question): To Mr. Garson ?

A. No, not at the time.

Mr. Fullerton: I will say this, if we had not set up all that I had proposed to ask for an amendment to that record, that on the strength of the assignment we advanced moneys from time to time, and our position was prejudiced.

*

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His Lordship: I think I will allow it, because it seems to me that it ought to be material.

Mr. Elliott: That changes the whole nature of the case. That changes the whole nature of this case, and it should not be gone into now on amendment.

His Lordship: I will allow it, subject to your objection, in the meantime. What is your question again ?

Mr. Fullerton: What do you say as to that ? Were any advances made, were any moneys advanced by the bank on the strength of this assignment ?

A. Why, *I can't remember just now,* it strengthened Garson's credit.

Q. *It was advanced on the strength of Garson's credit ?*

A. *Yes.*

Q. *After this assignment was made were moneys advanced to Garson ?*

A. *Yes; that is my recollection at least.*

Q. Would all the moneys in question in this action be sufficient to pay off Garson's indebtedness to the bank ?

Mr. Elliott: I object to the question.

His Lordship: I will allow it.

A. No.

Q. You say no ?

A. Yes — I am not positive about that. *Yes, I think, I can say no.*

Q. *You say no ?*

A. Yes; that is the moneys coming from here would not be sufficient.

Q. Let me ask you this question: Did you take any steps from time to time to ascertain what moneys were coming from the C.P.R. ?

A. *Yes.*

Q. *You did that ?*

A. *Yes.*

Q. And did the question of the advances that you were making from time to time depend to any extent upon your inquiry ?

Objected to by Mr. Elliott.

His Lordship: I don't think you should ask the question in that way.

Mr. Fullerton: What practice did you follow with regard to making advances to Mr. Garson ?

Mr. Elliott: That is not a material fact here, as to what his practice or habit was, and I object to that.

His Lordship: I don't think so.

Mr. Fullerton: I want to shew that he would come along for the advances, and they would ask the C.P.R. if an estimate were passed, and if the estimate were passed they would advance the money on the strength of that estimate being passed, and that is the question I want to ask.

Mr. Elliott: That does not concern us.

His Lordship: I don't know.

Mr. Fullerton: It depends upon that, whether on the strength of these estimates being passed money was advanced, and I want to shew that really when an advance was asked for the C.P.R. would be asked as to whether there was any estimate passed or to be passed, and on the strength of the inquiry, or the answer received to it, the advance was made.

His Lordship: You can probably get at it without putting a leading question to him. He says that he did take steps from time to time to find out if there were any moneys coming from the C.P.R., and if you ask him why he did that you may get at it.

Mr. Fullerton: Why did you do that ?

Mr. Elliott: I object again to that. His object and purpose in doing that would not, surely, affect us.

His Lordship: It may.

Mr. Elliott: How ?

His Lordship: If it does not, it will not do you any harm.

Mr. Elliott: I object to it, my Lord.

His Lordship: I will allow the question.

Mr. Fullerton: You made inquiries from the C.P.R. from time to time as to moneys coming from them to Garson ?

A. Yes.

Q. Why did you make those inquiries ?

A. Well, to ascertain whether we would be justified in paying his cheques.

This is the evidence given by Leslie at the trial.

On his examination for discovery he had made the following statement:—

Q. I see, Mr. Leslie, you witnessed this document. Just tell us all the circumstances and your reasons for taking that ?

A. *This assignment was given to us as security for the advances made from time to time to Garson.*

Q. Was it for advances *already made or for future advances ?*

A. *It was both.*

Q. Did you know at the time of taking that assignment what contracts he had with the C.P.R. ?

A. No.

Q. What moneys were owing to him ?

A. Not definitely.

Q. Why do you say "not definitely" ?

A. I knew that he had contracts with the C.P.R., but I knew nothing as to the amount definitely coming to him.

Q. Did you know what kind of contracts he had ?

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A. No, not — *I knew that he had — nothing definitely. The only thing I can remember that he had was some contract for roundhouses or something of that kind.*

Q. Do you remember him stating that he had contracts for stations and roundhouses ?

A. Not definitely; the only thing I can remember that he had *some contract for roundhouses at Calgary; that is the only definite contracts that I* ——

Q. He told you that he had tendered ?

A. Yes.

Q. And you remember that distinctly, and you remember definitely about the roundhouses at Calgary ?

A. Yes, I am pretty sure that that is right. But we never made any inquiry as to the nature of his contracts or where they were.

Q. Why ?

A. *We could find out how much was coming from the C.P.R. before we would lend him any money.*

Q. Did you find out in this case ?

A. *I must have found out in this case what he said was due, and had it corroborated to some extent.*

Q. What amount did he say that was due ?

A. Oh, I don't know. We generally figure on keeping a good margin.

Q. Did you call up the C.P.R. after you got this ?

A. No, I wouldn't say that I did. I wouldn't state positively — at the time.

Q. Was all the conversation with regard to this assignment made with you ?

A. Well, I think it was. I would say, "Here, if you are dealing with the C.P.R. and moneys are coming from there, we need an assignment of all the moneys coming from there, in a general way." *Garson would come in and when he was in need of money would say: "Now there is so much due me by the company." We would endeavour* to have that verified in some way or other, and telephone down to the depot, or engineers, and if they said "Yes," why we would take that for granted.

Moneys advanced in this way would, in the ordinary course, be repaid as soon as the bank received the payment in anticipation of which the advance had been made; and the natural inference from this course of business seems incompatible with the supposition that any debt remains unpaid which was incurred as early as July, 1910. The evidence afforded by Garson's pass-book and correspondence with the bank

is also inconsistent with it. So are the dealings with the July and August estimates already discussed and the correspondence between Garson and Morris in November. It is almost impossible to believe, for example, if Leslie regarded the moneys payable under the August estimate as security for an existing debt owing by Garson that he would have made an advance to Fraser in anticipation of these moneys being paid to Fraser as he admitted he did; or that the dealings with the July and August estimates already discussed could have taken place. And perhaps still more difficult to believe that Leslie and Morris would have abstained from comment upon Garson's statement in his November letter that the overdue estimate under the Outlook contract was Fraser's.

The only difficulty I have felt with regard to this matter of advances is this. I have not been altogether free from misgiving that the learned trial judge's ruling to which I have referred may be accountable for the lack of explicit evidence as to the dates of the bank's advances to Garson and I have carefully considered the question whether if the appeal should turn upon this point the bank ought not to have an opportunity of supplying such evidence. In a case which has been marked by so much misconception as to the legal principles governing the rights of the parties one naturally hesitates to proceed upon any merely technical rule as to the burden of proof. I am satisfied, however, that we have before us all the relevant facts that could lend support to the claim of the bank. The facts touching the matter of advances were all, of course, within Leslie's knowledge. On Leslie's *vivâ voce* examination for discovery the bank's solicitor took the position and adhered to it that the appellant

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was not entitled to any information touching Garson's indebtedness to the bank. In the affidavit of discovery Leslie states that the only book or document in the bank's possession containing anything relating to the controversy is the assignment itself. The bank's position, in a word, was that Fraser was a stranger having no interest in the moneys in question and the bank's relations with Garson had, of course, no bearing upon the issue thus raised. At the trial Fraser's counsel objected to evidence shewing advances by the bank on the ground that the bank by assuming and maintaining the position above mentioned had defined the issue and limited it to the single question whether or not Garson had assigned these moneys in question. With this counsel for the bank appeared to agree and there was some suggestion about an amendment. The learned trial judge eventually permitted, as appears from the extract quoted above, an examination of Leslie upon the subject of advances; but notwithstanding the fact that such evidence was permitted to be given, none was offered to shew when the debts were incurred which the bank claims the right to have paid out of the moneys in question. Indeed, while Leslie's evidence was explicit that no advance was made at the time the assignment was given, there was not a suggestion that any debt remains unpaid that had been incurred as early as July, 1910 — a suggestion which, as I have pointed out, is not easily to be reconciled with the inference to be drawn from Leslie's account of the course of business.

In point of fact that suggestion was not put forward, even in argument on behalf of the bank; and from the circumstances I have mentioned I think we are entitled to conclude that there is, in fact, no foundation for it.

But there is another ground upon which the appellant is entitled to succeed.

> Where one man induces another to alter his position by active misleading, or by silence, where there is by contract, usage of trade, or otherwise, a duty to speak, or in an equitable case, one may say, where the circumstances are such as to make it against conscience to be silent, his rights must be regulated by what he has himself brought about.

In these words Lord Blackburn (*Russell* v. *Watts* (1)), at p. 613) states a familiar principle of law; and in *Stronge* v. *Hawkes* (2), at p. 196, a great equity judge, Turner L.J., gives an illustration of the application of that principle to a particular class of cases in these words:—

> It has long been settled that where a party having a charge upon an estate, encourages or even permits another to advance money upon the security of the estate without giving notice of the charge, the party who has thus been encouraged or permitted to make the advance is entitled to priority over the party who has thus encouraged or permitted the advance to be made. The fact of the party having the charge standing by and permitting the further advance to be made, without giving notice of the charge, is alone sufficient to support this equity on the part of the subsequent incumbrancer.

The circumstances of this case already mentioned fairly bring it within both the general doctrine and the particular rule expounded in these passages. I assume for the purpose of applying this principle that when Garson and Fraser had their interview with Mr. Leslie and informed him of their arrangement, Garson was indebted for advances secured by the assigment which advances are still unpaid. If I am correct in my interpretation of that interview and of the subsequent conduct of Leslie and Morris, Leslie as a result of the interview was aware that Fraser had taken the Outlook contract off Garson's hands on the

(1) 10 App. Cas. 590. (2) 4 De Gex. M. & G. 186.

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understanding that the moneys earned were to be his. He knew that both Garson and Fraser assumed that Garson was entirely free to make that arrangement. He subsequently became aware that Fraser was proceeding with the performance of the contract on the faith of that arrangement. During the months of July, August, September, October and November while, to Leslie's knowledge, Fraser was devoting his time and his capital to the completion of the contract, he and Morris co-operated with Garson and Fraser in treating the moneys arising from the contract as Fraser's. It was only after the contract had been completed by Fraser's exertions and at his own cost and Garson was in his last illness that the claim to appropriate the reward of Fraser's work under the bank's assignment was, for the first time, suggested. It would be something of a reproach upon the law if in such circumstances such a claim could be allowed to prevail in a court of justice.

To summarize for the sake of clearness these rather lengthy reasons for disagreeing with the court below. The evidence, and notably that which discloses the conduct of the parties, conclusively justifies the finding of the trial judge that there was in April an arrangement between Garson and Fraser by which Fraser was to assume the building of the stations on the Outlook Branch in performance of Garson's contract with the Canadian Pacific Railway Co. and that by the same arrangement the moneys paid under that contract by the railway company to Garson were by him to be paid over to Fraser. It is, moreover, established that the bank had notice that an arrangement of this character had been made between Fraser and Garson at least as early as July. The proper infer-

ence from the facts in evidence (including the course of the bank in the conduct of its defence) is that no obligation from Garson to the bank which came into existence as early as July, and for which the assignment was to stand as security, is still unsatisfied. It follows that assuming the assignment of June to have been taken without notice of the appellant's rights and to have the effect of vesting in the bank the legal title to moneys (as soon as such moneys should be earned) which should become payable to Garson under the Outlook contract — still the bank having had notice of Fraser's rights before any debt was incurred for which it is now entitled to hold the assignment as security, cannot on well-known principles successfully assert any claim upon those moneys as against Fraser. Moreover, the conduct of the bank in not only standing by and permitting Fraser to proceed, but in effect encouraging Fraser to proceed with the work of performing the Outlook contract on the faith of his arrangement with Garson that he was to have as his own the proceeds of that contract when realized (without disclosing its own claim to retain those proceeds until after they had been earned by Fraser's exertions), disqualifies the bank on equally well-known principles as against Fraser from enforcing rights which otherwise might have been permitted to take effect.

ANGLIN and BRODEUR JJ. concurred with Duff J.

Appeal allowed with costs.

Solicitor for the appellant: *George A. Elliott.*

Solicitors for the respondents: *Aikins, Fullerton, Foley & McWilliams.*

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*Nov. 4.
*Nov. 26.

EDOUARD R. DUFRESNE (DEFENDANT) ..... APPELLANT;

AND

PIERRE DESFORGES (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Action—Public officer—Notice—Notary public—Principal and agent—Mandate—Pleadings—Practice—New objections on appeal—Case on appeal—Notes of reasons by judges—Findings of fact—Art. 88 C.P.Q.

If a defendant has not, in the courts below, taken exception to want of notice of action, as required by article 88 of the Code of Civil Procedure of Quebec, it is doubtful whether the objection can be urged on an appeal to the Supreme Court of Canada. *Devine* v. *Holloway* (14 Moo. P.C. 290) referred to.

Where the defendant has not been sued in an action for damages by reason of an act done in the exercise of a public function or duty, the provision of article 88 C.P.Q., as to notice of action against a public officer, has no application.

The Supreme Court of Canada ought not, in ordinary cases, to take into consideration the notes of reasons for judgments in the courts below which have not been delivered before the settling of the case on the appeal: *Mayhew* v. *Stone* (26 Can. S.C.R. 58) followed. In a proper case, however, when the non-delivery of such notes is satisfactorily accounted for, the court may permit them to be filed and made use of as part of the record on the appeal: *Canadian Fire Insurance Co.* v. *Robinson* (Cout. Dig. 1105) referred to.

The court refused to reverse the concurrent findings of fact by the courts below.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, which affirmed the judg-

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

ment of Demers J., in the Superior Court, District of Montreal, maintaining the respondent's action with costs.

The respondent, plaintiff, brought the action against the appellant, defendant, to recover $5,000, with interest, which, it was alleged, had been placed by him in the hands of the defendant, who was his notary, with instructions to invest the amount on loan secured by a second mortgage upon certain real estate in Montreal. It was charged that the defendant had not followed the instructions given by the plaintiff in regard to the security to be obtained, but that he had, without authorization, made new terms and that, in consequence, the money had been lost. No notice of action was given according to the provision of article 88 of the Code of Procedure of Quebec respecting suits against public officers. The effect of the defendant's pleadings and of his contentions in the courts below was that the plaintiff had been kept informed of all that transpired during the transaction of the business relating to the making of the loan and that he had acquiesced in all that had been done in the matter, and that, therefore, the loss of the money was not due to anything which he had done in the matter, but that it was the result of neglect and delay for which the plaintiff himself was responsible. The question of want of notice was not raised.

At the trial, Demers J. found that the defendant had not fulfilled his mandate, that he had acted contrary to explicit instructions of the plaintiff, and rendered judgment maintaining the plaintiff's action for the sum claimed with interest and costs. This judgment was affirmed, on appeal, by the Court of Review, Mr. Justice Tellier dissenting.

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Proceedings were commenced upon an appeal to the Supreme Court of Canada by the defendant and, on 19th June, 1912, an order was made by the Court of Review settling the contents of the "case" on the appeal, and the certified case, as settled, was filed in the office of the Supreme Court on the 11th September, 1912. Up to this latter date no notes of reasons for judgment had been delivered by Mr. Justice Tellier, but on the 20th of September, 1912, the learned judge delivered notes of his reasons for dissent from the judgment rendered in the Court of Review, and these notes were printed as an appendix to the case as filed and were deposited in the office of the Supreme Court on the 26th of October, 1912, during the session of the court at which the appeal was to come on for hearing.

Upon the appeal coming on for hearing before the court, Mr. Rinfret, of counsel for the respondent, moved the court to strike out from the record on the appeal the document purporting to contain the reasons of Mr. Justice Tellier on the ground that it had been irregularly filed after the appeal had been taken, that it did not form part of the record in the court below, and that it had the effect of prejudicing the respondent, who was not aware of the contents of the document. On behalf of the appellant, Aimé Geoffrion K.C. shewed cause, stating that similar reasons had been verbally delivered by Mr. Justice Tellier for his dissent at the time the judgment of the Court of Review had been rendered, but, owing to certain circumstances, that he had been unable to deliver the written notes until a later date.

The court referred to the case of *Mayhew* v. *Stone* (1), and *Canadian Fire Insurance Co.* v. *Robinson* (2),

(1) 26 Can. S.C.R. 58. (2) Cout. Dig. 1105.

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and expressed the opinion that the rule laid down in *Mayhew* v. *Stone*(1) was the correct one to apply in cases where reasons for judgment were delivered subsequent to the launching of the proceedings on an appeal to the Supreme Court of Canada, although there could be no objection to making use of reasons where their non-delivery was accounted for on the ground of illness, absence, etc.; that, by the statute and the rules, appeals were to be heard on the case as settled and that no additional material should be considered in ordinary cases. At the same time, the court did not preclude itself, in a proper case and upon a proper application, from receiving reasons for judgment which have been delivered by judges after the appeal has been taken. In the present case leave was granted to counsel for the appellant to make a subsequent application, supported by affidavits, etc., shewing the circumstances which, in the view of counsel, might justify the court in receiving the notes in question.

In the meantime the appeal was heard upon the merits.

Aimé Geoffrion K.C. and *Richard Beaudry* for the appellant. The contract of agency was not proved by the plaintiff; no mandate can result from the receipt of the cheque merely. Any instruction which may have been given as to the investment of the money was modified subsequently by conversations over the telephone; this parol evidence can be legally received under article 4585 of the Revised Statutes of Quebec, 1909, which has full and unrestricted application in

(1) 26 Can. S.C.R. 58.

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the circumstances of this case; it is, moreover, supported by a *commencement de preuve par écrit,* the letter from the plaintiff.

We also submit that the action ought to be dismissed because it was not preceded by the necessary notice of action required by article 88 of the Code of Civil Procedure; the appellant, being a notary public, and having been employed in this matter to act for the plaintiff as such, is a "public officer"; art. 4575, R.S.Q., 1909; the article 88, C.P.Q., gives him this protection. Although not pleaded it is a provision of which the court is obliged to take judicial notice in this case; on the face of the proceedings it appears that the defendant is charged with the responsibility, if any, for which it is sought to make him liable, in his capacity as the notary and professional adviser of the plaintiff. We rely upon the following authorities: *Lasnier* v. *Dozois*(1), *per* Lynch J. at pages 604-5; *Gervais* v. *Nadeau*(2), confirmed on appeal, and arts. 1065 and 1709, C.C. The action, in any event, is based on liability for damages; the plaintiff was bound to allege notice in his statement of claim and to prove such notice, and, having failed to do so, his action must fail.

Rinfret and *Genest,* for the respondent. As to the facts we have the findings of both courts below in our favour; these findings ought not to be reversed on appeal. The respondent has acknowledged the receipt of the plaintiff's letter instructing him in respect to the investment of the money; the proof has failed as to the alleged modification of the mandate; parol evidence is not admissible to contradict the terms of the

(1) Q.R. 15 S.C. 604. (2) 3 Que. P.R. 18.

letter and, moreover, the verbal evidence as to the alleged change has been denied and that denial accepted in favour of the plaintiff. We refer to Gouillard, no. 45; Fuzier-Herman, art. 1985, nos. 57, 59; Rolland de Villargues, Rep. du Notariat, no. 211, *vo.* "Responsabilité des Notaires"; *O'Malley* v. *Ryan*(1); *Brownlee* v. *Hyde*(2); Langelier, "Preuve," p. 246, *et seq.* The provisions of art. 4585, R.S.Q., 1909, can have no application in a case such as this; it is governed by arts. 1233 and 1234, C.C., which preclude parol testimony for an amount such as is in dispute in this case. See also Taylor on Evidence, vol. 2 (9 ed.), p. 742, par. 1132; Greenleaf, Evidence (16 ed.), vol. 1, pp. 404, 405; Phipson, Evidence (5 ed.), p. 536; Best, Evidence (11 ed.), p. 218; 8 Aubry & Rau, p. 320, note 2 to sec. 763; Pand. Fr. vol. 45, "Preuve," *nn.* 165, 424-430, 432, 448, 451, 454-456; *Gillchrist* v. *Lachaud* (3), confirmed in review; *West* v. *Fleck*(4); *Hamel* v. *Smith*(5); Laurent, vol. 19, *nn.* 558, 559, 564; *Moody* v. *Jones*(6).

No notice of action was necessary; the present action is not for damages by reason of any act done by defendant in the exercise of his functions as a notary, but for an omission to do what he was bound to do, as a simple mandatary: *Lachance* v. *Casault*(7); *Price* v. *Perceval*(8); *Jodoin* v. *Archambault*(9); *Chagnon* v. *Quesnel*(10); *Irvin* v. *Boston*(11). Notice is not necessary where the action is for breach of contract:

(1) Q.R. 21 S.C. 566.
(2) Q.R. 15 K.B. 221.
(3) 14 Q.L.R. 278.
(4) 15 L.C.R. 422.
(5) 17 Rev. de Jur. 490.
(6) 19 R.L. 516; 19 Can. S.C.R. 266.
(7) Q.R. 12 K.B. 179.
(8) Stu. K.B. 179.
(9) M.L.R. 3 Q.B. 1.
(10) 2 Que. P.R. 509.
(11) 2 L.C. Jur. 171.

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Davis v. *Curling*(1); *Fletcher* v. *Greenwell*(2); *Davies* v. *Mayor of Swansea*(3). This objection should have been raised by way of exception, or in the plea to the merits, and not for the first time before the Supreme Court: *Gale* v. *Bureau*(4); *Davey* v. *Warne*(5); *Richards* v. *Easto*(6); *Law* v. *Dodd*(7); *Bédard* v. *Corp. Comté de Québec*(8); *Kelly* v. *Montreal Street Railway Co.*(9); *Gauthier* v. *Municipalité de St. Louis*(10); *Sullivan* v. *Ville de Magog*(11); *Pageau* v. *Corp. St. Ambroise*(12); *Corp. de Douglas* v. *Maher*(13); *Legault* v. *Lee*(14); *Turner* v. *Corp. de St. Louis du Ha! Ha!*(15); *Laurin* v. *Corp. du Sault au Récollet*(16); *Boulay* v. *Saucier*(17); *Harrison* v. *Brega*(18); *Harold* v. *Corp. of Simcoe*(19).

In *Gervais* v. *Nadeau*(20) the defendant was sued in damages for a deed improperly drawn, against the law, and the question of notice had been raised in the plea.

THE CHIEF JUSTICE.—This is an appeal from a judgment in an action brought to recover the sum of five thousand dollars which the plaintiff, respondent here, says was given by him to the defendant, appellant here, to be applied to the purchase of a piece of property. The case turned in both courts below on the nature of the instructions subject to which the

(1) 8 Q.B. 286.
(2) 4 Dowl. 166.
(3) 8 Ex. 808.
(4) 44 Can. S.C.R. 305.
(5) 14 M. & W. 199.
(6) 15 M. & W. 244
(7) 1 Ex. 845, at p. 848.
(8) Q.R. 33 S.C. 188.
(9) Q.R. 13 S.C. 385.
(10) Q.R. 9 S.C. 453.
(11) Q.R. 18 S.C. 107.
(12) 10 Que. P.R. 208.
(13) 11 Q.L.R. 294.
(14) 26 L.C. Jur. 28.
(15) 16 Q.L.R. 260.
(16) 7 Legal News 318.
(17) 7 Que. P.R. 344.
(18) 20 U.C.Q.B. 324.
(19) 18 U.C.C.P. 9.
(20) 3 Que. P.R. 18.

money was deposited with the defendant. Both courts found on that issue of fact against the defendant, and he was condemned to refund the money.

Here, for the first time, the defendant raises the point that he being a notary public and, consequently, "a public officer," was by virtue of article 88 of the Code of Civil Procedure entitled to notice of this action, and that notice not having been given that the action must fail. It is doubtful whether such an objection, even if well founded, should be allowed to prevail here. *Devine* v. *Holloway*(1).

The complete answer to the objection, however, is that this is not an action in the form of an action for damages. It may be that it is difficult to find a distinction in substance between such an action as this and one simply for negligence; but the case has been treated throughout as an action *"en repetition"* pure and simple and we cannot change its nature here, even to allow the defendant to take advantage of this highly technical objection. Of course it was open to the plaintiff to sue for damages (art. 1709, C.C.), in which case he might have recovered a sum in excess of the amount now claimed. If he chose, however, to limit his recourse, without prejudice to the defendant, and to adopt an action in this form — how can this right be denied him ?

It is further to be observed that the defendant in his plea to the action takes pains to deny that he acted as a notary public in this transaction.

For these reasons I am of opinion that the objection of want of notice cannot be allowed to prevail.

On the merits I can see no reason to reverse the concurrent judgments of the courts below. The money

(1) 14 Moo. P.C. 290.

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in question was advanced in the form of a bank cheque made by the plaintiff to the order of the defendant, and it is found as a fact that the cheque was given with definite instructions as to the conditions under which it was to be used and that the defendant accepted it subject to those instructions. He subsequently parted with the cheque in violation of those instructions and without the most elementary regard for the interest of his principal, to whom the money was, in consequence, lost. On these facts also we have the concurrent findings of the two courts below. How in these circumstances can the appellant hope to escape liability ?

I would dismiss the appeal with costs.

DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I think this appeal should be dismissed with costs. And, as to the proposed defence of want of notice of action, I think it cannot be permitted to raise such a defence at this stage for the first time.

Besides, even if a notary public, as such, is entitled to a notice of action (as to which I say nothing) the facts in this case do not seem such as to have enabled the appellant to avail himself of it if he had pleaded it.

DUFF J.—I concur in dismissing the appeal. The highly technical objection based upon article 88 of the Code of Civil Procedure ought not, in my opinion, to be entertained. The objection was not taken in the pleadings nor at the trial nor before the Court of King's Bench. In his defence the appellant alleged that in the transactions out of which the respondent's

claim arose he was not acting in his capacity as a notary public. There can be no risk of injustice in refusing to permit it to be raised now. In these circumstances I think the objection based upon the absence of notice of action, if it ever had any substance, comes too late.

ANGLIN and BRODEUR JJ. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaudry & Beaudry.*
Solicitors for the respondent: *Perron, Taschereau, Rinfret & Genest.*

1910

*May 10, 11.
*June 15.

SMITH v. SUGARMAN AND OTHERS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Assignment—Insolvency—Preference—Trust—Statute of Frauds.

APPEAL from the judgment of the Supreme Court of the Province of Alberta (1), reversing the judgment of Beck J., at the trial (2), and dismissing the plaintiff's (appellant's) action with costs.

On the appeal by the plaintiff, the Supreme Court of Canada, after hearing counsel on behalf of both parties, reserved judgment and, on a subsequent day, the appeal was allowed and the judgment of the trial judge was restored, with costs in the Supreme Court of Canada and in the court appealed from.

Appeal allowed with costs.

C. A. Grant for the appellant.
Wallace Nesbitt K.C. for the respondents.

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

(1) 3 Alta. L.R. 108. (2) 2 Alta. L.R. 442.

RENTON v. GALLAGHER.

1910

*Oct. 25, 26.
*Nov. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Malicious prosecution—Probable cause—Evidence—Onus—Honest belief—Practice—Questions for jury.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), ordering that the judgment for the plaintiff, appellant, entered by Cameron J., at the trial, upon the verdict of the jury, should be set aside and that a nonsuit should be entered.

On the appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent day, the appeal was dismissed with costs, Idington J. dissenting.

Appeal dismissed with costs.

Trueman for the appellant.
Phillipps for the respondent.

[NOTE.—On the 15th of May, 1911, the Judicial Committee of the Privy Council refused leave for an appeal in *formâ pauperis;* 44 Can. S.C.R. ix.]

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

(1) 19 Man. R. 478.

1910

*Oct. 4.

RHÉAUME v. STUART.

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

Appeal—Jurisdiction—Interim injunction—Interlocutory order.

MOTION to quash an appeal instituted from the judgment of the Court of King's Bench, appeal side (1), dismissing an appeal from the judgment of the Superior Court, District of Montreal, granting an application by the plaintiff, respondent, for an interim injunction.

On motion by counsel for the respondent, counsel for the appellant admitted that the judgment appealed from was not a final judgment. The appeal was, therefore, quashed with costs, for want of jurisdiction.

Appeal quashed with costs.

Chauvin for the motion.
Beaudin K.C. contra.

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

(1) Q.R. 20 K.B. 411.

BRITISH COLUMBIA ELECTRIC RAILWAY CO. v. DYNES.

1910

*Oct. 10.
*Nov. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Operation of tramway—Passenger riding on platform—Dangerous arrangement of car—Evidence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Irving J., at the trial, setting aside the verdict of the jury and dismissing the plaintiff's action with costs.

The action was brought by the widow of a person who lost his life in consequence of an accident which occurred while he was a passenger on one of the defendant company's tramcars. The evidence shewed that deceased was riding on the front platform of the car which was, at the time of the accident, running at the rate of three or four miles an hour; that, on approaching a switch, the car jolted and deceased was thrown off the platform underneath the wheels; that the doors of the car were open and were not protected by bars or other devices to secure the protection of passengers. The jury returned a verdict in favour of the plaintiff and for $3,500 damages.

The trial judge set this verdict aside on the ground that no actionable negligence on the part of the company had been proved, and entered judgment dismissing the action.

By the judgment appealed from this judgment was reversed on the ground that there was some evidence

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

(1) 15 B.C. Rep. 429.

1910

B. C. ELECTRIC RY. CO. v. DYNES.

before the jury to support their finding of negligence against the company and also their finding against contributory negligence.

After hearing counsel on behalf of both parties on the appeal, the Supreme Court of Canada reserved judgment, and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Lafleur K.C. for the appellants.
Wallace Nesbitt K.C. for the respondent.

BECK v. CANADIAN NORTHERN RAILWAY CO.

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ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

*Oct. 24.
*Nov. 21.

Negligence—Operation of railway—Protection of passenger—Evidence —Mere conjecture.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Harvey J., at the trial, dismissing the plaintiff's action with costs.

On the appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent day, made an order that a new trial should be had, the Chief Justice and Idington J. dissenting.

New trial ordered.

Wallace Nesbitt K.C. for the appellant.
Chrysler K.C. for the respondents.

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

(1) 2 Alta. L.R. 549.

1910

*Oct. 4, 5, 6.
*Dec. 9.

CANADIAN PACIFIC LUMBER CO. v. PATERSON TIMBER CO. *et al.*

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Right to assign—Contracting firm becoming incorporated company—Novation—Breach of contract—Damages.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), dismissing an appeal, Irving J. dissenting, from the judgment of Clement J., at the trial, by which the plaintiffs' (respondents') action for damages for breach of contract was maintained with costs and the counterclaim of the defendants (now appellants) was dismissed with costs.

After hearing counsel on behalf of both parties on the appeal to the Supreme Court of Canada, judgment was reserved, and, on a subsequent day, the appeal was dismissed with costs.

Appeal dismissed with costs.

Sir C. H. Tupper K.C. for the appellants.
Craig for the respondents.

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

(1) 15 B.C. Rep. 225.

MACFARLANE v. DAVIS.

1910

*Oct. 21.
*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale of land—Deceit—Misrepresentation—Honest belief—Pleading—Amendment—Adding new cause of action.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), reversing the judgment of Johnstone J., at the trial, Newlands J. dissenting, and maintaining the plaintiff's (respondent's) action with costs.

On the appeal of Macfarlane, one of the defendants, to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent day, the appeal was allowed with costs, Idington J. dissenting.

Appeal allowed with costs.

Holman K.C. and *A. J. Kidd* for the appellant.
Chrysler K.C. for the respondent.

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

(1) 3 Sask. L.R. 446, *sub nom. Davis* v. *Burt.*

1910

GÉNÉREUX *et al.* v. BRUNEAU *et al.*

*Nov. 4, 7, 8.
*Dec. 9.

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

Will—Extension of powers of executors—Universal legatee—Special legacy—Appeal—Jurisdiction—Amount in controversy—Order to take accounts—Interlocutory judgment—Costs.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), by which, Archambeault and Carroll JJ. dissenting, the judgment of Charbonneau J., in the Superior Court, District of Montreal, was varied.

On the 15th of February, 1910, a motion was made on behalf of the respondents to quash the appeal for want of jurisdiction on the grounds:—that the judgment appealed from merely ordered that there should be a taking of accounts; that there was in controversy simply a sum of money which could not be shewn to amount to or exceed the sum of $2,000, being merely a dispute in regard to collection of the rents of buildings by the testamentary executors (respondents) which, at the time of the action, were less than $800; that no title to lands or future rights could be affected, and that the judgment appealed from was interlocutory only.

The hearing of the motion was orderel to stand over until the hearing of the appeal upon the merits, and, on the appeal coming on for hearing, during the following session of the Supreme Court of Canada, the motion was renewed.

After hearing counsel on behalf of both parties, the court decided that it had no jurisdiction to hear

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

(1) Q.R. 19 K.B. 507.

the appeal and an order was made quashing the appeal with costs to be taxed as if the appeal had been dismissed on the merits.

1910

GÉNÉREUX v. BRUNEAU.

Appeal quashed with costs.

Beaudin K.C. and *Mignault K.C.* for the appellants.
Bastien K.C. and *Duclos K.C.* for the respondents.

1911

*May 2, 3.
*May 8.

KEISER v. KALMET.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Appeal—Practice—Findings by trial judge.

APPEAL from the judgment of the Supreme Court of Alberta (1), affirming the judgment of Harvey J., at the trial, maintaining the plaintiff's action with costs, Beck J. dissenting.

The Supreme Court of Canada, after hearing counsel on behalf of both parties, reserved judgment, and, on a subsequent day, it was ordered that a new trial should be had, all costs up to date to abide the result.

New trial ordered.

Walsh K.C. for the appellant.

T. Lewis K.C. for the respondent.

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

(1) 3 Alta. L.R. 26.

CANADIAN PACIFIC RAILWAY CO. v. WOOD.

1911

*Feb. 21.
*May 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Operation of railway—Condition of yard—"Lay-out" of concourse—Switching—"Workmen's Compensation for Injuries Act," R.S.M. 1902, c. 178—Contributory negligence—Evidence—Volenti non fit injuria—Non-suit—New trial.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment at the trial and directing that a new trial should be had.

At the trial before Perdue J. with a jury, an order of non-suit was refused by the plaintiff and, thereupon, the jury were directed to find a verdict for the defendants, which was done and judgment entered accordingly. On an appeal by the plaintiff this judgment was set aside, on the ground that there was some evidence which should have been left to the jury, and a new trial was ordered.

The Supreme Court of Canada, after hearing counsel on behalf of both parties, reserved judgment, and, on a subsequent day, the appeal was allowed with costs, Idington and Duff JJ. dissenting, and the judgment entered at the trial was restored.

Appeal allowed with costs.

Wallace Nesbitt K.C. and *Curle* for the appellants.
M. G. Macneil for the respondent.

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

[NOTE.—The Judicial Committee of the Privy Council refused leave for an appeal in *formâ pauperis*, 20th March, 1912; 45 Can. S.C.R. vii.]

(1) 20 Man. R. 92.

1911

Oct. 11.

JUKES v. FISHER.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Bills and notes—Mortgage—Collateral security—Recovery on mortgage—New evidence discovered after reference to take accounts—Appeal to Supreme Court—Lapse of time.

APPEAL from the judgment of the Court of Appeal for Manitoba, affirming the judgment at the trial, Perdue J. dissenting, by which the defendant was declared liable for some part of the plaintiff's claim and a reference was made to the master to take accounts.

The action was to recover on a covenant in a mortgage for the payment of money and interest alleged to be due to the plaintiff under the mortgage which purported to secure $2,800 with interest. As to the mortgage the question involved was whether or not the plaintiff could claim re-payment of $1,000 paid, some time after the mortgage was executed, to retire a promissory note, made by the defendant and indorsed by the plaintiff, and which was in part renewal of a similar note which had been so made and indorsed prior to the mortgage. The defence was that the note was given for the purpose of raising funds for the use of a partnership which the trial judge found existed between the plaintiff and the defendant. The defendant contended that not only was the mortgage given to secure the note, but also that he was not personally liable to re-pay the $1,000 to the plaintiff. By the plaintiff it was contended that the mortgage was given, amongst other things, to secure him against liability on the note in question.

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

1911

JUKES v. FISHER.

The trial judge held that the note had been indorsed by the plaintiff for the accommodation of the defendant and that the mortgage had been given to secure the plaintiff in respect of the note, and he directed a reference to the master to take accounts. This decision was affirmed by the Court of Appeal, Perdue J. dissenting.

During the taking of accounts the defendant discovered a statutory declaration by the plaintiff to the effect, amongst other things, that the full amount of the mortgage had been advanced by him to the defendant and that it had been taken for the purpose of securing the advance so made and not as collateral security. In these circumstances the court appealed from, in pursuance of section 71 of the "Supreme Court Act," granted special leave for the present appeal, although it had not been brought within the time prescribed by the Act(1).

After hearing counsel on behalf of the appellant, and without calling upon counsel for the respondent for any argument, the appeal was dismissed with costs, the court not being satisfied that the judgment appealed from was so clearly wrong that it should be reversed.

Appeal dismissed with costs

Hugh Phillips for the appellant.
J. B. Coyne for the respondent.

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(1) 20 Man. R. 331.

1912
*Oct. 18.
1913
*Feb. 18.

THE NOVA SCOTIA CAR WORKS (DEFENDANTS) ..... APPELLANTS;

AND

THE CITY OF HALIFAX (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Exemption of industry from taxation—Special assessment—Local improvement.

By agreement with the city of Halifax, sanctioned by an Act of the legislature, a company doing business in the city was granted, for a certain period, "a total exemption from taxation" except for water rates.

Held, reversing the judgment of the Supreme Court of Nova Scotia (45 N.S. Rep. 552) Fitzpatrick C.J. dissenting, that a special assessment for a proportionate part of the cost of a public sewer, claimed to be chargeable against the lands of the company was "taxation" within the meaning of said agreement and the company was exempt from liability therefor.

APPEAL from a decision of the Supreme Court of Nova Scotia(1) in favour of the respondent on a stated case.

The case stated for the opinion of the Supreme Court of Nova Scotia was as follows:—

1. The plaintiff is the City of Halifax, a corporation under the Halifax City Charter.

2. The Silliker Car Company, hereinafter called the "Silliker Company," was duly incorporated under

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

(1) 45 N.S. Rep. 552.

the provisions of the "Nova Scotia Companies' Act" on the 4th day of April, A.D. 1907.

3. Section 4 of chapter 70 of the Acts of 1907, entitled "An Act to authorize the City of Halifax to assist the Silliker Car Company, Limited," is as follows:—

"The exemption from taxation of the property of the said company set out in the said Memorandum of Agreement is hereby confirmed."

4. The Memorandum of Agreement, referred to in said section 4 of chapter 70 of the Acts of 1907, was printed as a schedule to said Act, and clause I. thereof is as follows:—

"I. The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block, but may be divided by a street, and not to exceed twenty acres in all. In addition to these lands the company may hold, for the purposes of its business, and upon the same terms, a lot of land on the water front north of the Intercolonial Round House, Richmond, and not exceeding five acres, provided no tolls or wharfage are charged in connection therewith. At the expiry of the ten years the city agrees that the total yearly value for assessment on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand ($50,000) dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company, which shall be charged at the minimum rate charged other manufacturing concerns."

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NOVA SCOTIA CAR WORKS v. CITY OF HALIFAX.

5. The lands formerly owned by the Silliker Company and used exclusively for manufacturing purposes are practically in one block of less than twenty acres in extent and are situate in the northwest suburbs of the City of Halifax, bounded generally on the south by North street, on the west by Windsor street, on the north by Almon street and on the east in part by Clifton street and in part by the rear line of lots fronting on said Clifton street, and were acquired by and conveyed to the Silliker Company on the ninth day of May, A.D. 1907.

6. The defendant, the Nova Scotia Car Works, Limited, is a body corporate duly incorporated in February, 1911, under the provisions of the said "Nova Scotia Companies Act" with the object, among others, of acquiring and undertaking the whole or any part of the business, good will, property, franchises, rights, privileges, assets and liabilities of the said Silliker Company.

7. The defendant purchased and acquired all the property of every kind, real, personal and mixed, of the Silliker Company and assumed its liabilities, and the real property of the Silliker Company, including the said lands used exclusively for manufacturing purposes, mentioned and described in paragraph five hereof, were on the twenty-fifth day of April, A.D. 1911, conveyed to and the title thereof vested in the defendant.

8. The said lands since their acquisition by the Silliker Company have always been and still are used continuously and exclusively for manufacturing purposes either by the Silliker Company or the defendant.

9. In 1911 an Act, chapter 41 of the Acts of that year, was passed, dealing with the exemptions from

taxation of the Silliker Company and the defendant. The said Act is to be deemed a part of this case and incorporated therewith.

10. In the year 1908 the City of Halifax constructed public sewers along North, Windsor and Almon streets, opposite the lands mentioned and described in paragraph five hereof, and in 1910 and 1911 the City of Halifax constructed a public sewer along Clifton street opposite the said lands.

11. The proportion of the cost of construction of such sewers along North, Windsor and Almon streets claimed by the plaintiff to be chargeable, by and under the provisions of the Halifax City Charter, against said lands mentioned and described in said paragraph five hereof is two thousand and sixty-seven dollars and thirty-four cents ($2,067.34); and the proportion of the cost of construction of such sewer along Clifton street claimed by the plaintiff to be chargeable as aforesaid against the said lands is three hundred and twenty dollars ($320); and making in all the sum of $2,387.34.

12. The sewers on North, Windsor and Almon streets were completed during the year 1908, and the sewer on Clifton street was completed in 1910, the plans of North, Windsor and Almon streets with the list of owners of each property fronting on said streets were duly prepared and filed by the city engineer of the City of Halifax in his office in accordance with the provisions of section 602 of the Halifax City Charter on the 26th day of March, A.D. 1908, and the plans of said Clifton street together with the list of the owners thereon were duly filed by said city engineer in his office on the 30th day of March, A.D. 1911.

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13. The plaintiff claims that the said proportions of the cost of constructing the said sewers constitute a lien on the said lands of the defendant, under and by virtue of the provisions of the Halifax City Charter, and thereby enforceable against the said lands and the defendant company.

14. The defendant claims that the said lands are exempt from liability from such lien by reason of the said Acts, chapter 70 of 1907 and chapter 41 of 1911.

15. The question for the court is, does the exemption claimed by the defendant apply in respect to the sewers herein referred to ?

16. If the court is of the opinion that the lien exists in respect to the sewers herein referred to, the plaintiff is to be at liberty to enter judgment against the defendant for the sum of two thousand three hundred and eighty-seven dollars and thirty-four cents ($2,387.34) with costs Such liberty, however, not to affect any other remedy which the plaintiff has or may have for enforcing such lien. If the court answers the said question in the negative, the plaintiff shall pay defendant the costs of this action, and defendant may enter judgment therefor when taxed.

This case is stated and agreed upon pursuant to Order 33, Rule 6, of the "Nova Scotia Judicature Act."

The judgment of the Supreme Court of Nova Scotia on the case so stated was that the assessment for the company's proportion of the cost of the sewer was not "taxation" from which the latter was exempt under the agreement. The company appealed to the Supreme Court of Canada.

E. P. Allison for the appellants. The respondent and the court below rely on the American decisions

holding that exemption from taxation does not include special assessment. These decisions do not apply to conditions in Canada. They are all based on the constitutional limitation in the 14th amendment and the provision in State constitutions that all taxation must be equal and uniform. See *Davidson* v. *City of New Orleans*(1); *Illinois Central Railroad Co.* v. *City of Decatur*(2); *Boston Seamen's Friend Soc.* v. *City of Boston*(3).

The decisions in *Chicago Great Western Railway Co.* v. *Kansas City North Western Railroad Co.* (4) shews the interpretation to be given to the word "taxation" in the absence of statutory or constitutional limitations.

Every contribution demanded by the State is a tax. *Per* Strong J. in *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal*(5). And the decision of the court in that case should be decisive of this appeal.

F. H. Bell K.C. for the respondent cites *Armstrong* v. *Auger*(6); *Illinois Central Railroad Co.* v. *City of Decatur*(2); *Boston Asylum, etc.* v. *Street Commissioners of the City of Boston*(7).

THE CHIEF JUSTICE (dissenting).—Here is the apparently simple question in this case: Is the appellant, the Nova Scotia Car Co., exempt from liability to contribute to the cost of constructing certain sewers built by the respondent, the Corporation of the City of Halifax, under the provisions of the city charter?

(1) 96 U.S.R. 97.
(2) 147 U.S.R. 190.
(3) 116 Mass. 181.
(4) 75 Kan. 167; 12 Am. & Eng. Anntd. Cas. 588.
(5) 16 Can. S.C.R. 399.
(6) 21 O.R. 98.
(7) 180 Mass. 485.

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For brevity I will refer to the appellant as the company, and to the respondent as the corporation.

By a Memorandum of Agreement made with the corporation and confirmed by the legislature, the Silliker Car Company was promised a total exemption from taxation for ten years on its buildings, plant and stock. The company has since (1911) acquired the property, privileges and franchises including the right to exemption from taxation of the Silliker Car Company and, by Act of the legislature (chapter 41 of the Acts of 1911) this agreement is also approved of. The sewers were completed in 1908-1910, and except for the agreement, the liability of the company for its share of the cost of their construction is admitted.

