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1923

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir Louis Henry Davies C.J., K.C.M.G.
" John Idington J.
" " Lyman Poore Duff J.
" Francis Alexander Anglin J.
" Louis Philippe Brodeur J.
" Pierre Basile Mignault J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Sir Lomer Gouin K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. D. D. McKenzie K.C.
The Hon. E. J. McMurray K.C.

68208—A1½

MEMORANDUM

On the tenth day of October, 1923, the Honourable Louis Philippe Brodeur resigned the office of Puisne Judge of the Supreme Court of Canada and, later on, was appointed to the office of Lieutenant-Governor of the province of Quebec.

ERRATA

Page 69, third line of head-note—letter "W" should read letter "C."

Page 107, thirtieth line of head-note—the word "unforceable" should read "unenforceable."

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DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

A. E. HAMILTON, (DEFENDANT).....APPELLANT; 1922 *Oct. 10.

AND

G. H. EVANS AND OTHERS, (PLAINTIFFS)..RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Jurisdiction—Amount in controversy—Addition of interest to amount of judgment—"Supreme Court Act", 10-11 Geo. V., c. 32, s. 40.

Under the provisions of section 40 of the "Supreme Court Act", as enacted by 10-11 Geo. V., c. 32, interest from the date of the judgment of the trial court to the date of the judgment of the appellate court cannot be added to the amount of the judgment of the trial court, in order to bring the "matter in controversy" up to an amount exceeding two thousand dollars.

MOTION by way of appeal from an order of the registrar dismissing appellant's motion to affirm the jurisdiction of this court.

The appellant moved by way of appeal from an order of the registrar dismissing his motion to affirm the jurisdiction of the court. The action was begun after the 1st July, 1920. By the judgment pronounced at the trial, the plaintiff recovered $1,974.57, including interest to the date of the judgment. An appeal to the Court of Appeal was

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dismissed. Special leave to appeal was not asked for, and the defendant gave notice of appeal to this court. The question was as to the construction of sec. 40 of the "Supreme Court Act," as enacted by 10-11 Geo. V., c. 32, which reads as follows:

> Where the right to appeal or to apply for special leave to appeal is dependent on the amount or value of the matter in controversy, such amount or value may be proved by affidavit, and it shall not include interest subsequent to the date on which the judgment to be appealed from was pronounced or any costs.

By sec. 39, it is provided that:

> Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless,
>
> (*a*) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,
>
> (*b*) special leave to appeal is obtained as hereinafter provided.

Geo. F. Macdonnell, for the appellant, contended that "the judgment to be appealed from" is the judgment of the Court of Appeal, and that interest at the statutory rate from the date of the judgment at the trial to the date of the judgment of the Court of Appeal should, therefore, be added to the $1,974.57 awarded by the first mentioned judgment, which would bring "the matter in controversy" up to an amount exceeding the two thousand dollars.

Clarke, for the respondent, argued that, since the judgment of the trial court had been affirmed on appeal, it was the judgment to be "appealed from" within the meaning of section 40, in which Parliament meant to embody the effect of the decisions of the court in *Toronto Railway Co.* v. *Milligan* (1), and like cases. "The matter is controversy in the appeal" (s. 39, former s. 48c), was that of which recovery had been awarded by judgment at the trial and did not include interest subsequently accrued.

By THE COURT:

We agree with the position taken by counsel for the respondent. The motion will be dismissed with costs.

Motion dismissed with costs.

(1) [1908] 42 Can. S.C.R. 238.

ADEODAT CHAURET (DEFENDANT).....APPELLANT; 1922 *Oct. 30, 31. *Dec. 19.

AND

DAME MARIE JOUBERT AND OTHER (PLAINTIFFS) ..... RESPONDENTS.

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

Sale of land—Hypothec—Discharge—Consideration—Transfer of another hypothec—Second hypothec forfeited—Warranty as to its existence—Error—Arts. 992, 1013, 1015, 1020, 1085, 1508, 1511, 1574, 1576, 1693 C.C.—Art. 1110 C.N.