The exemption clause reads as follows:—

> The city will grant the company a *total exemption* from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block, but may be divided by a street, and not to exceed twenty acres in all. In addition to these lands the company may hold, for the purposes of its business, and upon the same terms, a lot of land on the water front north of the Intercolonial Round House, Richmond, and not exceeding five acres, provided no tolls or wharfage are charged in connection therewith. At the expiry of the ten years the city agrees that the total yearly value for the assessments on such lands, buildings, plant and stock shall, for a further period of ten years, not exceed fifty thousand ($50,000) dollars, the foregoing exemption not to apply to the ordinary water rate for fire protection, nor to the rate for water used by the company, which shall be charged at the minimum rate charged other manufacturing concerns.

After some general provisions authorizing the construction and maintenance of sewers, the city charter prescribes the liability of owners of property adjoining them. The important section is No. 600, which is in these words:—

(1) Whenever any public sewer is built in any street every owner of any real property on either side of the street, fronting on such sewer in the manner provided in the next succeeding section, *shall be liable to pay to the city towards the construction of such sewer,* the sum of one dollar and twenty-five cents for each lineal foot of his property so fronting.

(2) The remainder of the cost of such construction *shall be borne by the city.*

Section 605 defines what properties shall be considered as fronting on a sewer and liable to contribute to its cost.

Sections 602 and 603 provide for a filing by the city engineer on the completion of the sewer of a plan of the properties liable, which is made conclusive evidence of

the liability of every person named therein in respect to the property of which he is therein stated to be the owner,

and which amount is constituted a lien. This liability and lien may be

collected and enforced in the same manner and with the like remedies as by the charter are provided in respect to the rates and taxes of the city.

Finally section 605 enacts that the city collector shall retain from the proceeds of the sale of any property *for rates and taxes* the amount due in respect to such land for the construction of any *public sewer or private drain.*

The language of these sections would appear to differentiate clearly between municipal rates and taxes for which the general body of the ratepayers is liable, and the obligation to contribute to the cost of sewers and private drains imposed by the legislature on those whose property is specially benefited. And there lies, in my opinion, the crux of this case. Can that distinction be successfully made, and if it exists, what is the effect of it on the claim to exemption ?

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The sewer in question was, no doubt, like all sewers in a city, to some extent a public necessity as well as a private advantage to the owners of property fronting on it, and, therefore, the cost was distributed by section 600 of the charter between the general body of ratepayers and those immediately benefited.

In so far as the cost of construction bears upon the general body of the taxpayers, because the sewers meet a public necessity, one might say that the company would be exempt; — it is unnecessary, however, to decide that now, — but there is no reason to assume that it was the intention, notwithstanding section 362 referred to later, to impose on the general body of ratepayers that portion of the cost which represents the contribution due by the frontagers on the assumption presumably that their property is increased in value by the construction of the sewer to an amount at least equal to the sum they are required to pay.

I fail to see — and I say it with all deference — how it is possible to hold that the liability imposed by the legislature on the adjoining owner to pay $1.25 for each lineal foot of his property which fronts on the sewer can be called a tax within the meaning of that word in the exemption clause. It is, of course, a burden imposed by the legislative power upon property, to raise money for a purpose public in one aspect, but private in so far as it specially benefits the property of those called upon to contribute, and in so far as it effects that private purpose, can it be said to be a tax ? The obligation to pay does not arise under a city by-law or ordinance and there is no rating or assessment. To "assess" means to consider and determine the whole amount necessary to be raised by rate (Lord Esher, in *Mogg* v. *Clark*(1)). There is

(1) 16 Q.B.D. 79, at p. 82.

not even ratability dependent upon the extent of the benefit derived by the property. If it fronts on the sewer under the terms of section 601, the liability is absolute. In that view, and bearing in mind that taxation is the rule, and exemption the exception, can it be fairly said that, when the agreement authorizing the city to give the company total exemption from taxation for ten years was approved of by the legislature, it was intended that such exemption would include this special contribution to the city towards the construction of the sewer? Such a contention is so inequitable that it must be irresistible to be accepted. Where the legislature exempts any description of property from contributing to the local requirements, it is simply increasing the taxation on the other ratepayers, and such an intention is not to be lightly assumed. The provision in section 362(3) of the city charter that nothing contained in the charter itself shall be construed "to exempt any company, firm or individual from liability for paying any street enlarging, any sidewalk, constructing any sewer, or other betterment" cannot be easily conciliated with any such intention.

Further, it must be now considered as established that nothing but an express legislative exemption from rates can authorize that exemption. The exemption must be expressed, none can be implied, and if there be any doubt that interpretation will be adopted which least tends to impose unequal public burthens. (2 M. & G. 134-165; 11 East 675-785.) To repeat myself, I cannot find in the agreement an expressed intention on the part of the corporation to exempt the company from the special contribution imposed by the legislature on all frontagers as well as from the burden of ordinary municipal taxation.

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It was argued here that the proviso in relation to the fire protection rate and the rate for water used by the company is in the nature of an exemption and excludes all other exceptions or impositions of a similar nature from the exemption. I think the proviso was inserted probably *ex majori cautelâ* under the idea that the provisions of the Act might possibly otherwise include the subject-matter of the proviso. As pointed out in respondent's factum there are, in addition, substantial reasons why the proviso was usefully inserted and full effect can be given to it without stretching it in the extraordinary manner contended for. The water rates of the City of Halifax are made up of two distinct parts. There is first a fire protection rate, imposed upon all real property in the city, occupied or unoccupied, and rated upon the assessed values, and, therefore, in form at least analogous to the general rates and taxes, and is dealt with in the part of the charter dealing with taxation, and it was only a reasonable measure of precaution to provide that these should not be included in the exception. There is also the consumption rate, now based, in the case of manufacturing concerns, entirely on the consumption as shewn by meters. These rates vary in amount, and the second part of the saving clause is really an agreement on the part of the city, in addition to the exemption from taxation, to give the company the benefit of its minimum rates. The exception in the agreement of the ordinary water rate for fire protection and of the rate for water used by the company confirms me in the conviction that the exemption was limited to rates imposed for the general purposes of the city and does not include such charges as are incurred for some special service given for the particular benefit of the individual ratepayer.

That exemption from taxation does not include betterment charges, has been definitively decided by the Supreme Court of the United States in two very carefully considered judgments, in both of which it was held that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments: *Illinois Central Railroad Co.* v. *City of Decatur*(1); *Ford* v. *Delta and Pine Land Co.*(2).

These cases go much further than it is necessary to go in this case. Here there is neither an ordinary tax nor a special assessment. These decisions are not, it is quite true, authorities in our courts, but as Lord Herschell said, in *Gas Float Whitton* (No. 2), (1897) (3):—

> The opinions and reasoning of the learned judges of courts in the United States have always been regarded with respectful consideration and have often afforded valuable assistance.

I distinguish this case from *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal*(4), upon which so much reliance was placed here. The exemption in that case, as Strong J. said, was made to turn on the single point whether the assessment or charge in respect of a contribution to the drain was or was not "a municipal assessment," and he held that the Seminary was undoubtedly assessed by the city in respect of the contribution and, therefore, came within the terms of the exemption enactment. In that case the by-law provides that the cost of the sewer is to be borne and paid by the owners of real estate on each side of the street *by means of a special assessment to be made and*

(1) 147 U.S.R. 190.
(2) 164 U.S.R. 662, at p. 670.
(3) 66 L.J. Ad. 102.
(4) 16 Can. S.C.R. 399.

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levied upon the owners of real estate, and it was to cover that *special assessment* that the suit was brought. No reference is made to the point on which this case was decided below, namely, that the assessment was not imposed for the general purposes of the city, but for one particular purpose only, except possibly by Fournier, J., who says, in *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal*(1) :—

> La distinction que fait l'intimée entre les taxes ordinaires et annuelles aurait pu être soutenable en vertu de la sec. 3 de l'acte 38 Vict. — où ces expressions paraissent avoir été ajoutées dans le but de limiter les effets d'exemptions. Les *cotisations spéciales* pour fins purement locales pourraient être distinguées *des taxes ordinaires et annuelles*, si la question était soulevée ici à propos d'institutions de charité mentionnées dans la sec. 3, et si elle devait être décidée d'après cette loi. La sec. 26 qui doit servir de règle pour la décision de cette question ne fait aucune distinction quelconque entre les taxes ou spéciales ou générales, elle se sert dans son sens le plus large des mots cotisations municipales, en ajoutant quelque soit l'acte ou charte en vertu duquel elles soient imposées. Il me semble qu'il est tout à fait impossible de trouver dans ces expressions la possibilité de faire la distinction que l'intimée essaie de faire prévaloir. Les termes employés sont d'une généralité si complete et si absolue qu'il n'y a pas à se méprendre sur leur signification — "toutes cotisations municipales" — comprends toutes cotisations municipales quelqu'en soient la nature.

That judgment is not an authority on the point raised here.

It is worth mention that the Chief Justice, who was with the majority in *Wylie* v. *City of Montreal* (2), dissented in this case.

As to the effect of the remarks of the Privy Council on refusing leave to appeal, I trust I may be permitted to call attention to the following points:—

The court was evidently speaking only with reference to the Quebec statutes and their Lordships did not even refer to the provisions of the Montreal char-

(1) 16 Can. S.C.R. 399, at p. 406. (2) 12 Can. S.C.R. 384.

ter which they expressly state had not been laid before them. Consequently they were apparently under the impression that the sewer charges were rates in the same way as the yearly rates and taxes, and were described as rates or taxes, and that the only distinction between them and the ordinary taxes was that the former were local in application and the latter general. A case such as the present was apparently not in their minds, and the English system of municipal taxation is so different from that which prevails in the United States and Canada that such a case as this would not naturally present itself to them. Further, the reasons given in refusing leave to appeal are not equivalent to a judgment on the main question but only reasons why it was not so abundantly clear that the judgment below was so wrong as to induce the court to allow a further appeal. This is particularly clear from the last paragraph of the judgment in which their Lordships expressly leave open, and almost invite, a direct appeal on the question involved, which they would hardly have done if they had intended their remarks to indicate a definite opinion. Since the Montreal case this question has been much discussed in the United States. It is most probable that the Privy Council would not to-day wish its observations made on refusing leave to appeal to be viewed as a direct disagreement with the unanimous judgment of the Supreme Court of the United States reaffirmed on further consideration and concurred in by the practically unanimous judgment of the State courts, especially on a matter with which the American courts have such ample experience, and the English none.

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Idington J.

IDINGTON J.—This appeal turns upon the interpretation of a sentence in a contract between the parties concerned, which reads as follows:—

1. The city will grant the company a total exemption from taxation for ten years on its buildings, plant and stock, and on the land on which its buildings used for manufacturing purposes are situated, or immediately connected with the same, and used exclusively for the purposes of its business, such lands to be practically in one block, but may be divided by a street, and not to exceed twenty acres in all.

This was confirmed by the legislature enacting thus:—

4. The exemption from taxation of the property of the said company set out in the Memorandum of Agreement is hereby confirmed.

A tax is attempted to be imposed notwithstanding this comprehensive language upon appellant and its lands thus exempted to enforce a contribution in aid of the construction of a sewer.

It is attempted to be supported by references to a line of American authorities which cannot bind us. These authorities are the result partly of a development of constitutional limitations relative to taxation and partly of other causes unnecessary to dwell upon, and hence possess no weight here.

Then, again, it is urged that the contract must be limited by the use of the word "taxation" in the respondent's charter.

Even if the charter is to be taken as a guide I see no justification therein for the perversion of such express language as quoted above. Besides it would be slightly inconvenient for the people in the rest of Canada, where similar contracts are very numerous, to have a declaration of this court that such plain ordinary language in a contract for exemption from taxation is to be read in light of what the respondent's charter contains or any other charter might contain.

If the respondent had desired such or any other limitation it should have expressed it in the contract.

Indeed, it has expressly made exception therein relative to water rates for fire protection and rates for water used by the company and shewn thereby what limitations it desired to have inserted.

The former like levies for sewer construction is by respondent's charter made a local rate affecting properties within a certain distance from water-pipe lines, and the latter though in truth supposed to be for a service and thus probably distinguishable from the ordinary notion of a tax is yet made collectable as if a tax or rate.

So carefully was the contract framed in these regards that one would have supposed anything else having the like semblance to taxation should, if desired, have been provided against.

The language used is plain and so clear and comprehensive and given by the statute such effect that it thereby overrides anything in the city charter, which ingenuity might suggest as in conflict with the right appellant asserts.

The charter itself has express provision that specific exemptions made therein are not to extend to taxes of this kind.

And if the aldermen, when they came to frame a contract with strangers, knew the terms of the charter so well as counsel seeks to persuade us they must have known them, I submit, they would have followed the example in that instrument and put a like provision in this contract; if in truth such was their purpose, which I gravely doubt. It is more probable that sewers were not expected by these staid gentlemen to come into fashion for ten years in the district chosen for the factory site in question.

The appeal should be allowed with costs here and

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in the court below and judgment be entered accordingly pursuant to the terms of the stated case.

DUFF J.—By an agreement entered into between the appellant company and the respondent corporation it was provided that the company should enjoy "a total exemption from taxation" in respect of certain lands, for a specified period, and it was further stipulated that this exemption was "not to apply to the ordinary water rate for fire protection nor to the rate for water used by the company," and this agreement was confirmed by an Act of the Legislature of Nova Scotia. In the year 1908 the corporation constructed a public sewer along Clifton street opposite the lands which were the subject of the agreement. By section 600 of the charter of the corporation it is provided that

> whenever a public sewer is constructed in any street in the city owners of real property fronting on such sewer are liable to pay to the corporation towards such construction the sum of $1.25 for each foot of such property.

By another provision of the charter the payment of this sum is made a charge upon such property. The Supreme Court of Nova Scotia has held that this impost is not a tax within the contemplation of the agreement and consequently that the "total exemption from taxation" provided for thereby does not relieve the appellant company from liability to pay it, and the corporation appeals. With great respect I am unable to agree with the opinion of the court below. The ground upon which the judgment appears to proceed is this: The payment exacted by section 600 of the corporation's charter is, it is said, in the nature of a contribution for services done by the corporation in constructing a work which constitutes an improvement or better-

ment in respect of the property charged with the payment; and this sort of contribution, it is said, is not within the purview of the agreement. I do not think there is any principle upon which the plain language of the agreement can be thus restricted. It was not, I think, seriously argued that the contribution required by section 600 is not a "tax" within the ordinary meaning of the word. On that point at all events it appears to me that the judgment of Mr. Justice Strong in *Ecclésiastiques de St. Sulpice* v. *City of Montréal*(1), and the reasoning of Lord Watson published in the same volume at page 409 are conclusive. As Lord Watson says, powers to execute such works as sewers

> are entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise. *Primâ facie*, their Lordships see no reason to suppose that rates levied for improvement of that kind are not municipal taxes.

The fact that the sum levied upon each proprietor is fixed according to the length of the frontage of his property instead of varying with the assessed value of it can make no possible difference; nor can it matter in the least that the payment is required and the amount of it fixed by a specific provision of the corporation charter instead of being left to the discretion of the governing body of the municipality.

There are, moreover, two circumstances which appear to me to lend very substantial support to the view that the phrase "total exemption from taxation" is not in this agreement used in the restricted sense contended for by the corporation:—

1. The stipulation that the exemption is not to apply to the ordinary water-rate for fire protection nor to the rate for water used by the company clearly

(1) 16 Can. S.C.R. 399.

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indicates, in my opinion, that sums levied as special rates for services which municipalities ordinarily perform were not regarded as necessarily excluded from the exemption the agreement has provided for. This principle of construction has been acted upon frequently in agreements relating to taxes; see *Haslett* v. *Sharman* (1), at page 439.

2. In the charter of the corporation itself sections 335, 341, 362-3 indicate that a statutory exemption from taxation was regarded by the legislature as *primâ facie* extending to such contributions.

Counsel for the respondent rested largely upon certain decisions of the Supreme Court of the United States. The decisions of that court are, of course, entitled to the highest respect; but I think we should be going altogether too far if we should accept them as necessarily conclusive upon the meaning of a not uncommon English phrase used in a contract made in this country and especially when they are in conflict with opinions expressed by the Privy Council and by this court as to the normal effect of such words.

ANGLIN J.—The matter for determination in this action is the proper interpretation of an exemption clause in an agreement between a municipal corporation and an industrial company. The question is whether a sewer rate of $1.25 per foot frontage imposed on the appellant company, under the authority of section 600 of the charter of the City of Halifax, is taxation, within the meaning of that word as used in the provision of the agreement whereby the city assured to the Silliker Company (whose rights and privileges are now vested in and enjoyed by the appellant, 2 Geo. V. (N.S.), ch. 41)—

(1) [1901] 2 K.B. Ir. 433.

a total exemption from taxation for ten years on its buildings, plant and stock and on the land on which its buildings used for manufacturing purposes are situate.

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The rate in question is what is generally known as a local improvement or betterment rate. In considering whether such a rate should be included in a "total exemption from taxation," we are not embarrassed by the difficulty which affects many of the American courts in dealing with similar questions, namely, that, because of a constitutional provision that taxation must be uniform and equal and levied in proportion to the value of the property taxed, local improvement rates, especially when imposed as a fixed charge per foot of frontage on the improvement, are not deemed to be covered by the word "taxation" unless the context makes such a construction of it practically inevitable. For that reason most of the American cases in which it has been held that local improvement rates do not fall within a general exemption from taxation were so decided. The American courts have, however, recognized a difference between exemptions provided for in what are called general tax Acts and those granted by special agreements, or by private Acts of the legislature, such as we are now dealing with. The constitutional difficulty is not deemed so formidable in this latter class of cases.

As put by Mr. Justice Brewer, in delivering the judgment of the United States Supreme Court, in *Illinois Central Railroad Co.* v. *City of Decatur*(1), at page 203:—

It is said that it is within the competency of the legislature, having full control over the matter of general taxation and special assessment, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire

(1) 147 U.S.R. 190.

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exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. * * * This is undoubtedly true. So we turn to the language employed in granting this exemption to see what the legislature intended.

I find nothing in the agreement (which was confirmed by 7 Edw. VII. (N.S.), ch. 70, sec. 4), to restrict the application of the word taxation. On the contrary the express exception from the exemption of "the ordinary water rate for fire protection" and of "the rate for water used by the company" rather indicates that the word "taxation" is employed in its most extended meaning — a meaning wide enough to include even a rate imposed as a payment for water actually consumed by the company. The word "total" by which the exemption is qualified implies an intention to relieve from every charge in the nature of a tax, however imposed. There is, in my opinion, no substantial distinction between this case and *Les Ecclésiastiques de St. Sulpice de Montréal* v. *The City of Montreal*(1), where it was held that an exemption

from municipal and school assessments whatever may be the Act in virtue of which such assessments are imposed and notwithstanding all dispositions to the contrary.

included exemption from a local improvement rate levied for sewer construction. The same view as to the effect of a general exemption from taxation was taken by the Court of Common Pleas of Upper Canada in *Haynes* v. *Copeland* (1868) (2). The reasoning of the learned judge who decided this case does not, however, impress me as convincing.

The argument of Wells J., in delivering the judgment of the Supreme Court of Massachusetts in *Harvard College* v. *Aldermen of Boston*(3), at pages 482-

(1) 16 Can. S.C.R. 399. (2) 18 U.C.C.P. 150.
(3) 104 Mass. 470.

486, answers the contention that the rate here in question should not be deemed "taxation" within the meaning of that word in the exempting provision of the agreement because it is a special or local rate and is levied according to the frontage of the land abutting on the improvement and not according to its value. In *French* v. *Barber Asphalt Paving Co.*(1), at pages 343-4, the following passage from Mr. Dillon's work on Municipal Corporations is quoted by the court with approval:—

> The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency.

It is true that local improvement rates are declared by section 603 of the charter of the City of Halifax "to constitute a lien upon the land" benefited and that they are for some purposes to be regarded as incumbrances rather than as taxes. But, as is pointed out in the Ontario case cited by counsel for the respondent, which is one of a series of decisions where local improvement rates were so treated, they are, nevertheless, "charges in the nature of taxes." *Armstrong* v. *Auger*(2), at page 101.

With great respect for the Supreme Court of Nova Scotia, I am of the opinion that the imposition in question is taxation from which, under the terms of the agreement invoked by the appellants, they are entitled to be exempted.

(1) 181 U.S.R. 324. (2) 21 O.R. 98.

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Brodeur J.

The appeal should be allowed with costs here and below.

BRODEUR J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitor for the appellants: *E. P. Allison.*
Solicitor for the respondent: *F. H. Bell.*

FRANK W. PICKLES (DEFENDANT) . . . APPELLANT; 1912

AND *Oct. 21.

THE CHINA MUTUAL INSURANCE COMPANY (PLAINTIFFS) . . . . . } RESPONDENTS. 1913 *Feb. 18.

J. WILLIAM SMITH (DEFENDANT) . . . . APPELLANT;

AND

THE CHINA MUTUAL INSURANCE COMPANY (PLAINTIFFS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Mutual company—Cancellation of policy—Return of unearned premium—Cancellation by operation of law.

A mutual insurance company incorporated under the laws of the State of Massachusetts issued marine policies in favour of parties in Nova Scotia who gave notes for the premiums. The policies provided for a return of premiums "for every thirty days of unexpired time if this policy be cancelled." Before any of the premium notes matured the policyholders were notified that the company had been put into liquidation at the instance of the Insurance Commissioner, the notice stating that the legal effect was "to cancel all outstanding policies." In an action by the receiver in the company's name to enforce payment on the notes:—

Held, affirming the judgment appealed against (46 N.S. Rep. 7) that the decision of the case must be governed by the law of Massachusetts; that the holder of a policy in a mutual company being both insurer and insured the notes sued on were assets for distribution among the creditors; and the receiver was, therefore, entitled to recover the full amount.

Held, also, that a cancellation resulting from the action of the State was not a cancellation within the meaning of the above clause providing for return of premium.

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

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiffs.

The plaintiff company was incorporated in 1853 by the legislature of Massachusetts for the purpose of carrying on marine insurance "on the mutual principle" subject to the laws of the State then existing, and all subsequent laws in force relating to such insurance companies.

The company successfully carried on business for many years; but on the nineteenth day of March, 1908, at the instance of the insurance commissioner under the Massachusetts statute (chapter 76, Acts of 1907) its affairs were placed in the hands of a receiver and its officers and agents were enjoined from further proceeding with the business of the company. This proceeding cancelled all policies.

In the late fall of 1907 and the early part of 1908, the respondent Pickles had insured a number of vessels in the company and had given his notes for the premiums aggregating thirty-five hundred and fifteen dollars and ninety-two cents ($3,515.92).

There were many similar transactions of the company both in Massachusetts and the Maritime Provinces of Canada, and the question arose after the receiver's appointment as to his right to collect in full the outstanding premium notes, and as to the right of policy holders who had paid their premiums in cash or who had paid premium notes maturing before the date of receivership to recover back *pro ratâ* returns in the State of Massachusetts. A number of actions were brought at the instance of the receivership and

(1) 46 N.S. Rep. 7.

the result of the litigation is reported in the case of *Hill* v. *Baker*(1).

Subsequently actions were brought in Nova Scotia in the name of the company at the instance of the receiver of which the Pickles and Smith cases (now on appeal to the Supreme Court of Canada) are two which have been tried, and another case not under appeal was also tried and abides the result of these appeals.

The following defences were raised in Nova Scotia:

(1) That the company when it entered into the insurance contracts, held itself out as solvent, whereas it was insolvent to the knowledge of its officers, and was fraudulently carrying on business, and that, therefore, it could not recover on the premium notes or on any contracts.

(2) That there was no consideration for the notes.

(3) That the makers were liable only for the proportion of the premium accruing *pro ratâ* from the date of the note up to the date of the receivership.

(4) That the contracts of the company, including the premium notes, were illegal and void because the company had not kept up as required by the Massachusetts statute a deposit of two hundred thousand dollars ($200,000), which had to be subscribed before the company could commence to do business and which it was required to maintain.

The actions were tried before the Honourable Mr. Justice Meagher, who gave judgment in favour of the company. Defences one and four were then principally relied upon, although the others were argued and are dealt with briefly by the learned judge.

(1) 205 Mass. 303.

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On the appeal to the Supreme Court of Nova Scotia defences (1) and (2) were not pressed, and the findings and judgment of the trial judge on those defences are not now in question. The defendant urged, however, defences (3) and (4), and especially that by reason of a provision in the Pickles policy as follows: *"The consideration for this insurance is hereby fixed at the rate of 9¼ per cent. To return —— per cent. for every thirty days of unexpired time if this policy be cancelled,"* and in the Smith policy the same except that the —— for return was filled in with a specified percentage, 75 per cent., the defendant could only be held for payment *pro ratâ* of premium up to date of the receivership, the contention being that the appointment of the receiver was a cancellation of the policy contemplated by the foregoing excerpt.

The appeal was heard by Justices Graham, Russell and Drysdale. Mr. Justice Russell delivered the judgment of the court (Graham J. concurring) affirming the right of the plaintiff company to recover the full amount of the notes, while Mr. Justice Drysdale dissented, acceding to the contention of the defendant just mentioned.

Mellish K.C. for the appellants. *Hill* v. *Baker*(1) and similar American cases deal with insurance policies which do not contain the return premium clause. Consequently, they have no application to this case.

The permanent fund required by the Massachusetts statute to protect policy holders was not kept up. The issue of the policies to Pickles and Smith was, on that account, unauthorized and even prohibited and

(1) 205 Mass. 303.

the policies were void. *Reliance Mutual Ins. Co.* v. *Sawyer*(1). The learned counsel referred also to *Fayette Mutual Fire Ins. Co.* v. *Fuller*(2), and *Adamson* v. *Newcastle Steam-Ship Freight Ins. Assoc.*(3).

Rogers K.C. for the respondents. The cancellation mentioned in the policy must be by act of the company. *The Commonwealth* v. *Massachusetts Mutual Fire Ins. Co.*(4), *per* Morton J.; *Hill* v. *Baker*(5), and cases therein cited. *Lion Mutual Marine Ins. Assoc.* v. *Tucker*(6).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons given by Mr. Justice Duff.

DAVIES J.—For the reasons given by Mr. Justice Russell in delivering the judgment of the Supreme Court of Nova Scotia in this case, adopting and applying the principle of the decision of *Hill* v. *Baker*(5), with which reasons I entirely concur, I think the appeal should be dismissed with costs.

IDINGTON J.—The appellants gave their respective promissory notes by way of payments of premiums for insurances effected by the policies issued by respondent which was a mutual insurance company incorporated under and by virtue of Massachusetts statutes.

Respondent failed to comply with said statute and

(1) 160 Mass. 413.
(2) 8 Allen (Mass.) 27.
(3) 4 Q.B.D. 462.
(4) 119 Mass. 45, at p. 51.
(5) 205 Mass. 303.
(6) 12 Q.B.D. 176.

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during currency of these policies in question was put in liquidation by direction of the court upon the application of the authorities having supervision of such institutions.

These actions are brought to recover the amounts respectively unpaid by the insured.

The appellants each acknowledge liability for the proportionate amount earned up to the order of liquidation, but claim that beyond that no liability exists because of a clause written in each policy. This clause fixes the premium and provides for a partial "return" thereof, as it is expressed, to be made on cancellation. The cancellation of the policy here in question is alleged to result by operation of law from the order for liquidation.

The frame of the said clause is as follows:—

> The consideration for this insurance is hereby fixed at per cent. To return per cent. for every thirty days of unexpired time if this policy be cancelled.

In the Pickles policy the fixed rate intended by this clause is written in with figures "9¼," but the rate to be returned is left blank, and in the Smith policy there is written in for fixed rate "10" and in the blank for return "75."

It is conceded the insurance ceased with the suspension of the company.

The question raised in each case must be dependent upon the position occupied by the insured in his relation to the company. If we could treat these notes as ordinary promissory notes then something might be said in answer to the claim thereupon on the ground of a partial failure of consideration.

The term used is "to return," and hence partial failure of consideration as usually understood relative

to promissory notes is not capable of application, but even so, if no others interested than the parties hereto an equitable plea might conceivably be so framed, to avoid circuity of action, as to afford a complete answer to that part of the premium note never earned or possible now of being earned.

That is not, however, the actual position, for these notes are part of the security other policy holders are entitled by the law governing all concerned to look to for compensation of their losses which had been incurred before the liquidation proceedings.

What right has any one giving such a promissory note for such purpose to withdraw from what he had undertaken to meet or assist up to the limit of his promise in meeting ?

By the law constituting the company each person insured became a member of the company and entitled during the currency of his policy to take a part in its management.

He became at once insurer and insured. He has no more right to escape from this position than a partner with limited liability in any other venture where the fundamental principle is that what he has given or promised shall stand good for losses though he may when all losses and liabilities are satisfied be entitled to rank upon any fund left for distribution when these are satisfied.

Then legal effect may be given the right expressed in the above clause to "a return."

For these considerations I do not think the cancellation referred to in the clause covers the kind of cancellation resulting from the failure of the insured.

As to the other ground of defence that the violation of the law which led to suspension was such a

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fraud in itself apart from actual misrepresentation of the condition of things (of which there is no evidence) it seems to me hardly arguable.

I think the appeal should be dismissed with costs.

But lest there be ultimately a fund such as I have indicated upon which appellants may become entitled to rank, the judgment herein should not operate as an estoppel in answer to any such claim and if desired should be amended so as to avoid any such consequence by declaring it to be without prejudice to any such possible right.

DUFF J.—The respondent company was incorporated in 1853 by the Legislature of Massachusetts for the purpose of carrying on marine insurance "on the mutual principle." On the 18th of March, 1908 (the assets of the company appearing to be insufficient to meet its liabilities) the company and its affairs were placed in the hands of a receiver at the instance of the insurance commissioner of Massachusetts pursuant to certain statutory provisions (chapter 576, Acts of 1907), and its officers and agents were restrained by the same order from continuing the business of the company. In the years 1907 and 1908 each of the respondents, Pickles and Smith, insured a number of vessels in the company, and the actions out of which these appeals arise were brought by the receiver in the name of the company upon the premium notes given under these contracts of insurance. In the Nova Scotia courts judgment was given against the appellants. In this court the defence relied upon rests upon a clause found in both sets of policies in terms which in the view I take of the case may be treated as identical.

In the policies issued to the appellant Pickles the clause is as follows:—

> The consideration for this insurance is hereby fixed at the rate of 9¼ per cent. To return per cent. for every thirty days of unexpired time if this policy be cancelled.

In the policy issued to the appellant Smith the blank in the second sentence is filled in, 75% being specified. The contention is that the proceedings already referred to in the Massachusetts courts constitute a cancellation of each of these policies within the meaning of this clause, and further, that the appellants are entitled to a deduction from the amount of the premium note in each case of the sum returnable by the company under the clause. In the view I take of the case it does not appear to be necessary to decide the question whether or not the order of the Massachusetts court appointing a receiver and restraining the company from further continuing its business (which admittedly had the effect of making legally impossible any payments under any of these policies in respect of losses occurring thereafter) constitutes a cancellation of the policies within the meaning of this clause. The conclusion to which I have come is this: Assuming the appellant's construction to be on this point correct, and assuming further that in the events which have happened a right to recover a proportionate part of the premium has become vested in the appellants, this right is one which they can only assert as creditors of the company in the insolvency proceedings in Massachusetts and that in the actions with which we are concerned on these appeals they are liable for the full amount of their premium notes.

The appellants by accepting these policies became, by the by-laws of the company of which they had notice

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in the policies, members of the corporation. By virtue of the contract of insurance the insured stands in a two-fold relation to the company and the other policy holders. To the extent of his own policy he is insured; to the extent of his own premium note he is an insurer in the sense that he is a holder of unpaid capital in respect of which he is entitled to share in the profits of the company, and to the extent of that capital he is liable to contribute to the discharge of the obligations of the company. That this, according to the settled law of Massachusetts, is the position of the appellants is put beyond dispute by the decision of the Supreme Court of that State in *Hill* v. *Baker*(1), and the cases therein referred to; and it is, of course, indisputable that the appellants being members of the respondent corporation their relations, as members of the corporation, to the corporation itself as well as to other members of the corporation as such, are governed by the laws of Massachusetts. By the law of that State

> the premiums paid or absolutely agreed to be paid by the members for their policies constitute a fund for the payment of losses; and the principle is the same whether the payment is in cash or by note, so long as the policy is issued upon the mutual principle to one who by accepting the insurance becomes a member of the insurance company: *Hill* v. *Baker*(1), page 308.

The appellants' premium notes forming part of a fund for the payment of losses, the effect of the proceedings in insolvency on general principles would be that the company being insolvent would hold this fund in trust for a distribution among its creditors, according to the order and priority ordained by the *lex fori concursus*: *Galbraith* v. *Grimshaw*(2), at page 512; *Chartered Bank of India, Australia, and China* v. *Henderson*(3), at page 513. And this appears, from the

(1) 205 Mass. 303. (2) [1910] A.C. 508.
(3) L.R. 5 P.C. 501.

authorities referred to, to be the law of Massachusetts; see also May on Insurance (4 ed.), 1900, sec. 596.

The receiver is, therefore, entitled to have the premiums which the appellants have agreed to pay applied in liquidation of the company's obligations generally; and these premiums, although recovered in the name of the company, are affected by a trust for that purpose. Assuming then that the appellants have a just claim to recover a proportionate part of each premium from the company under the clauses relied upon that claim in the circumstances can only be recognized as a right to rank *pro ratâ* upon the assets available for the purpose of liquidating it together with other claims of equal rank, and it is a claim which must be presented and passed upon in the insolvency proceedings.

ANGLIN J.—The insurance policies in question should, in my opinion, be construed according to the law of the State of Massachusetts. According to that law, as proved in this case, I agree that there was not a cancellation of these policies within the meaning of the clauses in them providing for a rebate or return of premium on cancellation. For the reasons stated by Mr. Justice Russell I would dismiss this appeal with costs.

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

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solicitor for the respondents: *W. A. Henry.*

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WELLINGTON BOULTER AND NANCY HELEN BOULTER (DEFENDANTS) ..... APPELLANTS;

AND

J. LAING STOCKS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Rescission—Sale of land—Misrepresentations—Affirmance.

B. advertised for sale his farm in Ontario, stating the contents and describing it as in first-class condition. He also stated the number of trees, old and new, in the orchard then on it. S., then in British Columbia, was shewn the advertisement and, after some correspondence in which B. reiterated the statements therein, came to Ontario and spent some time in inspecting the farm, which he finally purchased on B.'s terms and entered into possession. Shortly after he leased the orchard for ten years, and within a day or two discovered that the farm contained over forty acres less than, and the contents of the orchard were only half of, what had been represented; also that the farm was not in the condition stated, but badly overrun with noxious weeds.

He, therefore, procured the cancellation of the lease of the orchard and brought action to have the sale rescinded.

Held, that the lease of the orchard was not, under the circumstances, an affirmance of the contract for sale which would disentitle S. to rescission; that if it were an affirmance as to the orchard the subsequent discovery of the other misrepresentations would entitle him to a decree. *Campbell* v. *Fleming* (1 A. & E. 40) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

The material facts of this case are stated in the head-note. The defendant as to the shortage in acreage

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

claimed that a parcel of thirty acres or more had been excepted from the sale as being separated from the rest of the farm and being of very little value, but he offered to convey it to the plaintiff. He also claimed that his other representations were substantially true.

Anglin K.C. for the appellants. The respondent cannot succeed unless he proves actual fraud; *Bell* v. *Macklin*(1); *Seddon* v. *North Eastern Salt Co.*(2); *Angelor* v. *Jay*(3); and this he has not done.

The respondent made his irrevocable election when he leased the orchard and no discovery of further facts restores his right to rescind. *Campbell* v. *Fleming* (4); *Law* v. *Law*(5), at pages 158, 159; *Frye* v. *Milligan*(6).

McKay K.C. for the respondent referred to *Wall* v. *Cockerell*(7); *La Banque Jacques-Cartier* v. *La Banque d'Epargne*(8).

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs. To what my brother Davies says I wish merely to add this. The plaintiff complains in his demand for rescission of three distinct false and fraudulent misrepresentations not in any way connected and each calculated according to the evidence to operate on his mind as an independent inducing cause. The trial judge found in his favour on all three grounds and in the Court of Appeal it is expressly held "that the learned judge's conclusions

(1) 15 Can. S.C.R. 576.
(2) [1905] 1 Ch. 326.
(3) [1911] 1 K.B. 666.
(4) 1 Ad. & El. 40.
(5) [1905] 1 Ch. 140.
(6) 10 O.R. 509.
(7) 10 H.L. Cas. 229.
(8) 13 App Cas. 111.

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The Chief Justice.

are entirely justified" by the evidence. Therein lies the distinction between this case and *Campbell* v. *Fleming*(1) so much relied on by the appellant. In that case, the contract was induced by a single representation of the vendor and the purchaser, with the knowledge of its falsity, affirmed the contract. He cannot escape if since the affirmation he discovers another particular in which the same representation departed from the truth. (Halsbury, No. 1767.)

It was argued here that the respondent had in some way elected to affirm the transaction, but there is no evidence to support any act of election after he became aware of the facts. The lease of the orchard is relied upon as evincing an intention to affirm or as a dealing with the land which precludes the respondent from seeking rescission. That lease has been cancelled and is now deposited in court, so there is no obstacle in the way of restoring the premises to the appellant free from any obligation arising out of the lease. Further assuming that the respondent elected to affirm with a knowledge of the facts concerning the orchard that was not the only discrepancy and the plaintiff was not debarred from relief on the other grounds if sufficient to justify rescission because he elected to affirm the contract with knowledge as to the orchard and as found by the trial judge in ignorance of the truth with respect to the other causes of rescission. The presumption of an intention to affirm does not arise out of an act done without knowledge of all the facts (*Banque Jacques-Cartier* v. *Banque d'Epargne*(2), at page 118). The plaintiff may have been willing to hold to his bargain notwithstanding the misrepresentation as to the orchard, but if to that

(1) 1 A. & E. 40.

(2) 13 App. Cas. 111.

were added the deficiency in the number of acres and the presence of the noxious weeds he might take a different view of his position, and this action is the best evidence of his change of mind.

DAVIES J.—At the conclusion of the argument on this appeal I was quite satisfied that the findings of fact of the trial judge, based as they were upon ample evidence and subsequently confirmed by the Court of Appeal, should not be disturbed by us.

The three matters upon which the trial judge found there had been fraudulent misrepresentations made which had induced the plaintiff (respondent) to purchase the appellants' farm and stock and which in his opinion justified rescission of the contract, related (1), to the quantity of land in the farm; (2) to the condition of the soil of the farm; (3) to the number of apple trees in the orchard.

Mr. Anglin strongly contended that as the true facts with respect to the condition of the farm and the number of trees in the orchard were known to the plaintiff at any rate on or about the 13th June, 1911, when he executed a lease of the orchard for ten years, he had, by that solemn act made his election, affirmed the contract, and could not afterwards revoke his election.

In support of his contention he relied mainly upon the case of *Campbell* v. *Fleming,* in 1834(1). He submitted that assuming the representations with regard to the condition of the farm and size of the orchard to have been fraudulently made and to have induced the respondent to enter into the contract, he had, never-

(1) 1 A. & E. 40.

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theless, after he had gained a true knowledge of the facts relating to the fraud practised upon him, elected to confirm by granting the orchard lease, and could not afterwards, on discovering a further misrepresentation with regard to the acreage, revoke his election.

In the report of the case of *Campbell* v. *Fleming* (1), so strongly relied upon by Mr. Anglin, it is stated that "after the purchase of the shares" (which the defendant in that case was seeking to repudiate)

> was concluded, he discovered that the statements in the advertisement and many of the representations made to him in the course of the negotiation were fraudulent and that the whole scheme was a deception.

The decision of the case is based upon these facts, that the representations made to him were fraudulent and that to his knowledge *"the whole scheme was a deception."* With this knowledge

> he formed a new company by consolidating the shares originally purchased by him with some other property and he sold the shares in the new company thereby realizing a considerable sum of money.

Having thus elected to confirm what he knew to have been a fraudulent transaction, he afterwards discovered another material fraudulent misrepresentation as having been made to him, and it was held that this discovery, though only made by him after he had made his election, did not entitle him to revoke the election he had made on the ground, as put by Patterson J., that it was merely a "new incident in the fraud." "This," he said,

> can only be considered as strengthening the evidence of the original fraud and it cannot revive the right of repudiation which has been once waived.

Now in the case before us, I do not think the facts

(1) 1 A. & E. 40.

brought to the plaintiff's knowledge from time to time as he began cultivating the land in the spring, as to the dirty condition of the soil and the presence of large quantities of noxious weeds, would of themselves be sufficient to satisfy plaintiff that the sale of the farm to him was a fraud and a deception.

The evidence was of a character, no doubt, to raise grave and serious doubts in his mind as to whether he had not been deceived in the transaction, but nothing more. Then as to the lease of the orchard. It was the day after that lease was signed that he first learned from the lessees' expert of the shortage in the number of the apple trees. Even that important fact only caused him still more seriously to deliberate and consider his situation. It did not give him positive assurance that he had been the victim of a fraud.

When, however, the shortage in his acreage of some 46 acres was shewn to him in the month of June "his eyes were finally opened." This, he says, "was the climax." And he, within a very reasonable time afterwards, took steps to have the lease he had given cancelled and to express his election to rescind the contract for the purchase of the farm and stock.

Considering, as I have done, all the facts and circumstances, I am of opinion that the judgment below was right, that the principle of the decision in *Campbell* v. *Fleming*(1) is not applicable to the facts of this case, that the plaintiff exercised his right of election to rescind in due time after he had found out that he had been the victim of a fraud, and that the appeal should be dismissed with costs.

(1) 1 A. & E. 40.

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IDINGTON J.—It is to be regretted that one bearing a christian name which stands almost synonymous with fidelity to truth, should in trying to sell his farm have so far forgotten himself as to describe it in terms so flagrantly false as the evidence proves. He makes these misrepresentations not only by the advertisement he put forth for all the world to read, but also by affirming in the letter he wrote to one inquiring on behalf of respondent as a possible purchaser that the advertisement was a fair description and by reiterating some of details therein.

The learned trial judge's findings of fact upheld by the Court of Appeal maintain the falsity of many of the material statements in these documents. And the falsity thereof invented for the purpose of inducing a purchaser to rely thereon, was clearly so fraudulent as entitled respondent on discovery thereof to a rescission of the contract unless and until he had clearly condoned the fraud.

Not content with that, after leading respondent, living in British Columbia, to believe he was buying a three hundred acre farm, to conclude a bargain therefor subject to inspection, and to come all the way thence to Ontario to inspect it, he contrived to get him to suppose he was carrying out that bargain when he signed an agreement, which on its face specified no definite acreage, but in fact only covered about two hundred and fifty-five acres.

He has a shuffling story to tell about thirty or forty acres he had across the road from his farm to which he pretends such reference was made on the respondent's inspection as to justify this abstraction of that quantity of land from the bargain without any allowance therefor by way of reduction from the price.

When this latter feature of his explanation is pressed on him by the learned trial judge, he says he calculated when giving him the canning factory he was giving him a good bargain.

He seemed to forget this canning factory was part of the very property he had advertised as in "A-1" state and going with the three hundred acres. And he seeks to cheapen this thirty or forty acres as comparatively worthless. Either it was part of the three hundred acres or it was not.

If it was part and so comparatively worthless, then the farm did not measure up to the standard in the description. And if it was not part then he never had intended selling more than two hundred and fifty-five acres, yet induced the respondent to buy that under the belief he had fraudulently induced, that it was three hundred acres.

Besides the attempt now made in appeal to induce us to accept these excuses and infer a mutual agreement by which respondent was to abandon this thirty or forty acres or forego in some way getting what he expected, and thus reverse the findings of fact below, we are asked as a matter of law to say that the respondent had by a lease made in May of the orchard then discovered for the first time to contain only about half the apple trees represented, he had elected to abide by his bargain and overlook all this fraud or these frauds.

The respondent had not then discovered that in truth he had only got two hundred and fifty-five acres when thinking he was getting three hundred acres.

Nor had the season so advanced as to disclose to him the fine crops of weeds he might reap.

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Idington J.

Neither the case of *Campbell* v. *Fleming*(1), relied upon to uphold this contention relative to election, nor any other case deserving to be called authority, binds us to hold in face of such facts that a purchaser so induced to rely upon such fraudulent representations and contrivance of which he knew not the falsity is to be defeated in his right to rescission by calling such an incident as this lease under such circumstances an election to adopt the contract.

The appeal must be dismissed with costs.

If there is any chance of too wide a meaning being attached to the word "damages" in the third paragraph of the formal judgment of the trial judge, it can be amended though I do not deem it objectionable if used in the sense it ought to be.

DUFF J.—I think the appeal should be dismissed.

The defence upon which the appeal is based is that the respondent after knowledge of the fraud practised upon him elected not to disaffirm the sale. The act relied upon as shewing such election was the granting of a lease of the orchard for a period of seven years. I shall assume that what the respondent did in the matter of the orchard was inconsistent with an intention to disaffirm and that if the respondent had at the time he did it a knowledge of the fraud of which he had been the victim it would be sufficient evidence of an election in the sense contended for. I think the appellant has not shewn that the respondent had such knowledge. It is clear on principle that where an election is implied from conduct one essential element in the circumstances upon which the inference rests must be this. It must be shewn that at

(1) 1 A. & E. 40.

the time of the acts relied upon as evidencing the election the person to whom the election is imputed had a knowledge of such facts as would entitle him to impeach the transaction. In the case before us it must be shewn that Stocks was aware that the representations of the respondent were fraudulent representations—that is to say, that they had been made with such a knowledge of their falsity or with such reckless indifference upon the subject of their truth or falsity as to form a sufficient basis for an action of deceit.

At the time of the execution of the lease of the orchard Stocks knew that the number of apple trees had been grossly overstated by the appellant, and he knew also that the farm was much affected by noxious weeds. He may have had his suspicions as to Boulter's entire honesty; but it is quite clear that the possibility of shortages in acreage had not then occurred to him and he had no suspicion that the whole transaction had been on Boulter's part the swindle it ultimately proved to be. It would probably seem to him to be most unlikely that the misrepresentations as to the number of apple trees — so easy to expose — had been made deliberately and as to the prevalence of noxious weeds that is a matter respecting which he may well have thought some exaggeration was to be expected. I think the evidence is quite consistent with the view that his discoveries in regard to these two matters did not bring home to his mind a conviction that a fraud had been practised upon him such as would entitle him to impeach the sale. In weighing Stocks's evidence upon this point the course of the action must be considered. The contention now advanced was not set up in the pleadings and the cross-examination in so far as it

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was directed to the conduct of Stocks, which is now relied upon seemed rather to aim at shewing that charges of fraud upon which the action was founded were the result of an afterthought. Stocks was not asked squarely at the trial to meet the objection that he had with a knowledge of his rights elected against the disaffirmance of the sale.

The appellants cite *Campbell* v. *Fleming*(1). Some of the expressions attributed to the learned judges who decided that case may appear to draw the line more strictly against persons complaining of fraud than Courts of Equity have done in similar cases (compare, for example, the judgment of Lord Redesdale in *Murray* v. *Palmer*(2)); but it is quite clear that the plaintiff in *Campbell* v. *Fleming*(1) had before doing what was set up as constituting an election discovered, as the report says, that the whole transaction "was a deception," With full knowledge of his right to repudiate on that ground he had dealt with the shares as his own. The case is, therefore, clearly distinguishable from the present; and the judgments when fairly interpreted by the light of the facts do not, I think, enunciate any principle at variance with the views above expressed.

BRODEUR J.—I am of opinion to dismiss this appeal for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Aylesworth, Wright, Moss & Thompson.*

Solicitors for the respondent: *Johnson, McKay, Dodds & Grant.*

(1) 1 A. & E. 40.

(2) 2 Sch. & Lef. 474.

DUGALD McPHERSON (PLAINTIFF) . . APPELLANT;

AND

DAMEAU H. MEHRING (DEFENDANT) . . . . . RESPONDENT.

1912
*Nov. 13.
1913
*Feb. 18.

IN THE MATTER OF THE WEST LORNE SCRUTINY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Election law—Vote on Municipal by-law—Scrutiny—Powers of judge—Inquiry into qualification of voter—Disposition of rejected ballots—"Ontario Municipal Act," 1903, ss. 369 et seq.—"Voters' Lists Act," 1907, s. 24.

A County Court judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. Davies and Brodeur JJ. dissenting.

The judge has no power to inquire whether rejected ballots were cast for or against the by-law.

Held, per Fitzpatrick C.J. and Duff J.—Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law. Davies and Brodeur JJ. contra.

The Supreme Court affirmed the decision of the Court of Appeal (26 Ont. L.R. 339) reversing the judgment of a Divisional Court (25 Ont. L.R. 267) which reversed the decision at the hearing (23 Ont. L.R. 598).

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of a Divisional Court(2) which reversed the order at the hearing(3) for a writ of mandamus ordering the judge holding the

(1) 26 Ont. L.R. 339. (2) 25 Ont. L.R. 267.
(3) 23 Ont. L.R. 598.

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

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scrutiny to inquire how rejected ballots had been marked, but refusing a prohibition against an inquiry as to qualification of voters.

The municipal corporation of West Lorne passed a by-law to prohibit the sale of liquor by retail in the village. A vote having been taken on such by-law an application was made to the County Court judge for a scrutiny, in holding which he proposed to inquire into the right of certain persons on the voters' list to cast their ballots. Application was then made to Mr. Justice Middleton for a writ of prohibition against this proceeding. He granted the writ to prohibit the judge from certifying the result of his scrutiny to the municipal council until he had ascertained how the ballots he had rejected were marked. On appeal to a Divisional Court the above order was set aside and a writ issued prohibiting the judge from certifying to the council that the by-law had not been approved by three-fifths of the electors. On further appeal the Court of Appeal reversed the last-mentioned judgment and as a result the County Court judge was left at liberty to certify that the by-law had not been appealed. An appeal was then taken to the Supreme Court of Canada.

Raney K.C. for the appellant. The weight of authority in Ontario is against the jurisdiction claimed by the County Court judge. See *In re Saltfleet Local Option By-law*(1), *per* Boyd C. and Mabee and Teetzel JJ.; *In re Mitchell and Municipal Council of Campbellford*(2), *per* Clute J.; *In re McGrath and Township of Durham*(3), *per* Anglin J.; *In re Orangeville Local Option By-law*(4), *per* Meredith C.J.; *In re*

(1) 16 Ont. L.R. 293.
(2) 16 Ont. L.R. 578.
(3) 17 Ont. L.R. 514.
(4) 20 Ont. L.R. 476.

Ellis and Town of Renfrew(1), *per* Riddell J. and Meredith J.A.; *In re Weston Local Option By-law*(2), and the opinions of Meredith and Maclaren JJ.A. of the Court of Appeal in this case.

C. St. Clair Leitch for the respondent. As to the power of the County Court judge to inquire into the qualification of electors, see the *Saltfleet Case*(3), *per* Boyd C. and Mabee and Magee JJ.

As to the disposition of rejected ballots the learned counsel cited *In re Armour and Township of Onondaga*(4), *per* Riddell J.; *In re Duncan and Town of Midland*(5), followed in *In re Prangley and Town of Strathroy*(6), *per* Sutherland J.; *The Renfrew Case* (1), at page 87, and the opinions of the majority of the judges of the Court of Appeal in the present case.

THE CHIEF JUSTICE.—The broad question to be decided on this appeal is: What is the nature and extent of the county judge's powers under the ballot scrutiny sections (367-372) of the "Ontario Municipal Act" (statutes of 1903, ch. 19)? In my view it will in addition be necessary to consider: How far in the case of a tenant the voters' list is conclusive not only as to his qualification when it is certified, but also as to his right to vote at the time of the election; and the powers of the judge to inquire into the way any of the votes were cast. The decisions in the provincial courts are numerous and have not been consistent.

Those sections (367-372) in substance provide

(1) 21 Ont. L.R. 74; 23 Ont. L.R. 427.
(2) 9 Ont. W.R. 250.
(3) 16 Ont. L.R. 293.
(4) 14 Ont. L.R. 606.
(5) 16 Ont. L.R. 132.
(6) 21 Ont. L.R. 55.

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that, upon reasonable grounds, the county judge may direct a "scrutiny of the ballot papers" (369) and, upon their inspection, and the hearing of such evidence as he may deem necessary, he shall in a summary manner determine "whether the majority of the votes given is for or against the by-law and forthwith certify the result to the council" (371). With respect of all matters arising upon the scrutiny, the judge possesses the like powers and authority as are possessed by him upon a trial of the validity of the election of a member of a municipal council (372).

The ultimate object of the proceedings authorized by those sections is, in the concluding words of section 371, to enable the judge "to determine in a summary manner whether the *majority of the votes given* is for or against the by-law and to forthwith certify the result to council," and to that end he is required not only to "inspect the ballot papers" for the purpose of counting the votes recorded on those ballot papers as in the case of a recount, but he is in addition "to hear such evidence as he may deem necessary" to enable him to give his certificate to the council. It would not be necessary to hear evidence if his duty was merely to recount the good ballots in the box, but he is directed to ascertain and report whether the will of the majority of those qualified to speak, — *i.e.,* the electors (sec. 338) — as signified by their ballots, is for or against the by-law, and for that purpose it may be necessary to hear evidence on matters connected with the *right* to vote, although external to the ballot which is merely the paper record of the *fact* that a person voted. Section 372 vests the judge with the like powers and authority as to all matters arising upon the *scrutiny* as are possessed by him upon a trial

of the validity of the election of a member of a municipal council. These are powers which one would not expect to find given to a judge to enable him to recount the ballot papers. This further observation is suggested by the use of the word scrutiny in this section. A scrutiny is an entirely distinct proceeding from a recount; it is an inquiry into the validity of the votes.

> The object of a scrutiny is to ascertain who has had the majority of the legal votes,

Halsbury, vol. 12, page 454, No. 883, and that being the accepted meaning of the word in England, from which country our whole system of elections by ballot is very largely borrowed, it is binding upon us.

The difficulty, however, arises out of the use of the expression "scrutiny of the ballot papers" in section 369, and of the words "inspection of the ballot papers" in section 371. It is argued that the legislature must have intended when it used the word "scrutiny" and "inspection" in collocation with "ballot papers" to give those words a restricted meaning and to limit the duty and power of the judge to a mere inspection of the ballot papers with respect to their physical aspect. This construction, I respectfully submit, defeats the object of the "scrutiny" or the "inspection." How, as I said before, could the judge comply with the terms of the statute and certify to the council whether the majority of the legal votes given and not of the ballots cast is for or against the by-law, if he cannot go beyond the ballot papers ? It is the assent of the electors of the municipality that gives effect to the by-law (338—sec. 141 "Liquor License Act"), and the elector is the person entitled for the time being to vote in respect of the by-law. Sec. 2, sub-sec. 5.

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Throughout the several Acts we have to consider "votes" and "ballot papers" are frequently used as convertible terms, as, for instance, in section 189, which provides for the recount. There the judge is directed to count "all the votes or ballots returned," and in some places the electors are said to have marked their "votes" and in others their "ballot papers." The judge it is also said recounts "the votes" on proof that the returning officer improperly counted the "ballot papers." Referring to the sections of the Act grouped under the caption of "The Poll," it will be found, one may fairly say, that the ballot papers are generally described as votes when they are deposited in the box. All those who have a voice at the polls are called voters; they express their choice by the means of the ballot papers which when used and deposited in the box are called votes. (Secs. 350, 353, 354, 355, 356, 357, 358, 361.) The deputy returning officer at the close of the poll is not required, for instance, by section 361 to count and state in writing the number of ballots given, but the number of votes, and what the council desires to know is the will of the majority of the voters. This further observation occurs to me assuming that the words used in section 369 were "scrutiny of the votes" instead of "scrutiny of the ballot papers," what difference would there be in the nature of the duty imposed on the judge? He could only ascertain the majority of the legal votes by the aid of the ballots which are the only record; there are no votes to scrutinize or inspect except those recorded on the ballot papers, so that ultimately the use of these words would lead to the same result. I am fortified in the conclusion at which I have arrived by an examination of the history of the legislation which is exhaustively

and lucidly set forth by Magee J., in the *Saltfleet Case* (1), and in Idington J.'s notes in this case. I have not, of course, overlooked the judgment of this court in *Chapman* v. *Rand*(2), but I distinguish for the reasons given by Magee J., in the *Saltfleet Case*(1).

The next question has reference to the qualification of leaseholders entitled to vote. In other words: How is their right to vote determined ? I have much difficulty in reaching a conclusion on this point. As a general rule the voters' list is conclusive as to the right to vote, but par. 2 of sec. 24, of the "Voters' List Act," read with sec. 86 of the "Consolidated Municipal Act," makes an exception in that continuous residence in the municipality up to the time the poll is held is made a condition of the exercise of that right by a tenant. This fair construction of the language of that section is confirmed by reference to section 357 of the Act, which provides for the form of oath the leaseholder must take if required. That form may, I think, be fairly taken as the construction put by the legislature upon section 24. Those only are qualified to vote who can take that oath, and one of the qualifications required is residence within the municipality for one month next before the vote.

Finally, I am of opinion that the judge has not got the right to inquire into the way any of the votes were cast. If the number of votes improperly cast is found to be greater than the majority in favour of the by-law and it is not possible to ascertain, without violating the secrecy of the ballot as admitted by all the judges, except Middleton J., whether or not those illegal votes constitute that majority, how can the judge report that the by-law was adopted or defeated

(1) 16 Ont. L.R. 293. (2) 11 Can. S.C.R. 312.

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by the required three-fifths of the legal votes cast? The result is, I admit, most unsatisfactory, in as much as it enables one who has no right to vote to cast his ballot against the by-law as pointed out by Mr. Justice Middleton. But if that incongruous result follows on the application of settled legal principles to the construction of the statute, the remedy is with the legislature that has attempted to apply a procedure devised for the contestation of municipal elections to a case in which the question at issue is whether or not the requisite majority of the legal votes is for or against a by-law. As the learned Chief Justice in appeal very properly observes, this case vividly illustrates the dangers attendant upon legislation by reference.

I would dismiss the appeal and confirm the judgment with costs.

DAVIES J. (dissenting).—The questions arising on this appeal relate to the ambit or extent of the jurisdiction of the County Court judge under the provisions of the "Consolidated Municipal Act of 1903," of Ontario, sections 369 to 372, when holding a scrutiny on the result of the voting of the electors of a municipality on a by-law submitted for their approval.

In the case before us, the pith of the dispute lies in the answer to be given to the question whether or not the County Court judge, when holding such scrutiny, has any, and if any, what power to go behind the voters' list, and examine into, and determine the legality of any vote cast except upon grounds apparent *ex facie* of the ballot papers. There has been much judicial difference of opinion on the question and the judgment of the appeal court now before us, Meredith J.A. dissenting, upholds the contention that

on such a scrutiny as the County Court judge is authorized to hold he is empowered to enter into a general scrutiny of the votes polled, and is not limited to a scrutiny of the ballot papers only.

After a careful examination and comparison of the different statutes which create, control and determine the County Court judge's jurisdiction, I have reached the conclusion that the sections in question of the "Consolidated Municipal Act," 1903, 369 to 372, confer only a limited jurisdiction upon the County Court judge, expressly confined to a "scrutiny of the ballot papers," and which does not entitle him to inquire into the validity of any vote cast except upon grounds apparent *ex facie* of the ballot papers.

This is the opinion of Meredith J.A., and one of his grounds for dissenting in the appeal, and has the support of a great many of the learned judges in Ontario before whom the question has from time to time arisen.

The legislature has used language in section 369 which to my mind indicates a clear intention of limiting the powers of the County Court judge to a "scrutiny of the ballot papers" only, and precludes an inquiry into the right of a voter upon the voters' list to vote. The judge was not to hold a general scrutiny, or a scrutiny of the "votes polled," and thus enter upon a vast field of inquiry. He was simply to enter into a "scrutiny of the ballot papers" and determine the result in a summary way. Without reading other words into the section than those used by the legislature, I cannot see how I can put any wider construction upon the County Court judge's powers than the limited one I have mentioned. I do not think I have any such right to read any other words into the section enlarging the meaning of the words used, or in a

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case where plain and simple language has been used, speculate as to whether some larger or hidden meaning had not been intended to be expressed. My view is that the legislature knew just what kind of an inquiry it was authorizing and used appropriate language to express its will.

It is argued that this view of the jurisdiction of the County Court judge creates simply a "recount" and that if a recount only was intended to be granted, the well known word "recount" would have been used.

I agree with Chief Justice Meredith's view of the meaning of the sections in question on this point as expressed by him in *In re Orangeville Local Option By-law*(1) :—

> The inquiry is, in my opinion, limited to a scrutiny of the ballot papers, and differs only from a recount in that the judge is not limited to dealing with the ballot papers *ex facie*, but may take evidence in the same way as may be done upon a trial of the validity of the election of a member of a municipal council (sec. 372), for the purpose of determining whether any ballot paper ought or ought not to be counted, this power being in terms limited to taking evidence as to all matters arising upon the scrutiny.

It was suggested that section 372 in enacting that "the judge should, on the scrutiny possess the like powers and authority as to all matters arising upon the scrutiny as are possessed by him upon the trial of the validity of the election of a member of a municipal council," shewed that a wider power than a "scrutiny of the ballot papers" alone must have been intended to be conferred.

It is obvious, however, that this section is not intended to enlarge the jurisdiction conferred on the judge by section 369, but simply to invest him with all necessary powers effectively to exercise a jurisdiction already conferred and defined.

(1) 20 Ont. L.R. 476.

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It would appear to me reasonably clear that if a voter duly entered upon the voters' lists tenders himself at the polls as a voter and claims the right to vote he may be required to take the oath prescribed by law with regard to the qualification he claims to vote under, whether as a tenant, a freeholder, or otherwise. This oath embraces the statement that he is a British subject, and if he claims as a tenant, the further statement of residence in the municipality for one month before the election. If he takes the oath, he does so at his peril, and his vote is entered. If he declines to take it, his vote is, of course, refused to be taken. The question whether or not he is or was such resident is frequently one of much doubt and difficulty. But it seems to me clear that none of the questions of nationality, age, tenancy, or residence, which go to make up his qualifications to be put on the voters' list, are open for discussion or inquiry on "the scrutiny of the ballot papers" which the County Court judge is authorized to hold.

Such questions of fact are under the "Ontario Voters' List Act," Ontario Stats. 1907, ch. 7, to be tried and determined before the voters' list is finally settled, and the only exceptions are those mentioned in section 24 of the Act. *In re Port Arthur and Rainy River Provincial Election* (1).

These exceptions, however, excluding the first, namely, "persons found guilty of corrupt practices at or in respect of the election in question on such scrutiny or since the list was certified by the judge," are expressly confined to persons who by reason of want of residence are "under the provisions of the 'Ontario Election Act,' dis-entitled to vote," or who

(1) 14 Ont. L.R. 345.

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under sections 4 to 7 of that Act are disqualified and incompetent to vote, and are not applicable to municipal elections. It is not contended that in this case any one of the four persons whose votes were disallowed by the County Court judge became disentitled to vote under the "Ontario Election Act," or were disqualified persons under that Act. I adopt the construction placed upon the language of this section by Chief Justice Meredith in *In re Orangeville Local Option By-law*(1), and am of opinion that it is applicable only to voting under the Ontario election law.

Then with regard to the first exception, persons "guilty of corrupt practices in respect of the election in question," it is perhaps sufficient to say that none of the votes attacked in this case were attacked on that ground.

But even if it were otherwise and votes had been attacked on the ground that the voters had been guilty of corrupt practices, I am utterly unable to see how, in the face of the statutory provisions guaranteeing the secrecy of the ballot, and the limited character of the scrutiny provided for, any vote could be inquired into and struck off. The "General Elections Act" contains provisions enabling such votes to be dealt with on a general scrutiny, but it has not been suggested that any similar legislation exists with respect to municipal elections, and until that is done the provisions with regard to the secrecy of the ballot preclude any striking off of the votes of persons, even if they may be found guilty of corrupt practices, for the obvious reason that how the corrupt voter voted is unknown and cannot be inquired into. To give effect to exception one of section 24, therefore, on such a

(1) 20 Ont. L.R. 476.

scrutiny as that now before us, further legislation would probably be necessary. As I have said, however, that question does not arise here, except indirectly.

The judge is, by section 369 of the "Municipal Act," authorized to enter upon a "scrutiny of the ballot papers." By section 371 he is directed, upon inspecting the ballot papers and hearing such evidence as he may deem necessary, to "determine in a summary manner whether the majority of the votes given is for or against the by-law." His determination must be reached by the validity or invalidity of these papers and not by going behind them and entering upon an inquiry whether any of the persons on the voters' list who voted by depositing these ballot papers were entitled to vote or not. It is the "votes" polled as evidenced by the ballot papers that he is to determine upon.

If he had the right to inquire beyond the ballot papers, then to do so effectively he must have the right to inquire how the parties voted. But section 200 prohibits any such inquiry. The secrecy of the ballot is made a matter of public policy by the statute, and cannot be waived. No inquiry, therefore, being permissible as to whether any voter voted for or against the by-law, how is it possible for the county judge to determine, except from the legal and allowed ballot papers themselves, whether the majority of votes given was so given for or against the by-law ? I do not think it is possible, and the plan adopted by the County Court judge in this case of deducting the disallowed votes from the total of those cast in favour of the by-law is to my mind an arbitrary, unjust and totally indefensible plan. It was suggested, but not decided, by Garrow J.A., that

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in some cases perhaps evidence more or less reliable might be got as to the habits and associations of the voter which might raise a presumption as to which way he had probably voted.

I cannot assent to any such process of mere speculation or presumption.

No other judge has, I think, adopted the suggestion, and the very necessity which the extreme construction of the County Court judge's powers on the scrutiny compelled the learned judge to resort to, shews how unreasonable such a construction is.

And still, if this extreme construction of the Act is held to be correct, while the public policy of maintaining the secrecy of the ballot is maintained in order to make such a construction workable or effective, resort must either be had to the suggestion put forward by Garrow J., and which I think absolutely indefensible, or to the conclusion reached by Middleton J., that it was competent for the judge to examine into the voters' qualifications to vote, and when he had determined adversely to that right then the secrecy which, as a matter of public policy had been placed upon the ballot, was withdrawn and the voter could be compelled to state how he had voted. I cannot find that this construction of the clauses of the Act relating to secrecy of the ballot reached by Middleton J. has received any other judicial support. I cannot concur with it, though I admit it is the logical result of accepting the enlarged construction of the County Court judge's powers on the scrutiny. The 89th section, which provides that

> no person shall be entitled to vote at any election unless he is one of the persons named or intended to be named in the proper list of voters, and *no question of qualification* shall be raised at any election except to ascertain whether the person tendering his vote is the person intended to be designated in the list of voters,

and the sections 198 to 200 providing for the secrecy

of the ballot, all convince me that no such conclusion is permissible. Section 200 reads:—

> *No person* who has voted in any election shall in any legal proceeding to question the election or return, be required to state for whom he voted.

This language is, to my mind, conclusive. It is not confined to those who may on a subsequent scrutiny inquiry be held to have been "legally qualified voters" only, but expressly applies to *any person* who votes, and that includes all persons named or intended to be named in the lists of voters.

I have dwelt at some length upon these two rival suggestions of the learned Justices Garrow and Middleton, because I think on their enlarged construction of the scrutiny clause one or other is essential to the practical working out of the scrutiny, but as I have shewn, I do not agree with either suggestion.

That of Justice Garrow is avowedly only a partial solution of the difficulty the larger construction of the judge's powers on the scrutiny involves, and is one which I venture to say will not be adopted. That of Justice Middleton is, as I have attempted to shew, at direct variance with the language and policy of the statute.

If neither of these suggestions can be adopted, then I venture to think that the construction of the Act which alone is workable under existing legislation should be adopted. In my humble judgment that construction is clear and is confined to a scrutiny of the ballot papers only, and does not extend to an inquiry into the right of a duly registered voter to vote. Such a construction involves no insuperable difficulties; it assumes that the legislature well knew what it was doing when it used the language it did, and it gives

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effect to clear and unambiguous language without reading into the section words which are not there.

As the ballot paper itself is the only legal means which the County Court judge possesses to determine how the voter who deposited it intended to vote, so it is this paper alone, which if found bad or invalid, must determine from which vote, for or against the by-law, it should be deducted. The "votes" he is to determine upon in a summary manner are those and those only evidenced by ballot papers found to be good *ex facie*.

Summing up shortly my reasons for holding that the special jurisdiction conferred on the County Court judge by the 369th section of the "Consolidated Municipal Act, 1903," is confined to a scrutiny of the ballot papers only; they are, first, that such a construction follows the literal words of the section relating to such scrutiny, carries out their intent and expressed object, is workable, does not contravene any of the other provisions of the statute, and is supported by a very large, if not a preponderating, judicial opinion in Ontario.

That the larger construction contended for is not justified by the language of the section and is unworkable, unless either by violating the public policy of the statute with regard to the secrecy of the ballot, or by resorting to the expedient of taking evidence as to the habits and associations of the voter so as to raise a presumption as to which way he probably voted, neither of which alternatives is permissible.

That with respect to the three exceptions to the conclusive character of the certified voters' list stated in section 24 of the "Voters' Lists Act," 1907, exception one referring to persons guilty of corrupt prac-

tices has nothing to do with any of the votes challenged on this scrutiny, and if it had, requires further legislation to make it effective in municipal scrutinies, while exceptions 2 and 3 relate *exclusively* to voting under the "Ontario Election Act," and to votes disqualified under that Act.

For these reasons I would allow the appeal with costs and restore the judgment of the Divisional Court, Exchequer Division.

IDINGTON J.—If any one desires truly to interpret a statute which is, or was when enacted, a marked innovation in existent law, he should observe the rules in *Heydon's Case*(1), which are quite as good to-day as three hundred years ago.

The first and chief question raised herein is in truth the meaning of section 369 of the "Municipal Act, 1903."

To comprehend properly the purpose and meaning of this section we must look at the group of sections in which we find it under the caption of scrutiny, and inquire whence they came and why they were brought into existence. They are substantially, and indeed almost literally, the same as those appearing in 39 Vict. ch. 35, entitled:—

An Act to provide for voting by ballot on municipal by-laws requiring the assent of the ratepayers,

and numbered therein sections 21, 22, 23 and 25, and have remained ever since as part of the "Municipal Acts."

Other sections of the same Act appear in other parts of the "Municipal Act, 1903," relevant to the said elections.

This "Ballot Act" was passed two years after vot-

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ing by ballot had been enacted as the method of election to the municipal councils. This latter Act had specially excepted from its operation the taking of votes of electors with respect to by-laws requiring the assent of electors.

Why was it necessary in passing the enabling Act to provide this group of sections now in question ?

To understand this we may profitably advert briefly to the history of legislation relative to the quashing of municipal by-laws.

The Court of Queen's Bench in 1854, in *In re Cæsar and Township of Cartwright*(1), having apparently in earlier cases suggested the court might have a common law power over such by-laws, concluded it had none but such as given by statute.

The first statutory power in this regard was contained in 12 Vict. c. 81, s. 155. The language of that statutory provision pointed at illegality in the by-law as the ground upon which the courts might quash, and that was for some time held to mean an illegality on the face of the by-law.

It was interpreted later in such a way as to enable ratepayers to shew illegality in a variety of ways not appearing on the face of the alleged by-law; such, for example, as if a by-law required the assent of the ratepayers and yet no such vote had been taken. This was later expanded to cover the case of illegal voting or any improper taking of the vote.

In other words "illegality" seemed to be taken as synonymous with *ultra vires* in the widest sense of the term.

It is to be noted that the exercise of the power to quash had always been held, and especially so in

(1) 12 U.C.Q.B. 341.

these cases of irregularity, as in the discretion of the courts.

And in *Coe and Township of Pickering*(1), Chief Justice Draper had questioned whether a scrutiny of the vote had ever been intended as part of the duty of the courts on a motion to quash. He pointed out that they could not sit beyond term, and within these limited periods such a proceeding seemed impracticable. That state of things continued till terms were in the old sense abolished by the "Judicature Act" of 1881.

The Court of Common Pleas, in the case of *Erwin* v. *Township of Townsend*(2) seemed to imply that illegal votes might become a proper subject of inquiry on a motion to quash.

Indeed, the jurisdiction to quash had been the subject of so much doubt and difficulty that as late as 1885 Chief Justice Wilson, in the case of *Fenton* v. *County of Simcoe*(3) found it necessary to review the authorities in order to shew his duty to entertain what was analogous to a scrutiny.

Preceding, yet almost concurrently with, the ballot, there had come other reforms reaching many indirect modes of bribery or corrupting the electorate in ways that had not been always considered bribery, and also acts of intimidation.

In accord with legislation in this regard relative to elections to the legislature, the Act of 1872, for the prevention of corrupt practices at municipal elections, 35 Vict. ch. 36, was passed, and in that was given for the first time the express statutory power to make such causes the basis of a motion to quash a by-law.

(1) 24 U.C.Q.B. 439. (2) 21 U.C.C.P. 330.
(3) 10 O.R. 27.

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The grounds open on a motion to quash were still limited, if this statute was to be taken as the guide measuring the powers the courts were given. Such a motion might not reach the cases of personation, for example. Besides, motions to quash had never been at that time very summary; and as I have said had been looked upon as dependent upon discretion.

And after all this was an unsatisfactory way of reaching and remedying the evils likely to arise from any such or other misconduct, as an election for obtaining the assent of the electors to a by-law was apt to give rise to.

Indeed, there was even with this amendment no adequate machinery then in the power of the courts for effectively reaching such cases, and all others as might be involved in and be reached by a proper scrutiny of the vote, and hence for all these reasons a better remedy for growing evils was urgently needed.

So when the legislature, which had paused for two years after introducing the ballot at municipal elections, decided to apply the same method of taking votes for by-law elections, it enacted above named 39 Vict. ch. 35, containing a code, as it were, consisting of twenty-eight sections relevant to the subject.

The County Court judges had always been, concurrently with the Superior Court judges, the duly constituted tribunals for trying and deciding cases of controverted municipal elections and so continue. There can hardly be a doubt, therefore, respecting their supposed fitness for the duties of trying any question arising on the trial of a contested election relevant to the submission of a by-law to the electors.

They had become accustomed to applying the laws bearing on such elections and been fully intrusted in

that regard with enforcing the stringent provisions relevant thereto, and to which I have adverted; so far as bearing upon the council elections.

I, therefore, see no reason to doubt that when the legislature enacted this new law it intended to confer on these judges to the fullest extent any and every power any tribunal might need to decide such controversies as might arise in the conduct of such an election as voting upon a by-law; at least just as extensively as they had been given power to thoroughly try and decide other municipal elections involving the same sort of questions.

The history and peculiar frame of the legislation indicates that much.

Section 21 of the Act was substantially that which is now section 369 of the Act before us. It was as follows:—

21. If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector applies upon petition to the the County Judge, after giving such notice of the application and to such persons as the judge may direct, and shews by affidavit to the judge reasonable grounds for entering into a scrutiny of the ballot papers, and the petitioner enters into a recognizance before the judge in the sum of one hundred dollars, with two sureties (to be allowed as sufficient by the judge upon affidavit of justification) in the sum of fifty dollars each conditioned to prosecute the petition with effect, and to pay the party against whom the same is brought any costs which may be adjudged to him against the petitioner, the judge may appoint a day and place within the municipality for entering into the scrutiny.

Let us turn to section 128 of the Act respecting municipal institutions as in the Consolidated Statutes of Upper Canada, and section 132 (its successor) in the "Municipal Act" of 1873, and compare this section which I quote with those for initiating the trial of a controverted municipal election and we see where it was got. Let us then turn to the subsequent sections

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in the original Act and in the Act as it stands, and we find the judge is empowered not only to inspect the ballot papers, but also to take evidence and hear the parties

> and in a summary manner determine whether the majority of the votes given is for or against the by-law and shall certify the result to the council.

And it remains so in the Act before us.

Then section 372 of the Act now in question is as follows:—

> The judge shall, on the scrutiny, possess the like powers and authority, as to all matters arising upon the scrutiny, as are possessed by him upon a trial of the validity of the election of a member of a municipal council; and in all cases costs shall be in the discretion of the judge, as in the case of applications to quash a by-law, or he may apportion the costs as to him seems just.

This is substantially the same as section 25 in the original Act.

What can a scrutiny in such a connection mean if it does not mean the full trying out of all that can be legally tried on an election petition relative to the rights of parties to vote; and incidentally thereto in some cases, the loss or forfeiture of a vote by reason of some act which the law prohibits from being given, and surely by implication from being counted as a vote?

Every intelligent man of the time when this group of sections first became law had, by reason of the occurrence of a great many cases of scrutiny, come to have a pretty accurate idea of what it meant. It is necessary to understand that commonly received apprehension of the term when the Act was passed, if one would read these sections aright.

It had, prior to its use in this Act in 1876, a well defined meaning derived from its use in Parliamentary trials of election petitions. It had been used in the

"Controverted Elections Act" of Ontario, passed three years previously, and stands yet in that Act.

It seems amusing in light of legal history to hear an argument addressed to the court that this scrutiny must mean no more than a recount.

A change in habit of thought does in time change the meanings of words and shades thereof. And I am now convinced from this case that a use of words changes the mode of men's thoughts.

But for all that I must insist upon it that a scrutiny of ballots did not, according to the notion that prevailed in 1876, and in this connection, mean the same thing as a recount. In proof thereof we have the fact that the legislature which first enacted these sections now under consideration, had during the same session in which they were enacted made the first legislative provision in Ontario for a recount of ballots; and I may, by the way, add that in doing so it used the words "votes" and "ballots" as if interchangeable terms.

Nay, more, though for or in respect of elections to the legislature it had provided a recount by a judge, it did not provide any such thing for municipal elections till six years later than the Act we are considering, when it did so by the Act of 46 Vict. ch. 18, sec. 162.

Moreover, the Act of 1874, 38 Vict. ch. 28, sec. 19, sub-sec. 4, had provided for the clerk of the municipality as returning officer in case of dispute, breaking open the ballot packages and deciding any dispute that had arisen as to the count of ballots.

Framed as the whole scheme of this group of sections is in outline upon the plan and with the identical powers that had long been in use for trying controverted municipal elections, can there be any doubt of its purpose ?

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How can it be said in face of such a course of legislation amid which these sections were first enacted, that this scrutiny before a county judge was intended for or meant merely a recount? Or how can it be said that when the law was changed and power was given to have a recount by the county judge in ordinary municipal elections and the provisions for a scrutiny left standing unrepealed and in force, that they were to be reduced, in effective operation, to something less than originally intended and to be treated as a mere recount? And if these considerations do not dispose of such a contention how can it be maintained in face of section 322, sub-sections 3 and 4 (in the same Act as introduced the recount in municipal elections) which provided specially as to bonus by-laws requiring a two-fifths of the total available vote, as follows:—

(3) In case of dispute as to result of the vote, the judge shall have the same powers for determining the question as he has in any case of a scrutiny of the votes. 45 V. c. 23, s. 17.

(4) The petition to the judge may be by any elector, or by the council; and the proceedings for obtaining the judge's decision shall be the same, as nearly as may be, as in the case of a scrutiny. 43 V. c. 27, s. 16(2)?

That section stands now section 366*a* of the present Act.

Such is the history of the law so far as I can find and verify it.

The decision we are asked to come to would gravely affect the rights of electors to have a true report made of the result not only of this sort of election relative to the liquor law, but also as to all the elections by which the Act provides for obtaining the assent of the electors to any by-law involving their money and property and especially as to the bonus

by-laws which respectively require a certain specified proportion of the total votes entitled to be cast in such regard.

When electors suppose that the law provides a protection in requiring that a certain percentage of the total available vote must be had, they do not turn out with the same zeal as in other cases and hence often the doors are thrown open to personation and the analogous fraud of voting when a man, though on the list, has in truth no vote.

This view presented by appellant, if adopted, would render all this and much more of an undesirable kind of consequence not only possible, but without the summary and reasonable remedy the scrutiny gives, drive the ratepayer to a locking of the stable after the horse has been stolen, as moving to quash the by-law would often mean.

I do not think an Act which has stood as a shield for an honest vote and protection against fraud in by-law elections for so very long, ought to be frittered away merely because the supporters of this by-law neglected (if their pretensions be founded on fact) the obvious duty of tendering the oath to those voting where they had no right to vote.

Coming to the last question involved in the appellant's contention, it seems a remarkable one. The voters' list is the foundation of the vote taken, and but for the "Voters' List Act" containing section 24, no trouble could arise in the way of carrying out this scrutiny.

The following is the section in question:—

24. The certified list shall, upon a scrutiny, under the "Ontario Election Act," or the "Municipal Act," be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used, except

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(1) Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the judge;

(2) Persons who, subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the "Ontario Election Act," disentitled to vote;

(3) Persons who, under sections 4 to 7 of the "Ontario Election Act," are disqualified and incompetent to vote.

Appellant argues that the exception in sub-section 2 forms no part of the law governing this election and has nothing to do with the matter.

The first part of the section is set up against scrutiny, but its limitations expressed in the exceptions are to be excluded. Needless to answer that, I imagine.

But we are asked, despite recent amendment in 1907, to read sub-section 2 so as to make the last member of the sentence govern the whole and say it can only refer to Ontario elections and thus render nugatory and nonsensical the first part referring to a municipality. I do not think that mode of interpretation commends itself or falls within either the latter part of the rule in *Heydon's Case*(1) above referred to or the "Interpretation Act" in force here.

I am also unable to read the language of this sub-section 2 as it is said it has been read elsewhere.

I am unable to so read that as to treat the non-resident at the time of voting as entitled to vote. If tendered the proper oath he could not take it. But his vote cannot be effectively counted, and if in the result the learned trial judge is thus disabled from reporting the by-law has been carried, he must say so.

It is, therefore, unnecessary to determine here anything relative to the first class of exceptions. But to support the argument of appellant excluding its opera-

(1) 3 Co. 18.

tion I suppose we must assume that the voting when and where a man knows he has no right to vote should not be held a corrupt, but a pious practice: Willes J. in the case of *Cooper* v. *Slade*(1), at page 773, and Baron Martin in the *Bradford Election Case*(2), at page 31, to the contrary notwithstanding.

The judge cannot do the impossible thing in such a case as this. However ingenious the method adopted of counting the votes cast so as to produce a total vote and then deduct the total bad votes from the numbers reported as supporting the by-law and thus present a less than three-fifths majority, I do not agree therein, save as illustrative of possible results if voters could be sworn as to how they had voted.

If the law prohibits his swearing the alleged voters and forcing them to tell how they voted, as I think it does by section 200 of the Act, then there is no alternative left him but to consider, as in any other election trial, whether or not he can say there has been a valid election shewing the by-law carried.

If, as here, the result is that he cannot thus determine, he must say so and thus end the matter.

There might in many such cases be such a preponderance of votes cast in favour of the by-law as to overcome any such result being necessary.

Each case must in its result depend on these considerations according to the facts developed.

In this case the result is the by-law cannot be reported as carried.

The appeal must be dismissed with costs.

DUFF J.—I concur in dismissing this appeal. The grounds upon which this conclusion is based are suffi-

(1) 6 H.L. Cas. 746. (2) 1 O'M & H. 30.

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ciently stated in the judgment of Garrow J. with which I entirely agree.

BRODEUR J. (dissenting).—In 1876 the ballot paper was introduced in elections on municipal by-laws in the Province of Ontario (39 Vict. ch. 35). The law provided that the ballot should have a number printed on the back and should have attached a counterfoil with the number printed on the face. That numbering of the ballot made it similar to the one then used in England. At the same time it was provided that a scrutiny of the ballot papers could take place. That provision as to the scrutiny is now reproduced in section 369, chapter 19 of the "Consolidated Municipal Act" of 1903, under the heading "Scrutiny," and reads as follows:—

> If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector applies upon petition to the county judge * * * and shews by affidavit to the judge reasonable grounds for entering into a scrutiny of the ballot papers * * * the judge may appoint a day and place within the municipality for entering into the scrutiny.

The legislative and municipal elections are held on lists prepared according to the provisions of an Act known as the "Voters' List Act," though the qualification of the elector in those elections are different. Thus we find in the "Election Act for the Legislative Assembly," that the judges are not competent to vote (sec. 4, the "Ontario Election Act"). However, in any municipal election those judges could vote. Their names are put on the list.

The "Voters' List Act" which is now contained in chapter 4 of the statutes of 1907, declares in its section 24 what is the effect of those lists upon a scrutiny as follows:—

24. The certified list shall upon a scrutiny, under the "Ontario Election Act," or the "Municipal Act," be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was, or was the proper list to be used, except

(1) Persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the judge;

(2) Persons who, subsequently to the list being certified are not or have not been resident either within the municipality to which the list relates, or within the electoral district for which the election is held, and who by reason thereof are, under the provisions of the "Ontario Election Act," disentitled to vote;

(3) Persons who, under sections 4 to 7 of the "Ontario Election Act," are disqualified and incompetent to vote. R.S.O. 1897, c. 7, s. 24.

In the last few years the "Ballot Act" was amended and the numbering of the ballot on its back has disappeared as a result of the amendment.

A scrutiny has taken place in this case in a municipal by-law election. The County Court judge has proceeded to inquire as to the residential qualifications of a certain number of voters. Four of them were found to have the same residential qualification as that which they had when the lists were made. And the judge, although not able to ascertain now for whom those people had voted, because their ballots were not numbered as formerly, proceeded, nevertheless, to deduct their votes from the number given in favour of the by-law. As a result of that subtraction he found that the by-law had not the necessary majority and declared it had not carried.

The majority of the Court of Appeal confirmed that decision of the County Court judge.

I may say that I am not able to concur in that view. I am of the opinion that the County Court judge had no authority first to inquire upon a scrutiny in a municipal election as to the residential quali-

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fication of electors and secondly that even admitting that he could make such inquiry, the law does not give him the power to deduct those votes from the votes given in favour of the by-law.

The scrutiny is well known in Great Britain. It is a procedure on the trial of an election petition by which the petitioner claiming the seat must put himself in a majority by adding sufficient votes to his own poll or by striking off a sufficient number from the respondent; then the respondent begins and adopts the same course until he is in a majority and so the scrutiny is continued until the particulars are exhausted. And in order to ascertain for whom a person whose name should be struck off has voted, the court refers to the register used in the election, finds the name of the voter, then refers to the counterfoils and finds the ballot paper used by that disqualified voter and having in that way discovered for whom he has voted, deducts his vote from the number given in favour of his candidate.

Fraser in his work on Parliamentary Elections, 2nd ed., p. 26, says:—

> The object of the numbering of the ballot paper is to make it possible to ascertain in the event of a scrutiny how votes have been given.

In Ontario the law, as I have already said, provided at first for a numbered ballot in municipal elections. When a scrutiny would take place and a corrupt vote would be found they could then refer to the poll book, the counterfoils and the ballot papers and strike off that vote.

There is no doubt that under section 24 of the "Ontario Voters' List Act" they could also in a provincial election strike off the votes of persons who

were declared unqualified by sections 4 to 7 of the "Election Act," or who had ceased to be residential voters since the making of the lists, but when they abolished the marked ballot they unfortunately forgot to amend the provisions of their Act as to the scrutiny, and did not provide any machinery by which it could be detected for whom the unqualified voter had given his vote. It would have been easy in order to render the scrutiny effective to authorize such an inquiry. On the contrary it is declared in the law that nobody may disclose, and the elector cannot be forced to state, for whom he voted.

Now, as to whether the judge could inquire as to the residential qualification of voters who were in the same position as when the list was made, I find that the section 24, though referring in its first part to a scrutiny in municipal and provincial elections, applies in its two last sub-sections to legislative elections only. Corrupt practices might, under sub-section 1, be inquired into in municipal elections, but no power seems to me to have been given to make the same inquiry as to voters disqualified on account of change of residence or for some other reason. That is the view which has been enunciated by several judges of the Ontario courts and in which I concur. See *Saltfleet Case*(1); *Campbellford Case*(2); *Durham Case*(3); *Orangeville Case*(4); *Renfrew Case* (5).

Now, suppose that the inquiry could be made as to the change of residence of a voter, could the inquiry cover or relate to a case where the voter is to-day in

(1) 16 Ont. L.R. 293.
(2) 16 Ont. L.R. 578.
(3) 17 Ont. L.R. 514.
(4) 20 Ont. L.R. 476.
(5) 21 Ont. L.R. 74; 23 Ont. L.R. 427.

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the same position as he was when the list was made ? One cardinal principle is that the lists are final and conclusive. They are made with a great deal of care under the control of the municipal authorities and of the courts. Very frequently in the making of the lists the municipal authorities and the courts have to decide whether a man is residing in one municipality or in another. The residence is a question of fact which it is sometimes difficult to determine. In the case of a man whose residence has not changed since the making of the lists is it legal that the qualification of that man could be determined on the scrutiny ? I think not. I think that the list is final and conclusive in such a case.

Now, coming to the second question as to what the judge is going to do with the votes which he finds have been illegally given.

Formerly when the ballot was marked it would have been easy to find out for whom this person had voted, and his vote could have been struck off. But by the law passed a few years ago, the ballot was changed and is not numbered any more. It is the same as in our federal law. Could it be claimed for one moment under the federal law when a scrutiny takes place, that a member could not be declared elected because some person had voted who had no right to vote ? Suppose that a member should be elected by a majority of one, a scrutiny takes place and it is found that two electors were not qualified to vote, should it be declared by the judge who holds this scrutiny that the member should not be returned because he is not sure whether he has the majority or not, there being no means of ascertaining for whom those unqualified men have voted ? Certainly not.

That is, however, what has been done in this case. Where was the authority of the judge to declare that the four or five alleged illegal votes should be deducted from the number of those who have voted for the by-law? That is a conclusion not authorized by the law, and it is also a very unjust and unfair one, because those unqualified electors may have voted against the by-law so their votes would be counted twice against the by-law. For my part, I am strongly of the view that the judge acted without authority and that those votes should not be deducted from those given for the by-law. To justify his acting in that way the judge would have required express statutory authority, and I fail to find in the statutes any such powers vested in the judge who holds a scrutiny.