The respondents, being the owners of a hypothec of $5,000 on a certain lot belonging to appellant, gave the latter a discharge of this hypothec and accepted in lieu thereof a transfer from appellant of part of a $22,000 mortgage, being the balance of the purchase price of three other properties. The transfer of the mortgage by appellant to respondents was made "sans autre garantie que celle de l'existence de la créance," the respondents also declaring themselves satisfied with the hypothec securing the sum transferred "aux risques des dites cessionnaires qui déclarent être contentes et satisfaites de l'hypothèque garantissant la somme présentement transportée sans s'en rapporter en aucune façon sur la solvabilité du cédant." Afterwards, two of the above-mentioned properties were taken back by a prior owner by forfeiture proceedings under a resolutory clause and the third sold for taxes. As a result, both the appellant and the respondents lost their entire claim as mortgagees on these properties. The respondents then brought action against the appellant to annul the above-mentioned deeds of discharge and transfer.

Held that, under the circumstances the warranty of the existence of the debt comprised that of the existence of the mortgage, and as this mortgage was destroyed by the retroactive effect of the resolutory condition and of the sale for taxes, the respondents were entitled to recover the amount for which they had given a discharge when they accepted the transfer made them by the appellant.

Per Duff and Brodeur JJ. and *semble, per* Anglin J.—The transaction is also annullable as being infected by error *in substantia*.

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action.

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

Eug. Lafleur K.C. and *Louis Boyer K.C.* for the appellant.

P. C. Ryan K.C. for the respondents.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Mignault in which I concur, I would dismiss this appeal with costs.

IDINGTON J.—I concur in the judgment of Mr. Justice Mignault in dismissing the appeal herein with costs.

DUFF J.—This appeal has caused me not a little perplexity and I am still far from confident that the decision I am concurring in is the right decision. Mr. Ryan, who presented his argument with lucidity as well as the most commendable candour, in effect supported the judgment below on one ground. His contention was that the instrument of transfer, in part by its explicit language and in part by necessary implication, imports a warranty of the existence of a hypothec as an effective hypothec on the lands described in the instrument.

With the greatest possible respect, and with some diffidence because of the difference of opinion upon the point, I cannot satisfy myself that that is a contention to which effect should be given. The subject of warranty is expressly dealt with in a clause of the instrument. The language of that clause does not in itself admit of doubt as to its meaning. There is a warranty of the existence of the debt transferred; that as it stands, I think, necessarily excludes any warranty on the subject of the hypothec and there is nothing in the other clauses of the instrument which, in my opinion, can fairly be held to modify the effect of the warranty clause. The declaration by the transferees that they are relying on the hypothec rather than on the solvability of

the debtor, does not, I think, when the context is considered, import any undertaking as to the hypothec. In the absence of an express warranty it would, no doubt, import a warranty as to the existence of the hypothec but it does not, I think, imply, when read together with, as it must be read, the warranty clause, any modification of that clause.

This view as to the effect of the warranty clause is not without support from authority; Baudry-Lacantinerie, Vente, no. 820. The question is, however, I think, a question of construction of language, and so treating it the result is, I think, as I have stated it.

Assuming, however, that a warranty as to the existence of the hypothec is to be found in the terms of the instrument I am still unable to agree that a right of action is in consequence vested in the transferees.

For the purpose of discussing the point I concede that the existence of the hypothec for this purpose means the existence of a hypothec which affects the lands mentioned in the instrument. I am unable to agree that such a warranty, if it be found in the instrument, is on the facts unfulfilled. Consider the situation; the creator of the hypothec was the owner of the lands under an agreement which exposed his title to extinction by the operation of a resolutive condition depending upon the non payment of the purchase money. The facts necessary to make the condition operative were not in existence at the critical time, the date of the transfer. The hypothec, it is quite plain, did in fact at the date of the transfer burden the title of the grantor of the hypothec, a title which was a title to the land subject to the resolutive condition. It was in consequence, in my opinion, an existing hypothec affecting the lands in question.

As against that it is said that by the law, once the *condition résolutoire* went into effect, the title of the owner subject to the condition is deemed to have been non-existent *ab initio*. While this is quite true it is none the less the fact that at the time of the transfer there was an existing title which was a right *in rem* subject to be divested upon the happening of the condition. I am unable to follow the reasoning by which it is concluded that in such

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circumstances there was not in contemplation of the warranty clause at that time an existing right in the immoveable in question.