For those reasons the appeal should be maintained and the judge should declare that there was a sufficient majority of votes in favour of the by-law.

Appeal dismissed with costs.

Solicitors for the appellant: *Mills, Raney, Lucas & Hales.*

Solicitors for the respondent: *Leitch & Green.*

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*Feb. 18.

THE CANADA FOUNDRY COMPANY (RESPONDENTS) ..... } APPELLANTS;

AND

THE BUCYRUS COMPANY (PETITIONERS) ..... } RESPONDENTS.

IN THE MATTER OF THE TRADE-MARK "CANADIAN BUCYRUS."

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade-mark—Geographical name—Right to register—Interference.

A manufacturing company in the United States adopted the word "Bucyrus," the name of a town in Ohio, as a trade name to designate their goods, but did not register it as a trade-mark nor protect their manufactures by patent. They sold their goods in the United States and Canada for many years, and they became well-known as "Bucyrus" manufactures.

Held, affirming the judgment of the Exchequer Court (14 Ex. C.R. 35), that the company was entitled to register the word "Bucyrus" in Canada as a trade-mark for use in connection with such manufactures.

A Canadian company for some years manufactured and sold "Bucyrus" goods as agent for the makers thereof and built up a good business for the same in Canada. When their agency terminated they sold similar goods of their own manufacture under the name of "Canadian Bucyrus," which they registered as their trade-mark for such goods.

Held, affirming the judgment below, that such trade-mark should be expunged from the register.

APPEAL from a judgment of the Exchequer Court of Canada (1) in favour of the respondents.

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

(1) 14 Ex C.R. 35.

Two questions arose on this appeal. First, whether or not the respondents were entitled to register as a trade-mark the geographical term "Bucyrus," which for many years had been applied to the goods they manufactured and under which name said goods had become widely known in the United States and Canada; secondly, whether or not the appellants, manufacturing similar goods in Canada, could register the words "Canadian Bucyrus" as their trade-mark. By the judgment of the Exchequer Court the first question was answered in the affirmative and the second in the negative.

J. K. Kerr K.C. and *J. A. Paterson K.C.* for the appellants. We are entitled to use a trade name similar to that of the respondents so long as we take effective steps to prevent the public from being deceived as we have done. See *Grand Hotel Co. of Caledonia Springs* v. *Wilson*(1); *Orr Ewing & Co.* v. *Johnston & Co.*(2); *Singer Machine Manufacturers* v. *Wilson* (3); *Pabst Brewing Co.* v. *Ekers*(4).

The word "Bucyrus" is a geographical as well as an historical term and cannot be registered as a trade-mark. *In re Salt & Co.*(5); *Elgin National Watch Co.* v. *Illinois Watch Case Co.*(6).

D. L. McCarthy K.C. for the respondents referred to *Partlo* v. *Todd*(7), at page 199; *Richards* v. *Butcher* (8); *Leather Cloth Co.* v. *American Leather Cloth Co.* (9); *In re Rivière & Co.'s Trade Mark*(10).

(1) 2 Ont. L.R. 322; 5 Ont. L.R. 141; [1904] A.C. 103.
(2) 13 Ch. D. 434.
(3) 3 App. Cas. 376.
(4) Q.R. 21 S.C. 545.
(5) 63 L.J. Ch. 756.
(6) 179 U.S.R. 665.
(7) 17 Can. S.C.R. 196.
(8) 8 Cut. P.C. 249; [1891] 2 Ch. 522, at p. 543.
(9) 35 L.J. Ch. 53, at p. 64.
(10) 53 L.J. Ch. 578.

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CANADA FOUNDRY CO. v. BUCYRUS CO.

The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal from a judgment rendered on an application made by the respondents to the judge of the Exchequer Court, to expunge from the register, the words "Canadian Bucyrus," registered by the appellants as their trade-mark. That application was made necessary by reason of the refusal to register the word "Bucyrus" as the trade-mark of the respondents and the validity or propriety of that refusal falls also to be considered on this appeal.

Two questions therefore arise: (*a*) Should the appellants' trade-mark be removed from the register? (*b*) Is the word "Bucyrus" registrable as a trade-mark under the circumstances? The facts as to which there is practically no dispute, stated in their chronological order, lead irresistibly, in my opinion, to the conclusion that the first question must be answered affirmatively. There may be some doubt as to whether the word "Bucyrus" can be registered as a valid trade-mark; but on that question also I agree with the learned judge of the Exchequer Court.

The petitioners, now respondents, are an American corporation engaged, since 1879, in the manufacture and sale in the United States and Canada, and other parts of the world, of particular types of wrecking cranes, pile drivers, shovels and other railway appliances, and during the greater part of that period they adopted the name "Bucyrus" to distinguish their manufactured products.

Those railway appliances speedily became known under the name of "Bucyrus" and the business of the company grew rapidly, their machinery obtaining a wide celebrity. It was sold invariably and solely under the name of "Bucyrus." All the machinery so

sold had been prominently marked with the word "Bucyrus," printed on a name-plate. The respondents began to sell their machinery in Canada, and on the first of October, 1904, they entered into an agreement with the appellants by which the latter were appointed sole and exclusive agents to make, manufacture and sell in Canada, the railway appliances described in the agreement as "Bucyrus" specialties. It was expressly stipulated that all such specialties manufactured under that contract should be

> characterized and distinguished under the name "Bucyrus," that this name shall appear prominently on the complete machines, and that the *method and system of marking adopted by the Bucyrus Company* on its own apparatus in the United States shall be followed as closely as practicable.

This contract remained in force until 1909 when, in the month of November of that year, it was cancelled by the appellants, who continued thereafter, as they had done before, to sell steam shovels, cranes, etc., with the name "Bucyrus" upon them. As the appellants say in their factum, by judicious advertising and adopting energetic business methods they established a large and prosperous business for the sale of products manufactured under that agreement. And in these circumstances they, in the month of February, 1911, obtained permission to register as their trade-mark the words "Canadian Bucyrus," to be applied to steam shovels, wrecking cranes and other railway appliances of their own manufacture. On or about the 7th July, 1911, the respondents also applied to register the word "Bucyrus" as their trade-mark, to be applied to their specialties, which are the same as those manufactured by the appellants and that application was refused because of the prior registration obtained by the appellants. Hence this applica-

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tion to expunge from the register the trade-mark "Canadian Bucyrus" and to register the word "Bucyrus" as the trade-mark of the respondents.

The respondents claimed and proved that in Canada, as elsewhere, the word "Bucyrus" had become (and was at the date of their agreement with the appellants) specially and exclusively distinctive of the railway specialties manufactured by them, and that it had always distinguished such specialties from those of all other makers whatsoever and that the use of the word "Bucyrus" conveyed to the minds both of the trade and the public in Canada and elsewhere, that the specialties to which it was applied had been manufactured by the respondents, or by the appellants under their license and by no other company, firm or person. On the evidence it appears to me conclusively established that the word "Bucyrus" has a particular signification and indicates the origin or manufacture of the thing to which it is attached. From the very first the word has been used to distinguish the machinery manufactured by the respondents from the machinery of other persons; it has been on the name-plate attached to the machinery sold by them under the designation of "Bucyrus" railway specialties. I am consequently of opinion that the word "Bucyrus" is a good trade-mark (section 5) and registrable as such.

To the objection that a geographical name is not a good trade-mark I reply by referring to: *Rey* v. *Lecouturier*(1), page 268; *The Karlsbad Case*(2), page 162.

That the respondents' goods had been upon the market for many years and were known under the

(1) 27 Cut. P.C. 268. (2) 29 Cut. P.C. 162.

name of "Bucyrus" specialties is not an objection (see *National Starch Co. Application*(1)).

To refuse to expunge from the register the trade-mark "Canadian Bucyrus" would be to encourage unfair dealing. The object of a trade-mark is not to distinguish particular goods, but to distinguish the goods of a particular trader. It is reasonably clear by the terms of the contract between the parties that the "Bucyrus" specialties meant to the ordinary public, machinery used in the construction of railways, made by a particular firm or company and that the respondents guarded themselves carefully against the contingency which has arisen. The appellants argue here that in their advertisements they are careful to say that the goods they sell are manufactured by them in Canada, but this is not a case of passing off. The question here is: Have the appellants the right to register as their trade-mark the word "Bucyrus" either alone or in combination with the word "Canadian"? The principle which, in my opinion, ought to govern in the case of an application of this kind is to prevent the use by two companies of names so nearly resembling one another as to be calculated to deceive. In my opinion, the use of the word "Canadian Bucyrus" is calculated to cause confusion. This is evident from the mere comparison of the two names. There is also abundant evidence that confusion would result from the use of both names. The word "Bucyrus," as I have already said, had long before this application been adopted by the respondents to distinguish the goods of their manufacture and by that name they were identified and known to the public. The appellants contend that they have under license from the

(1) [1908] 2 Ch. 698.

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respondents contributed to make a market for these goods in Canada. In that argument I find a complete answer to their case because it involves the admission that the word "Bucyrus" was to the public at the time of their application, a distinctive word and meant the goods of a particular maker of whose good name and reputation they seek to get the benefit.

For all these reasons I would confirm with costs.

DAVIES J.—I would dismiss this appeal with costs for the reasons given by Mr. Justice Cassels in the Exchequer Court.

IDINGTON J.—When the contract of agency between the parties concerned herein was put an end to, the Canada Foundry Company had no higher right than any one else to register as its trade-mark, one embodying the name of the Bucyrus Company.

Such a trade-mark was within the meaning of section 11, sub-section (*c*) of the "Trade-Mark and Designs Act," calculated to deceive or mislead the public and hence properly expunged by the judgment appealed from.

The respondent company seems clearly to have used the mark the judgment gives it a right to register.

The fact that "Bucyrus" is the name of a town in Ohio, does not of absolute necessity in law prevent its registration.

The use of a geographical or other name might in some circumstances be good ground for refusing registration of a trade-mark containing such name. But the facts in this case disclose no such state of

circumstances as to preclude either its use or the registration of the trade-mark containing it.

The appeal must be dismissed with costs.

DUFF J.—The evidence establishes that the use of "Canadian Bucyrus" as descriptive of steam shovels, railway wrecking cranes or pile drivers manufactured by the appellants would be calculated to work a deception on the public. I think that is *primâ facie* sufficient ground for cancelling the registration. As to the respondents' right to have the term "Bucyrus" registered as their trade-mark there are only two points to consider.

1st. It is contended that the word "Bucyrus" being a geographical name is incapable of being registered as a trade-mark. That objection is met by the evidence, which shews that it has acquired a secondary signification as designating steam shovels, railway wrecking cranes and pile drivers manufactured by (or from the designs and plans in current use by) the respondents or their predecessors.

2nd. The agreement of 1904 unquestionably gave the appellants a license to use the term "Bucyrus" as descriptive of objects manufactured by them under the provisions of the agreement; but the respondents did not by virtue of this license lose their exclusive property in the name "Bucyrus" as descriptive of articles of the kinds mentioned for these reasons: (*a*) The appellants acquired the right to use the term "Bucyrus" as descriptive of such articles as the agent of the respondents only and on the termination of the agency the license came to an end except it may be as regards articles already produced or in process of manufacture at the time the agreement was cancelled.

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(*b*) Under the agreement the appellants became entitled to the use of all the plans, designs and engineering data of the respondents relating to the manufacture of the articles governed by the agreement as well as the fullest inspection of and information relating to the respondents' processes of manufacture and the respondents became bound to furnish the appellants with advice as to all improvements and changes in type or style; the intention of the agreement obviously being that the articles manufactured and sold by the appellants should from time to time conform in all substantial respects to those which the respondents were then producing. It cannot be successfully argued that the effect of such an agreement was to make the term "Bucyrus," as applied for trade purposes to articles of the kinds in question, a term *publici juris;* because the license was a license to the respondents' agents and it was a license to use the mark only in respect of articles which in the only relevant sense were intended to be in substance the respondents' own productions.

BRODEUR J.—I am of the opinion that the appeal should be dismissed. I concur in the reasons given by Mr. Justice Cassels in the Exchequer Court.

Appeal dismissed with costs.

Solicitors for the appellants: *Kerr, Davidson, Paterson & McFarland.*

Solicitors for the respondents: *McCarthy, Osler, Hoskin & Harcourt.*

IN THE MATTER OF THE POWERS OF THE LEGISLATURE OF BRITISH COLUMBIA TO AUTHORIZE THE GOVERNMENT OF THAT PROVINCE TO GRANT EXCLUSIVE RIGHTS TO FISH.

1912 *Nov. 26 27.
1913 *Feb. 18.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Sea-coast and inland fisheries—Canadian waters—Tidal waters—Navigable waters—Open sea—B.C. "Railway Belt"—Foreshores—Ferœ naturæ—Legislative jurisdiction—Construction of statute —47 *V. c.* 14, *ss.* 2-6 (*B.C.*).

In respect of waters within the "Railway Belt" of British Columbia which are tidal it is not competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right of taking fish which, as *ferœ naturæ*, are the property of nobody until caught. The public right to take such fish being subject to the exclusive control of the Dominion Parliament it is immaterial whether the beds of tidal waters passed or did not pass to the Dominion in virtue of the transfer of the "Railway Belt."

As to waters within the "Railway Belt" which although non-tidal are in fact navigable, the Legislature of British Columbia is likewise incompetent to make such grants.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, in the open sea within a marine league of the coast of that province, by way of lease, license or otherwise the exclusive right of taking such fish (*ferœ naturæ*).

In so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right to take such fish (*ferœ naturæ*), in tidal waters, there is no difference between the open sea within a marine league of the coast of the province and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States of America.

Per Fitzpatrick C.J. and Davies, Idington, Duff and Brodeur JJ. (Anglin J. expressing no opinion on the point).—The beneficial ownership of the beds of navigable non-tidal waters within the "Railway Belt" in British Columbia, which were vested in the Crown, in the right of that province, at the time of the transfer of the "Railway Belt lands" to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

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

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REFERENCE by the Governor-General in Council of questions for hearing and consideration as to the powers of the Legislature of British Columbia to authorize the Government of that province to grant exclusive rights to fish as therein mentioned.

The questions referred to the Supreme Court of Canada for hearing and consideration pursuant to the authority of section 60 of the "Supreme Court Act" are as follows:—

"1. Is it competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right to fish in any or what part or parts of the waters within the "Railway Belt,"

(*a*) as to such waters as are tidal, and

(*b*) as to such waters as although not tidal are in fact navigable?

"2. Is it competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low-water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province?

"3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province, or lying between the province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right, or any

right, to fish below low-water mark in the said waters or any of them ?"

At the hearing of the arguments presented in respect of the issues raised upon the reference:—

Hon. A. W. Atwater K.C. and *Newcombe K.C.* (Deputy-Minister of Justice), appeared for the Attorney-General for Canada.

Lafleur K.C. and *H. A. Maclean K.C.* for the Attorney-General for British Columbia.

Wallace Nesbitt K.C., Aimé Geoffrion K.C., E. Bayly K.C. and *Chris. C. Robinson,* for the Attorneys-General for Ontario, New Brunswick and Manitoba.

S. B. Woods K.C. for the Attorneys-General for Saskatchewan and Alberta.

THE CHIEF JUSTICE and DAVIES J. agreed with Duff J.

IDINGTON J.—The respective jurisdictions of the Dominion and the province relative to the questions of fisheries and fishing rights were determined by the decision of the Judicial Committee of the Privy Council in the case of the *Attorney-General for the Dominion of Canada* v. *The Attorney-General for Ontario et al.*(1). The result of that decision was to leave the property therein as such (save possibly in the merest technical sense) in the province subject to and entirely dependent upon the legislative regulations and restrictions of the Dominion Parliament.

There can be no doubt that the right to fish in the sea and all its arms on the coast of British Columbia has been a public right enjoyable by everybody, and must so remain until the Dominion Parliament signi-

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

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fies otherwise, as, for example, by declaring that it will be for the good of the whole of Canada that a several or exclusive right of fishing may be granted.

There may be a question whether or not the province could grant an exclusive license anticipating and conditional upon and subject to the legislative regulations to be provided by Parliament. This would be practically of little use, even if technically it could fall within the terms of the judgment referred to.

After having given that possibly arguable right of the province the best consideration I can, it seems to me that it must be taken to be the will of Parliament that, until it has otherwise declared, the common law giving such rights as the public now possess is the regulation to be observed, and that is inconsistent with the grant of an exclusive license.

If the province should try to revoke this right of the people, it must do so through its legislature. Such legislation would be *ultra vires* and in any event if need be the veto power of the Dominion could prevent it.

What has been urged relative to the province having exclusive jurisdiction over "property and civil rights" as a ground for interference by the local legislature independently of Parliament, seems to me misplaced.

There is *primâ facie* no more of property or civil right involved in the question than in the right to navigate these same waters. There may be civil rights arise out of the operation of navigating, but the right to navigate is held subject to regulation by Parliament. When there has been well and truly granted a license to fish in said waters, within and conformable with the legislative regulations adopted by Parlia-

ment, then there will arise a civil right in the licensee which will fall in all its incidents of assignment and succession within the power of the province over property and civil rights. This exercise of power granting such a civil right is the foundation of such incidental rights and is itself an exercise of the power the province has over property and civil rights. It may be also made so long as consistent with the Parliamentary regulations, subject to terms and conditions giving rise to other incidental civil rights.

The recognition of the power of the province over all these properties and civil rights so developed, furnishes no argument for limiting the exclusive legislative authority of Parliament given by section 91, subsection 12, of the "British North America Act," over "Sea Coast and Inland Fisheries."

If the contention of the province were to prevail it might result in one man or corporation acquiring the monopoly for all time over a food supply of fish which the rest of the people of Canada, as well as of British Columbia, have a right to enjoy. Such a result is properly admitted as a possible logical consequence of the contention set up, but is plausibly met by the argument that there is no power but may be abused.

But I cannot overlook the comprehensive language of the exclusive power given Parliament over "Sea Coast and Inland Fisheries" and coupled therewith the predominant feature of our whole scheme of confederation, which is that to those who are to be directly affected by the exercise of any power is entrusted the power of due and proper rectification of any misuse of such power.

This power of granting exclusive licenses to fish in the waters of British Columbia so touches the wel-

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fare of the whole people of Canada, not only in relation to their food, but also in the widest areas of national life, in so many and diverse ways, that a book might be written thereon. I think the people who may be affected by its operation must be declared virtual masters, through their Parliament, of the situation.

The illustration given by Lord Herschell as to Parliament having the right to prescribe the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose, has been pressed, not exactly as the limit, but as if expressive of the entire nature of its power. I do not think it is more than an illustration. I by no means read it as indicating the whole nature of the power. For I think the exclusive nature of the legislative power over the subject-matter named, is as wide as it possibly can be and relates to everything that Parliament may deem fit to deal with in regard thereto. The incidental property or civil rights in the province which may be found therein, of course, cannot be touched by Parliament. And I have no doubt once these limits of their respective powers are accurately apprehended, the trust, so timely expressed by Lord Herschell, that the good sense of the legislatures concerned will overcome any apparent inconvenience, will be realized.

Even if the right to fish in non-tidal but navigable waters may differ from those other rights, all seem so classed together by the "British North America Act" that I think the right of the province in either case must be treated for all practical purposes as resting on the one common basis of the regulations of Parliament.

The nature of the property which the Dominion

may have relative to the granting of licenses to fish in the waters within the "railway belt" is not directly raised by these questions submitted for determination herein. It can only be incidentally considered here relative to the questions put by way of an answer to the claim of the province. In the view just expressed it seems hardly necessary to consider it. There is, however, not the same clear common law right of the public to fish in these non-tidal navigable waters as in the others in question herein. Hence, notwithstanding the opinion I have just expressed, I see there may be another point of view worthy of notice. The "Settlement Act," chapter 14 of the British Columbia Statutes of 1884, seems to transfer such a title in the soil as to preclude the province from granting any license to fish in non-tidal navigable waters existent on lands covered by said grant.

There is, in my opinion, no foundation in law for the claim that fish therein ever were *jura regalia* such as the precious metals. I would, therefore, answer each of the questions in the negative.

I understand from counsel that though taking the form of "Reference under the 'Supreme Court Act,'" this submission is in fact pursuant to the consent of the Province of British Columbia and the Dominion as a means of determining their respective rights in the premises.

It is conceivable that British Columbia before the Union or after that event, and before the later "Settlement Act" I have referred to, may have made grants inconsistent with the operative effect to be given the respective results of the legislation dealt with in accordance with what I have said. In either such case the Act of Union or later Act cannot interfere.

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DUFF J.—It will be convenient first to consider question 2.

The colony of British Columbia was established in 1858. By an ordinance promulgated by Governor Douglas, on the 19th of November of that year, the laws of England, criminal and civil, as they existed on that date were declared to be in force in the colony "so far as the same are not from local circumstances inapplicable," and by an ordinance, promulgated in 1867, after the union of the old colony of British Columbia with Vancouver Island, the ordinance of 1858 was made applicable to the whole of the new colony of British Columbia thereby constituted.

It is not suggested that from the first establishment of the colony of British Columbia down to the time when the United Colony entered the Canadian Union any enactment was passed by any law-making authority affecting the public rights of fishing in tidal waters in any way material to the present question. At the date of the Union the law governing these rights may be taken for our present purpose to have been the law of England "so far as the same was not from local circumstances inapplicable."

> The soil of "navigable tidal rivers,' like the Shannon, so far as the tide flows and reflows, is *primâ facie* in the Crown, and the right of fishery *primâ facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *primâ facie* right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by Act of the Crown not later than the reign of Henry II.

This statement of the law, contained in the opinion of the judges given by Mr. Justice Willes, in 1863, in response to a question put by the House of Lords in

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Malcomson v. *O'Dea*(1), at page 618, was expressly approved by the House, and is, of course, a final pronouncement as to the state of the law in England respecting public rights of fishing in tidal waters on the 19th November, 1858. I can think of no good reason why the rule enunciated in this passage should be supposed to be inapplicable to the circumstances of British Columbia, and I think it must be held to have been in force throughout British Columbia in 1871, when the provisions of the "British North America Act" became applicable to the province. That statute vested in the Dominion Parliament the exclusive authority to make laws relating to the "Sea Coast and Inland Fisheries," and in *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario* (2), at page 716, one consequence of this was held by the Privy Council to be that

> all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only.

It follows that question 2 in so far as it refers to a supposed exclusive right to be created by the province in tidal waters ought to be answered in the negative.

The question as framed goes further; but no suggestion was made in the argument as to the character of any possible non-exclusive rights of fishing grantable by the province in tidal waters and, as I do not understand what point is intended to be raised by the reference to such possible rights, I must ask to be permitted to treat the question as confined to exclusive rights.

I may further add that I have treated the question as relating only to rights of fishing as commonly

(1) 10 H.L. Cas. 593. (2) [1898] A.C. 700.

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understood, that is to say, rights to take fish (not being *royal fish* as to which our opinion is not desired) that as *feræ naturæ* are, where the fishery is public, the property of nobody until caught.

Treating question 3 as also confined to exclusive rights of fishing in the sense already indicated that question must for the same reasons be answered in the negative. It is not necessary to consider the very important question whether the bed of the open sea within the three-mile limit is or is not vested in the Crown in right of the province.

For the same reason also the first branch of the first question must be answered in the negative. The public right being subject to the exclusive control of the Dominion Parliament it is immaterial whether the beds of tidal waters passed or did not pass to the Dominion under the transfer of the "Railway Belt."

The second branch of the first question raises a different point. I think it should be answered in the negative for these reasons.

1st. The beds of non-tidal, navigable waters within the "Railway Belt," in my opinion, passed to the Dominion by the transfer effected by the "Settlement Act." In that Act, 47 Vict. ch. 14, sec. 2, the lands transferred are thus described:—

> The public lands along the line of railway * * * to a width of 20 miles on each side of the line.

It is argued that the beds of non-tidal navigable waters within the boundaries indicated by this language did not pass to the Dominion for two reasons:—

(*a*) It is said that the rights of the Crown to such beds, at the date of the Union with Canada as well as the date of the "Settlement Act," rested upon prerogative title; and that according to the judgment of

the Privy Council delivered by Lord Watson in the *Precious Metals Case*(1) the term "public lands" in the description above quoted must be taken not to comprise any land held under such title. It cannot be doubted that expressions can be quoted from the judgment of Lord Watson, which taken by themselves might appear to lend some support to this view of that decision. At page 303, for example, he says:—

> It, therefore, appears to their Lordships that a conveyance by the province of public lands which is in substance an assignment of its right to appropriate the territorial revenues arising from such lands does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

It is unnecesary to decide whether passages such as this justify the construction the province seeks to place upon the judgment as a whole; for it is clear, I think, that the beds of non-tidal waters whether navigable or not, do not, according to the law of British Columbia, belong to the Crown *jure prerogativæ*. That such is the law of England is indisputable. *Bristow* v. *Cormican*(2), and *Johnston* v. *O'Neill*(3), at page 557. Mr. Lafleur referred to certain expressions in books of authority which designate non-tidal rivers subject to a common right of passage as "royal rivers" and sought to draw the inference that the beds of such rivers are held under prerogative title. The significance of such expressions is fully explained by Lord Hale in the second chapter of *"De Jure Maris"* (Moore, Foreshore, p. 374). They signify nothing more than the expression "King's Highway" as applied to a highway on land. See also the judgment of Bowen L.J., in *Blount* v. *Layard*(4).

It seems to be argued, however, that, in this matter

(1) 14 App. Cas. 295.
(2) 3 App. Cas. 641.
(3) [1911] A.C. 552.
(4) [1891] 2 Ch. 681*n*, at p. 688.

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of the nature of the title by which the beds of such waters are held, the law of England is from local circumstances inapplicable to British Columbia and that in that province the beds of navigable non-tidal waters are (like the beds of tidal waters) the property of the Crown in right of prerogative.

I cannot understand why it should be supposed to be more in consonance with the circumstances of British Columbia that the beds of non-tidal navigable waters vested in the Crown should be deemed to be held under prerogative title than that such beds should be held under the same title as the Crown lands in the province generally. In the argument counsel dwelt upon the great size of the lakes and rivers. The rivers of Vancouver Island are diminutive when compared with the Shannon, and there is certainly no lake as large as Lough Neagh. On the mainland there are lakes perhaps twice as large as Lough Neagh and rivers much longer than the Shannon; but what conceivable inconvenience could the community suffer by reason of the beds of those waters being held by the Crown under the same title as other Crown lands? From the very beginning full authority to deal with Crown lands of every description was vested in the local legislative authority. The first local law-making authority was that conferred upon Governor Douglas, who was appointed on the 2nd September, 1858, and, under the authority of an order-in-council passed pursuant to 22 Vict. ch. 49, was invested with power to make laws for the "peace, order and good government" of the colony; and it was in exercise of this power that the ordinance of 19th November, 1858, already referred to, providing for the introduction of the law of England was passed. All Crown lands and mines in

the colony whether held under prerogative title or not came under the legislative jurisdiction of the Governor and from that time forward they became the subject of legislative provision as occasion arose.

One is at a loss to surmise what possible practical importance could attach to the point whether beds of non-tidal waters which were the property of the Crown and were subject to the local legislative authority were to be regarded in the eye of the law as held according to one description of title or according to another. I do not think there is any ground for holding that in this matter the rule of the common law did not come into force *simpliciter*.

(*b*) The other ground upon which the province contends that these beds did not pass to the Dominion is this. It is said that in British Columbia the Crown's title to the beds of non-tidal waters which are capable of navigation in fact are, like its title to the beds of tidal waters, burdened with a public easement of navigation; and it is said to be a rule of construction applicable to grants by the Crown to a subject that lands held by a title burdened with such a public servitude do not pass except by express words or by necessary implication. This rule of construction, it is argued, ought to be applied to the "Settlement Act." The object of the transfer being, it is contended, to enable the Dominion to recoup the cost of construction of the railway, by selling the land to settlers, a presumption arises, it is said, that only such rights were intended to pass to the Dominion as in the ordinary course would be granted to settlers. It does not appear to me to be necessary for the purpose of dealing with this argument to express any opinion upon the very important question of how far

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and upon what principle public rights of navigation are recognized by the law of British Columbia as existing in non-tidal waters capable of being navigated. Certain rivers and lakes in that province, which from the first settlement of it have been used as public highways are, one cannot doubt, subject to a public easement of passage. Such rights can in the case of such waters be maintained upon grounds which involve no straining of the principles of English law.

There are, on the other hand, lakes and streams capable, no doubt, of navigation whose economic value for the community is primarily due to their availability or potential availability for purposes of irrigation, of mining and of industry generally. From the first settlement of the country the necessity of making provision for the application of the waters of lakes and streams to these purposes was recognized; and a system of "water records" which, while not entirely displacing riparian rights, recognizes the paramount right of the province to control the use of such waters, and under which riparian owners and others may, upon application to the public authorities, acquire the right to divert such waters from their natural beds for such purposes has for years been a settled feature of the law of the province and has always been regarded as essential in the interests of provincial industry. On the other hand these waters are often so situated that while they are capable of navigation, in fact, the practical interest of the community in them as possible ways for public travel or transport could only be infinitesimal.

It is not necessary, I repeat, in my view of the question before us to say whether the law of England was so modified on its introduction into British Columbia

as to give rise to a public right of navigation over every such inland navigable water. Nor do I think it necessary to decide how far the rules of English law relating to the rights of riparian proprietors in respect of the beds of such waters are applicable to British Columbia, nor whether by the law of that province there is any rule of construction applicable to grants from the Crown according to which the beds of non-tidal navigable waters only pass by express words or by necessary implication. Assuming such rights of navigation to exist in all such waters, and assuming the rule of construction in the case of a grant to a subject to be that which is contended for, still it seems to me that the conclusion which the province asks us to draw cannot be supported.

The area transferred by the "Settlement Act" is an area about 500 miles long and 40 miles wide. It stretches from the eastern boundary of the province to the Gulf of Georgia, and is very varied in its physical character. At the time of the "Settlement Act" it included a good deal of timber land and a good deal of land known to be fit for agriculture. The waters navigable and non-navigable within the area must have been regarded by everybody who thought about the matter as likely to prove a most important factor in connection with the settlement and development of it. Why should anybody be supposed to have contemplated that as between the Dominion and the province the control of the water system should be divorced from the ownership of the "Belt" as a whole? As regards non-navigable waters nobody suggests such a thing. As regards waters navigable in fact, assuming they were subject, as is argued, to public rights of navigation and fishing, then it

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must be remembered that this area was to be dealt with by public officials under the control of the Dominion Parliament and that the Dominion Parliament is the supreme conservancy authority in respect of navigation and fishing. Whatever considerations might be urged in the case of a grant by the Crown to a subject in support of a presumed intention to exclude the beds of navigable waters because of the existence of such public rights I can think of no reason why such a presumption should be applied to this transfer. Moreover, it could hardly have escaped the notice of both parties that the retention by the province of the beds of non-tidal navigable as distinguished from non-navigable waters was bound to lead in numberless cases to much uncertainty of title, and for that reason alone I think we may assume that such retention was not contemplated.

2nd. The beds of the waters in question having passed to the Dominion the right of fishing would pass also as a profit of the soil, unless according to the law of British Columbia the right of fishing in non-tidal, navigable waters is not a profit of the soil; and having passed to the Dominion that right could not be granted away again by the province.

I am not sure that I have grasped the argument of the province at this point, but whether the right of fishing in these waters is or is not vested in the Dominion as a profit of the soil it seems to me to be impossible to answer this question in the affirmative.

It cannot be argued, and I do not suppose counsel intended to argue, that (the beds at the time of the transfer being vested in the Crown in proprietary right) the right of fishing was held by the Crown in right of prerogative. The argument addressed to us

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was that in these waters there is a public right or privilege of fishing over which in some way the province is entitled to exercise control. I do not think it is necessary to decide whether the law of British Columbia at the date of the Union recognized any public right of fishing in these waters. There can be no doubt that the law of England recognizes no necessary connection between the public right of navigation and the public right of fishing; and, indeed, the great weight of authority is in favour of the view that a right of the character last mentioned cannot exist in non-tidal waters under the common law. Whether on its introduction into British Columbia the law of England underwent such a modification as to require us to hold that in every body of water in that province which is capable of navigation (the bed of which is vested in the Crown) a right or privilege of fishing belongs to the public and if there be such a right or privilege in non-tidal waters what is the nature of it are questions involving points of far-reaching importance which ought only to be passed upon after hearing argument in the interest of those private owners who might be affected by the decision and who were not represented on the hearing of this reference. It is unnecessary, as I have said, to pass upon those questions. Such a public right or privilege if it exist in non-tidal waters may be either (*a*) an absolute right, only capable of limitation or restriction by legislative authority, such as the public right of fishing in tidal waters or (*b*) a privilege in the nature of a mere tacit license revocable at the will of the Crown or the Crown's grantee as owner. Strong C.J., in his opinion in the *Fisheries Case*(1), at pages

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

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526, 527, 528, and 531, expresses the view that there is a public privilege in such waters and appears to think it is of the last-mentioned character. Such a privilege would, of course, leave untouched the Crown's proprietorship of the fishery as incidental to the ownership of the *solum*. As regards the waters in question this proprietorship would pass to the Dominion by the transfer and with it the power of revocation theretofore vested in the province as owner. If, on the other hand, there is a public right of fishing of the first mentioned character it is, as we have seen, subject to the exclusive control of the Dominion Parliament.

This question then should be answered in the negative because the beneficial ownership of the beds of navigable non-tidal waters within the "Railway Belt" that were vested in the Crown at the date of the transfer passed to the Dominion; and with the ownership of the beds the fisheries passed also as ordinary profits of the soil unless at the date of the union the title of the Crown was burdened with a public right of fishing that was only capable of being restricted or limited through the exercise of legislative authority. If such a public right did exist in respect of the fishings in the waters in question then by the operation of the "British North America Act" as construed in the *Fisheries Case*(1), the Dominion Parliament became solely invested with legislative authority to limit or restrict that right.

ANGLIN J.—I concur in the reasons assigned by my brother Duff for answering in the negative the second and third questions, restricted as indicated by him,

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

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and that part of the first question which relates to tidal waters. But I prefer to state in my own way the grounds on which I base a negative answer to the second branch of the first question which concerns waters navigable in fact but not tidal.

It was much debated at bar whether under the provincial statutory grant the Dominion Government did or did not acquire proprietary rights in the beds of these waters. While I adhere to the view which I expressed in *Keewatin Power Co.* v. *Town of Kenora* (1), as to the inapplicability to the great stretches of fresh water in this country, which are navigable in fact, of the rule of the English common law, which treats as navigable only such waters as are tidal, in the view that I take it is not necessary here to determine that important point.

If the English common law test of navigability applies in British Columbia without any modification, all non-tidal waters must be deemed non-navigable in law, and a grant similar in its terms to that before us, if made by letters patent to a private person, would carry the subjacent soil of such waters whether in fact navigable or non-navigable. The statutory grant to the Dominion will not receive a narrower construction. In this view the province has by its grant parted with the proprietary interest upon which its right to grant fishing leases or licenses must be rested. It has transferred that proprietary interest to the Dominion; and whatever jurisdiction the legislature of British Columbia may possess enabling it to derogate from provincial Crown grants to private persons, it has no legislative power to derogate from the effect of its statutory grant to the Dominion of the "Rail-

(1) 13 Ont. L.R. 237.

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IN RE BRITISH COLUMBIA FISHERIES.

Anglin J.

way Belt" lands, which, as public lands, are under the exclusive legislative authority of the Dominion Parliament until disposed of to settlers. *Burrard Power Co., Ltd.* v. *The King*(1).

On the other hand if, in British Columbia, waters in fact navigable though non-tidal should be deemed navigable in law, and *publici juris* in the same sense as tidal waters, there would, in my opinion, exist in them the same public right of piscary which exists in tidal waters; and the provincial legislature is not competent to authorize any grant which would interfere with the fullest exercise of that public right. It follows that in either view the legislature of British Columbia cannot authorize grants of exclusive rights to fish in these waters.

I cannot accept the contention pressed on behalf of British Columbia that the interest of a province in the ordinary fisheries in provincial waters which should be deemed navigable in law is a *jus regale* of the same nature as its right to the precious metals which were held not to be *partes soli,* and were on that account excluded from the operation of the grant of the *"Railway Belt Lands"*(2).

A public fishery will not pass by a Crown grant of the *solum* of the water in which it exists, or indeed of the fishery itself in express terms, not because such a fishery is not *pars soli,* but because the *solum* itself, vested by law in the Crown, is subject to a trust to preserve the public rights of navigation and of fishing, which the competent legislature alone can extinguish. But the precious metals do pass under a Crown grant

(1) [1911] A.C. 81.

(2) *Attorney-General of British Columbia* v. *Attorney-General of Canada;* 14 App. Cas. 295.

which contains language apt to convey them. Legislative action is not requisite.

On the other hand any fishery vested in the Crown in waters of which it owns the *solum,* other than a public common of piscary existing by law, with which a province is not competent to interfere, is held not by prerogative, but by proprietary title. *Mayor of Carlisle* v. *Graham* (1), at pages 367-8; *Duke of Devonshire* v. *Pattinson* (2), *per* Fry L.J., at page 271.

BRODEUR J. agreed with Duff J.

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(1) L.R. 4 Ex. 361. (2) 20 Q.B.D. 263.

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*Oct. 29, 30, 31.
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*Feb. 18.

THE CITY OF MONTREAL (DEFENDANT) ..... APPELLANT;

AND

JOHN LAYTON & CO., LIMITED (PLAINTIFFS) ..... RESPONDENTS.

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

Construction of statute—"Quebec Public Health Act"—R.S.Q., 1909, *art.* 3913—*Inspection of food—Duty of health officers—Quality of food—Condemnation—Seizure—Notice—Effect of action by health officers — Controlling power of courts—Evidence—Injunction — Appeal—Jurisdiction—Question in controversy.*

Per Fitzpatrick C.J.—In the Province of Quebec, in order to constitute a valid seizure of movable property there must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made and a guardian appointed. Where these formalities have not been observed there can be no valid seizure. *Brook* v. *Booker* (41 Can. S.C.R. 331), referred to.

Per Fitzpatrick C.J.—Extraordinary powers, conferred by statute, authorizing interference with private property must be exercised in such a manner that the rights of the owners may not be disregarded. *Bonanza Creek Hydraulic Concession* v. *The King* (40 Can S.C.R. 281), and *Riopelle* v. *City of Montreal* (44 Can. S.C.R. 579), referred to.

Per Fitzpatrick C.J. and Davies and Idington JJ.—The authority conferred upon health officers by the "Quebec Public Health Act" respecting the condemnation, seizure and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect, but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the judges thereof.

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

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Per Anglin and Brodeur JJ.—The protection afforded by the Quebec "Public Health Act" to an executive officer of a local board of health cannot be invoked when the officer has apparently not acted under its provisions, but has condemned food, not as the result of his own independent judgment upon its quality, but in carrying out instructions given him by municipal officials purporting to act under other statutory provisions.

In the result the finding of the trial judge that the food in question was fit for human consumption (Q.R. 39 S.C. 520), being supported by evidence, was not disturbed, and the effect of the judgment appealed from (1 D.L.R. 160) was affirmed with a variation of the order making absolute the injunction against the defendant interfering therewith.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming, with some variation, the judgment of Weir J., at the trial in the Superior Court, District of Montreal (2), in favour of the respondents.

The respondents, plaintiffs, commenced the present action by a petition for an interim injunction to restrain the appellant, defendant, from interference with a quantity of frozen canned eggs, the property of the respondents, which the municipal health officials were about to destroy, after an alleged condemnation of the eggs as deleterious to the public health and unfit for human food and an alleged seizure thereof by some of said officials. The petition also asked that the appellant should be summoned before the Superior Court, at Montreal, to shew cause why the injunction should not be declared absolute, and also that their right to recover damages sustained in consequence of the action of the municipal officials with regard to the eggs might be expressly reserved for consideration and adjudication in such other suit or action as they might be advised to institute in that respect. An interim in-

(1) 1 D.L.R. 160. (2) Q.R. 39 S.C. 520.

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junction issued and the respondent's petition was contested by the appellant. The principal grounds of the contestation were that the eggs in question were unfit for human food, of a nature generally detrimental to the public health, and that they had been duly condemned, after inspection and analysis by the provincial and municipal health authorities, under the provisions of the "Quebec Public Health Act," R.S.Q., 1909, arts. 3867 *et seq.*, and duly placed under seizure and ordered by them to be disposed of in the manner necessary to prevent them being sold or delivered for consumption as human food.

At the trial, Weir J. found that the proceedings taken by the municipal health officials in regard to the eggs were illegal and irregular; that the alleged seizure was invalid and should be set aside, and that the eggs were the property of the respondents and both wholesome and suitable for human food. It was, therefore, ordered, that the Gould Cold Storage Company, the *mis-en-cause,* in whose warehouse the eggs were stored, should deliver them up to the respondents and that the injunction should be made absolute against the defendant corporation interfering with the eggs in so far as might relate to acts or proceedings theretofore taken or conditions theretofore existing with respect to such eggs. On an appeal to the Court of King's Bench, this judgment was affirmed on the ground that the alleged seizure was illegal and ineffective, and the injunction was declared absolute against interference with the eggs by the defendant "otherwise than by due process of law."

Upon the 25th March, 1912, pursuant to notice, a motion was made on behalf of the respondent to quash

the appeal on the grounds that there was no pecuniary amount in controversy, as shewn by the pleadings, which involved a sum or value of $2,000 as provided by the "Supreme Court Act"; that the appeal had not been entered within sixty days from the date of the decision appealed from, as provided by the Act; and that, as there was *lis pendens* in regard to another appeal from the same judgment taken *de plano* to the Judicial Committee of the Privy Council, there was no jurisdiction in any of the judges of the Court of King's Bench to extend the time for appealing to the Supreme Court of Canada.

It was shewn that, upon the delivery of the judgment now appealed from, the defendant had given security, in the court below, for an appeal to the Judicial Committee of the Privy Council and obtained the approval thereof by a judge of the Court of King's Bench; that, within the sixty days limited for appeals to the Supreme Court of Canada, the defendant had filed in the office of the Court of King's Bench a notice that the proceedings on the proposed appeal to the Privy Council had been discontinued, and, within the time so limited, had obtained an order from a judge of the Court of King's Bench extending the time and approving security filed for an appeal to the Supreme Court of Canada. In these circumstances it was contended that the Supreme Court of Canada had no jurisdiction to entertain the appeal and that no such appeal could lie.

Mr. S. L. Dale-Harris, on behalf of the respondents, contended that it did not appear from the record that there was a pecuniary amount of the value of $2,000 in issue on the controversy involved on

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the present appeal; that there was *lis pendens* in regard to the proceedings instituted for an appeal to the Privy Council, and that, therefore, the judge of the Court of King's Bench had erred in acting upon the *désistement* filed in that court, that, in the circumstances, no appeal could lie to the Supreme Court of Canada, and that it was not now competent to the latter court to entertain the present appeal.

Hon. A. W. Atwater K.C., on behalf of the appellant, shewed cause to the motion. He contended that the injunction, made absolute by the judgment appealed from, was merely an incident in a cause, matter or proceeding for the recovery of goods which were shewn, in the record, to be valued at about $100,000, and that the usual practice of the courts in the Province of Quebec had been followed in regard to the abandonment of the proposed appeal to the Privy Council. He consequently argued that the effect of the filing of the *désistement* was to restore jurisdiction in the Court of King's Bench, and that the order made by the judge of that court approving the security filed for the appeal to the Supreme Court of Canada had been validly made.

It was then suggested by the court that the appellant should now be allowed to give the notice of the withdrawal of the appeal to the Privy Council, under P.C. Rule 32, and this was done accordingly. In reply to the notice the registrar of the Judicial Committee of the Privy Council intimated that, as nothing had been received in his office indicating that such an appeal was pending, it could not properly be considered as a case requiring a notice to be given in accordance with that rule.

The court, having been informed of these cir-

cumstances, reserved judgment upon the motion to quash the appeal and, on the 1st of April, 1912, there being an equal division of opinion in regard to jurisdiction among the judges, the motion stood dismissed, without costs.*

The questions argued on the merits of the appeal are stated in the judgments now reported.

Hon. A. W. Atwater K.C. and *Aimé Geoffrion K.C.* for the appellant.

S. L. Dale-Harris for the respondents.

THE CHIEF JUSTICE.—It appeared to me at the argument that this appeal was without merit and that impression has developed into a conviction by a careful examination of the very voluminous record. It is difficult, on the evidence, to say whether the moving spirit in all the proceedings which led to this action—Doctor Lachapelle — acted as "President of the Provincial Board of Health," or as one of the Board of Commissioners. He is a prominent member of both bodies. But in whatever capacity he acted, it is abundantly clear to me that the objection taken by the appellant to the jurisdiction of the Superior Court cannot prevail. It is said that the finding of the Board of Health is final and definitive, and this notwithstanding the very wide terms of article 50 of the Quebec Code of Civil Procedure, which, with the ex-

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*NOTE.—The notes of reasons delivered on the motion are reported at pages 424-430 in Cameron's "Supreme Court Practice" (2 ed.). See also the note (*ib.* p. 436) as to the effect of the order by the judge of the court below extending the time for appealing to the Supreme Court of Canada after the expiration of the time limited.

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ception of the Court of King's Bench, makes all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof. This article has been time and again construed to mean that the Superior Court is invested with all discretionary power to grant relief against arbitrary and unauthorized acts of public officials or public corporations. See also *The Queen* v. *Local Government Board*(1), at p. 321; *Hartlepool Electric Tramways Co.* v. *West Hartlepool Corporations*(2).

On the facts, I agree in the conclusion reached by the trial judge. The report by Dr. Bernier and McCrady, on the strength of which the commissioners ordered the destruction of the eggs, is not supported by the evidence, the overwhelming effect of which leads one to the conclusion that they were not "unfit to serve as food for men." Dr. Grüner does not say they were unfit, and, in answer to a question put by the court, Dr. Hersey, the city analyst, says that he would not condemn the eggs. Assuming, therefore, that the eggs were offered for sale, a fact not proved, although that is the condition upon which the right of the municipal sanitary authority to interfere depended, I would hold that a case has not been made out justifying such interference. It has been recently said that the finding of a judge in the first instance is not on the same footing as the verdict of a jury, notwithstanding the dictum of Lord Loreburn that the one is scarcely distinguishable from the other. But it must, at least, be admitted that the judge who tries

(1) 10 Q.B.D. 309. (2) 9 L.G.R. 1098.

a case like this has advantages, and, *in dubio,* there is a strong presumption in favour of his judgment; the onus is, in any event, on the party attacking to shew that it is wrong. In this, the appellant has failed.

On the question of law: Admitting for the purposes of the appellant's argument that the inspectors are clothed with very large statutory powers and that they were not bound to proceed with strict form and regularity in all they did, they were certainly bound to proceed according to the substantial rules of justice, and these, in my opinion, they failed entirely to observe. Nearly three months intervened between the so-called seizure by the fish, fruit and vegetable inspector (who does not pretend to have exercised anything like an independent judgment as to their condition, or in fact any judgment whatever) and the trial; and, with the exception of Dr. Hersey, not a single witness is examined by the appellant who can speak with any authority on the subject of the examination of food stuffs.

The eggs in question are said to have been seized on the 24th December, and it was not until the 26th January following that the owners were informed that they were free to remove them from the province, the opportunity to have a proper independent examination of their edible quality by a competent official in the interval being denied them, most unjustifiably in my opinion. The corporation appellant is vested under the laws of Quebec with exorbitant powers for the protection of public health and very properly so, but those powers must not be exercised in total disregard of the rights of private individuals. All that I can usefully say on this branch of the case will be

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found in *Bonanza Creek Hydraulic Concession* v. *The King*(1); *Riopelle* v. *City of Montreal*(2).

To those of us who are familiar with the elaborate provisions of the Quebec Code of Civil Procedure for the protection of those whose property has been taken in execution, it seems almost ridiculous to suggest that there was any proceeding here which bears the faintest resemblance to a seizure as that word is understood in that province. On this point I agree with the court of appeal. To seize is to *dispossess* the party proceeded against, "Mettre sous main de justice," and the law requires at least notice—inventory and a guardian. See *Brook* v. *Booker*(3). Here, beyond a notice to the warehouse keeper, no steps whatever were ever taken to attach the property or to in any way protect or safeguard the rights of the owner.

In view of the great importance of the subject, I venture to add this observation: a careful examination of its provisions leads me to the conclusion that in many cases the "Quebec Public Health Act" will be found to be unworkable. Some provision for, amongst other things, the condemnation of articles of food seized by judicial authority such as is to be found in the English Act ("Public Health Act, 1891") would be useful. Chapter 133 of the Revised Statutes of Canada, 1906, might also be consulted with advantage.

I can see no useful purpose to be served by changing the form of the order as settled by the court of appeal.

I would dismiss with costs.

DAVIES J.—The substantial question of fact in controversy between the parties to this action was

(1) 40 Can. S.C.R. 281. (2) 44 Can. S.C.R. 579.
(3) 41 Can. S.C.R. 331.

whether the canned eggs seized and confiscated as being held by the plaintiffs for sale, were or were not unwholesome and unfit for human food.

A vast mass of scientific and expert testimony on this question was given before the trial judge. Much of it was conflicting. The experts and scientists differed greatly in their opinions and conclusions.

In the result, the trial judge found in favour of the plaintiffs that the eggs, when seized, were not unwholesome or unfit for human food or otherwise injurious to health.

While I might not, upon the evidence given, had I tried the case, have reached the same conclusion as the trial judge, I am not able to say that his finding of fact is so clearly erroneous as would justify me in reversing it.

This finding goes to the very root of the controversy, and apart from any question as to the legality of the seizure in form or substance, would be sufficient to dispose of this appeal unless the contention of the appellant's counsel that the *bonâ fide* exercise of the discretionary power conferred on the executive officer of a local Board of Health by the Quebec "Public Health Act," with respect to the seizure and confiscation of food offered for sale and suspected to be impure and unfit for human food, is not subject to be overruled, controlled or interfered with by the courts, but is conclusive in itself.

I am not able to accept this contention. Article 3913 of the Revised Statutes of Quebec (1909), on which the appellants rely in justification of the seizure and confiscation of the eggs, is as follows:—

> Every executive officer of the municipal sanitary authority or any other officer appointed by it for that purpose, may inspect all animals,

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dead or alive, meat, fowl, game, fish, fruit, vegetables, grease, bread, flour, milk or other liquids and food intended for human consumption and offered for sale, or deposited in a place or transported in a vehicle for the purpose of being afterwards sold or offered for sale, or delivered after being sold; and, if upon inspection such animals, liquids or food appear to be unwholesome, putrid, damaged, or infected with the germs of disease, or otherwise injurious to health, he may seize the same, carry them off, and dispose of them so that they shall not be offered for sale or serve as food for man.

The burden of proof that the animals, liquid or food are not intended to be sold, or to be delivered after having been sold, or to serve as food for man, lies upon the owner or person who had possession thereof.

The proprietor of the articles, or the person in whose possession they were seized, is further liable to a fine not exceeding fifty dollars.

I may say that there were two seizures made of these canned eggs, one of the 24th of December, 1910, by Grenier, who was the health officer of the City of Montreal, acting under the by-law of the city, and the other on the 24th January, 1911, by Dr. McCarrey, who was the chief food inspector of the city and an officer entitled to act under art. 3913, R.S.Q., above cited.

Counsel for the appellants disclaimed, at bar, justifying the seizure made by Grenier on the 24th of December, 1910. They relied entirely upon that made by Dr. McCarrey on 24th of January.

In view of the finding of the trial judge that the seized goods were not unwholesome or unfit for human food, and of my inability owing to the conflicting character of the evidence to reverse that finding, the question for me is reduced simply to this: Assuming the seizure to have been *bonâ fide* made, is the inspector's finding, if he did so find, that the eggs were unwholesome and unfit for human food, final and conclusive, or is it subject to review by the courts?

The clause empowers the officers to *inspect* enumerated kinds of food and drink intended for sale and

human consumption, and declares that if upon inspection such liquids or foods "appear to be unwholesome," etc., "or otherwise injurious to health," the officer may seize and dispose of them "so that they shall not be offered for sale as food for man."

Now the position of the appellants was, and I think it a tenable one, that the "inspection" referred to is not necessarily limited to the ocular inspection of the officer. If such a limited construction was placed upon the section it would be almost, if not entirely useless. I think it extends to such an inspection as the conditions of the suspected articles may call for in order to enable a proper conclusion to be reached as to their wholesomeness or otherwise. Such inspection may, in the case of canned or sealed food, require merely an opening of the cans or of reasonable samples, or it may call for a scientific analysis of the contents of the cans or samples and necessitate chemical and bacteriological analyses to enable a conclusion to be reached whether they are unfit for human food.

If the former or limited ocular inspection was the only one intended, and the section only covered goods respecting which such an inspection would enable the officer to reach a conclusion, I could appreciate an argument that the conclusion of the inspector might be held to be final and conclusive. But if the contention of the appellant, the City of Montreal, as to the broad meaning of the inspection referred to is accepted, as I accept it, then I am quite unable to appreciate the finality argument. In this latter case the result is to be determined not from the exercise of the senses, of feeling, smell, or sight, knowledge and experience possessed by the inspector, but from the reports of one or more scientific analysts. In such a

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case, to confer such an arbitrary, uncontrolled power upon the inspector would require the use of clear language expressing that to be the intention of the legislature.

No language even implying such an intention is used, and from the fact that the burden of proof with respect to the food not being intended for sale, or its not being intended to serve as food for man, is thrown upon the owner or possessor, I think the intention would have been clearly expressed if it was intended to invest the inspector with uncontrolled arbitrary power of deciding the crucial point of the wholesomeness of the food in cases where it could only be determined after and upon scientific analyses.

In the view I take of the case, it is not necessary for me to express any opinion as to the form or substance of the seizure itself. The canned eggs seized were held by the trial judge not to be unwholesome or unfit for human food. I find myself unable to reverse that finding because I cannot say in the face of the conflicting testimony, that it is clearly wrong. The seizure, therefore, cannot be sustained.

On a question so vitally important as the health of the inhabitants of a large city like Montreal, I would not hold the officer *bonâ fide* exercising his power of preventing the sale of unwholesome food to be a wrongdoer for mere technical defaults of procedure. If substantially and practically he complied with the statutory requirements so that no real injustice was done, I would hold his seizure sufficient, if in the ultimate result the food seized was found to be unfit for human food. I am unable, in matters of this kind, to exalt the rights of the individual over those of the community. I would go a long way to prevent the vender

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of unwholesome food profiting, through technical defects merely, by his nefarious traffic.

In this case, however, the merits are found for the respondents and the trial judge's findings on them are not reversed by the appeal court which decided the appeal on questions relating to the legality of the seizure irrespective of the quality or character of the eggs. I, therefore, do not find it necessary to express any opinion upon the legality of the seizure.

I agree to the modification of the injunction proposed by my brother Anglin, and concur in dismissing the appeal.

IDINGTON J.—In any view I can take of this appeal it must turn upon the determination of whether or not the goods in question have been proved unfit for human food within the description given in the statutes appellant relies upon. This question of fact has been fully and fairly tried out, and the pleadings must be held as if conformable to the constitution of such an issue for if not so already are in such case amendable and must be considered as if amended.

This is not an action for damages against the officer for his wrongdoing and, therefore, I respectfully submit objections relative to his mode of procedure are misplaced.

The appellant certainly had an interest in seeing the law enforced and the respondents by founding their action for an injunction upon the alleged assertion of the appellant's intention and threats to confiscate the goods in question because unfit for food raises the broad issue of the quality of the goods and nothing else save the right on the part of the respondents to sell the goods for purposes of food.

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If they are unfit for food then the respondents have no right they can maintain save the property in so much manure, but this latter is not the question.

If the goods were in fact unfit for food no court could properly enjoin appellant or its officers from so asserting or threatening to discharge, or discharging, the duties resting upon them in such case by virtue of the statutes in question.

The chief of these statutory provisions are first part of article 3913 of the Revised Statutes of Quebec, which reads as follows:—

> 3913. Every executive officer of the municipal sanitary authority or any other officer appointed by it for that purpose, may inspect all animals, dead or alive, meat, fowl, game, fish, fruit, vegetables, grease, bread, flour, milk or other liquids and food intended for human consumption and offered for sale, or deposited in a place or transported in a vehicle for the purpose of being afterwards sold or offered for sale, or delivered after being sold; and, if upon inspection, such animals, liquids or food appear to be unwholesome, putrid, damaged or infected with the germs of disease, or otherwise injurious to health, he may seize the same, carry them off, and dispose of them so that they shall not be offered for sale or serve as food for man.

And the appellant's charter, 62 Vict. ch. 68, art. 300, sec. 40, as follows, enabling by-laws to be passed by it.

> 40. To provide for and regulate the inspection of meats, poultry, fish, game, butter, cheese, lard, eggs, vegetables, flour, meal, milk, dairy products, fruit and other food products; to provide for the seizure, confiscation and summary destruction of any such products as are unsound, spoiled or unwholesome; to prohibit the bringing into the city and the having or keeping such unsound, spoiled or unwholesome products, and to define the duties, powers and attributions of the inspectors appointed for that purpose.

The amendment to this last by section 122 of 4 Edw. VII. ch. 49, art. 7, though important, does not help much here.

In my view I need not trouble with the question of

the validity of the appellant's by-laws and will assume for the present that they extend as far as these statutes enable by-laws relative to the officers and matters in question to be passed.

I cannot assent to the appellant's contention that the decision or acts of its officers or of any other officer resting upon either of these statutes is to be held as binding and

final unless it can be shewn that they have acted illegally or in a grossly improper manner.

The statute, to which I am about to refer and analyze as basis alleged for this contention, is above quoted, article 3913, and, for the sake of clearness in expressing my meaning, I will treat it singly, but nearly all I will say anent same can be applied to the other statute above quoted.

Now the first thing the article 3913 does is to enable the officers to inspect. I think they are thereby impliedly empowered to exercise such degree of control over the object to be inspected as will enable an efficient discharge of this duty.

It may not in some cases be necessary for an officer to lay a hand upon it, but if in other cases it is necessary to enable him to discharge his duty to take possession of the goods and lock them up, till he has been enabled to determine the fact, then he is entitled to do so. In all this the greatest care and sound sense has to be exercised, so that no unnecessary inconvenience or damage be caused either to the goods, or the owner's profitable handling of them, or to his reputation; in short that due dispatch be had and everything be done in a due and orderly manner.

I conceive the officer need not rely only upon his own eyes or sense or skill or knowledge or experience, but

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can call in to his aid others possessing these qualifications or some one or more of them, in order to advise and assist him.

If he act unreasonably in any one of these several things I have indicated as within the scope of his power and duty, then he may be amenable to an action of damages at the suit of any one unjustly suffering thereby. In such an action the good faith of the officer and the facts to justify his conduct may constitute a defence.

The question of whether or not in fact the goods were in any such case unfit for human food may be found of little consequence; if he can justify by his good faith and the facts which would lead a man reasonably competent for such an office to have reasonably done, under the like circumstances, as he may be charged with having done.

An honest judgment so formed cannot be lightly set aside and may in that sense answer any action brought against the officer.

Nay more, I am disposed to think due weight should be given not only to that judgment of procedure from hour to hour, but also to the ultimate finding of such an officer when he has duly inspected and declared the goods obnoxious to the statute.

It may form a *primâ facie* defence in a case in which the owner may have brought an action. He may have to rebut such a finding in taking steps to recover possession of the goods in case the officer has possessed himself of them.

I am not expressing herein any final opinion in regard to all that which may in many conceivable cases concern the officer. I am only illustrating how far I think this judgment of its officer now set up by appel-

lant as conclusive defence may in an honest case reach, and having due regard to ordinary principles of law protecting officers discharging a duty the law has cast upon them, may justify them personally.

But when we are asked to go further and say that on such a *primâ facie* finding of fact by a health officer, no matter how unfounded in fact when appearances have been dispelled and thorough investigation has shewn them absolutely without foundation, an owner can be thus and needlessly despoiled of his goods and his legal rights to the enjoyment thereof and profits in selling same, is a thing that ordinary sense of right revolts at.

The language of the statute does not give colour to such a claim.

I admit that the phrase "if upon inspection such * * * food appears," etc., might under certain circumstances be read as if intended to convey the meaning the appellant contends for.

When the word "appears" is used conditionally in an Act to confer jurisdiction on a court or judge, no doubt the usual legal consequence of a judgment may follow something so appearing to the eyes of the court or judge, and subject to appeal, the appearance thus made in the eyes of the tribunal may be final and the consequence absolute.

But all that is predicated upon the implication that due proof shall have been made. In fact the use of the word there implies what cannot be implied here without attributing to the legislature such a degree of rashness as I will not readily impute.

We know that the conditions of fact it had to deal with did not really render it prudent to entrust

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such an absolute *ex parte* power to men in the ordinary course of events, sure to fill the position designated.

If we read the word "appears" as exacting the actual foundation thereof to be the fact and nothing else, we give effect to the purview of the entire Act, do no harm to any one and run no risks of doing so.

Now what must be our decision on the issue of fact ?

With the single exception of his intimating to Dr. Grüner, who had expressed a doubt on one point, that experts were not in court to doubt, but to tell what they knew, the learned trial judge seems to have conducted the trial with patience and an intelligent understanding of this issue and of the bearing of the evidence and principles involved in its application thereto and has reached the conclusion of fact that the goods were fit for food. Such finding unreversed must stand here unless there can be shewn demonstrable error in the foundation on which it rests or in the mode of thought adopted by the court conducting the investigation. The extreme importance which I attach to seeing just what shade of meaning an expert giving evidence may have in his mind prevents me passing this incident unnoticed.

With great respect, I think experts who have conducted an elaborate experiment and are relating the result, are not only entitled to give their own actual deductions therefrom, but also bound to express their doubt if there should happen to be a chance of the general bearing of their evidence being taken as affirming or denying a something respecting which they in fact are in doubt. I do not think this was departed from more than accidentally and, therefore, do not

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purpose analyzing in detail the evidence adduced on the main issue, but merely to point out in a general way the bearing of what I have said and of the evidence in leading me to come to practically the same result, on this issue of fact, as the learned trial judge.

I have already intimated that in carrying out either of the statutes in question the inspecting officer responsible for the determination of the result of the inspection, need not be that remarkable man possessed of all the knowledge possible to be had on the subject of health and food, but a reasonably competent man who has the right to inquire from others, and thus aided, become possessed as occasion arises of the knowledge necessary to enable him to reach a satisfactory determination in any particular case brought under his notice.

In this case I assume Mr. McCarrey, and not his messenger or assistant Grenier, was as chief food inspector the officer to determine.

There were nearly five thousand cans of the material in question. The goods had been put up in three different classes, of egg yolks, of white of egg, and of egg yolks and white of egg. The food inspector had apparently without informing himself as to the nature or classification of this large collection of canned goods got Grenier to bring four cans thereof. Parts of these were given to the city analyst and part to the provincial bacteriologist.

I am unable to understand how any one could honestly and fairly determine (even if these gentlemen had made reasonably fair reports in respect of what these four cans contained) as the result of such inspection, the quality of the entire goods in question.

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It might have been worth his while to know something of the history and ownership and classification of the material, but he ignored such things.

He might have ascertained from the owners their views and had a selection made that was mutually agreeable. It is said the owners' names were refused, but I do not observe any persistent effort in this direction.

At all events in the absence of any such agreement or more reasonable mode of determining the quality of goods in such a large number of separate cans, I do not think this could be called an inspection such as the Act contemplates.

But let us pass that with the remark that it seems rather a striking illustration of the dangerous consequence apt to flow from a judicial holding that the judgment of such an officer under such circumstances must be taken as final. For my part it is utterly worthless in this case as entitled to any weight of the kind which I have above suggested might be given in a proper case to the finding of the officer. I cannot understand how it came about that the city authorities refused (as at one stage they did) the respondents a chance of further examination.

As further examination was in fact got later on and selections were made of cans to be subjected thereto as fair tests of the average quality of the goods, this misconduct (shall I call it ?) or strange misapprehension of duty is only of value now when we come to estimate the evidence of those liable to be influenced by such a bad example.

The case is thus left to us with the evidence adduced on each side in respect of the character of this material as a food.

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The appellant's case rests chiefly on the evidence of the city chemical analyst and the provincial bacteriologist and his assistant, and such indirect support as other witnesses give it. The provincial bacteriologist and his assistant made two reports, of which the first was that acted upon in making the seizure, and the later one was relied upon as furnishing for the trial alleged justifying facts.

The city chemical analyst cannot say the sample he got was, when it came to his hands, unfit for food. And the result he gives of that and a later investigation is that the utmost he can say is, one might have suspicion of the fitness of those frozen eggs for food.

The provincial bacteriologist had as an assistant a young man twenty-five years of age.

The evidence of the latter betrays the errors or weaknesses of youth and thus its value in our present inquiry is so impaired as to be an unsafe guide.

The first report the bacteriologist and his assistant made, though addressed to the Provincial Board, was so clearly intended to instruct the appellant's inspector that I think he might, if it had been properly founded, have used it and relied thereupon.

This report, however, contains radical error in several particulars. It states "a fresh egg is sterile; it contains no bacteria." This has been so demonstrated to be erroneous that the provincial bacteriologist has been constrained to admit his error. Creditable as his acknowledgment is, yet the error must detract from the weight one should, but for it, feel inclined to give his later investigations and evidence. And when we find that accuracy of observations of time, temperature and other conditions bearing upon any experiment in attempting to reach a scientific conclusion

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regarding such subjects as now in hand are of the highest importance, how can we attach importance to experiments made when these elements necessary to success have not been strictly observed ?

As to due regard therefor the experiments on which the first report was based seem to have been made recklessly, and borne the natural result thereof. The basis of the second report is much improved in this respect, but far from being what one should desire.

Then the experiment with a guinea pig was so conducted that every one competent to speak thereon has condemned the method.

When we find a sensational and misleading paragraph founded on that experiment is inserted in this first report for the obvious edification of an officer standing sorely in need of assistance founded on scientific observation, how can we safely rely on what he responsible therefor tells the court ?

It is not in the ordinary sense of the term that I suggest the witness is untrustworthy, for I am far, very far, from supposing he wilfully misstates anything, but he seems not to have been sufficiently imbued with the absolute need of anticipating so far as possible all contingencies and adopting in regard thereto every possible effort to exclude error in the result.

I am not oblivious of the use that might be properly made of such an experiment, if and when properly conducted.

Then again in this first report he says he

found masses and clots of material some of which appear to be embryos of chickens in an advanced stage of development. At least such material would not be found in an egg fit to be eaten. Egg shells, hair and other foreign material were also found.

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When we find numerous other experiments made by competent men and there appears in their results not only no verification by them of such a picture save as to egg shells, but also decidedly negative evidence in that regard as to the material in question, can we feel sure this officer has dealt fairly by those concerned ?

Assuming the absolute truth is told regarding this specific result from two samples blended together, are we to suppose this officer did not know that the question to be solved related to thousands of other cans ? Or that an accident might produce such a result in one and could not be fairly made to condemn so great a quantity ?

One should have expected as result of such a single finding an inquiry for more material and a suggestion in the report tending to bring about such an inquiry.

I observe that the evidence of this provincial bacteriologist adds to the kind of foreign material found, other specimens than those above enumerated.

And again we have in the same report the following:—

> A small part of the eggs from samples A and B were taken and placed in a warm temperature. Putrefaction of a violent nature resulted in about 24 hours, shewing the presence of large numbers of bacteria. Such bacteria were probably introduced at the time of packing, subsequent freezing checking their action.

These are not the same samples as the alleged embryo remains were found in.

We are not told how warm the temperature was which these samples were subjected to — and what of such a phrase as "about 24 hours" duration ?

No one can quarrel with the observation made by counsel for the city on the possible weight to be at-

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tached to the evidence of "professional" experts; for no one can in the administration of justice overlook the fact that too often such experts lay themselves open to adverse criticism. I may add, however, that the only witness herein who may properly be spoken of as of that class seems to have given his evidence fairly, and I see no reason why honour and truth should not bind such men just as it does the lawyer in court, for in each of these two classes the man disregarding such obligations fails in the end.

But when we find men, who are in fact experts, make, as is done in this report, the grave mistake of attaching undue importance to one or more isolated facts, it is not safe to rely too far upon them in same case. The situation they have thereby created tends to prejudice their own minds as well as those of others supporting the cause they have espoused.

Thus outlined is the appellant's case as I see its strength and weakness.

On the other hand men, who seem above reproach, conducted experiments with a degree of accuracy desirable in all such cases, and proved as the result thereof that exposure of the samples which they had got from the goods in question would develop a bad odor or other signs of evil taint, at the end of forty-eight hours, though the product of fresh eggs under similar conditions of exposure would not develop the like odor or taint under sixty hours.

Others, again, speak of samples of the material developing, in a warm room, odor or evil taint in some cases at the end of thirty-six hours, and in others at the end of forty hours.

No one else than the parties to this report has ventured to vouch for so low a record as twenty-four

hours for such like tests to develop such results. The chemical assistant seems willing to indicate as low as "around twenty hours." I, not they, have used the word "taint;" I have not tried to improve their language, but merely use a general term to cover the many specific ones used by different witnesses.

As these kind of tests by way of taste, smell and appearances and development thereof, seem to be the crucial tests which a number of witnesses qualified to speak would apply, we must ask which set speaking thereto are entitled to credit.

It seems to me the evidence of respondent's witnesses on this point overbears, in every way we can weigh the evidence, that of these two signing said report and speaking as witnesses for appellant.

Dr. Grüner does not in this regard help appellant much, for his mind seems to have been turned in another direction. He is asked and answers as follows:—

Q. You did not make any comparisons as to the time of decomposition in these eggs ?
A. No, sir.

Mr. Vanderleck does not found any evidence he gives in this respect upon any satisfactory data. The surrounding conditions of the material he tested before making any test does not warrant any one in feeling much confidence in the results he got.

The bacteriological views which Dr. Grüner and Dr, Laberge present, I pass for the present.

The result, leaving that phase out of the reckoning is that these frozen eggs seemed to be good when the cans were opened, that the thawing would take some time before the process of decomposition arrested by freezing could begin again to operate, and that in

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an ordinary room of seventy to seventy-two degrees Fahrenheit, it would require at least thirty-six hours and probably forty-eight hours to so develop the process as to reach the stage when the material might become unfit for food.

Can we thus say that frozen eggs in such state as found here were, therefore, within any of the terms applied by either of above statutes, unfit for food when seized?

It is what they were then and not what they might become that must be the test applied under these statutes to entitle authorities acting thereunder to confiscate and destroy them.

It is said that in the ordinary course of housekeeping they might within a less period than thirty-six hours become unfit for food, without the true condition becoming noticed.

So may fish, in summer, for example, and many other articles of daily consumption. Doubtless much food goes to waste for want of proper care, and some of it is improperly used, perhaps with detrimental effect. But what has that to do with enforcing the rigorous terms of a law which can only be put in operation when the article has become and is found unwholesome in the hands of those holding it for sale?

The proof adduced relative to bacteria raises problems of an entirely different character. And if science has so developed that there are tests based on bacteriology which can be usefully applied to this problem before us, I must say its application in the hands of the witnesses for appellant in this case has not been so made that a satisfactory conclusion can be reached, much less a conclusion that could justify the confiscation of respondents' property now in question.

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If I understand aright the argument put forward in support of such a conclusion, it is that though there may be bacteria in the egg, they do not exist in such profusion as found in these goods; that the normal effect of freezing is not only to prevent the multiplication of bacteria, but to destroy a very large percentage of such as did exist originally at the freezing; that on the contention of the respondents these goods were continuously frozen from the time of their first packing till opened in Montreal, and yet that when opened and thawed and then submitted to bacteriological tests, they were found to produce an abnormal number of bacteria as compared with those found either in fresh eggs, or eggs not quite fresh, or of such eggs when submitted to a test of freezing and thawing, and hence of necessity the conclusion must be reached that these frozen eggs are unwholesome and unfit for food.

However plausible this contention may be, it is founded upon such purely theoretical assumptions of fact and ill-conducted experiments that, not only the evidence of those competent to speak on the subject, but also, a profound respect for the methods of the men whose genius and patient investigations founded and developed that branch of science named bacteriology, forbid the acceptance of such conclusion.

The mere presence of bacteria in these eggs before being frozen, proves nothing relative to their fitness or unfitness for food at the time when frozen.

The number of bacteria then existent therein must on the evidence have depended on the temperature they have been previously subjected to, and other conditions under which they were handled before being frozen. Of all these conditions we are left in

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absolute ignorance. The prevalence of bacteria of the same kind in that part of the world where the eggs were produced and handled, as in the City of Montreal, is an assumption of fact without anything in the evidence to found it upon as scientific fact.

The evidence herein varies as to the effect upon bacteria of freezing the material in which they may be found. According to some evidence herein the consequential effect thereof also varies.

Then, again, variation is found in the resistant power of bacteria not only in those of the same kind, but also by a comparison of the effect of freezing on different kinds.

There is apparently also great variation of result according to the degree of cold and duration thereof. I imagine also a serious result in the way of variation might be found produced by sudden and unusual changes of temperature though continued below freezing point.

There is no proof of what degree of cold was applied from the time of freezing till the tests made in Montreal; nor of the variations therein; nor of the effect of such variations upon bacteria of any kind, much less a varied assortment; nor of the effect thereon of such long continued freezing as is assumed to have existed; nor of the possible results in case of the freezing having ceased for a few hours, for example, or on more than one occasion.

Thus it seems to me that the assumption of fact, as to freezing being destructive of bacteria, which is the foundation of the argument, vanishes.

There are many other conceivable possibilities needless to dwell upon which might have to be reckoned with before accepting as proven the theory that

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of necessity there must have been a diminution of numbers or of vitality in the bacteria to be found immediately before the samples tested were taken for experimental purposes.

Then from the moment these samples were taken charge of for such purposes did any single one of those making the tests therewith now relied upon take such precautions, by so anticipating all possible contingencies, as to ensure that there could not be a rapid multiplying of bacteria resulting from even the reduced numbers, if we are to assume the reduction in numbers had taken place as claimed ?

Neither the temperature of the rooms were kept, nor the exact length of time taken in thawing, nor the mode of thawing, nor the surrounding conditions during all that time, are so accurately given as to lay a proper foundation by means of the results reached for any scientific deduction, relative to the quality of this material.

It was not, I venture to say, by such methods of observation that the science of bacteriology was founded and has been to the present time developed.

I need not dwell on details when I find the methods in these regards so unsatisfactory, for without scientific treatment of the subject no scientific knowledge can be furnished us.

I may remark that Mr. Vanderleck, one of the appellant's own witnesses, ventured the opinion that though freezing destroyed many bacteria yet they afterwards increased in numbers in the frozen material. If I understand him aright the increase was going on, but such additional crop was of a weakened vitality. The same witness told the learned trial judge that the increase under other conditions might be a

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doubling every twelve or twenty-four hours. Whether he meant a continuous geometrical progression of this kind was to be expected I know not. The rapidity of possible production manifestly is great. But the degree of heat applied thereto in any event must affect the result, and in absence of knowledge on that vital point, how can any proper estimate be made, or comparison be founded on such data ?

Guesses about room-heat during night and day are poor substitutes for such knowledge.

Again as to the kind of bacteria, is it on such a basis worth while estimating the effect of a finding of and comparison of the numbers of bacilli of colon variety, when on the evidence before us it is doubtful whether or not such may not be found in fresh eggs ?

Indeed, the surprising truth seems to be that knowledge on the subject of eggs seems to have been beyond the ordinary range of a great many expert bacteriologists, shocking as such a discovery may be to people dependent on officers of that class for protection.

We get back to the practical tests of smell, taste and appearance upon which the weight of evidence seems against appellant.

Whether or not a food which is liable to become unwholesome within so brief a period after being thawed out, should or should not be sold without being subject to regulation designed to protect the consumer is a something with which we have in a strictly judicial sense no concern; especially as it is beyond the contemplation of the statutes in question.

In view of the many suspicions aroused by the inquiry, it may be that further inquiry of a more searching and scientific kind may be desirable and the dangers, if any, guarded against, from such food being

improvidently used, but that is for others than we to enter upon. It does not fall within our province.

It may be that the injunction is too wide in restraining statements which fall within the province of those having on behalf of the city to deal with such problems. They ought to be allowed the utmost freedom to state the actual facts even if arousing a suspicion. A just and reasonable suspicion may exist relative to all canned or frozen foods and the subject of use thereof may well bear re-examination in order to avert the results of carelessness on the part of the producer or merchant, or rashness begotten of ignorance on the part of the consumer or his servants. All we can say is the defence is not proven.

The assumption I have made that the health officer, because filling such office as the by-law designates, falls within the Acts, may be found, if one had the whole by-laws and legal history thereof before him (as I am not sure I have), in fact not legally correct. My assumption, however, cannot affect the result on the main point on which I think it desirable the case should turn and be decided.

The appeal should be dismissed with costs.

Since writing the foregoing I have assented to the memo. substituted by my brother Anglin amending formal judgment below.

ANGLIN J.—In order to succeed in this appeal the defendant must satisfy us either that its action in attempting to seize and destroy property of the respondents as unfit for human food was justifiable, or that it is not subject to review and control by the courts. It takes both positions. It alleges that the plaintiffs' eggs were in fact unwholesome and unfit for

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human food and that their seizure and confiscation was justified under the provisions of the Montreal City Charter and by-laws and also under the Quebec "Public Health Act," and it maintains that its health officer acted under the latter statute and that it clothes him with a discretionary power of such a nature that its *bonâ fide* exercise either may not, or should not be interfered with by the courts.

Without so deciding, because that seems to be unnecessary for the determination of this appeal, which may be more satisfactorily disposed of on broader grounds, but assuming in favour of the appellant:—

1. That there was a seizure of the plaintiffs' eggs sufficient in substance and in form;

2. That food such as that here in question, put up in sealed cans and of such a character that its fitness for human consumption can be determined only by expert analysis, falls within the purview of the legislation invoked;

3. That the objections taken to the inspection by the health authorities, on the grounds that it was made by the testing of samples, that the samples taken were too few, and that the analyses of them were not made by the health officer in person, are ill-founded;

4. That the discretionary power conferred by the "Public Health Act" on the executive officer of a local Board of Health cannot, or should not, be controlled or interfered with by the courts, unless attempted to be exercised *malâ fide;* and

5. That the defendant's plea was not demurrable because it omitted to allege that the plaintiffs' eggs "were held or offered for sale for food," I am of opinion that this appeal must fail.

By art. 300, sec. 40, of its charter (62 Vict. ch. 58), the City of Montreal is authorized:—

To provide for the inspection of meats, poultry, fish, game, butter, cheese, lard, eggs, vegetables, flour, meal, milk, dairy products, fruit and other food products; to provide for the seizure and summary destruction of any such products as are unsound, spoilt or unwholesome; to prohibit the bringing into the city of unsound, spoilt or unwholesome products and to define the duties, powers and attributions of the inspectors appointed for that purpose; and to prevent any animals or meat brought into the city from being sold within its limits for consumption before it has been inspected and stamped in the manner prescribed by the council at the cost of the city.

By sec. 122 (4 Edw. VII. ch. 49, art. 7), the municipal corporation is empowered

in the interests of public health, to prohibit the adulteration of any substances intended for food; to prohibit the sale of any adulterated or unwholesome food and order the confiscation, or the confiscation and destruction thereof, as the case may be; to define what constitutes food for the purpose of this paragraph; what shall be considered an adulteration thereof; to enact that a third offence against any by-law passed in virtue of this paragraph shall render the offender liable to imprisonment not exceeding two months at the discretion of the recorder, in addition to the usual penalty.

In the exercise of the authority thus conferred, the city council passed its by-law No. 105, creating a Board of Health. This by-law contains the following clause:—

Sec. 8.—The said Board of Health is hereby empowered to appoint such health officers as may be deemed necessary for superintending or carrying out the orders of the board.

Sec. 17.—No person shall sell or have in his possession for sale any unwholesome meat, poultry, game, eggs, fish, unripe or decayed fruit or vegetable that might in any way be injurious to health; and any member or officer of the Board of Health is hereby authorized to seize and confiscate all such meat, poultry, game, eggs, fish, fruit or vegetable; the entire cost of removing any of such deleterious articles as may be found in any premises, to be paid by the delinquent in addition to the penalty provided in section 56 of this by-law.

Under this legislation the jurisdiction of the Board of Health and its officers to seize and confiscate the articles of food with which it deals depends upon their being "unsound, spoilt or unwholesome." It is

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only in respect of food which is in fact unwholesome that the statute confers any authority; it is only for the seizure and confiscation of food which is in fact deleterious to health that the civic by-law provides. In order to justify the action of the local Board of Health and its officers under these provisions, the defendant must prove to the satisfaction of the court that the eggs in question were unwholesome and unfit for food. The burden of doing so is upon it. After exhaustive inquiry the learned trial judge found that that burden had not been discharged—that

> the preponderance of evidence received in this case demonstrates that the frozen eggs in question were not unwholesome, putrid, damaged, or affected with germs of disease or otherwise injurious to health.

Because they dismissed the defendant's appeal on other grounds, the majority of the learned judges of the Court of King's Bench found it unnecessary to pass upon this question of fact.

Careful attention to the evidence during the argument and subsequent study of it with the aid of the supplementary factum furnished by counsel for the appellant have not convinced me that the conclusion of the learned trial judge in regard to the quality of the eggs was erroneous. If the testimony does not clearly establish that when seized the eggs were wholesome and sound, it certainly falls short of what would be necessary to justify an appellate court in deciding that their unsoundness and unwholesomeness had been so clearly demonstrated that the finding of the trial judge should be reversed. In so far, therefore, as the defendant attempted to justify the action of its health authorities under the provisions of its charter and by-law No. 105, it has failed to do so.

Article 3913 of the Revised Statutes of Quebec,

"Public Health Act," which the defendant also invokes, reads as follows:—

Art. 3913.—Every executive officer of the municipal sanitary authority or any other officer appointed by it for that purpose, may inspect all animals, dead or alive, meat, fowl, game, fish, fruit, vegetables, grease, bread, flour, milk or other liquids and food intended for human consumption and offered for sale, or deposited in a place or transported in a vehicle for the purpose of being afterwards sold or offered for sale, or delivered after being sold; and, if upon inspection, such animals, liquids or food appear to be unwholesome, putrid, damaged or infected with the germs of disease, or otherwise injurious to health, he may seize the same, carry them off, and dispose of them so that they shall not be offered for sale or serve as food for man.

It is contended for the appellant that the discretionary power with which the legislature has by this enactment clothed the executive officer of the municipal sanitary authority, or any officer appointed by it for the purpose, if exercised *bonâ fide,* is not subject to curial control; that the method and sufficiency of the inspection is entrusted to the officer's judgment; and that the courts should interfere only if *mala fides* is alleged and proved, or if it is shewn that there has not been any real inspection. I assume in the defendant's favour that this is the correct view of this statute, notwithstanding the arbitrary and drastic character of the power which it confers and the absence from it of any provision for compensation, in case of mistake, to the unfortunate owner who loses his property. But the seizure and confiscation must be the act of the executive or other designated officer himself, as the result of his own adverse judgment upon the character of the condemned food; it must be undertaken and carried out upon his responsibility; it must in fact and reality be an exercise by him of the power entrusted to him. That is the sole safeguard which, upon this interpretation of the statute,

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the legislature has provided for the protection of the owner whose property is subjected to the risk of summary confiscation. To that protection at least he is entitled; and the burden of shewing that he had the benefit of it rests upon the defendant which has assumed responsibility in this case for all that Dr. McCarrey did.

A study of the record has satisfied me that, in directing the seizure and destruction of the plaintiffs' eggs, Dr. McCarrey, "the executive officer of the municipal sanitary authority," did not act on his own judgment or responsibility, but merely carried out the instructions of the Board of Control. He consulted that Board at every step in his proceedings. He did nothing except under its immediate direction. In his notices to the storage company, prepared under the direction of the legal advisers of the city by instructions of the Board of Control, he refers to the inspection as having been made "by the sanitary authorities of the City of Montreal," and he indicates that "further action (is to) be taken by the health authorities." In his testimony he refrains from stating that he acted in any way on his own judgment or responsibility; on the contrary he emphasizes his constant submission to the directions of the Board and the steps taken by it which resulted in his action. Indeed, had it not been that counsel for the plaintiffs in the course of cross-examination put to him an incautious question, we would have been left in ignorance of what Dr. McCarrey's personal opinion as to the quality of the eggs had been. In its plea the defendant makes no allusion to art. 3913 (R.S.Q.) of the "Public Health Act." It is not suggested that the seizure and condemnation were made under the authority of that

provision. The proceedings are there justified under the provisions of the city charter and by-laws. The seizure is spoken of as the act not of the executive officer of the Board, but as that of the city itself. Throughout the defendant accepts responsibility for everything that was done. In my opinion it is not possible on the evidence before us to contend successfully that Dr. McCarrey exercised or intended to exercise the powers conferred on him by art. 3913 (R.S.Q.) of the "Public Health Act." The attempted seizure and confiscation of the plaintiffs' eggs was undertaken and proceeded with by the order and on the responsibility of the Board of Control acting under the authority of the city charter and by-law. There never was any condemnation of them or direction for their seizure and destruction by Dr. McCarrey as his own act, on his own responsibility, or as the result of his own conviction that they were unwholesome and unfit for food. Assuming that the courts should not review or interfere with the conduct of a competent officer proceeding *bonâ fide* under art. 3913 (R.S.Q.) of the "Public Health Act," the defendant cannot in this case invoke that provision to oust the jurisdiction of the courts to prevent the seizure and destruction of the plaintiffs' eggs which it has failed to shew were unwholesome or unfit for human food.

Neither can it uphold the legality of the action of its officers by appealing to the order of the provincial Board of Health, which purports to be made under art. 3875 (R.S.Q.) of the "Public Health Act." That order directs the municipal corporation

d'appliquer, dans un delai de trente-six heures, l'article 3913 de la dite loi, c'est-à-dire prendre les mésures voulues pour que les dits œufs ne puissent être délivrés à la consommation, non seulement dans Mon-

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tréal, mais de même dans tout la territoire de la province, que le conseil d'hygiène doit également protéger.

The power conferred on the provincial Board of Health by sub-section 3 of article 3875 (R.S.Q.) of the "Public Health Act" is

in the interests of public health to compel ***municipal councils*** to exercise and enforce such of their powers as in the opinion of the Board of Health the urgency of the case demands.

Article 3913 (R.S.Q.) of the "Public Health Act" does not confer any power on municipal councils. It empowers an officer as *persona designata* to take a certain course of action. The provincial board is not given jurisdiction to order that official to exercise his powers. Moreover, if the provincial board had authority to direct the executive officer of a local board to act under art. 3913 (R.S.Q.), in order to carry out such a direction, there must have been a condemnation of the food by him on his own responsibility and as his own act before it could legally be seized and destroyed under that article. Treating the order, which is addressed to the municipal corporation, notwithstanding the distinct reference in it to art. 3913 (R.S.Q.) of the "Public Health Act," as a mandate requiring the corporation to act under the provisions of its charter and by-law, which it would be within the power of the provincial board to direct, the appellant again encounters the insuperable difficulty that that power is exercisable only in respect of food which is in fact bad and unfit for use. The burden of establishing the existence of that condition precedent to the jurisdiction of the local Board of Health is upon the defendant and, as already pointed out, it has failed to make the requisite proof.

For these reasons I would dismiss this appeal with costs.

The injunction granted by the Superior Court contained the limiting words

so far as may relate to any acts or proceedings heretofore had or begun or to any condition or conditions heretofore existing in connection with the said goods.

By its judgment the court of appeal excised these words from the injunction. This might lead to the conclusion that the court of appeal forbade the municipal authorities to discuss the present condition of the plaintiffs' eggs or to institute new proceedings for their seizure and condemnation. That cannot, I think, have been intended in view of the facts that the court of appeal maintained the plaintiffs' action on the grounds that the seizure by the municipal officers had been defective and that the defendant's plea was technically insufficient, and that there was before it no evidence as to the condition of the eggs when the appeal was heard and disposed of. The evidence bore only upon the condition of the eggs up to the time of the trial — now some two years ago. We know nothing as to their present condition. In order to make it clear that the injunction does not extend to present or future conditions, or to any future proceedings which may be lawfully instituted, I would restore the limitation placed by the learned trial judge upon its terms.

The injunction also restrains

the defendant, its officers, agents and servants from making any threats or statements respecting the state of the said merchandise.

In connection with any further proceedings which the civic health authorities may be advised to institute it may become necessary for them to discuss the history of the plaintiffs' eggs and their condition from

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time to time. Such discussion may also be necessary and proper should the plaintiffs bring an action for damages against the defendant by reason of the proceedings taken by it of which further prosecution has been enjoined. Under these circumstances it would seem to be advisable to omit from the injunction the provision lastly above quoted. I would, therefore, modify the judgment in appeal by substituting for the paragraph in which the injunction is declared permanent, the following:—

> Doth declare the injunction permanent; doth accordingly enjoin and restrain the defendant, its officers, agents and servants from seizing, destroying, taking possession of or in any way interfering with the plaintiffs' eggs under or in pursuance of any acts or proceedings begun or had before the 7th day of April, 1911, or otherwise than by due process of law; doth order that the *mise-en-cause* do take notice hereof and govern itself accordingly.

BRODEUR J.—L'intimée prétend dans son factum que la Cour Suprême n'a pas le pouvoir d'entendre cette cause parce qu'elle est pendante devant le Conseil Privé.

Cette question de jurisdiction avait déjà été soulevée par motion mais la cour étant également partagée la motion avait été renvoyée.

Il appert que l'appelante aurait obtenu de la Cour du Banc du Roi la permission de porter cette cause devant le Conseil Privé, et aurait fourni le cautionnement nécessaire. Rien cependant n'aurait été fait pour poursuivre cet appel au Conseil Privé. La copie du dossier ne fut pas préparée ni transmise, la requête en appel ne fut pas déposée au Conseil Privé et l'intimée n'y produisit de comparution.

L'appelante aurait alors le 4 mars, 1912, fait signifier à l'intimée un désistement de son appel au Conseil

Privé et l'aurait produit au greffe de la Cour du Banc du Roi. Elle aurait ensuite fait les procédures nécessaires pour porter son appel devant cette cour.

J'ai été d'opinion quand la requête en cassation est venu devant nous que le désistement avait mis fin à l'appel au Conseil Privé et qu'il n'était pas nécessaire, comme le prétendait l'intimée qu'il fût produit au bureau du Conseil Privé vu que le dossier n'y avait pas été transmis (Practice, Cameron (2 ed.), p. 430). Je vois que le régistraire du Conseil Privé en est arrivé à la même conclusion.

Agissant sur une suggestion qui lui avait été faite lors des plaidoiries sur la requête en cassation l'appelante a transmis au régistraire du Conseil Privé l'avis suivant en date du 12 mars, 1912:—

17, Victoria Street,
London, S.W.,
19th April, 1912.

Sir,—

City of Montreal v. John Layton & Co., Ltd., and The Gould Cold Storage Company.

This is an appeal by the City of Montreal from a judgment of the Court of King's Bench (Appeal Side), for the Province of Quebec.

We beg to enclose a formal notice addressed by the solicitors for our client, the City of Montreal, to yourself advising that the city has desisted from, and wishes to withdraw, this appeal.

According to our instructions, the city has desisted from the appeal to His Majesty in Council and has taken steps to appeal to the Supreme Court of Canada. It appears that, notwithstanding the filing of a notice of desistment in the Court of King's Bench, and the allowance by that court of the security on appeal to the Supreme Court of Canada, a motion to quash the appeal in the Supreme Court has been made by the respondents, one of the grounds being that, once security had been given and allowed in an appeal to His Majesty in Council, the appeal cannot be withdrawn except in accordance with the Privy Council Rules.

We are instructed to request that you will, under Rule 32, notify the Clerk of the Court of King's Bench (Appeal Side), by letter of

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the lodging of the enclosed notice of withdrawal. We trust that the non-arrival of the Record will not be considered to prevent the application of Rule 32.

We are, Sir,
Yours obediently,
(Sgd.) BLAKE & REDDEN.

The Registrar,
Judicial Committee of
The Privy Council.

Le régistraire du Conseil Privé a alors envoyé la lettre suivante au Greffier de la cour d'appel:—

Privy Council Office.
Downing Street, London, S.W.
19 April, 1912.

Sir,—

City of Montreal v. John Layton & Co., Ltd., and another.

I enclose a copy of a letter received from Messrs. Blake and Redden, the London agents of the appellants, with a copy of the document referred to in that letter. I have informed them that I do not see my way, under the Privy Council Rule 32, to which they refer, to notify you formally that the above appeal has been withdrawn, because the Record not having arrived, I have no official notice that it has been admitted. With a view to assist them, however, I enclose these documents, which will shew you that it is not the intention of the appellants to proceed further with the appeal to His Majesty in Council and I think this will probably attain the object that they have in view.

I am, Sir,
Your obedient servant,
CHARLES NEISH,
Registrar of the Privy Council.

The Clerk of Appeals,
Court of King's Bench,
Montreal.

Cette correspondance me confirme dans l'opinion que le désistement d'un appel au Conseil Privé peut être produit devant la Cour du Banc du Roi aussi longtemps que le dossier n'est pas transmis en Angleterre. Il ne peut pas y avoir de doute alors que cette cause n'est plus pendante devant le Conseil Privé et

que nous avons jurisdiction pour en disposer au mérite.

Au mérite je trouve, après avoir étudié soigneusement la cause, que l'appel ne peut pas être maintenu. Je dois ajouter cependant que c'est avec la plus grande hésitation que j'en suis venu à cette conclusion et le fait est que si le juge instructeur qui a eu l'avantage d'entendre les témoins, de peser les contradictions nombreuses que nous relevons dans la preuve en était arrivé à une autre conclusion que celle qu'il a adoptée cela aurait été plus conforme à mon opinion, mais du moment qu'il trouve que les œufs en question étaient propres à l'alimentation je ne peux pas facilement renverser son jugement. La législature a donné à l'officier exécutif de l'autorité sanitaire municipale des pouvoirs bien étendus sous les dispositions de l'article 3913 des Status Refondus de Québec. Il peut après inspection saisir et confisquer des aliments qui paraissent préjudiciables à la santé. Il parait avoir une très grande discrétion à ce sujet, mais dans le cas actuel l'inspecteur, le Dr. McCarry, n'a pas lui-même exercé cette discrétion et il n'y a aucun document au dossier établissant qu'il a agi de sa propre autorité et sous les pouvoirs qui lui sont accordés par la loi. La cité parait plutôt avoir procedé suivant les dispositions de son règlement municipal. Or pour qu'elle puisse réussir il faut que les aliments saisis soient de fait impropres à l'alimentation. Comme je l'ai dit plus haut dans le cas actuel le tribunal de première instance en est venu à la conclusion que les aliments en question dans cette cause sont propres à l'alimentation.

Un mot maintenant quant à l'injonction. Il est évident que les termes dans lesquels elle a été émise

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pourraient donner lieu à une interprétation erronée. Alors afin de faire disparaître tout doute à ce sujet je concours dans la rédaction qui est suggérée par mon collègue M. le Juge Anglin.

L'intimée a donc gain de cause et l'appelante doit être condamnée à payer les frais du présent appel.

Appeal dismissed with costs.

Solicitors for the appellant: *Ethier & Co.*
Solicitor for the respondents: *S. L. Dale Harris.*

CHARLES WILLIAM CROSS (RESPONDENT) ..... APPELLANT;

AND

WILLIAM FREDERICK WALLACE CARSTAIRS (PETITIONER) ..... RESPONDENT.

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Feb. 21.

IN THE MATTER OF THE EDMONTON PROVINCIAL ELECTION.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Appeal — Jurisdiction — Provincial election — "Alberta Controverted Elections Act"—Preliminary objections—"Judicial proceeding"—"Final judgment."

Held, per Davies, Idington and Anglin JJ., that under the provisions of the "Alberta Controverted Elections Act" the judgment of the Supreme Court of the province in proceedings to set aside an election to the legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per Davies, Anglin and Brodeur JJ., that the judgment of the Supreme Court of Alberta on appeal from the decision of a judge on preliminary objections filed under the "Controverted Elections Act" is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Held, per Duff J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the contemplation of section 2 (*e*) of the "Supreme Court Act" in respect of which an appeal lies to the Supreme Court of Canada.

APPEAL from a decision of the Supreme Court of Alberta(1), affirming, by an equal division of opinion, the judgment of Mr. Justice Scott(2) dismissing

(1) 22 West. L.R. 797. (2) 22 West. L.R. 48.

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preliminary objections to the petition against the return of the appellant as a member of the provincial legislature of the Province of Alberta for the District of Edmonton.

MOTION on behalf of the respondent to quash the appeal for want of jurisdiction.

Ewart K.C. for the motion. The authority in respect of the trial of controverted elections resides absolutely in the Legislature of Alberta, and, in this regard, that legislature has delegated only partial powers to the courts and judges of the province for inquiry and report. By the "Supreme Court Act," R.S.C., 1906, ch. 139, there is no jurisdiction conferred on the Supreme Court of Canada to hear such appeals, and the local statute makes such proceedings and the report thereon final within the province. The controversy on this appeal does not concern a cause, matter or proceeding, either at law or in equity, which could fall within the statutory jurisdiction on the Supreme Court of Canada. Moreover, the decision sought to be appealed from was merely in respect of preliminary objections, whereby those preliminary objections were dismissed; these proceedings were interlocutory only and did not put an end to the election petition; consequently, it cannot be deemed a final judgment within the meaning of the "Supreme Court Act." *Charlevoix Election Case*(1); *Glengarry Election Case; Kennedy* v. *Purcell*(2).

Lafleur K.C. and *O. M. Biggar* contra. The proceedings in question arose in a court of superior juris-

(1) 2 Can. S.C.R. 319. (2) 59 L.T. 279.

diction and the judgment appealed from was rendered by the final court of appeal within the province. There is no restriction placed upon the powers of Parliament in respect to such proceedings by section 101 of the "British North America Act, 1867." The Alberta statute in respect to controverted elections (secs. 4, 7, 10, 13) provides for the filing of the petition in the court; the proceedings are had in open court (secs. 15, 18, 19, 20, 21, 28). The whole matter involves a dispute in respect of civil rights submitted to the decision of a court of superior jurisdiction within the province, and the decision is a final judgment within the provisions of the "Supreme Court Act." Reference is made to *McDonald* v. *Belcher*(1); *Baptist* v. *Baptist*(2); *Chevalier* v. *Cuvillier*(3); *Shields* v. *Peak* (4); *Ville de St. Jean* v. *Molleur*(5).

DAVIES J.—This is an appeal from a judgment of the Supreme Court of Alberta confirming, on an equal division of opinion, the decision of Mr. Justice Scott dismissing certain preliminary objections taken to a provincial election petition under the "Alberta Controverted Elections Act."

At the hearing objections were taken that this court had no jurisdiction to hear this appeal because, first, it is taken from the findings of the Supreme Court of Alberta under the "Alberta Controverted Elections Act," and, secondly, because the decision dismissing the preliminary objections was not a "final judgment" within the interpretation placed by this court upon that term as used in section 37 of the "Supreme Court Act."

(1) [1904] A.C. 429.
(2) 21 Can. S.C.R. 425.
(3) 4 Can. S.C.R. 605.
(4) 8 Can. S.C.R. 579.
(5) 40 Can. S.C.R. 139.

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Davies J.

We were all of the opinion, at the conclusion of the argument, that the objections were fatal.

In order to give us jurisdiction to hear appeals from decisions of provincial courts under provincial controverted elections Acts, it seems to me that such Acts must either expressly or by necessary implication contemplate and provide for such appeals and that, in addition, Parliament must have clearly conferred upon us jurisdiction to hear them.

Mr. Lafleur contended that, under the 18th and 21st sections of the "Controverted Elections Act" of the Province of Alberta, the decision of the trial judge was a judgment of the court; that section 28 provided for an appeal to "the Supreme Court sitting *in banco* from any order or determination of the judge," and that the determination of such Supreme Court on such appeal was a "final judgment" within the 37th section of chapter 139 of the Revised Statutes of Canada, 1906, respecting the Supreme Court of Canada.

I am not able to accept this contention.

The inherent power of the legislature to determine questions relating to the election of its members has been, in part, delegated by the Legislature of Alberta to the judges of the Supreme Court of the province. The judge who tries the election petition is empowered to find whether the candidate petitioned against was "unduly returned or elected a member of the Legislative Assembly," and he is directed within a specified time, "unless his judgment is appealed," to "report his finding to the clerk of the Executive Council." The judge is empowered expressly not only to find that the candidate petitioned against was not duly elected, but that another candidate was entitled to the seat and so to certify, in which case it is provided

that such other candidate is entitled to the seat in the place and stead of the respondent

to the petition.

Then section 28 provides for an appeal to

the Supreme Court *en banc* from any order or determination of the judge,

and section 31 provides

that the adjudication and finding of such court on such appeal shall be duly certified by the registrar or such other officer to the judge appealed from,

and

if the appeal is from any finding or determination of the judge under section 21,

he shall, in turn, forward it to the clerk of the Executive Council.

It is perfectly clear to me that the delegation of power to the court was one intended by the legislature to be final and not to be subject to further appeal to this court.

The conclusions the judge in the first instance and the court in appeal afterwards may reach are variously spoken of as a "judgment" and as "findings" or "determinations" or "adjudication and finding." Provision is expressly made for giving effect to them.

No provision whatever is made for any further appeal, and, in my opinion, the appeal to the provincial Supreme Court was and was intended to be a final disposition of the subject-matter delegated by the legislature, so far as the courts of law were concerned.

I do not think that the finding or disposition made by the Supreme Court on an appeal to it from the trial judge on these election petitions can be said to be "a final judgment of the highest court of final resort

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in the province" within the meaning of section 37 of the Act respecting this court.

In any event, the disposition made in this case of the preliminary objections cannot be said to be such a final judgment. It simply dismissed these objections leaving the petition to be proceeded with and heard in the ordinary way.

The appeal to this court must be quashed because of want of jurisdiction. Costs of a motion to quash allowed.

IDINGTON J.—The provincial legislatures are each entitled to declare how the members of its legislative assembly are to be elected, the validity of their elections are to be tested and determined, in the case of dispute thereabout, and how the proceedings adopted to apply such test and procure such determination are to be had and the consequences of such determination.

Parliament has not the slighest right of its own mere will to interfere.

It never was intended by section 101 of the "British North America Act" that the appellate court therein contemplated should be given, as against the will of the legislature, any jurisdiction over the subject of elections to the legislative assembly.

Such a mode of determining the right to sit in any parliament or legislature (of higher order than a municipal council), as trial by the judges of the ordinary courts of the country had not, when the "British North America Act" was passed, either in England or here, ripened into a practical legal conception.

Such bodies had always guarded as one of their most precious privileges the right to determine all such questions.

When the time came for provincial legislatures to confer the power of doing so, in whole or in part, on the courts and judges, the cry was rather that no such power could be constitutionally exercised, and it was somewhat grudgingly conceded as an improvement on old methods though a great step in modern civilization as developed under constitutional government to effectively help purify public life.

It has long been conceded to be part of the inherent power of each legislature to so enact by way of delegating the execution of that power inherent in the legislature, or to speak more accurately, the legislative assembly, to such authority as it might see fit to entrust with the duty of deciding and determining what should be done in the premises.

Until the legislature has determined otherwise than it has, the delegation of power cannot be held to have gone so far as an appeal here would involve.

The "Controverted Elections Act" of Alberta has certainly intended that the Supreme Court of the province should be the ultimate appellate court and its decision end all disputes arising under said Act.

Everything indicates that when proceedings were taken they should be so conducted as to enable an appeal there before constituting a final result and when once decided there that the proceeding should be ended and that the result reached there is to be treated as final.

Parliament can in no way add to this delegation of power by the legislature or meddle with it or with its results in any way.

The legislature might, for example, to put an extreme case, have constituted Parliament itself the

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sole judge of all such questions or given it power to help in the determination thereof, but it has not.

Until it does some such like thing or otherwise permitted the intervention of Parliament, the latter cannot nor can we, its creation, interfere.

The appeal must be quashed with costs as of a motion to quash.

DUFF J.—In my opinion a proceeding under the "Controverted Elections Act" of Alberta for questioning the validity of an election is not a "judicial proceeding" within the contemplation of section 2, subsection (*e*) of the "Supreme Court Act," R.S.C., 1906, ch. 139; and the appeal is, consequently, incompetent. There are, I think, other objections equally fatal, but it is unnecessary to refer to them specifically.

ANGLIN J. agreed with Davies J.

BRODEUR J.—A motion to quash has been made in this case on two grounds: (1) That the judgment appealed from has been rendered in the matter of a provincial controverted election; and (2) that it is not a final judgment.

The appellant whose election has been contested has filed preliminary objections that the deposit had not been validly made and that the petitioner was not a qualified elector. The judgment *a quo* is on these preliminary objections.

It is not necessary, in order to dispose of this motion, to decide whether there is an appeal to this court in controverted elections of Alberta. The law states, however, that the judgment from that province has to be final in order to be brought before this court.

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Brodeur J.

According to the well settled jurisprudence of this court, a judgment dismissing preliminary objections is not considered final.

For that reason I would quash the appeal.

Appeal quashed with costs.

Solicitor for the appellant: *A. G. McKay.*
Solicitor for the respondent: *C. F. Newell.*

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Feb. 18, 19.
Feb. 24.

FRED GRAVES, ALFRED GRAVES AND HARRY GRAVES ..... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Indictment for murder—Trial—Charge to jury—Misdirection—Constructive murder—Natural consequence of act—New trial.

On the trial of an indictment for murder of one Kenneth Lea it was proved that the prisoners, who had been drinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away, and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood, when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a hospital in Halifax where he died shortly after. The trial judge in charging the jury instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not it was manslaughter, drawing their attention especially to sections 256 and 259(*b*) of the Criminal Code. The prisoners were found guilty of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserved case:—

Held, that the above direction to the jury ignored the requirements of the Code formulated in sub-section (*d*) of section 259, to which the Judge should also have drawn their attention directing them to find whether or not the prisoners knew, or ought to have known, that their acts were likely to cause death, and his failure to do so left his charge open to objection and constituted misdirection for which the prisoners were entitled to a new trial.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming, on a case reserved, by an

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

equal division of opinion, the conviction of the appellants for murder.

Under the circumstances set out in the above headnote the appellants were found guilty of the murder of Kenneth Lea at Wolfville, N.S. The prisoner's counsel then presented to the trial judge thirty-six objections to the charge and verdict and asked him to reserve a case for consideration to the full court, which he refused to do. On application to the full court he was ordered to reserve a case on thirty-two of the objections(1), and after argument on the case so reserved the court was equally divided and the conviction stood. The prisoners then appealed to the Supreme Court of Canada.

Roscoe K.C. for the appellants. In a criminal case it is not necessary that evidence should be objected to. *Reg.* v. *Gibson*(2); *Rex* v. *Brooks*(3); *Rex* v. *Farrell*(4). The rule in civil cases does not apply to criminal cases. *Reg.* v. *Thériault*(5).

When the facts render it necessary, in order to guide the jury, that a direction on law should be given, want of direction on the point of law is ground for a new trial. *Prudential Assurance Co.* v. *Edmonds* (6); *Hawkins* v. *Snow*(7); *Rex* v. *Blythe*(8). The chief defect in the judge's charge is the weight attached to the illegal presence of the appellants on the lands of deceased.

The term "malice," when used, should be defined to the jury. *Richardson* v. *The State*(9). The judge

(1) 46 N.S. Rep. 305.
(2) 18 Q.B.D. 537, at p. 540.
(3) 11 Ont. L.R. 525-9.
(4) 20 Ont. L.R. 182, at p. 187.
(5) 2 Can. Cr. Cas. 444.
(6) 2 App. Cas. 487.
(7) 28 N.S. Rep. 259.
(8) 15 Can. Cr. Cas. 224.
(9) 28 Tex. Cr. Rep. 216.

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charged that if the jury found that the appellants were actuated by malice and ill will in going to Lea's premises, and behaving as they did, even though they did not intend to injure him, the crime was murder. The words and actions of drunken men, as indicative of malice, should be differentiated from those of a sober man. *The People* v. *Rogers* (1); *Rex* v. *Thomas* (2).

Failure to instruct upon the distinction between murder and manslaughter is also the proper subject of reservation. *Rex* v. *Wong On* (3); *Rex* v. *Walkem* (4). Any point submitted by the judge to the jury should be considered as materially affecting the conviction. The Crown must shew affirmatively that the misdirection did not influence the result. *Allen* v. *The King* (5).

Newcombe K.C. for the Attorney-General of Nova Scotia discussed the evidence in regard to the *res gestæ,* and referred to 1 Hawk. P.C. (Ker ed.), page 86, para. 10; page 513, and page 99, paras. 41, 42; Bishop Crim. Law (8 ed.), pages 534, 535, 654, 858; Foster's Cr. Cas., pages 55-57, 259; Hale P.C. 451; 9 Halsbury, Laws of England, page 572, paras. 1158 *et seq.;* "Criminal Code," sec. 261(3); *Blake* v. *Barnard* (6); 1 Russell on Crimes, 879; 1 East P.C. 225; *Reg.* v. *Martin* (7).

DAVIES J. agreed with Anglin J.

(1) 72 Am. Dec. 484.
(2) 7 C. & P. 817.
(3) 8 Can. Cr. Cas. 423.
(4) 14 Can. Cr. Cas. 122.
(5) 44 Can. S.C.R. 331.
(6) 9 C & P. 626.
(7) 8 Q.B.D. 54.

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Idington J.

IDINGTON J.—The appellants were convicted of murder as result of a trial by the learned Chief Justice of Nova Scotia and a jury.

Their counsel took some thirty-six objections to the learned judge's charge to the jury, asked for a reserved case thereon and being refused, appealed to the court *en banc,* which directed the learned Chief Justice to state a case as to thirty-two of the grounds for these objections. The result was that in disposing of his statement of case framed as thus directed the court was equally divided and hence this appeal.

Of these thirty-four alleged points of law I may say that the great majority of them are in law without foundation. In the result reached by this court it is needless to shew why I have come to such conclusion or to say more about all of them than this: With the one exception I am about to deal with, and a few other instances in which the remarks objected to may have a bearing more or less direct on that one point, it seems to me these points would never have been directed to be stated or upheld if due regard had been had to the curative provisions governing criminal appeals. I have selected that point on which Mr. Justice Drysdale put his finger as containing the pith of all that was objectionable and which I find so well founded as to entitle appellants to a new trial. That objection is No. 28, stated as follows:—

> 28. Whether the law applicable to the case was stated sufficiently to enable the jury to determine whether if the defendants were guilty of homicide such homicide was murder, and the facts applicable to such law pointed out.

I think the first question we must ask ourselves in all criminal appeals where the objections taken are well founded or arguable, is whether or not we can say

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that in our "opinion some substantial wrong or miscarriage was occasioned thereby at the trial."

I am not disposed to interpret this statutory duty in any narrow metaphysical sense, for if we did so we might frame a judgment in every case of mistake no matter how trivial so as to demonstrate that there might have been somebody in the jury panel that might have taken another view of the matter if this supposed error had not taken place.

I think this and every other appellate court acting under our Criminal Code must grasp the matter presented with a strong hand and not allow the trivial error to lead them into the land of speculation founded on some shade of possibility.

We must see, however, that the trial has been one of the legal offence charged.

We must also, I submit, assume that the jurors have brought to the subject dealt with that close attention to what has taken place in the course of the trial and that strong common sense what would enable them in light thereof to apprehend the language of the learned trial judge in charging them, and in many instances mentally, and automatically as it were, correct the accidental slips of the tongue the most careful judge may chance to make.

In this case we have illustrations in many of the objections made of how this should work out. The learned Chief Justice, it appears, used expressions which, isolated, and read without having regard to the evidence and general scope of his charge, might be held to be misdirection, partly of law and partly relative to fact, but which ought not to lead astray or be supposed to have led astray any intelligent jury acting in the spirit which, I submit, should be presumed to have governed them.

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Idington J.

The general outline of the evidence herein was so clear and simple that properly marshalled there should not have been any misapprehension in this regard of the duties such evidence had cast upon the jury in this case. Simple as the case in this regard is there happened to be two phases of the problem to be solved which were not kept as clearly separated throughout as they might have been, and there is thus the greater difficulty in escaping from the conclusion I have reached, or of applying the curative provision I have referred to.

Briefly put the facts in outline as presented for the prosecution were that on a Sunday afternoon the appellants, who had been drinking, carried one or more bottles of liquor with them, drank more, and when thus in an intoxicated condition in front of deceased's premises stopped and trespassed on his lawn. There they used grossly offensive language and though asked by deceased to retire, refused. The deceased and his wife and others who had been on the verandah, withdrew into the house or outbuildings.

The appellants remained on the lawn, or on the highway, continuing their unseemly conduct. The deceased after a time loaded his gun and proceeded therewith to the verandah in front of his house. The appellants gave evidence on their own behalf, and it was said by one or more of them that deceased asked them to go away or he would shoot them. They do not pretend that he ever came from his position on the verandah, which was fifty-six feet distant from the highway where they say they then were. The wife of deceased heard a rush of feet on the walk up to the verandah where deceased stood and immediately thereafter an explosion of a gun. It seems tolerably clear that the gun

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had been used as a club by deceased in resisting the onset of one or all of these appellants, and in the result an explosion of the loaded gun lodged its contents in the upper part of the thigh of deceased, from the ultimate effects of which, I assume for the present, he died, whether necessarily so if not further ill treated, might form another question. A hole was found in the screen front door of the dwelling and a bottle, or remains of one, were, immediately after this, found in the screen front-door of the dwelling and a other facts and especially the possession of a bottle or bottles by appellants, left ground for inference I need not dwell upon.

The wife of deceased rushed out and found all three appellants on the verandah or steps therefrom.

Up to this rush from the highway or lawn, whichever was the place they are supposed to have rushed from, there was not anything which took place that in law could properly be held as provocation so rousing the passions of appellants as to reduce the gravity of the offence, if any, committed by the appellants, or any of them, to manslaughter.

The charge, I respectfully submit, rather confuses thought in not restricting this question of manslaughter to be dealt with in treating of the later phase of the case and including there the whole.

The evidence warrants the inference that the appellants had unlawfully come to attack the deceased and as the charge puts it that he resisting or anticipating it, struck the foremost of them violently on the head with the butt end of the gun and thereby produced the explosion. But there are other possible inferences as to the exact cause of the explosion quite as much within the range of the consideration of the

struggle and its consequences. It may be possible to consider any of these and yet the result of guilt or innocence be open to a jury. Now all the errors, if any, in the learned judge's charge bearing only upon the evidence or its application so far, I count as nothing that need concern us.

Let it be assumed for argument's sake that the attack made or threatened by appellants or any of them was intended to be only an assault, the question arises whether or not the consequence which followed can be made the basis of a charge for murder.

The learned Chief Justice charged as follows:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter provided there was no malice on their part in doing what they did. On the other hand, if a party while engaged in the commission of a felony kills another it becomes murder and not manslaughter. What is meant by that is this: Suppose these men had come there at night for the purpose of committing burglary and in the course of the commission of that act Mr. Lea had been killed, that would be murder because they then would have been there committing a felony. * * *
>
> I will next draw your attention to the law bearing upon one of the most important features of the case. There is a common idea, or I have heard it said, that because Mr. Lea held in his own hand the gun the discharge of which inflicted the wound which proximately contributed to his death, the accused are not responsible for that part of the affray. I have heard—and probably you have—that they did not shoot him. It would be a sorry business if that were the law. It would be absurd if such were the law. They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun as much as if they seized the gun and discharged it into him. Did they rush at him with the intention of assaulting him and did Mr. Lea then use his gun? If so they are as responsible as if they seized the gun and discharged it into him. "A person may be responsible for the death of another either as murder or manslaughter, provided it was caused by his unlawful act resulting in corporal injury." The unlawful act here, as I have pointed out, would be the men assembling in a disorderly way, and trespassing on Mr. Lea's property and refusing to go away when asked.

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Now, on the facts I have outlined and bearing in mind the law to be applied, I think this charge misapprehended that law and consequently misdirected the jury.

The foundation of the law is in section 252 of the Code defining culpable homicide, and can be properly referred to as aiding any one to understand and interpret the later sections.

When we want to find the definition of the specific offence of murder applied and that applicable to this case, we must look to section 259 of which sub-sections (*b*) and (*d*) are as follows:—

(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

* * * * *

(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

I refer to sub-section (*b*) because the learned Chief Justice says he read that sub-section to the jury, but he does not seem to have read or at all referred to and explained sub-section (*d*). With the greatest respect, I must hold this omission was misdirection.

I do not think as at present advised the evidence in this case warranted much reliance being placed on sub-section (*b*). I need not elaborate. Let any one consider the facts and read this sub-section and see how ill fitted they are to that sub-section.

I think sub-section (*d*) was that to which attention should have been called and its meaning, which is not clear to those ignorant of the history of the law, should have been expounded to the jury in such clear terms that they would understand the ground upon which they ought to have proceeded.

If the evidence would not warrant a conviction on this section, then it would be our manifest duty to say so and set the verdict aside on that ground alone.

I do not, however, so hold, but on the contrary think and hold there was evidence which would warrant the jury in finding thereupon a verdict of murder, resting it on this sub-section (*d*).

It is to that sub-section, I submit, the learned Chief Justice ought to have addressed himself in all he said relative to death resulting from the pursuit of an unlawful object and the bearing thereof on the charge of murder.

There are other specific unlawful purposes as in section 260 not appropriate to the peculiar facts in this case.

His general remarks as to the pursuit of an unlawful object do not seem to me to exactly fit the case. The unlawful, uncalled for and utterly unjustifiable attack on a man with a loaded gun in his hands was liable to produce a scuffle resulting as this did in the death of some one. The person or persons making the attack must according to their evidence for the defence, have known the gun was likely to be in a loaded condition and liable to explode as it did, and so result. This or something like it was what I conceive was quite competent for the jury to have adopted as a mode of reasoning to found a verdict of murder upon such facts as were presented. I am not to be taken here as doing more than illustrate a possible line of thought and by no means determining the legal result.

The learned Chief Justice did refer to a number of analogous cases. But each case in a matter of this kind must stand upon its own bottom. In applying these precedents, or rather as it seems to me this sub-

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section substituted as codification of the law touching such like cases, the measure of its utility and reasonable application in any case must abide the judgment of the jury.

No one can in all that branch of the law of homicide anticipate or do more than see that the jury are so fully and accurately instructed that they can intelligently address themselves to the task set before them by the law in said sub-section (*d*).

Theirs is the responsibility when once so instructed. Their understanding of the evidence within the scope of such instructions and application thereof is alone the limit of the practicable operation of the law that must determine the fate of the accused in any such case. In the absence of proper legal instructions in regard thereto there was no legal trial of the real issue of murder. Hence there was no possibility of applying the curative provision I have referred to.

Much was said of malice which is aside from the true issue presented here.

The doing an unlawful act or rather the pursuing an unlawful object carries with it the implication of malice in all the consequences thereof so far as the sub-section may reach.

I am by no means to be understood as implying thereby that evidence of hate or ill will external to that so implied or the operation of such other malice upon the mind of one pursuing an unlawful object is to be discarded. The existence of such and the possible influence it may have had on the conduct of one pursuing any unlawful object may be of value in helping those having to reach a conclusion in such a complex case.

But I repeat it is not an essential of the evidence

which may otherwise and independently thereof point to a conclusion of guilt.

I purposely omitted above all reference to evidence of the treatment meted out by the accused to the deceased after the explosion of the gun, for it seems to my mind we can by separating the two phases of the case the more clearly reach a proper conception of the law which must govern the case so far as the charge of murder resting upon the explosion of the gun is concerned.

I am not to be understood, however, as by any means holding that the evidence of such later action is to be discarded as not having any proper place for consideration in connection therewith. It may or may not shed light, but only, as I have suggested regarding evidence of hate or ill will, have a value in enabling a proper estimate to be made of the whole conduct of the parties and of their responsibility in the way of holding they ought to have known regarding the reasonably possible result of their conduct under the circumstances.

It is the basis also herein of the other phase of the case relative to the charge of murder and for that should be given separate consideration.

If there is any ground for the charge that thereby the death of the wounded man was accelerated this branch of the evidence touches directly upon that and it is in that connection alone that there was ground for referring to provocation resting on the severe wound the blow with the gun had inflicted on one of the assailants.

I do not see misdirection in what was said in that regard and need not dwell thereupon, but simply say that it would be better understood by distinct and

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separate treatment in any charge in such a view of the case.

The questions relative to manslaughter need not be dwelt upon, but allowed to remain for the future trial and take their proper place in any future charge.

I think the appeal must be allowed and a new trial be had.

DUFF J. agreed with Anglin J.

ANGLIN J.—In this case I am to deliver the judgment of my brothers Davies, Duff and Brodeur as well as myself.

With very great respect for the learned Chief Justice who tried this case, a close study of his charge, which we have read and re-read, has driven us to the conclusion that he misdirected the jury in regard to what, under the circumstances of this case, it was essential that they should find in order to warrant a verdict of murder. He not only failed to bring to their attention at least one inference of fact which it was necessary that they should draw, but his charge, read as a whole, was tantamount to a direction that they might assume that fact — that they might properly bring in a verdict of murder without passing upon it.

The Crown charged the prisoners with murder (*a*) because they did certain unlawful acts which caused the deceased to do an act that resulted in his inflicting upon himself a gun-shot wound from which he died; and (*b*) because by their subsequent brutal treatment of him they accelerated his death. Both aspects of the case were presented to the jury. It is impossible to know whether their verdict of murder

was based upon both grounds or upon only one of them; and, if upon one only, it is impossible to know upon which. Misdirection as to the essential constituents of the crime of murder upon either aspect of the case would, therefore, amount to such a substantial wrong or miscarriage that it would entitle the defendants to a new trial, although the case had been properly presented upon its other aspect. Having reached the conclusion that there was such misdirection in connection with the degree of responsibility of the defendants for the infliction of the gun-shot wound which caused the death of Mr. Lea on the assumption that his death was not accelerated by what was afterwards done by them, but happened when it did solely as a result of the wound, we deal with the case as if there had been no subsequent ill-treatment of the deceased by the accused.

By section 252(2) of the Criminal Code it is provided that,

> Homicide is culpable when it consists of the killing of any person * * * by causing a person by threats or fear of violence or by deception to do an act which causes that person's death * * *

There is no evidence upon which it could be found that the acts of the deceased in "clubbing" his gun and striking Fred Graves over the head with its stock were the result of physical force or compulsion on the part of the defendants. These acts were, physically at all events, the acts of the deceased himself. Upon the evidence they were the immediate cause of his receiving the gun-shot wound from which he died. In order that responsibility for that result should rest upon the defendants so as to make them guilty of culpable homicide under section 252, it was necessary

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that the jury should find that such acts of the deceased were caused, *i.e.*, induced, "by threats or fear of violence, or by deception." There was here no suggestion of deception; but there were facts from which a jury might infer, if properly instructed, that the deceased acted through fear of violence on the part of the accused. Yet, although the learned Chief Justice read to the jury other portions of section 252, he entirely omitted to direct their attention to the vital provisions of sub-section 2 above quoted. He neither stated their effect to them, nor, as Mr. Justice Graham points out, did he give them any direction from which they should have gathered that they must find that the "clubbing" of the gun by the deceased and striking Fred Graves upon the head with it were acts induced by fear of violence. That was in itself a serious non-direction, which might amount to such a substantial wrong or miscarriage as would necessitate a new trial. But we do not dwell further upon it because there appear to be even more serious objections to those portions of the charge in which the learned Chief Justice directs the jury as to the facts they must find and the inferences which they must draw in order that what may have been culpable homicide on the part of the accused should amount to the crime of murder.

Without determining that the definition contained in sections 259 and 260 of the Criminal Code is exhaustive, under the circumstances of the present case it was, in our opinion, necessary for the Crown to establish and for the jury to find, in order to warrant a verdict of murder, such facts as would constitute that crime under clause (*d*) of section 259, read with sub-section 2 of section 252.

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259. Culpable homicide is murder.

* * * * *

(*d*) If the offender, for an unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

For the purposes of this appeal I assume that under this provision it was not necessary, in order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person — the person killed or any other person. That construction of section 259(2) is the least favourable to the accused.

There was no suggestion that the defendants meant to cause the death of Mr. Lea or to cause him any bodily injury likely to cause his death. The evidence would not support such a finding. Yet the learned Chief Justice read to the jury clause (*b*) of section 259; but he neither read clause (*d*) nor stated its effect; nor does his charge contain any equivalent statement of the law. It was assumed that the acts of the accused, which, it was charged, had led to the deceased clubbing his gun and striking Fred Graves with the stock, were done for an unlawful object. But the jury were not instructed that before convicting of murder they must find not merely that the conduct of the accused had in fact led to the doing of that

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which resulted in death, but also that the accused knew or ought to have known that their acts were likely to cause death — to lead to the deceased so handling or using the gun that some person would probably be killed — that this was under the circumstances such a natural or probable consequence of their conduct that the defendants should have anticipated it. On the contrary the learned Chief Justice told them distinctly and repeatedly that if in doing what they did the defendants were actuated by spite or ill will towards Mr. Lea they should be found guilty of murder. I quote some of the passages in which this view was impressed on the jury.

Early in the charge, after reading section 259(*b*) to the jury, the learned judge says:—

> If a man goes on the property of another as a mere trespasser, and in the course of such trespass commits an assault or anything of that kind upon the owner of the property and death results, although he may have had no malice, if he is there unlawfully, he is guilty of manslaughter. If, on the other hand, he went there with some wicked purpose or with the intention of committing a felony it would be murder. That is the distinction that the law draws between the two offences. The rule that will reduce the crime of killing another from murder to manslaughter is the absence of malice or ill-feeling towards the deceased. If there was no malice or ill-will the crime would be manslaughter. If the evidence satisfies you that the accused, although not intending to kill the deceased, in what they did, were actuated by malice and ill-will in what they did and that his death resulted as a consequence of their unlawful conduct it will be murder and not manslaughter.

A few lines lower down he says:—

> They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun, as much as if they seized the gun and discharged it into him.

A little earlier he had said:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter provided there was no malice on their part in doing what they did.

Further on he says:—

Now, as I said before, you must judge their motives from their conduct, whether they were actuated by malice, spite and ill will in this inhuman treatment of Mr. Lea. Does the evidence satisfy you that in acting and behaving there as they did they were gratifying an old grudge that they bore towards Mr. Lea. If you find that they were actuated by malice and ill will in going there and behaving as they did, even though they did not intend to injure him, the crime is murder.

Towards the close of the charge we find the following passage:—

Now, just a few words in conclusion. I have explained to you as fully as I could, the difference between murder and manslaughter. I have told you that if you believe these men were actuated by ill will or malice towards Mr. Lea and did what has been detailed here, that would be murder, and that all of them should be found guilty. On the other hand, if you think that there was no such ill feeling, that it was a mere fracas, without previous ill feeling, then your verdict should be manslaughter. I have called your attention to the various witnesses who have come here and testified to different expressions of ill will towards Mr. Lea. and you have heard the expressions that they used on this occasion. You must weigh these. If you believe them it is evidence of malice and it is for you to consider them.

The jury subsequently returned to court and requested directions on the subject of malice. The notes of the ensuing proceedings are in part as follows:—

I thought I had defined that fully. "Malice" is where a man has ill-will towards another — any kind of wicked feeling towards his neighbour. If you come to the conclusion that what these men did resulted from hatred or dislike or ill-will that would make it murder. If there is evidence to satisfy you that these men were influenced by spite or ill-will, that with the other facts would constitute murder. But you must not find them guilty of murder unless you are satisfied from the evidence that they had a grudge, or spite, or ill-will against Mr. Lea.

A juryman asked for further directions as to premeditated murder and malice.

THE COURT: Premeditated murder would be an agreement to commit murder before they went there. There is not the slightest evidence of that. But if the grudge was there and they went there

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without any premeditated intention, if their acts were induced through ill-feeling that would constitute murder. If you are satisfied that what they did was not done through ill-will that would be manslaughter.

A JURYMAN: Then we do not need premeditation; all we need is malice ?

THE COURT: All you need is malice.

A juryman asked for further instructions as to the distinction between murder and manslaughter.

THE COURT: It is enough if they did the acts with malicious intent. If in carrying out the acts that they did after they got there there was malice, that would be malice sufficient to constitute murder.

* * * * * *

If after they got there they were carrying out a grudge, if they had it, it constitutes murder.

A JURYMAN: If they had malice, it is as bad as if they had premeditation.

THE COURT: Yes.

A JURYMAN: Would they have to have that malice at the time he was shot ?

THE COURT: Yes, they would have to have the malice at the time. If they had these malicious feelings or this antipathy towards the deceased, it must have existed at the time they did what caused his death, even though they had no intention of doing it before they went there. You must gather the existence or non-existence of malice from what they did at the time. You must take into consideration the threats made beforehand, although I do not know what value you would put on them to shew bad feeling towards Mr. Lea.

A JURYMAN: Is it necessary to prove that just before the crime was committed — a few minutes before — they had malice.

THE COURT: What I have told you is that if there was malice you can gather it from the facts of the whole transaction. If you think from the facts proved that they had this ill feeling during the time that they were doing the injuries, then it was malice.

(The jury then retired.)

When the jury next returned to the court room it was to deliver their verdict of guilty of murder.

The vital distinction — that, while, to sustain a charge of manslaughter, it would suffice that the acts of the accused, whatever their character, should in fact have aroused in the mind of the deceased a fear

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of violence which induced him to do that which resulted in his death (section 252(2)), in order that that culpable homicide should amount to murder those acts of the accused must have been such that they knew or should have known that the death of some person would be likely to be caused by them (section 259(*d*)) — was not brought to the attention of the jury. Whether the acts of the accused were of that character it was for the jury to determine; and the inference which they should draw would depend to a great extent upon whether in their opinion the accused knew or ought to have known that the gun in the hands of the deceased was loaded and whether they knew or should have known that their acts would be likely to lead to the deceased making some use of it which would be likely to cause death. Upon neither point can it be said that, under the circumstances disclosed in the evidence, a conclusion in favour of the Crown was so necessary that no reasonable man could have found otherwise. Indeed, the learned Chief Justice appears to have gathered the impression from the evidence that the deceased produced his gun not to shoot with it, but merely to frighten the accused. May not they have had the same idea; and, if so, may they not have thought that the gun was not loaded? Again, there is no evidence whether the deceased clubbed the gun before or after the accused are supposed to have rushed at him. If before, may not that act have led them to think that a gun so handled was not loaded? Can it be said that the use of the gun by the deceased in a manner likely to cause death was under the circumstances so clearly a natural or ordinary consequence of the acts done by the prisoners that the jury, acting as reasonable men, could not have found other-

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wise than that they knew or should have known that the deceased was likely to so use that gun? Upon both these matters of fact it was the function of the jury to determine what inference should be drawn. Upon neither were they given the opportunity of doing so. On the contrary they were directed that if they should "come to the conclusion that what these men did resulted from hatred or dislike or ill will that would make it murder."

It is not possible to read the charge of the learned Chief Justice without realizing that the jury were instructed that, although in the absence of personal grudge or ill will on their part towards the deceased the acts done by them and the consequences which ensued would have rendered them guilty only of manslaughter, those same acts and consequences, if accompanied by spite or ill will towards the deceased, would make them guilty of murder. The only question really left for the consideration of the jury in determining whether their verdict should be one of murder or of manslaughter was whether in doing what they did the defendants were actuated by ill will to the deceased.

With great respect, this involved ignoring the requirement of the Code that the acts of the accused must have been such as they knew or should have known would be likely under the circumstances, to cause death, or an assumption by the learned judge himself of the function of the jury in regard to that vital question of fact, or a direction that the acts of the accused were of such a character that as a matter of law the jury should assume that they knew or should have known that they would be likely to cause death.

Under such a direction the jury may have convicted of murder without at all considering whether the conduct of the accused was such that it was probable that it would cause the deceased to act in a manner likely to result in some person being killed. Indeed, they might return such a verdict, although no reasonable man could say that such a result from the acts of the accused should or even might have been reasonably anticipated. That this was a vital misdirection amounting to a substantial wrong or miscarriage in the trial seems only too plain.

It is unnecessary to express our views upon any of the numerous other points raised in the stated case.

It is abundantly clear that this is not a case in which we should exercise the power conferred by section 1018 of the Criminal Code sub-section (*d*) to direct that the appellants should be discharged.

For the foregoing reasons we are of the opinion, however, that their conviction must be quashed and a new trial had.

BRODEUR J. agreed with Anglin J.

Appeal allowed without costs.

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*March 17.
*April 7.

THE HALIFAX AND SOUTH WESTERN RAILWAY (DEFENDANTS) .... } APPELLANTS;

AND

MARTHA SCHWARTZ, ADMINISTRATRIX OF THE ESTATE OF FRANK SCHWARTZ (PLAINTIFF) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Statute—Construction—Railway company—Right of way—Combustible materials—R.S.N.S. [1900] *c.* 91, *s.* 9.

Chapter 91, section 9, of the Revised Statutes of Nova Scotia, 1900, provides that "when railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

Held, that this provision is imperative and obliges the company at all times to keep its right-of-way so clear of combustible material that it will not be a source of danger from fire. Clearing it at certain periods only is not a compliance with such provision.

Duff J. dissented on the ground that it was not proved that the fire in this case originated on the right-of-way.

Judgment appealed from (46 N.S. Rep. 20) affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming the verdict at the trial in favour of the plaintiff.

The action in this case was to recover damages for loss of property of the late Frank Schwartz by fire, alleged to have been caused by sparks from an engine of the defendants. The jury found that the fire so originated and started on defendants' right-of-way; that combustible material on the right-of-way was the

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

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cause of the fire and its subsequent spread to the property destroyed; and they assessed the damages at $1,950. The verdict entered for that amount was maintained by the full court below and the defendants then appealed to the Supreme Court of Canada.

Mellish K.C. for the appellants.
W. J. O'Hearn for the respondent.

THE CHIEF JUSTICE.—The only arguable question on this appeal is: Can the finding of the jury as to the place of origin of the fire be supported on the evidence? The court below accepted that finding, and although the evidence is not very satisfactory, I do not think we can say that it so strongly preponderates against the conclusion reached by the jury as to justify us in holding that they did not understand it, or that they wilfully disregarded it. There certainly was an accumulation of brush and dry grass on the track from the previous year in which the fire started almost immediately after the engine passed by. Whether the fire started on the respondent's property and then spread to the track and came back again to the place of origin, or whether it originated on the right-of-way and then travelled over to the respondent's property is the point in dispute. There is no doubt that the fire was caused by sparks from the company's engine and that it spread and caused the damage because of the accumulation of brush and dry grass on the right-of-way, and, in my opinion, it was negligence, in the circumstances of this case, to have allowed that combustible material to remain on the company's right-of-way from the previous year. The evidence of Dauphinée and Fox may not be very conclusive, but

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The Chief Justice.

they both say that the locomotive set the fire on the right-of-way, and the jurors were entitled to accept or reject that evidence. They did accept it, and I do not feel justified in refusing to give effect to their conclusion concurred in by the court of appeal.

I would dismiss with costs.

DAVIES J.—Two questions were discussed upon the appeal. One was as to the duty of the railway company under the Provincial Statute, R.S.N.S., [1900] ch. 91, sec. 9, "Of the Protection of Woods against Fires," and the other was whether there was evidence from which the jury could fairly find that the fire which caused the damages complained of started upon the defendant's right-of-way and was caused by sparks emitted from the company's engine.

The jury found that

> the fire started on the right-of-way and inside the fence and was caused by sparks carried from the defendant's engine.

They further found that

> inside the right-of-way was an accumulation of dried ferns, grass, bushes and turf.

After reading over the evidence given I am not prepared to say that there was not evidence from which a jury might fairly find as this jury did.

The evidence is, of course, not positive. It would be almost impossible to produce such. But I think it quite sufficient.

On the other branch of the case as to the statutory duty of the company, I agree with the court below that such a duty is an absolute and not a qualified one discharged by an annual clearing up as suggested.

The section says:—

Where railways pass through woods, the railway company shall clean from off the sides of the roadway the combustible material, by careful burning at a safe time or otherwise.

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Davies J.

It is imperative. I cannot read it as meaning that when the company has once obeyed it, then it is absolved from the further duty of keeping the right-of-way clear for some unknown or indefinite time; or that the statute was intended to limit the common law duty of the company. The object of the statute, cleaning from the sides of the railway combustible material, is surely not discharged by doing it once or even by doing it once a year. Such combustible material will accumulate from time to time by the growth of grass, ferns, bushes, etc., and from other causes, and these accumulations must be removed as and when necessary to carry out the evident and plain object of the Act, namely, to prevent fires. I cannot place any other construction upon the company's duty in this regard than that it is an absolute one and necessary for the protection of the property of persons adjacent to the railway line. Any other construction would, it seems to me, defeat the object and purpose of the Act.

The appeal should be dismissed with costs.

IDINGTON J.—This appeal seems hardly arguable unless we are to become so astute as to render the statute a subject of mere critical examination regardless of what its obvious purpose was.

The ground taken on the facts seems to so conflict with the unanimous opinion of all the judges who have heard the case, that it is not open for us to interfere.

DUFF J. (dissenting).—There is evidence sufficient to support the inference that the fire started from one of the locomotives. Whether it started in the

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Duff J.

right-of-way or outside the right-of-way is, I think, purely matter of conjecture. The facts proved appear to be equally consistent with both hypotheses, or if the balance incline a little in one direction rather than another it is in so slight a degree as to make it worthless as a foundation for a verdict.

ANGLIN J.—I would dismiss this appeal with costs for the reasons given by Graham and Russell JJ.

BRODEUR J.—The question that we have to decide is as to the construction of section 9 of chapter 91 of the Revised Statutes of Nova Scotia. That section deals with the protection of woods against fires and the section 9 has for its object to prevent railways from setting fire to the adjoining property and reads as follows:—

> 9. Where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

In this case it has been found by the jury that there was on the appellants' right-of-way combustible materials and that the fire that destroyed respondent's property started from there.

Under the common law as it was decided in the case of *Grand Trunk Railway Co.* v. *Rainville*(1), a railway company is required to keep its track free from combustible and inflammable substances which are likely to be ignited by sparks from passing engines and to communicate fire to adjacent property.

The fact of having combustible material on its right-of-way would, in certain circumstances, constitute negligence on the part of the company and would render it liable.

(1) 29 Can. S.C.R. 201, at p. 204.

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In this case the plaintiffs could have proceeded to recover under the common law and with the evidence that has been adduced would likely have recovered. But the case as it is brought before us rested upon the construction of the statute above quoted.

That statute imposes upon a railway company the obligation of keeping the sides of its right-of-way clean of combustible material and to remove or burn it.

When a statute declares that something shall be done the language is considered imperative and the thing must be done, especially when the thing to be done is for the public benefit.

There was then an imperative duty on the part of the appellants to clean from their right-of-way all the combustible material that was there for some months, and I would not be disposed to reverse the decision of the courts below.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Fulton.*
Solicitor for the respondent: *W. J. O'Hearn.*

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*Mar. 17, 18.
*May 6.

ALFRED WEST (PLAINTIFF) ..... APPELLANT;

AND

JAMES H. CORBETT AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Railway—Prescription—Damage or injury "by reason of construction" — Contractor — Transcontinental Railway Commissioners—"Railway Act," s. 306.

Section 15 of the "National Transcontinental Railway Act" provides that "The Commissioners shall have, in respect to the Eastern Division * * * all the rights, powers, remedies and immunities conferred upon a railway company under the 'Railway Act.'"

Held, Fitzpatrick C.J. and Idington J. dissenting, that the provision in sec. 306 of the "Railway Act" that "all actions or suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be commenced within one year, etc.," applies to such an action against the Transcontinental Railway Commissioners, and also against a contractor for construction of any portion of the Eastern division.

Held, per Anglin J., that it applies also to an action against a contractor for constructing a railway for a private railway company incorporated by Act of Parliament.

APPEAL from a decision of the Supreme Court of New Brunswick reversing the judgment at the trial in favour of the plaintiff and dismissing the action.

The plaintiff, West, had a license from the Government to cut timber on Crown lands in New Brunswick. The defendants had been awarded by the Transcontinental Railway Commissioners a contract to build a portion of the Eastern division of the Grand Trunk Pacific Railway and in course of their work a con-

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

struction engine set fire to the plaintiff's timber. To the plaintiff's action for damages defendants pleaded that the action was not brought within a year as provided by section 206 of the "Railway Act." Plaintiff obtained a verdict at the trial which the full court set aside, giving effect to the plea of prescription.

F. R. Taylor for the appellant. Eminent Judges in Ontario have held that section 306 is *ultra vires*. See *McArthur* v. *Northern and Pacific Junction Railway Co.*(1); *Anderson* v. *Canadian Pacific Railway Co.* (2).

It is, at all events, *ultra vires* as respects all persons except Federal railway companies. The authority of Parliament to pass this section only exists by virtue of its legislative jurisdiction as to railways and its legislation must be essential to the purposes of the "Railway Act."

A contractor, *qua* contractor, is not subject to the legislative authority of Parliament, and nowhere in the "Railway Act" is such authority expressly exercised and nowhere impliedly exercised unless it be in this section.

The limitation of the right of action in statute must be clear and express, it will never be implied. Maxwell on Statutes (5 ed.), page 463; *Canadian Northern Railway Co.* v. *Robinson*(3); *Canadian Northern Railway Co.* v. *Anderson*(4), *per* Fitzpatrick C.J. at page 360.

The contractor does not stand in such relation to the company as would extend the latter's privilege to him by implication. He is not the company's em-

(1) 17 Ont. App. R. 86.
(2) 17 Ont. App. R. 480.
(3) 43 Can. S.C.R. 387.
(4) 45 Can. S.C.R. 355.

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ployee; *Kearney* v. *Oakes*(1); nor their agent or servant.

The provision in section 306 as to prescription cannot apply to the Commissioners as no action such as is prescribed could be brought against them. As a consequence it cannot apply to the defendants who only claim through the Commissioners.

Teed K.C. for the respondents. The Commissioners are obliged to construct the railway through contractors and the latter are merely their instruments and under no greater liability than they themselves would be.

The defendants were "persons authorized to construct a railway" under the interpretation section of the "Railway Act."

In *Hendrie* v. *Onderdonk*(2), and *Lumsden* v. *Temiskaming and Northern Ontario Railway Commission* (3), contractors were held entitled to plead the prescription provided for in a similar section of the "Ontario Railway Act."

THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Idington.

DAVIES J.—This was an action brought by the plaintiffs as licensees of certain timber limits in the Province of New Brunswick for damages for loss by fire of many trees upon such limits caused by sparks emitted from a railway locomotive engaged in the work of constructing a part of the National Transcontinental Railway. The defendants, in the statement of claim, were alleged to be

(1) 18 Can. S.C.R. 148. (2) 34 C.L.J. 414.
(3) 15 Ont. L.R. 469.

contractors engaged in certain work in the construction of the National Transcontinental Railway adjacent to and near the plaintiff's limits and in such construction used a locomotive engine.

The claim was that the defendants were negligent in the operation of the engine and that in consequence of their negligence the sparks from the engine escaped and set fire to plaintiff's limits.

The statement of claim was also based upon an alleged liability of the defendants for the damages caused by the sparks escaping from the engine, whether there was negligence on the defendants' part or not.

This last claim was based upon the 298th section of the "Railway Act," R.S.C. ch. 37, providing in certain cases for the absolute liability of "the company" making use of the locomotive causing the fire whether guilty of negligence or not.

In the case at bar, however, the jury found, and no question was raised before us on the finding, that the damages were caused by the negligence of the defendants in not having the engine equipped with modern and efficient appliances for preventing the escape of sparks, and on that finding the verdict was entered.

The claim, therefore, for a right to recover under the 298th section of the statute for statutory damages, irrespective of negligence, does not arise here.

The important facts that the defendants were contractors for the construction of a part of the National Transcontinental Railway, and that while engaged in such construction they so negligently used and ran one of their locomotive engines as to cause the damages complained of, were conceded at the argument.

The only point upon which the defendants claimed to set aside the judgment was that the action was

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brought against them too late, and was barred by the 306th section of the "Railway Act."

The single question we have to determine is whether that section can only be invoked by a railway company authorized by Parliament to construct a railway, or whether contractors under the National Transcontinental Railway Commissioners for the construction of the whole or of part of such railway, can also invoke it.

Now, the railway in question was the Eastern branch of the National Transcontinental, and was being constructed pursuant to the powers contained in the statute 3 Edw. VII. ch. 71, and conferred upon three Commissioners appointed by the Governor-in-Council, who were declared to be a body corporate.

These Commissioners had all the necessary powers vested in them to carry out the work of constructing the Eastern section of the road and operating it until completion. They had, by section 15, in addition to the special powers conferred upon them, all the rights, powers, remedies and immunities conferred upon a railway company under the "Railway Act," and such "Railway Act," so far as applicable, was declared to be taken and held as incorporated in the Act 3 Edw. VII. ch. 71.

The Commissioners, by section 16, were obliged to let the work of constructing the Eastern division by tender and contract as specified. The defendants in this case were contractors for the construction of part of this Eastern division of the railway, and in the carrying out of such contract negligently caused the damages complained of.

The 306th section of the "Railway Act" provides that

all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, etc., and not afterwards.

Sub-section 2 provides that in any such action

the defendants may plead the general issue and give this Act and the special Act in evidence, and prove that the damages were done "in pursuance of and by the authority of this Act or of the special Act."

Sub-section 3 provides that nothing in the section shall apply to actions against "the company" upon any breach of contract relating to the carriage of traffic or for damages respecting tolls.

This limitation upon actions for damages, though in form somewhat different, was contained in the general railway Acts for many years before that of 1903. In the Act consolidated that year, the clause making the railway liable for damages caused by fires from locomotives irrespective of negligence, was first introduced, and the language of the limitation clause was changed from damages sustained "by reason of the railway," to its present form, "by reason of the construction or operation of the railway," and the time limit extended from six to twelve months.

The first two clauses of the section 306 are as broad and general apparently as language could make them respecting damages sustained by reason of the construction or operation of the railway, and no words are used shewing any intention to confine their application to "companies" only.

In my opinion they refer to damages the result of negligence in the exercise of statutory powers given for the construction and operation of railways. For damages resulting from the exercise of such statutory powers without negligence no action at all would lie. *Canadian Pacific Railway Co.* v. *Roy*(1).

(1) [1902] A.C. 220.

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Are they confined to "the company" authorized to construct and operate a railway, or do they extend to a contractor under such company who does such work of construction ? In the case of the Eastern branch of the National Transcontinental the Commissioners were not authorized to do the work of construction themselves or by their employees. They were obliged by section 16 to let the work of construction by tender and contract and the defendants in this case were contractors under the Commissioners for the construction of part of the road.

I cannot see why a construction should be put upon the broad general language of the section in question excluding the contractors from the benefit of it. It must be remembered that the Eastern division could only be built by contractors. If the section does not apply to contractors then it would not be applicable at all to any one constructing such Eastern division, for I do not see how the Commissioners could be held liable for such damages as were recovered in this action. If this was an action to recover the statutory damages, liability for which was created by section 298, then it would seem the question would have to be determined whether "the company" declared in that section to be liable for the damages included a contractor under the company, and that would probably be solved by the construction put upon the words of sub-section 4 of section 2, the interpretation clause, which declares that company means

> a railway company and includes any person having authority to construct or operate a railway.

Do those words include persons having contractual authority to construct or operate, or are they confined to those who have legislative authority to do so?

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In this case it is not necessary that we should decide upon the point because the action does not involve any question of statutory damages, but damages for negligence only, and the limitation clause does not use the word "company" at all either in the first section or in its second sub-section, but speaks of the persons sued as defendants.

I am of opinion that these damages sued for in this action were damages sustained by reason of the negligent construction of the railway, and are, therefore, within the Act. In the absence of any language restraining the privilege or benefit of the section to the company only and excluding contractors, I think the contractor who, in this case, alone could construct the railway has the right to invoke the benefit of the section.

In sub-section 3 certain actions against "the company" upon any breach of contract or respecting tolls are excepted out of the section, but this is the only reference direct to "the company."

While, therefore, the section doubtless includes a "company" which builds the road itself, it also includes a contractor who alone, under the Act for the construction of the Eastern branch of the National Transcontinental Railway, was authorized to do the work of construction.

For these reasons I think the appeal must be dismissed with costs.

IDINGTON J. (dissenting).—The broad question raised by this appeal is whether or not contractors engaged in the construction of part of the National Transcontinental Railway, pursuant to the contract said to have been let by the Commissioners appointed

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under 3 Edw. VII. ch. 71, are entitled to plead section 306 of the "Railway Act" in bar to an action for damages resulting from the contractors' own negligence in course of their execution of the work so let to them.

The respondents, as such contractors, had in their service a railway locomotive so defective that fire spreading therefrom burned appellant's timber.

The 15th section of the said 3 Edw. VII. ch. 71, is as follows:—

> 15. The Commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the "Railway Act" and amendments thereto, or under any general railway Act for the time being in force, and the said Act and amendments thereto, or such general railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.

In order to comprehend accurately the bearing of this section in relation to the matters respecting which section 306 of the "Railway Act" provides for a limited immunity, we must see who or what these Commissioners are and what acts they are authorized to do in respect of which such immunity may possibly serve them.

They are created a corporation. So are other public officers occasionally. It is here as in such other cases a convenient method of creating and providing a continuity of official life and action which need not depend upon or be interfered with by the accidents of death, removal or resignation of any of its members.

So far as the commission or its members may be enabled by the Act creating, or providing for its creation, to do anything that in the ordinary course of events might give rise to an action against it or them or any of them, I will assume for the present this section may entitle it or them to plead this limitation.

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But when we find that neither the commission nor any of its members are given power to construct a foot of the railway in question or do anything bearing on such a question except the mere getting of tenders and letting to the lowest tenderer a contract and reporting upon tenders for the work (for the large contracts like this one were let only, I believe, by the Crown, which is not liable, or by the sanction of the Governor-in-Council), and supervising the officers, such as engineers or others employed in the work of making the contractors live up to their contracts and similar service of supervision, and reporting upon the progress and financial matters connected therewith to the Government of the day as it may require, it seems difficult to imagine how this statutory limitation in said section 306 could serve the commission or its members in relation to a fire caused by the negligence of some one over whom neither had control in relation thereto.

The letting of a contract could involve no such responsibility as in question herein.

The section 306 in question is as follows in its first two sub-sections relied upon:—

306. All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the general issue, and may give this Act and the special Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

How can the Commissioners under their limited powers relative to construction ever fall within these

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provisions by means of any act they may have done as regards construction ?

The second sub-section clearly indicates by its language that the thing had in view which is to be barred is something done "in pursuance of and by the authority of this Act or of the special Act."

Statutory limitations are personal and confined to the person or body acting and cannot as a matter of course be extended to some one else. Indeed they may be applicable in one forum yet not in another in such peculiar cases as *The Metropolitan Water Board* v. *Bunn*(1).

The matter seems so clear I need not pursue it. The commission has in certain cases been enabled when the Government should see fit to operate the road or part of it, and then the second part of sub-section 1 of section 306 might become in such cases operative and applicable. The difficulty in this case seems to have arisen from the statement of claim being partly founded on section 298 relative to fires from locomotives.

The appellant in that regard, I think, misconceived his right of action. If it had rested on section 298 alone it ought to have been dismissed, for the obvious purpose of this section was to provide for the cases of operating a railway. It was first enacted in 1903 after the decision of *Canadian Pacific Railway Co.* v. *Roy*(2), as a mode of solving a well known grievance. It never was intended to apply to contractors for mere construction work.

I think the possibility of applying this statutory provision to the facts here is much more remote than it was to the facts respectively presented in the cases

(1) [1913] 1 Q.B. 134. (2) [1902] A.C. 220.

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of *Canadian Northern Railway Co.* v. *Robinson*(1); and *Canadian Northern Railway Co.* v. *Anderson*(2). In the latter case leave to appeal was refused by the Privy Council. The former presented a case of operation, it was claimed. The latter it was suggested fell under construction.

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

DUFF J.—The only point requiring specific mention, in my judgment, is whether the first sub-section of section 306 of the "Railway Act" applies.

I think that by force of section 15 of the "National Transcontinental Railway Act" that enactment is pleadable by the respondents in defence to this action.

ANGLIN J.—The appeal in this case is taken upon three grounds, two of which involve the construction of section 306 of the Dominion "Railway Act," R.S.C. ch. 37. For the appellant it is contended (*a*) that section 306 does not apply to actions for damages for injuries such as that which is the subject of this action; (*b*) that it does not apply to the National Transcontinental Railway; (*c*) that, if applicable to that railway, it protects only the Commissioners and not contractors for construction under them.

The plaintiff sues to recover damages for injuries caused to his timber limits by fire which originated from sparks emitted from a locomotive in use by the defendants in the course of constructing a section of the Transcontinental Railway. The defendant con-

(1) 43 Can. S.C.R. 387; [1911] A.C. 739.

(2) 45 Can. S.C.R. 355.

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tractors were employed by the Transcontinental Railway Commissioners, but contracted with the Government of Canada for the construction of a portion of the railway.

The jury found, and the present appeal proceeded on the basis, that the locomotive was defectively equipped and that the sparks that caused the fire which injured the plaintiff's premises were emitted owing to such defective equipment.

(*a*) Assuming that section 306 applies to the National Transcontinental Railway and that the defendants are entitled to the benefit of it, I think the injury sued for was "sustained by reason of the construction of the railway." I am of the opinion that, applying the principles which underlie the decisions in such cases as *Poulsum* v. *Thirst* (1) and *Newton* v. *Ellis* (2), injury caused by negligence in carrying out the work of construction is within the purview of the section. "There was no evidence of a want of *bona fides,* that is to say, of any indirect motive for the defendants' conduct." Their work was being done under the powers conferred by the "National Transcontinental Railway Act." "The action is brought for an improper mode of performing the work" — for "doing unlawfully what might be done lawfully."

(*b*) By section 15 of the "National Transcontinental Railway Act" (3 Edw. VII. ch. 71), it is provided that,

> the "Railway Act" and amendments thereto * * * in so far as they are applicable to the said (National Transcontinental) railway and in so far as they are not inconsistent with or contrary to the provisions of this Act shall be taken and held to be incorporated in this Act.

(1) L.R. 2 C.P. 449. (2) 5 E. & B. 115.

I find nothing in sub-section 1 of section 306 of the "Railway Act" "inconsistent with or contrary to" any of the provisions of the "National Transcontinental Railway Act." I, therefore, think that by virtue of section 15 of the latter statute, section 306 of the "Railway Act," so far as applicable, is incorporated in the "National Transcontinental Railway Act."

(*c*) The remaining question has occasioned me rather more difficulty. Upon an examination of section 306 of the "Railway Act" a feature of it which immediately strikes one is that sub-sections 1 and 2 are general in their terms, while sub-sections 3 and 4 are restricted in their application to railway companies themselves. This difference in language indicates an intention on the part of Parliament that the application of the two earlier sub-sections should not be confined to actions in which the railway company itself is defendant. We are asked by counsel for the appellant to read into sub-section 1 after the word "suits," the words "against the company." I see no justification for doing so. On the contrary, I think that to insert these words would be to place upon the operation of sub-section 1 a restriction which Parliament obviously did not intend. When the purpose was to confine the application of certain provisions of the Act to railway companies, Parliament has expressed its intention to do so by using the word "company." The reason for giving to railway companies the benefit of such protection as sub-sections 1 and 2 of section 306 afford applies with equal force to the case of contractors engaged in railway construction authorized by Parliament. We cannot ignore the fact that probably nine-tenths of the entire railway construction work of Canada is done not by railway com-

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panies themselves, but by independent contractors to whom it has been let. If sub-sections 1 and 2 of section 306 apply only where a railway company itself undertakes the work of construction the great bulk of railway construction work in this country would not come within them. That contractors constructing a railway under contract from a railway company were entitled to the benefit of the similar provision in the Ontario "Railway Act" was held by a strong Divisional Court (Armour C.J., Falconbridge J. and Street J.) in *Hendrie* v. *Onderdonk*(1). I have seen a copy of the judgment delivered in that case by Street J., and while the applicability of the limitation provision to the contractors, who were there defendants, appears rather to have been taken for granted, it is scarcely conceivable that the question now under consideration escaped the notice of these distinguished judges.

Having regard to the provisions of section 16 of the "National Transcontinental Railway Act," which oblige the National Transcontinental Railway Commissioners to "let the work of constructing the Eastern division by tender and contract," contractors under that Commission certainly do not occupy in regard to section 306 of the "Railway Act" a less favourable position than that of contractors under companies constructing railways under the "Railway Act." The principle underlying the decision in *Michigan Central Railroad Co.* v. *Wealleans*(2), may be applied in this case.

The constitutionality of section 306 of the "Railway Act" was not questioned in the pleadings, or factums, or at bar.

(1) 34 C.L.J. 414.

(2) 24 Can. S.C.R. 309.

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For the foregoing reasons I am of opinion that the defendants are entitled to the benefit of the limitation conferred by section 306 of the "Railway Act."

It follows that this appeal fails and should be dismissed with costs.

BRODEUR J. agreed with Davies J.

Appeal dismissed with costs.

Solicitor for the appellant: *F. R. Taylor.*
Solicitor for the respondents: *E. A. Reilly.*

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*April 8.
*May 6.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM FLEMING (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence — Street railway — Explosion — Defective controller — Inspection.

S. was riding on the end of the seat of an open street car in Toronto when an explosion occurred. The car was still in motion when other passengers in the same seat, apparently in a panic, cried to S. to get off, and when he did not do so, endeavoured to get past him whereby he was pushed off and injured. In an action for damages it appeared that the explosion was caused by a defective controller and that the motorman at once cut off the current but did not apply the brakes, and the jury found the company negligent in using a rebuilt controller in a defective condition and not properly inspected, and the motorman negligent in not applying the brakes.

Held, affirming the judgment of the Court of Appeal (27 Ont. L.R. 332), that the evidence justified the jury in finding that the controller had not been properly inspected and that a proper inspection might have avoided the accident.

Held, per Idington and Brodeur JJ., Anglin and Davies JJ. contra, that the motorman was guilty of negligence in not applying the brakes.

APPEAL from a decision of the Court of Appeal for Ontario (1) maintaining the verdict for the plaintiff at the trial.

The facts of the case are sufficiently stated in the above head-note.

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

Gamble K.C. for the respondent.

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

(1) 27 Ont. L.R. 332.

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THE CHIEF JUSTICE.—The case is not free from doubt, but on the whole I am of opinion that we should not interfere.

DAVIES J. concurred in the opinion stated by Anglin J.

IDINGTON J.—The respondent has recovered a verdict and judgment for damages suffered in consequence of being pushed off an open street railway car by passengers whom a panic had seized on the occasion of an electric explosion therein and its results. It is claimed all this was consequent on the negligence of appellants.

The panic and its consequences so far as we are concerned was, I think, the natural result of the explosion and its results, and hence if appellants are liable at all, the damages are not too remote.

The jury found, amongst other things, as follows:

Q. 2. If they were, of what negligence were they guilty. (If there are in your opinion more than one act of negligence, state them all fully.) A. For using a rebuilt controller in a defective condition, and not being properly inspected.

The explosion and fire creating all the excitement and confusion in question were the result of a short circuit caused by some defect in the electric controller or wires connected therewith, in use in said car. The controller was not a year old. It was of an approved kind. It had been a couple of months before this accident overhauled so that it might be correctly described as rebuilt according to its pattern. It was in daily use thereafter till the accident and supposed to be inspected daily.

Mr. McCrae, the master mechanic of appellants, who has supervision of the maintenance and inspection

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of the company's cars, says he never knew of so serious an explosion and loss of control of the electric current as happened on the occasion in question.

He was called by respondent and suggests one possible cause of the accident.

Mr. Richmond, an electrical engineer, also examined as an expert on behalf of the respondent suggests another possible cause thereof. Both agree it was the result of a short circuit produced by some defect.

Either man may unconsciously be biased by his peculiar views as to the exact cause of the accident.

No intelligent person experienced in such tasks as involved in considering evidence, can read their evidence without feeling that both are absolutely honest in all they say in regard to the conclusions they have reached. Their mode of thought or point of view may account for the divergent results of their evidence.

In either result it seems to me we are forced to the conclusion that there is evidence presented by them both that rendered it impossible for the learned trial judge to withdraw the case from the jury.

The broad facts appear that the accident was the result of some defect in the controller or wires connected therewith, and that there was no external cause, suddenly supervening, such as an electric storm or collision, for examples, to account for such defect, or abnormal results.

It seems to me the whole matter is reduced to one of whether or not due and proper inspection the night before should not, if had, have averted the accident.

It is almost incredible that if such due care had been used, as ought to have been, in the inspection,

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that either of the only possible causes suggested could have existed without detection by the inspector.

It is not difficult to see how in his routine way of discharging his duties, the inspector may have failed to observe the defect on its first appearance. But the question of whether or not he, or his employers, could be reasonably excused therefor or not, is one for the jury.

It seems to me that a trial judge presuming to decide that question would clearly be going beyond his duty. Indeed, to hold that on such facts there could only be that conjecture which alone would justify a nonsuit, would in every case free the negligent and the careful inspector alike and his employers, from responsibility in every case of the kind where a doubt may exist as to exactly what might have been discovered.

It seems clear that eighteen years' experience of a capable, vigilant man, in so wide a field of experience having brought to the court and jury the results thereof that his story demonstrates due care can avert such results as produced on this occasion.

In the finding I quote there is an apparent resting upon the fact of the rebuilding of the controller. That seems to me only apparently so, for it is the non-inspection of such a rebuilt controller that is charged.

No doubt greater care is perhaps due in case of an old or rebuilt controller than in the case of one quite new, but the reason given does not affect the finding of negligence.

I cannot agree with the Court of Appeal that a motorman able to turn round and go back to warn passengers is excused by reason of shock from applying the brake.

I think the appeal should be dismissed with costs.

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DUFF J.—I think there was evidence from which the jury, if they accepted it, might conclude that a short circuit, such as that to which the accident seems to be attributable, would not ordinarily occur if the controller were properly constructed and properly inspected.

If the jury took this view it was for them to say whether the company had acquitted itself of the onus which rested upon it to shew that in these respects proper care and skill had been exercised.

ANGLIN J.—This action is brought to recover damages for personal injuries sustained by the plaintiff as the result of his being thrown from a moving car in a panic caused by an explosion and fire resulting from a short circuit in the controller of the car. The controller, originally purchased from the Canadian General Electric Company, was admittedly of an approved type. It had been overhauled or rebuilt by the defendant company, according to their ordinary custom, about two months before the plaintiff was injured and had been in regular use during that period. The accident resulted in such a complete destruction of the wires and parts of the controller that it was not possible afterwards from inspection of them to determine its precise cause. The evidence clearly establishes, however — it was in fact admitted — that the short circuit could not have happened unless there had been a defect in the controller. The plaintiff charges that this defect was due to negligence in the rebuilding of the motor by the defendant company, or, if not, that it was of such a character that proper inspection would have discovered it. He also charges that the defendants' motorman was negligent in not applying

the brake of his car so as to stop it immediately after the explosion.

The first trial of the action took place before Middleton J. It resulted in a verdict for the plaintiff for $1,200. That verdict was set aside by the Court of Appeal and a new trial ordered (1), on the ground that certain evidence tendered by the defendants had been improperly rejected.

At the second trial before Sir William Meredith C.J.C.P., the jury again found for the plaintiff. The damages were assessed at $1,100. The negligence attributed to the defendants consisted in their

using a rebuilt controller in a defective condition and not being properly inspected.

The motorman was also found to have been negligent "in not applying his brake." The Court of Appeal upheld this verdict and from its judgment the present appeal is taken.

Counsel for the defendants contended that there was no evidence upon which any finding of negligence against his clients could properly be based; and he further argued that the injuries sustained by the plaintiff were not the direct or proximate result of the explosion or fire, but were caused by an independent and voluntary act of two passengers who deliberately pushed him from the car.

While the evidence may be susceptible of the view that the plaintiff was thus pushed from the car, it is quite open also to the construction that the two passengers were impelled by fear of injury to themselves to escape from the car and that in the course of doing so, owing to the narrowness of the space between the seats, they necessarily pushed against the plaintiff,

(1) 25 Ont. L.R. 317.

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Anglin J.

who was sitting at the outside of the seat, and involuntarily caused him to fall from the car. I find no allusion in the charge of the learned Chief Justice to this contention on behalf of the defendants and it is not referred to either in their reasons for appeal to the Court of Appeal or in the reasons for judgment given by that court. Counsel for the plaintiff stated at bar that it was presented by the defendants for the first time in this court, and his statement was not controverted. Under these circumstances it would not, in my opinion, be proper to give effect to this defence even if the evidence sufficiently established it, which I do not think it does.

I agree with Mr. Justice Garrow that if the verdict for the plaintiff depended on the finding of the motorman's negligence the evidence would not support it. It is very questionable whether owing to the fire which immediately resulted from the explosion it was possible for the motorman to apply his brake. The only evidence on this point is his own and it indicates that he could not have done so. In the exercise of his judgment in the emergency he appears to have considered that the most important thing to do promptly was to cut off the current from the car. He immediately shut off the controller with one hand and tried to reach the hood-switch at the top of the vestibule with the other, but was prevented from doing so by the fire. He then leaned out of the vestibule and called to the conductor to pull the trolley pole off the wire, simultaneously shouting to the passengers not to attempt to get off the car. Having regard to all the circumstances I think the evidence does not support a finding of negligence on the part of the motorman. He appears to have done all that he could or, at all events, what he

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thought best in the emergency to prevent injury either to the passengers or to the property of his employers.

There was, however, in my opinion, evidence from which the jury might reasonably infer that an efficient inspection of the controller would have revealed the defect which caused the short circuit. They may, for the reasons which he gave, have not improperly accepted the view of the witness Richmond as to the place where the short circuit occurred and as the probable cause of it. Unless it should be held that where an accident results in the destruction of the physical evidence of its cause an injured person cannot recover — a position which the Judicial Committee has decided to be not maintainable (*McArthur* v. *The Dominion Cartridge Co.*(1)) — a jury must be allowed to act upon evidence such as that which was put before them by the plaintiff in the present case. The defendants attempted to meet that evidence by shewing that they had a regular and adequate system of inspection of controllers and that the controller in question had been inspected on the 2nd of August, and again on the 7th of August. The accident happened on the 10th of August. Of neither inspection was the evidence offered entirely satisfactory. There certainly was room for the contention made on behalf of the plaintiff that the report of the inspection of the 2nd of August indicated that the controllers had not then been inspected. The evidence of the inspection of the 7th of August was still more unsatisfactory in that the man who made it was not called as a witness and the foreman, who was called, was unable to speak from personal knowledge as to its thoroughness or extent. I doubt whether the report of

(1) [1905] A.C. 72.

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the inspection which was put in was admissible in evidence. But, if it was, the jury may not improperly have reached the conclusion that the plaintiff had sufficiently established that the defect was one which proper inspection would have disclosed and that the defendants had failed to satisfactorily establish that there had been such inspection.

This suffices to dispose of the case and renders it unnecessary to consider the other finding of the jury that the defendants were negligent in using a rebuilt controller in a defective condition. In regard to that finding I desire merely to remark that if by it the jury meant that the existence of the defect in the controller was due to negligence in rebuilding it, I am not satisfied that the evidence would support such a finding.

In the result the appeal fails and must be dismissed with costs.

BRODEUR J.—The jury in stating that the company defendant was guilty of negligence by using a rebuilt controller in a defective condition and by not inspecting it properly, have returned a verdict that could be reasonably found on the evidence.

It seems to me that if the equipment had been minutely inspected the defect would have been detected and the injury would have been avoided. Besides, when the short circuit occurred and the fire started the motorman should have applied the brakes and stopped the car in order that the passengers could get off without fear and without accident.

In the circumstances of the case the principle laid down in *Scott* v. *London and St. Katherine Docks Co.* (1) should apply. The car was under the management of the defendants and their servants and the acci-

(1) 3 H. & C. 596.

dent is such as in the ordinary course of things would not have happened if those who had the management used proper care. It affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

The *onus probandi* that fell upon the appellants has not been fulfilled to the satisfaction of the jury and a verdict of negligence has been given.

It is claimed by the appellants that the shoving of the plaintiff off the car by the other passengers was not the natural and direct outcome of the explosion, because the passengers took hold of the respondent and pushed him off.

It is pretty evident that the passengers who pushed off the respondent were panic-stricken on account of the explosion and in trying to get off the car to reach the street and save their lives, they removed the respondent from his seat and he fell on the street.

A similar case came before the Supreme Court in Illinois, and it was held as follows:—

> Where the passengers in a street car when an explosion occurred in the controller rushed to rear door in a panic, and the plaintiff being one of them was pushed and thrown from the car and injured, there was *primâ facie* evidence of negligence on the part of the railway company under the doctrine of *res ipsa loquitur*, and judgment for the plaintiff was affirmed. (*Chicago Union Traction Co.* v. *Newmiller*(1).)

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *C. & H. D. Gamble.*

(1) 18 Am. Neg. Rep. 380.

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*April 8, 9.
*May 6.

ALBERT NELSON ROBINSON (PLAINTIFF) ..... } APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railways—Carriage of passenger—Special contract—Notice to passenger of conditions—Negligence—Exemption from liability.

P., at Milverton, Ont., purchased a horse for a man in another town who sent R. to take charge of it. P. signed the way-bill in the form approved by the Board of Railway Commissioners, which contained a clause providing that if the consignee or his nominee should be allowed to travel at less than the regular fare to take care of the property the company should not be liable for any injury to him whether caused by negligence or otherwise. R. was not asked to sign the way-bill though a form indorsed provided for his signature and required the agent to obtain it. The way-bill was given to R., who placed it in his pocket without examining it. On the passage he was injured by negligence of the company's servants.

Held, that R. was not aware that the way-bill contained conditions.

Held, also, Fitzpatrick C.J. dissenting, that the company had not done all that was incumbent on them to bring notice of the special condition to his attention.

Judgment of the Court of Appeal (27 Ont. L.R. 290) reversed and that of the trial judge (26 Ont. L.R. 437) restored.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of the plaintiff.

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

(1) 27 Ont. L.R. 290. (2) 26 Ont. L.R. 437.

The material facts are stated in the above headnote.

McKay K.C. and *Haight* for the appellant. The appellant could not become a party to this special contract without his assent, obtained expressly or by reasonable implication. It was not so obtained and the case is within the principle of *Parker* v. *South Eastern Railway Co.*(1), approved in *Richardson* v. *Rowntree*(2), and *Bate* v. *Canadian Pacific Railway Co.*(3). See also *Stephen* v. *International Sleeping Car Co.*(4); *Hooper* v. *Furness Railway Co.*(5); *Marriott* v. *Yeoward Bros.*(6); *Ryckman* v. *Hamilton, Grimsby and Beamsville Railway Co.*(7).

D. L. McCarthy K.C. for the respondents. If appellant was lawfully on the train he could only be so by the contract with the company.

The company may limit its liability for injury to a passenger through negligence. *Parker* v. *South Eastern Railway Co.*(8); *Burke* v. *South Eastern Railway Co.*(9). The appellant's assent to the limitation by the contract is clearly implied.

The fact that he did not read the conditions did not free him from their effect. *Harris* v. *Great Western Railway Co.*(10); *Coombs* v. *The Queen*(11).

(1) 1 C.P.D. 618; 2 C.P.D. 416.
(2) [1894] A.C. 217.
(3) 18 Can. S.C.R. 697; Cam. S.C. Cas. 10.
(4) 19 Times L.R. 621.
(5) 23 Times L.R. 451.
(6) [1909] 2 K.B. 987, at p. 992.
(7) 10 Ont. L.R. 419, at p. 422.
(8) 2 C.P.D. 416.
(9) 5 C.P.D. 1.
(10) 1 Q.B.D. 515.
(11) 4 Ex. C.R. 321; 26 Can. S.C.R. 13.

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The Chief Justice.

THE CHIEF JUSTICE (dissenting).—I am very clearly of opinion that this appeal should be dismissed. The appellant was travelling on a freight train where he had no right to be except under the special agreement made with respect to the carriage of the horse of which he was presumably in charge. That special agreement contained a limitation of the company's liability in case of accident, and I agree with the judges below who found that the company did everything that was reasonably sufficient to draw the appellant's attention to that limitation.

DAVIES J.—The judgments below proceeded upon the assumption that the plaintiff must either have been travelling under the contract made between the owner of the horse and the railway company and that he was bound by such contract, or that he was a trespasser to whom the company owed no duty.

I think his position was not, under the circumstances of this case, one or the other. I do not think he was travelling under and by virtue of a contract, which was made between his master and the company without any knowledge on his part of its conditions which he was not asked to sign or agree to, and which contained special clauses relating to him as man in charge of the horse not called to his attention, and of which he had no knowledge. One of these special clauses printed in the body of the contract declared the company

> to be free from liability in respect of his death, injury or damage; and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever.

It was headed "Grand Trunk Railway System"—"Live Stock Special Contract." On the margin was written

"Pass man in charge half-fare." The plaintiff was the man in charge of the horse to be carried by the contract. A special notice on the back required the company's agents to see that such man wrote his own name on the back of the contract. This may have been for the purposes of identification merely; but the evidence is clear that the plaintiff had not his attention called in any way to this clause by which the company attempted to contract themselves out of any liability for damages caused by their own or their servants' negligence.

The plaintiff's position on the car was certainly not that of a trespasser, but rather that of a licensee. The contract was not made with him or by him, and he cannot be held bound by provisions of such a startling character as the contractual exemption relied upon here unless his assent had been first obtained by his special attention being directed to the clause affecting him and his acceptance of it either expressly or impliedly.

There was nothing when this "Live Stock Special Contract" was handed to him to lead him to believe that it contained any such special exemption of liability with respect to his carriage as the one I have cited.

If the plaintiff had been told the substance of this condition respecting his carriage as man in charge, or had he read the condition and in either case had not objected, but had accepted his passage with such knowledge, he would probably have been held to have assented to the terms of the condition and been bound by it. But there not being, in my opinion, any obli-

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Davies J.

gation on him to read this "Live Stock Special Contract," and he not having, as a fact, read it, or been invited to do so, or had his attention called to the condition with respect to himself, I cannot think he was bound by it.

The cases cited of *Parker* v. *South Eastern Railway Co.*(1), and in the Court of Appeal(2), and *Richardson, Spence & Co.* v. *Rowntree*(3), amply support the conclusion that in a case like the present one, the company has not the right, under such circumstances as are here proved, to invoke a contractual exemption from liability arising out of their own or their servants' negligence, as this contract contains.

They fail because the plaintiff, the man in charge of the horse, had no knowledge of the condition they seek to invoke against him and because their servants neglected to do what was reasonably sufficient to bring such notice to his knowledge or attention.

I would allow the appeal with costs.

IDINGTON J.—The appellant was sent by Dr. McCombe from South River to bring him from Milverton a horse purchased there by a friend, Dr. Parker, to be shipped by him from Milverton to South River.

The respondents required as a term of receiving such a shipment for a distance greater than a hundred miles, that the animal shipped should be accompanied by a man in charge of it. Hence the necessity for Dr. McCombe sending appellant to Milverton to

(1) 1 C.P.D. 618. (2) 2 C.P.D. 416.
(3) [1894] A.C. 217.

take charge of the horse and travel on same train as it did.

Dr. Parker signed a contract of shipment as required by respondents' agent in a form which had the approval of the Board of Railway Commissioners. He paid nothing. The charges were to be paid by Dr. McCombe. The form of contract signed by Dr. Parker expressly absolved the respondents from all liability in case of accident happening the man thus in charge of the horse.

The contract was not read by Dr. Parker, but he had the opportunity to have read it if he chose.

The respondents' agent was present when it was signed, but nothing was said by any one as to its terms. Dr. Parker had suggested mailing it to Dr. McCombe, but the company's agent said no, let the man take it as he might need it for identification by the conductor. Dr. Parker accordingly folded it up and handed it to appellant, who put it in his pocket without reading it and never knew what it contained until a week or so after the accident in question.

Dr. McCombe on getting it then from respondents paid the charges, which consisted of freight for the horse and half-fare for the appellant's transportation.

There was, as result of respondents' negligence, a collision between another train and the train on which the appellant travelled with the horse, whereby the appellant suffered serious damages for which respondents would admittedly be liable even if carrying gratuitously unless prohibited by the terms of the contract I have referred to.

There was indorsed on the back of the contract a memorandum which was as follows:—

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GRAND TRUNK RAILWAY SYSTEM.
LIVE STOCK.
TRANSPORTATION CONTRACT.

From .....
To .....
Date ..... 19 .
Shipper .....

Names of persons entitled to a free pass or reduced fare in charge of this consignment—

.....
.....
.....
.....
.....Agent.

NOTE.—Agents must require those entitled to free passage or reduced fare in charge of Live Stock under this contract to write their own names on the lines above.

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon to compare signatures.

This contract must be punched by Conductors of each Division.

This was never filled up or signed by any one.

The question raised is whether or not a man occupying the position of the appellant put in charge of the said horse and travelling as its caretaker, is without being made expressly aware of the terms of the contract his employer had entered into, debarred by virtue thereof from all right of recovery for injury suffered by "reason of the negligence of the company's servants or otherwise howsoever," as the terms of exemption I have referred to put it.

In regard to this question there is some similarity between this case and the case of *Bate* v. *Canadian Pacific Railway Co.*(1). There the signature of the passenger was got by telling her such signing was necessary for identification. Here no signature or assent of any kind was required, but incidentally to

(1) 18 Can. S.C.R. 697.

handing appellant the contract instead of mailing it as proposed by Dr. Parker, it was stated in appellant's presence that he might need it for identification. And as it turned out he never needed it for such purpose.

It seems to me the appellant, who was not asked to sign anything, but thus thrown off his guard, has quite as much ground to be excused as the plaintiff in that case who was induced to sign what she could not read by reason of sore or defective eyes, but did sign, though she might have insisted on the paper being read to her.

Then we have the cases of *Richardson, Spence & Co.* v. *Rowntree*(1), following *Parker* v. *South Eastern Railway Co.*(2), and *Henderson* v. *Stevenson*(3), which in principle seem to cover the whole ground involved in the dispute herein by requiring knowledge on the part of those concerned of the conditions pleaded and relied upon. The appellant was invited to trust himself to the care of respondent in discharge of its duty to carry appellant safely, and it pleads something his master, but not he, agreed to.

It seems rather a startling proposition of law that an employer can of his own mere will and motion so contract that his servant shall be treated as of less value than a horse or dog shipped as freight. It seems to me to come to that if we are to uphold the judgment appealed from, for there is no fair ground on the facts to impute to appellant an assent to something he knew nothing of.

If appellant had by his occupation been shewn to be accustomed to undertake such services, there might

(1) [1894] A.C. 217. (2) 2 C.P.D. 416.
(3) L.R. 2 H.L. Sc. 470.

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have been some basis for inferring assent to a something he in fact knew nothing of, but ought to have known.

If the principle of identification is to be carried so far, where would it not extend if applied in other relations of contractors with those for whom they undertake something to be done and on behalf of those in their employment presume, without their knowledge or assent, to bind them to assume all risks?

All the appellant was concerned with was that he was to be carried safely and for aught he knew gratuitously if you will.

All he knew was that the railway company needed him to go.

Is there anybody else than railway managers and lawyers who can be conceived of as presuming that a man so sent for and invited by the company to ride upon its car in order to serve its purposes of protecting itself must know that he has agreed without recourse to be killed by the negligence of their servants "or otherwise howsoever." Not only is that to be presumed as part of common knowledge, but also that the horse had to be paid for in such case, but not the man. Indeed, also he is supposed to know that the Railway Commissioners of Canada were such a set of humorists as to have approved thereof.

The learned trial judge by what transpired at the trial must be taken to have reserved to himself to dispose of what was not submitted to the jury and he seems to have had no doubt in regard to essential facts which they were not asked in regard to and did not pass upon.

I think the appeal must be allowed with costs throughout and the judgment of the learned trial judge be restored.

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Duff J.

DUFF J.—The defendant was *de facto* accepted as a passenger on their train by the railway company which thereby *primâ facie* incurred an obligation to use reasonable care to carry him with safety. The company says that this *primâ facie* obligation was limited by the condition in the shipping bill. I do not understand that it was contended on behalf of the company that Dr. Parker, who signed the shipping bill on behalf of the consignee, had authority to bind the appellant by entering into an agreement on his behalf limiting this obligation. I am not required by law to hold that he had such authority and there is no evidence justifying a finding that the appellant had made him (or held him out as,) his agent in fact for that purpose. The evidence, moreover, is clear that the condition referred to was not actually brought home to the knowledge of Dr. Parker or of the appellant. In these circumstances the contention of the company is and must be that the company's agent took reasonable steps to notify the appellant that they were accepting him as a passenger on the special terms contained in the shipping bill and that the appellant's conduct in not perusing the bill shewed that he was content to accept the conditions without reading them; and that he must, consequently, in law be held to be bound by it. I think this contention must be rejected. The gist of it is that a normal person in the situation of the appellant would have read the bill unless he was content to abide by any reasonable conditions it might contain. I am not obliged by any rule of law to say that that is so. Treating the question as a matter of fact I think it is not so. I think the appeal should be allowed and the judgment of the trial judge restored.

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Anglin J.

ANGLIN J.—I am unable to discover any distinction in principle between this case and such cases as *Richardson, Spence & Co.* v. *Rowntree*(1); *Henderson* v. *Stevenson*(2); *Parker* v. *South Eastern Railway Co.*(3); and *Bate* v. *Canadian Pacific Railway Co.*(4). Upon evidence warranting such a finding the trial judge held that the plaintiff was unaware of the special conditions contained in the shipping contract under which the defendants claim exemption from liability to him for personal injuries, and, if not expressly, I think impliedly, that neither the circumstances under which he received the contract nor what was done by the defendants' agent would suffice to convey to his mind (or "to the minds of people in general") the fact that it contained special conditions affecting him or would justify imputing to him notice of them. The learned judge says that the plaintiff had "neither notice nor knowledge" of the special terms. By this I understand him to have meant that the plaintiff had not notice of any kind, actual or constructive. As put by Mellish L.J., in *Parker* v. *South Eastern Railway Co.*(5), at page 423:—

> The proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

It is this "reasonable notice" that I understand the learned trial judge to negative in the present case

(1) [1894] A.C. 217.
(2) L.R. 2 H.L. Sc. 470.
(3) 1 C.P.D. 618; 2 C.P.D. 416.
(4) 18 Can. S.C.R. 697; Cam. S.C. Cas. 10.
(5) 2 C.P.D. 416.

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by the word "notice," which he uses in contradistinction to the word "knowledge" by which he negatives actual notice.

If, however, the learned judge did not find that the defendants had failed to do what was necessary to bring the special conditions in the shipping contract to the attention of the plaintiff, treating him as a man of ordinary intelligence and acuteness, the Court of Appeal had power to make that finding (Ont. Jud. Act, sec. 53; Ont. C.R. No. 817), and upon my view of the evidence should have made it. Our statutory duty is to render the judgment which the Court of Appeal should have given.

On the single ground that the present case is governed by the authorities above cited, and without expressing any opinion upon the other interesting points taken by the appellant, I would, with respect, allow this appeal with costs in this court and the Ontario Court of Appeal, and would restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the appellant: *W. L. Haight.*
Solicitor for the respondents: *W. H. Biggar.*

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April 14, 15.
*May 6

ROY H. STONE (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Negligence—Contravention of statute—Protection of employees—Foreign car—Defective equipment—R.S.C. [1906] *c.* 37, *s.* 264, *ss.* 1(*c*).

The provisions of section 264, subsection 1(*c*) of The Railway Act which require every railway company "to provide and cause to be used on all trains modern and efficient apparatus" for coupling and uncoupling cars without the necessity of going between them is contravened by the use of a foreign car not provided with such "modern and efficient apparatus" in a train operated by a Canadian company, and the company using such car is responsible for any injury caused by the want of such equipment. A lever for opening and closing the knuckle of the coupler which is too short to be operated from the side ladder with safety is not "modern and efficient apparatus" under the above provision.

Where a brakeman on a car approaching another with which it was to be coupled saw that the knuckle of the coupler of the car he was on had to be opened and had only fifteen seconds in which to do it, being unable to signal the engineer to stop, took the only course open to him, which was a common one, and was injured he was not guilty of contributory negligence.

Fitzpatrick C.J. dissented on the ground that the plaintiff's negligence was the sole cause of the accident.

Judgment of the Court of Appeal (26 Ont. L.R. 121) reversed, Fitzpatrick C.J. dissenting.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) setting aside the verdict at the trial in favour of the plaintiff and dismissing his action.

The material facts in relation to the matter which are not in dispute may be shortly stated as follows:—

The plaintiff, a young man about 22 years of age, entered the employment of the defendants as brakesman in August, 1910, after being with the Canadian Express Company for five or six years and with the Grand Trunk Railway as brakesman. On the day of the accident, 18th March, 1911, he was engaged as brakesman on a freight train running between Toronto and Fraxa Junction, a short distance north of Orangeville, on the respondents' line and among the cars which made up this train was a foreign box or freight car belonging to the Wabash Railroad which was being returned empty to that company. This car was equipped with automatic couplers, it had the usual side ladders near the ends, but it had no ladders at either end. When the train arrived at Bolton Junction a car from near the centre of the train and attached to the Wabash car had to be uncoupled and left there. This was done and it was while the rest of the train was being coupled up again that the accident happened. The appellant went on the top of the Wabash car to signal the engineer and while there he noticed that the knuckle, *i.e.*, a portion of the automatic coupler attached to the Wabash car, was closed. For the purpose of opening the knuckle and while the car was travelling at a speed of about 7 miles an hour, he went down the side ladder in order to get hold of the lever or coupling rod by which the knuckle was opened. According to his own testimony the appellant went to the bottom of the ladder. His left foot was

(1) 26 Ont. L.R. 121.

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resting on the step below the ladder and he was holding on with his left hand to the lowest rung of the ladder, there being a space of about only 20 inches between them. While his right foot was in the air, he tried to reach round the end of the car with his right hand and attempted to raise the lever or coupling rod. While he was in this cramped or doubled up position the car passed over a crossover between the two tracks, the jar caused his foot to slip from the bottom step and he fell with his right arm beneath the wheels. The arm was badly crushed and had to be amputated at the shoulder.

The allegations in the Statement of Claim were that the side ladder from which the plaintiff fell was improperly placed and was insecure, that the car was not equipped with end ladders as required by the "Railway Act" and was not properly equipped with automatic couplers, in that the lever or coupling rod was too short, and to these defects the appellant attributes his accident.

The jury assessed the damages at $6,000 and the learned trial judge on their answers to questions submitted by him, entered judgment for that amount against the respondents, but this judgment was reversed by the Court of Appeal for Ontario, and the appellant's action dismissed on the ground that the accident was not caused by the short lever or want of end ladders, but was due to the plaintiff's own negligence.

Creswicke K.C. and *C. C. Robinson* for the appellant. Sub-sections 1(*c*) and 5 of section 264 of the "Railway Act," were passed for the protection of railway employees and should not be strictly construed if

so doing would defeat that object. See *Johnson* v. *Southern Pacific Co.*(1), at page 18; *Atcheson* v. *Grand Trunk Railway Co.*(2). Interpreting the words "of the company" in sub-section 5 as meaning "owned by the company" would defeat it.

The duty is imposed on the company of providing reasonably safe appliances for their employees. *Ainslie Mining and Rway. Co.* v. *McDougall*(3); *Marney* v. *Scott*(4); and the jury have found that such duty was not observed in this case.

Hellmuth K.C. and *MacMurchy K.C.* for the respondents referred to *Barnes* v. *Nunnery Colliery Co.* (5); *Plumb* v. *Cobden Flour Mills Co.*(6).

THE CHIEF JUSTICE (dissenting).—I agree entirely with Mr. Justice Meredith. The appellant lost his balance and fell from the car after deliberately getting himself into an impossible position, and his own negligence in that regard was, in my opinion, the determining cause of the accident.

The appeal should be dismissed with costs.

DAVIES J.—In the final analysis of the evidence as to the facts and conditions under which the accident occurred, the question whether the appeal should be allowed seems to resolve itself into two, first, whether the plaintiff was guilty of contributory negligence in his attempt to work the lever attached to the coupler of the Wabash car so as to enable the couplers to connect, and, secondly, whether the find-

(1) 196 U.S.R. 1.
(2) 1 Ont. L.R. 168.
(3) 42 Can. S.C.R. 420.
(4) [1899] 1 Q.B. 986.
(5) [1912] A.C. 44.
(6) 29 Times L.R. 232.

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ings of the jury negative this contributory negligence on the one hand, and can be fairly construed as imputing negligence to the defendants which caused the accident, on the other.

To find the plaintiff guilty of contributory negligence under the circumstances, it is not sufficient to find that he erred in judgment at the supreme moment when action was promptly required from him. He may have acted unwisely and imprudently in attempting to hang on to the ladder with one hand, clinging to the rung of the ladder immediately above the lower step on which one only of his feet was placed, and with crouching, bent body, reaching round the end of the car to get hold of and work the lever. The result places it beyond doubt that his judgment was faulty and his action dangerous. But I take it the question is not whether his judgment in the moment calling for instant action was prudent or otherwise, but whether it constituted gross carelessness.

It seems beyond reasonable doubt that if the lever had been long enough to reach the side of the car or nearly so, the method he adopted of going down the side ladder and operating the lever from it would have been quite safe. It was the shortness of the lever which compelled him to crouch and bend himself so as to give his arm a long reach and thus make up for the shortness of the lever. He had 15 seconds within which to stop the car. If the lever had been of the same length as those on the ordinary C.P.R. cars, it does not seem doubtful that he would have safely worked it. The extra reach to get hold of the short handle made his position perilous and the jar of the car in passing over the crossing of two tracks caused his foot to slip from the lower rung of the ladder and he fell with his arm under the car wheels.

The plaintiff's evidence is that the lever was only about 16 inches long, bringing its length to about 2½ feet from the side of the car. The defendants' witnesses, who inspected the car, but did not measure the lever, say it was about 2½ feet long, which would bring its end to about 16 inches from the side of the car. No witness on either side suggested it came within 15 inches of the side of the car. The jury, in answer to questions 5 and 6, say the plaintiff was injured in consequence of defects in the make up of the car, and that the car lacked the ladder on the end and the *long lever equipment* used by the defendants on their cars. They do not find specifically the actual length of the lever, but they find its shortness, or want of normal length, was one of the defects which caused plaintiff's injuries. I do not attach importance to the absence of the end ladder because under the circumstances with the rapidly approaching cars it seems obvious that it would have been dangerous and against good practice for him to have used an end ladder and so placed his body between the approaching cars.

It does seem to me that it was at least open to the jury to accept plaintiff's evidence on the length of this lever, and that at any rate they could find it was not the *long lever equipment* used on the Canadian Pacific Railway cars, and which doubtless experience had shewn was necessary in order to comply with the requirements of the statute.

They further find in answer to question 3, that as plaintiff had not received circular No. 4, he acted as he did to the best of his knowledge, and in answer to question 7, that he could not, under the circumstances, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself.

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It is true that they do not give any answer to the specific question No. 8, whether they found negligence as to the matters in dispute, (*a*) in the Canadian Pacific Railway Co., or (*b*) in the plaintiff. But finding generally that the car and its fittings were not reasonably safe in the respects they mention for the employees in the usual operations of the road; that the plaintiff acted, not having received circular No. 4, to the best of his knowledge; that he was injured in consequence of defects in the make up of the car, and that what they found to be wrong was the absence of end ladder and "the long lever equipment used by the Canadian Pacific Railway," and that plaintiff could not, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself; they may have concluded that further specification of negligence in either party was unnecessary, and would only involve repetition of their previous answers.

It seems to me that these findings, read in connection with the charge of the Chancellor, negative contributory negligence of the plaintiff on the one hand, and find negligence in the defendants which caused the accident on the other.

I may remark that the alternative course which was open to the plaintiff when he discovered that the knuckle of the coupler of the Wabash car was closed, was, from his place on the top of the car, to signal the engineer to *stop the train*. He says he did not do so because the engineer was not looking. The engineer was not examined, and there is no conflict of evidence on that point. The course he took in going down the side ladder and attempting to operate the lever from it was a perfectly safe one had the lever been the ordin-

ary length of those in use on the Canadian Pacific Railway cars, that is, a length which would enable the brakesman to operate it without being under the necessity of placing at least a part of his body between the cars.

The statutory requirement as to trains is found in section 264 of the "Railway Act," which reads:—

> Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—
>
> * * * * *
>
> (*c*) to securely couple and connect the cars composing the train. and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

This sub-section evidently requires such apparatus and appliances as will enable the couplers to be efficiently operated without the necessity of men going between the cars.

It was argued that this lever of the Wabash car was sufficiently long to enable such purpose to be accomplished when the cars were not moving, in other words, that the brakesman could have opened the knuckle of the coupler which was closed, and so enabled the cars automatically to be coupled without going between the ends of the cars, and that no doubt is so. But the question comes back to the one I started with: Was the plaintiff, when he found he could not convey to the engineer a signal to stop the train because that officer was not looking, guilty of gross negligence or "inviting disaster," as one of the judges in the Court of Appeal pointedly puts it, by attempting to reach the lever in the manner and at the time and under the circumstances he did? Was he guilty of gross negligence in his attempt or only of an error

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of judgment at a moment requiring prompt and instant decision and action ?

The answers of the jury taken as a whole placed the blame for the accident on the inefficiency of the lever on account of its shortness, and must be taken to have absolved the plaintiff from contributory negligence.

I have not reached my conclusions without much doubt, founded in part on the absence of specific answers to question 8, and in part on the reasonings of the learned judges of the Court of Appeal which were ably supported at bar. But I feel myself bound by the construction I place upon the findings of the jury as I interpret them, and upon the conclusion I have reached that sub-section (*c*), of section 264, is applicable to the Wabash car which formed part of the defendants' train and which was found inefficiently equipped in not having the long lever equipment used by the Canadian Pacific Railway Co. on its own cars.

I, therefore, concur in allowing the appeal and restoring the judgment of the trial court, with costs.

IDINGTON J.—The appellant was a brakesman on one of the respondents' trains engaged in shunting cars at one of their stations. He was on top of a self-coupling car being moved backward to be connected with another car standing on the track. He descended the side ladder of the car on which he was, in order to reach the lever by which the knuckle might be opened or pin raised of the coupler or part thereof attached to his car so as to prepare it to receive and connect with the part of the coupler on the other car towards which his train was moving at a rate of about seven miles an hour.

He put his left foot in the step which projected

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below the bottom of the car, seized a rung of the ladder with his left hand and attempted with his right hand to reach the lever which was unusually short, but failed to reach it, and whilst in this attitude the car crossed a part of the crossing of the tracks which gave a jolt or jar and he fell and then his arm was run over. The arm had to be amputated near the shoulder. This action was brought for the resultant damages. It was tried before the Chancellor, who refused to nonsuit and submitted to the jury a number of questions; and upon their answers thereto he entered judgment for appellant.

The Court of Appeal dismissed the action. Some difficulty is experienced in trying to harmonize the several reasons assigned therefor, and I shall not attempt to analyze same. Broadly speaking they may, I think, be properly described as attributing the accident to the alleged unjustifiable conduct of appellant in attempting to do what he did.

Incidentally to the determination thus reached the interpretation and construction of sections 264 and 317 of the "Railway Act" are dealt with in such a way as to render it more easy to reach a conclusion that the appellant is solely blameworthy for the accident. It is important for that reason to settle, if possible, the questions thus raised.

Under the caption in said Act of "Operation—Equipment and Appliances for Cars and Locomotives," appears, first, section 264, intended to be chief part of an efficient code for the purposes indicated.

This section enacts:—

264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—

* * * * *

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(*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

And then, after sub-sections 2, 3, and 4, follows sub-section 5, as follows:—

5. All box freight cars of the company shall, for the security of railway employees, be equipped with:—

(*a*) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and

(*b*) hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders;

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment.

Sub-section 6 enables the Board to deal with draw-bars, and sub-section 7 provides as follows:—

7. The Board may upon good cause shewn, by general regulation, or in any particular case, from time to time, grant delay for complying with the provisions of this section.

It is attempted to distinguish the effect of sub-section 5 from the rest of the section by reason of the use of the expression therein "of the company." It is pointed out that the word "trains" is used in some of the earlier sub-sections and that, therefore, this expression "of the company" must mean something else, though the entire sub-section is, as if to emphasize the very contrary, being enacted expressly "for the security of railway employees."

I can hardly appreciate how "the security of railway employees" is to be obtained in relation to cars that do not form part of a train and that in motion. When cars stand still there would not seem to be much

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need for securing employees or any one else against their defects.

It does not appear in the reasons given exactly how such security is to be attained anywhere else than where the cars are in motion and forming part of a train. It is said, however, that cars are exchanged with foreign roads which may not be so equipped, and we are referred to section 317 providing for a foreign traffic.

There is not a word therein or elsewhere in the Act shewing any discrimination is to be made between such foreign and the domestic cars in relation to the security of the employees in this regard. Indeed, section 317 is entirely devoted to another object and purpose.

The sub-section 7, of section 264, may or may not enable such discrimination, but if it does not there is none possible. And there is no pretence made that the said power has ever been exercised in the premises. There is no possibility of pretending that by section 317 or otherwise than by said sub-section 7 has the Board or any one else authority to suspend in favour of such foreign cars or use thereof, the provisions of this statute for the security of the employees.

The more the extent of the use of foreign cars is magnified, as it is impliedly in the argument put forward, the less justification is there for importing such an invasion of this security the statute was designed to provide.

If exception had been attempted in the case of other Canadian railways whose cars had failed to obey the statute, then it might have been argued with a degree of plausibility that the penalties of the Act imposed by section 386 must be held to be the only

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mode of relief, inasmuch as interchange of cars and traffic are made obligatory. I do not think that would be tenable, and no one has been bold enough to so argue.

But why exemption should be made in favour of foreign cars of which the owners could not be subjected to such penalties, is something I cannot understand if employees are needing and are to get protection.

The distinction, I respectively submit, is quite unwarranted. When one reflects upon the rapidity of judgment needed to be exercised by these employees in a variety of ways their situation so often calls for in discharge of their duties, it is not to be supposed in face of such legislation that it was ever intended that judgment was to be needlessly confused by considerations of the different rules to be applied to the nationality or kind of cars in relation to which it has to be exercised.

I think the statute applies and must be held to apply to all cars in all trains, including such combinations of locomotives and cars as the statute constitutes a train in a yard or elsewhere.

Now, what did this statute require, which, according to the interpretation I have given it, related to the cars and train in question ?

It required modern appliances and these must, it is conceded, be progressively so modern as to keep pace with modern invention and known utility.

This Wabash car in question herein had the semblance of an automatic coupler, but it failed so lamentably in placing the lever which was to open or close it that it did not come up to the standard which the respondent and others had adopted before this accident.

On any view one may take of the matter the antiquated appearance of the appliances on this Wabash car as compared with those in use by their own company, before the eyes of the inspectors of respondent, ought to have arrested their attention.

Instead of their inspection being, as the reasons assigned by the Court of Appeal suggest, a means of shielding the respondent, the neglect of these inspectors and of those who permitted them to act, on their own responsibility in such matter, instead of directing their attention to the statute and its requirements furnishes the condemnation of the respondent in this regard so far as it bears on the issues raised herein.

Then it is said that the provision of the section relative to the coupling or uncoupling of cars had only a bearing upon an operation to take place by the hands of some employee standing upon the ground, and not on the car or a ladder or platform of any kind attached to a car.

No one has been able to say so as a witness. Some of them seemed adroit in way of answering carefully framed questions to indicate that in certain emergencies this or that mode of doing something in relation to such a proceeding as coupling or uncoupling of cars, might be bad practice. But no one pretends that the raising of the lever in itself by a man standing on a ladder of a moving car, would in every case and of itself be bad practice.

These couplers may, it seems, so get out of order or be so misplaced as to require adjustment, and that the employees are warned against (though this man was not) doing when the cars are in motion.

But what the appellant attempted is nothing of that kind. It might be that the coupler in question

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needed such adjustment, but no one pretends such ever was discovered to be the fact. If it had been, no doubt, it would have been proven herein as giving some semblance of excuse or means of blaming the appellant.

Having read the entire evidence in the case I agree with the following extract from the judgment of Mr. Justice Magee in the Court of Appeal:—

> It is, I think, clear from the evidence, that it was customary for brakesmen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakesman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary, and he would not think of reporting a brakesman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.
>
> It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted, but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was contrary to the defendants' circular No. 4 of 15th February, 1911, which, however, the jury find the plaintiff not to have notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler * * * when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus it refers to "accidents from holding on side of car," but only "when passing platform, building or other obstruction, known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only

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the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

The appellant was attempting to do just what this practice so referred to justifies. In hopes of averting a mishap likely by reason of both parts of the coupler, that on the Wabash car and that on the car to be connected with it, being closed, he tried to reach and raise the lever to open the one on the Wabash car on which he was. He swears that this, if done, would have enabled successful connection, and he is not contradicted in regard thereto, or the possibility of its accomplishment by the means he tried.

What Mr. Justice Magee condemns, and the sole reason for his judgment being adverse to appellant, is that appellant took such a position in his attempt that the overbalancing of his body, which he thinks was the direct result thereof, disentitled him to succeed.

It seems he, standing with one foot on the stirrup part (if I may so call it) of the ladder, holding on by a rung of the ladder twenty inches or more above that, had to bend down and thus be placed in an insecure position and be liable to be jerked off, as he was.

There was nothing impossible in such a feat. It was necessary to so bend down to reach the lever, or try to reach it.

And if he failed, whose fault was it ? The utmost that is said is that his doing so was bad judgment. That is the evidence of the respondent's own man called to testify as an expert. I respectfully submit he and appellant, as well as some of the jury, evidently knew a great deal more of the nature of the feat attempted, than some others possessed of higher gifts of another sort.

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When was error of judgment converted in law into either recklessness or negligence ?

Who invited him to so act ? Who imposed upon him the duty of exercising a judgment determining how far he should venture ? Who placed before him the necessity for his attempting such a thing and made for him the trap into which his misjudgment led him ?

If the practice of the men and the masters placed in charge by respondent did not shew that they felt it was no more than a question of judgment, then surely the use by respondent of such a defective and illegal lever as this one in question did invite him, and as result of its use impose upon him the duty of determining how far he ought to venture to avert the damage likely to happen to respondent's property.

The respondent violated the statute in carrying such a car so equipped that the lever could not be reached without this undue straining of appellant to serve his master. There is not a word in the statute requiring the operation, needed to work such couplers, to be done when standing on the ground, or to indicate the protection was solely intended for such cases. Invention might well reach the point of making it with greater safety on a car than on the ground.

If the longer kind of lever used on other cars built and run by respondent had been placed on this Wabash car then there would have been no necessity for appellant running any risk. If even one of a shorter description than those of this latest pattern had been on said car, there would have been little risk.

And if there had been a ladder on its end as required by said sub-section 5, of section 264, the operation needed could have been executed with the short

lever. Of course, the operator in such case would have had to act with such promptness that the act of drawing it would be over and the operator straightened up or back to the top before the two cars being connected had met.

The respondent had equally violated the statute in carrying as part of its equipment on this train a car which had no ladder properly placed on the end of the car as required by the statute. That violation is perhaps not so clearly as the other a possible basis for this action. If there had been, however, no such violation of the law, the means of averting the consequence of the other violation of law would have had to be considered if the facts had presented such a case. The appellant, or any one so situated as he, would be bound to use that ladder so far as practicable as a means of mitigating the risks to be run in handling a car so defectively equipped in regard to the lever.

The point made by Mr. Robinson in his brief argument so admirable for its precision and direct bearing on the issue raised by a consideration of these subsections in their relation to each other, was well taken, and the authority of the case of *The "Arklow"*(1), at page 139, which he cited, is as undoubted as the principle of law involved therein. The violating of a statute bearing on the duty of a railway company may well have *primâ facie* the like results as attendant upon the violation of a statutory rule of navigation though the consequences as to measurement or apportionment of damages may not apply.

The reasonableness or unreasonableness of the effort made by appellant to operate with such defects has been passed upon by the jury, and I hold the Chan-

(1) 9 App. Cas. 136.

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cellor was quite right in submitting that question to the jury, and the Court of Appeal wrong in overruling such submission and direction.

Much might be said of the failure to instruct by means of the circular No. 4. If it aimed at anything such as appellant is said to have mistakenly done, which I do not think it did, then that clearly had been brought to the notice of the respondent's authorities a month before, and the need for directing regarding it and to stop what had become recognized practice by its employees.

It was the duty of the company to have seen to it, under such circumstances, in such a case that such practices as it describes should cease, and that a copy of the circular was duly delivered, especially in the case of men comparatively new to its service.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge be restored.

DUFF J.—The jury found in effect that the coupling equipment did not conform to the statutory requirements and that the accident was due to this deficiency. I think there was abundant evidence to support this finding. As to contributory negligence:—I think the jury may not unreasonably have thought—assuming the appellant in the circumstances in which he found himself on descending the ladder to be chargeable with an error of judgment—that he was not fairly chargeable with the graver fault of recklessly or thoughtlessly exposing himself to unnecessary risk.

ANGLIN J.—The plaintiff appeals against the judgment of the Court of Appeal for Ontario setting aside

the judgment in his favour entered by the learned Chancellor of Ontario on the following findings of a jury:—

1. Was the car in question owned by the C.P.R. or by another company?

Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?

We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice?

Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car?

Yes, in our opinion we think he was.

6. If he was so injured state everything which you find to be wrong.

The car in question lacked the ladder on end of car and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff by the exercise of reasonable care have provided for the coupling of the cars with safety to himself?

In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute:

(*a*) In the C.P.R.

(*b*) In the plaintiff.

(*c*) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much.

The jury have agreed on $6,000 for damages for plaintiff.

The Court of Appeal held that the evidence did not establish any negligence or breach of statutory duty on the part of the defendants, but did clearly establish that the plaintiff's injury was attributable solely to his own fault.

I concur in the opinion of the Court of Appeal that, on its proper construction, sub-section 5 of section 264, of the "Railway Act," does not apply to foreign

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cars being hauled on Canadian railways in the ordinary course of, or as a result of, interchange of through traffic with foreign railways. But, I think, the provisions of clause (*c*) of sub-section 1 of that section apply to foreign cars equally with domestic cars when they form part of a railway train subject to the jurisdiction of the Parliament of Canada. That clause reads as follows:—

> 264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means:—
>
> * * * * *
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

Although the words "without the necessity of men going in between the ends of the cars" grammatically qualify only the verb "can be uncoupled," the same requirement is introduced with regard to the operation of coupling by the qualifying phrase "automatically by impact." Having regard to the means provided for preparing the coupler to operate automatically, viz., a lever extending from it towards the side of the car—and to the fact that it is necessary to use this lever to open the knuckle of the coupler on one of the cars to be coupled whenever both knuckles are closed, in order to permit of their automatic operation, the statute, on its proper construction, requires that the lever shall be of sufficient length to permit of its being effectively used—whether in coupling or uncoupling—without the necessity of men going in between the ends of the cars. The jury has found that the "make-up" of the car in question was defective in that it "lacked the * * * long lever equipment used by the Canadian Pacific Rway. Co., in which company he (the plain-

tiff) was employed." The jury further found that the plaintiff was injured in consequence of that defect.

According to the evidence of the plaintiff, the lever was about 16 inches in length, so that he had to reach 32 inches in from the side of the car to touch it. According to the evidence of the defendants' witnesses the lever was about 32 inches in length and came to within about 16 inches of the side of the car. Harry Bogardus, Grand Trunk Car Inspector at Allandale, said that the lever "should run from the coupler out to the side of the car." John Hood, C.P.R. Inspector at West Toronto, said, "I guess if it came to the edge of the car it would be better. * * * Yes, it should come to the edge of the car." Wm. Lillew, leading Hand-car Inspector at Toronto Junction, in answer to Mr. Creswicke's question, "And you agree with Mr. Hood that the lever should really come out to the side of the car for better safety, you agree with his evidence?" said, "I agree with his evidence all right enough." Modern Canadian Pacific Railway cars are constructed with the lever coming out to the side. On some of the older cars the position of the buffers prevents this, but according to the evidence of John Hood, "taking the Grand Trunk and the C.P.R. and the ordinary trunk lines from the other side," the usual distance of the lever from the side of the car would be 7 or 8 inches. On the Wabash car in question, according to the evidence of Wm. Lillew, the lever could have been brought without difficulty to within 8 inches of the side — *i.e.*, 8 inches farther out than it was brought according to the evidence of the defence witnesses, and 24 inches farther out than it was brought, according to the evidence of the plaintiff. All the witnesses who were

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questioned on the point admitted that "the shorter the lever the greater the danger." John Hood stated that if the lever were as short as the plaintiff said it was it would be so improper that the company would have to change it. It is not surprising, in view of this evidence, that the jury found that the equipment of the car with such a short lever was a defect; and by that finding, having regard to the facts that it is coupled with the finding as to the lack of end ladders, and that negligence proper was covered by the eighth question which the jury did not answer, I have little doubt that they meant that the lever on the car was not in conformity with the requirements of the statute, in that it did not obviate the necessity of men going between the cars for the purpose of operating the so-called automatic coupler. A finding of negligence on the part of the defendants is probably involved in the finding of such a defect; but a finding of negligence is not requisite where a breach of statutory duty causing the injury complained of has been established. Such a breach of statutory duty has been found in the present case, as I understand the answers of the jury — and, I think, upon sufficient evidence. Unless, therefore, the evidence makes it so clear that the plaintiff was himself guilty of some negligence or improper act which was the sole or a contributing cause of his injury that a finding to the contrary would be perverse, the verdict in his favour should not have been disturbed.

The defendants charge that it was improper to have attempted to work the coupling lever from the side ladder of a moving car; and that, if this were permissible under any circumstances, the crouching position which the plaintiff assumed to perform the opera-

tion — with his left hand he clutched the bottom rung of the ladder; his left foot rested on a step some 16 inches to 18 inches lower; his right foot hung in the air, and his body was strained forward and swung around the end of the car to permit of his right hand reaching the short lever to open the knuckle of the coupler — entailed very great and unnecessary danger. On these issues the jury found in the plaintiff's favour. While the terms in which they couched their finding — that the plaintiff could not under the circumstances, by the exercise of reasonable care have provided for the coupling of the cars with safety to himself — have been made the subject of criticism because of the use of the somewhat equivocal words "under the circumstances," I incline to think that the jury made sufficiently clear its intention to acquit the plaintiff of the charge of contributory fault or negligence — and, of course, to negative the view that his injury was ascribable solely to his own fault. Notwithstanding this finding, the learned judges of the Court of Appeal have held that the plaintiff's own carelessness was the main, if not the sole, cause of his injury, and have reversed the judgment in his favour and dismissed the action. With great respect, I am of the opinion that the evidence did not warrant the appellate court in taking that course.

The faults attributed to the plaintiff are (*a*) that he attempted to make the coupling without stopping the train; (*b*) that in endeavouring to make it he assumed an unnecessarily dangerous posture.

(*a*) According to the evidence, to effect a coupling between cars equipped with automatic couplers, the knuckle in the coupler of one car should be open and that in the coupler of the other closed. With both

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knuckles closed the coupling cannot be made, and if the cars come together with the knuckles in this position, although with a momentum which might not be too great with the couplers in proper position, it was stated by counsel for the appellant that there is a probability of the couplers being broken. There is no evidence, however, on this latter point. With both knuckles open the attempt to make a coupling is only occasionally successful.

While the plaintiff admittedly knew, before he gave the engineer the signal to back the train from the freight sheds for the purpose of making the coupling, that the knuckle on the Wabash car was closed, his evidence, though not as explicit as might be desired, is open to the construction that he did not then know that the knuckle on the stationary car, with which the Wabash car was to be coupled, was also closed. It is not suggested in the evidence that he should have known or ascertained how this was before he signalled to the engineer to back up in order to make the coupling. He says he discovered the fact after he had reached the top of the Wabash car which was moving at about 7 miles per hour and was then about four car lengths from the stationary car — a distance which would be covered in about 15 seconds. Asked why he did not then give a signal to the engineer to stop, his reply was "he was not looking — that is why he did not get one." While there is no charge of negligence against the engineer, there is no contradiction of this evidence. There is evidence in the record from defence witnesses as well as from witnesses for the plaintiff, that it is usual and customary for brakesmen to open the knuckles of automatic couplers for coupling as well as for uncoupling, by operating the levers from

the ladders when cars are in motion, and that a lever coming out to the side of the car can be operated from the side ladder "without any trouble."

The defendants proved the issue of a circular warning their employees against the "adjusting" of couplers while cars are in motion. Some witnesses deposed that it was the previous "unwritten law" that this should not be done. But the plaintiff, who was not a regular brakesman, had not received this circular; and the witnesses for the defendants prove that opening the knuckle of a coupler by using the lever is not "adjusting" the coupler within the meaning of that term as used in the circular. That process is resorted to only when the lever fails to work. It involves going between the cars and handling the coupler itself. Hence the prohibition. This adjusting or handling of the coupler is what two of the defence witnesses pronounced dangerous; and, when pressed on cross-examination, the defendants' witnesses constantly revert to "adjusting" as the dangerous and forbidden thing. There is no suggestion in the evidence of any specific rule of the defendant company relating to the operation which the plaintiff was performing other than that contained in circular No. 4, and the so-called "unwritten law" which preceded it, forbidding the "adjusting" of couplers on moving cars. What the plaintiff was doing was not "adjusting." The general rule against taking chances is referred to. But the evidence is that it is customary, and necessary, for certain purposes, for brakesmen to ride on the side ladders of moving cars, and that it is usual to operate the levers of automatic couplers from them. The conductor, Harcourt, called by the defendants, says he would not report a brakesman under his orders for doing so.

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There is no evidence that the plaintiff knew of the shortness of the lever until he attempted to reach it from the side ladder with his right hand. On the whole evidence, in my opinion, it is not possible to say that the plaintiff's attempting to open the knuckle of the coupler while the train was in motion was so clearly a wrong or improper thing that it is fatal to his right to recover notwithstanding that the jury has found in his favour on the charge of negligence against him. On this branch of that charge there was evidence to support the finding, and it should not have been disturbed.

(*b*). Then as to the plaintiff's position when he endeavoured to operate the lever: On reaching the foot of the ladder and realizing that the lever was short he was confronted with a situation of some difficulty. Had the lever been of normal length, the defendants' witnesses say that he could easily have accomplished what he intended to do. The car on which he was was moving at the rate of 7 miles an hour. He scarcely had time to get down and open the knuckle from the ground even if he could descend with safety, or, having got down, could reach and operate the lever while the car was moving as rapidly as it was. The defence witnesses do not say that he could not, as a result of crouching as he did, swing his free right arm farther around the end of the car. That may have been, for aught that the testimony discloses to the contrary, if not the only, the most effective means of reaching the short lever. There is no evidence that the fireman was then on the locomotive or that the plaintiff could have signalled him to stop. He was on the wrong side of the train to signal the engineer. When he had left the top of the car the engineer was not looking in his

direction. Should he have acted on the chance that if he again mounted the ladder he might find the engineer looking and might successfully signal him in time to have the train stopped before the cars would come together ? Should he have attempted that, or allowed the cars to meet at whatever risk there might be of breaking the couplers because both were closed ? Was it clearly wrong for him under the circumstances to have attempted to operate the lever of the coupler with his right hand by swinging it around the end of the car ? In the effort to reach that lever he assumed a position which railway men condemn. But there is no evidence that he could have reached it had he held himself more erect. The objection which the defence witnesses take to the position which he assumed is that it was so strained that it could be held "only for a short distance." But the moving of the lever would require the plaintiff to remain in that position only for a moment. He was an athlete, 22 years of age. Whether he should have realized that he was incurring risk and to what degree was eminently a question for the jury who had the advantage of seeing him. If he did err in the judgment which he formed on the spur of the moment as to what his duty required him to do, it was again for the jury to say whether that error under the circumstances amounted to negligence or fault on his part. They found that it did not. I have failed to discover in the record sufficient to justify an appellate court in setting aside that finding and holding that the evidence clearly establishes that the plaintiff was so negligent that he should be held to have been the author of his own injury notwithstanding the contrary opinion of the jury.

They are the tribunal entrusted by the law with the determination of issues of fact, and their conclusions on such matters ought

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not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at. *Toronto Railway Co.* v. *King*(1), at page 270.

With great respect for the distinguished judges of the Ontario Court of Appeal, I would for these reasons allow this appeal with costs and would restore the judgment entered by the learned Chancellor upon the verdict of the jury.

BRODEUR J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Creswicke & Co.*

Solicitors for the respondents: *MacMurchy & Spence.*

(1) [1908] A.C. 260.

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in the alternative, damages for deceit, the trial judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim, ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full court (46 N.S. Rep. 156) and the defendants sought to appeal to the Supreme Court of Canada.—*Held*, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the "Supreme Court Act"; and that the court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) followed. DUNN *v.* EATON **205**

2——*Election law — Preliminary objections—Interlocutory motions — Construction of statute—"Dominion Controverted Elections Act," R.S.C.*, 1906, *c.* 7, *s.* 64.] Several of the preliminary objections to a petition against the election of a member of the House of Commons of Canada having remained undisposed of, on the day before the expiration of the six months limited for the commencement of the trial by section 39 of the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, the petitioner applied to a judge, by motion, (*a*) to obtain an enlargement of the time for the commencement of the trial, and, (*b*) to have a day fixed for the hearing on such preliminary objections. On appeal from the judgment dismissing the motions.—*Held*, that the judgment in question was not appealable to the Supreme Court of Canada under the provisions of section 64 of the "Dominion Controverted Elections Act." *L'Assomption Election Case* (14 Can. S.C.R. 429); *King's County Election Case* (8 Can. S.C.R. 192); *Gloucester Election Case* (8 Can. S.C.R. 204), and *Halifax Election Case* (39 Can. S.C.R. 401) referred to. TEMISCOUATA ELECTION **211**

3——*Final judgment—Further directions —Master's report.*] On the trial before

the Chancellor of Ontario of an action claiming damages for breach of contract judgment was given for the plaintiffs with reference to the master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The master then made his report which, on appeal to the Chief Justice of the Common Pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiff for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together, but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial, having applied without success to the court below for an extension of time to appeal from the latter judgment. See *Nelles* v. *Hesseltine* (27 Ont. L.R. 97).—*Held*, Brodeur J. dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the master's report and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision, and the Supreme Court being required by statute to give the judgment that the Court of Appeal should have given was likewise debarred from reviewing these earlier decisions. HESSELTINE V. NELLES **230**

4——*Habeas corpus — "Supreme Court Act," s.* 39(*c*)*—Criminal charge—Prosecution under provincial Act—Application for writ — Judge's order.*] By sec. 39 (*c*), of the "Supreme Court Act," an appeal is given from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * not arising out of a criminal charge.—*Held, per* Fitzpatrick C.J. and Davies and Anglin JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the "Nova Scotia Temperance Act" are proceedings on a criminal charge

NEW TRIAL—*Criminal law—Indictment for murder—Trial—Evidence—Criminal intent—Provocation—"Heat of passion"—Charge to jury—Misdirection—Reducing charge to manslaughter—"Substantial wrong"—Criminal Code, ss.* 261, 1019—*Appeal—Questions to be reviewed.*] On a trial for the murder of a police officer there was evidence that E. and J. had set out from their home, during the night when the deceased was killed, with the intention of committing theft; J. and his wife testified that, on returning home, E. had told them that a man, whom he supposed to be a secret-police constable, had pointed a pistol at him and told him to "go to hell" and that he had shot him. The defence was rested entirely upon *alibi* and the accused testified on his own behalf stating that he had been at home during the whole of the night in question, but making no mention of any facts concerning the shooting. In his charge the trial judge reviewed the evidence in a general way, and told the jury that, upon the evidence adduced, they must either convict or acquit of the crime of murder, that they could not return a verdict of manslaughter, that if they believed J.'s account of what happened to be substantially true they should convict of murder; and he did not instruct the jury as to what, in law, constituted manslaughter nor as to circumstances on which the verdict might be reduced to manslaughter. He was convicted of murder.—*Held*, Duff J. dissenting, that, on the evidence, the charge of the trial

judge was right, and that the omission to instruct the jury in respect to manslaughter did not occasion any substantial wrong or miscarriage which could justify the setting aside of the conviction nor a direction for a new trial.—*Per* Fitzpatrick C.J. and Idington J.—In a criminal appeal, it is doubtful whether any question except that upon which there was a dissent in the court below could be reviewed on an appeal to the Supreme Court of Canada.—*Per* Duff J. dissenting.—In the circumstances of the case, the effect of the charge was to withdraw from the jury some evidence which ought to have been considered by them and which if considered by them might have influenced them favourably towards the accused in arriving at their verdict; consequently some substantial wrong was thereby occasioned on the trial and the conviction should not be permitted to stand. EBERTS *v.* THE KING **1**

2——*Criminal law—Indictment for murder——Trial—Charge to jury—Misdirection—Constructive murder—Natural consequence of act.*] On the trial of an indictment for murder of one Kenneth Lea it was proved that the prisoners, who had been dhinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away, and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah, where he stood, when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a hospital in Halifax where he died shortly after. The trial judge in charging the jury instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not it was manslaughter, drawing their attention especially to section 256 and 259(*b*) of the Criminal Code. The prisoners were found guilty of murder. On soners were found guality of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserved case: —*Held*, that the above direction to the

SUBSTITUTION—*Construction of will—Trust — Death of grevé—Accretion — Partition — Apportionment in aliquot shares—Distribution of estate—Partial intestacy — Devolution.*] By his will, in 1845, M. devised his estate to trustees charging them with its administration in a manner intended to secure the enjoyment of the revenues by his surviving children and their descendants so long as the law would permit; he provided for the division of his estate into as many equal parts as he should leave children him surviving: "pour chacune de ces parts ou portions de mes biens representer les biens mobiliers et immobiliers dont chacun de mes dits enfants aura seulement la moitié des revenus sa vie durante, ainsi que ci-après pourvu, et pour les revenus de chacune de ces parts ou portions de mes biens être réversibles après le décès de chacun de mes dits enfants aux enfants nés en légitimes mariages d'eux, mes dits enfants, respectivement, et être substitué de descendants en descendants, et ce indéfiniment, ou autant que permis par la loi, en observant que je veux et entends que lors de chaque succession ou transmission de mes biens il en soit fait partage, autant que possible, entre chacun de mes descendants de manière à pouvoir connaître et distinguer la part ou portion des biens dont chacun d'eux aura les revenus sa vie durante."—At the time of his death, in 1847, eight of his children survived the testator and his estate was, accordingly, apportioned so far as then possible, the residue, not then conveniently divisible, being held in suspense as a ninth share to be subsequently divided from time to time as it

Substitution—*Continued.*

became possible to do so. Of the eight shares, that attributable to L. M., one of the children, was enjoyed by him up to the time of his death, in 1887, intestate as to the share in question and without issue.—*Held*, Brodeur J. dissenting.—That, as the will did not give the children and grandchildren of the testator any rights as proprietors in his estate, there was no substitution created by its provisions.—*Held*, also, Davies and Brodeur JJ. dissenting.—That, on the death of L. M. without issue, the share allotted to him remained vested in the trustees subject to distribution among the children of the testator and their descendants in the same manner and upon the same conditions as if L. M. had pre-deceased the testator and the estate had been originally apportioned into seven instead of into eight parts.—*Per* Davies J.—As there was no provision in the will in respect to children dying without issue, and as there was no collateral substitution, there was intestacy resulting, on the death of L. M. without issue, in regard to the share allotted to him; consequently, it remained vested in the trustees for the benefit of and to be distributed amongst the heirs of the testator living at that date. —*Per* Brodeur J. (dissenting).—The will had the effect of creating a direct and collateral substitution. At the death of L. M. his brothers and sisters became substitutes and their descendants are *appelés*.—Judgment appealed from (Q. R. 20 K.B. 1) reversed. MASSON v. MASSON **42**

TARIFF — *Customs duty — Canadian Tariff*, 1907, *items* 503-506—*Importation of lumber—"Sawn planks"—"Dressed on one side only"—"Not further manufactured"—Sizing by saw—Free entry.*] Under item 504 of the "Customs Tariff, 1907," the importation into Canada is permitted free of duty of lumber described as "planks, boards and other lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured."—*Held*, reversing the judgment appealed from (14 Ex. C.R. 53), Duff and Anglin JJ. dissenting, that sawn boards or planks which have been "dressed on one side only" by a machine which not only dresses them on one side

WORDS AND PHRASES.