I have examined with care the authorities cited in support of the proposition and I have been unable to discover a single statement of the law which supports the proposition, nor among the numerous illustrations given by the authors can I find one which supports it by analogy. I find it laid down again and again that where the specific debt which is the object of a sale is after the sale annulled by a judgment in an *action en nullité* based upon facts existing at the time of the sale that the ordinary warranty is exigible. That is perfectly intelligible. Where by reason of fraud or mistake the *acte juridique* upon which the debt is supposed to be founded is annulled and the case of nullity existed anterior to the sale, it is an intelligible proposition that in contemplation of the warranty clause the debt was juridically non-existent; but I can find no statement of the law in any of the authorities which justifies the proposition that where the *acte juridique* itself is unassailable but that by reason of the terms and conditions of the *acte* the rights created are subject to a resolutive condition and are put an end to by the operation of the condition, I can find no single statement which treats such a case as falling within the warranty clause. The distinction, of course, is the very clear distinction between the annulling of the *acte juridique* in consequence of some vice which affects it with *nullité* and the resolution of rights under the provisions of the contract which in itself is unassailable. Indeed the terms in which the subject is discussed by well known writers shew very clearly that the distinction has not been overlooked. See Baudry-Lacantinerie, no. 818.

On the other hand I have not been able to satisfy myself that I should be justified in dissenting from the view upon which I understand my brother Brodeur proceeds, the view namely, that the transaction in question is annullable as being infected by error *in substantiâ*. I find myself embarrassed in considering the question by the circumstance that counsel for the respondent did not press that view upon the argument and I think I should have no great

difficulty in reaching the conclusion that if the question here were to be determined by the Code Napoléon it must be decided in favour of the appellant. While under the law it might be very plausibly argued that the existence of the resolutive condition constituted a fact falling within the operation of the doctrine touching *vice caché* or *vice rédhibitoire* (though the terms of the warranty would on that assumption be conclusive) it could not, I should be inclined to think, be regarded as coming within Art. 1110 of the C.N. It may seem an audacious thing to express an opinion upon a point about which there is so much difference of opinion among French authors, but the reasoning of M. Wahl (*Revue Trimestrielle,* 1914, at p. 13) is, in my humble opinion, conclusive; and reference may be made also to Dr. Walton's book on Obligations, vol. 1, pages 266 et seq. However, my brother Brodeur has called my attention to the circumstance that the language of the Civil Code of Quebec (Art. 992) radically differs from that of the C.N. (Art. 1110) and the difference in language affords, I think, satisfactory evidence that the code adopted the view of Pothier's doctrine taken by Baudry-Lacantinerie (Obligations no. 54); and that whatever objections there may be in theory to the test of error *in substantiâ* (described as the subjective test by the French authors), that is the test which has been adopted in Quebec by the Civil Code. I agree that the existence of the *condition résolutoire* was a circumstance which, if it had been disclosed, would in all probability have been regarded by both parties as a defect which must be removed as a condition of the bargain which was made.

In the course of the argument Mr. Lafleur, in answer to questions put by myself as to this ground of support for the judgment below, urged that because the condition had become operative restitution was impossible and that consequently on that ground rescission could not be sustained.

On the whole, I think with much doubt, that although in fact there has been a radical change of circumstances since that change is due to the operation of the condition, that is to say, of the undisclosed defect, the right of rescission is not lost.

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ANGLIN J.—It is quite clear that the respondents were wholly unaware of the resolutory provision to which the title of two of the lots on which they were induced by the defendant to accept a hypothecary security was subject. They took that security from him in exchange for another on which he was personally liable to them and which it is admitted in his factum in this court was a perfectly safe security. It is in my opinion also reasonably certain that the respondents did not assume any risk as to the legal efficacy of the hypothec which they were so acquiring as a charge on the property it purported to cover. They did expressly acquit the appellant of all responsibility towards them as guarantor of the sufficiency of the value of that property as security for their investment and of the solvency of the principal debtor. But nothing was farther from their contemplation than the acquisition of *un contrat aléatoire*. What they intended to buy was an interest in an absolute and indefeasible hypothecary security—not in a security subject to the risk of defeasance.

As the sale of a debt secured by hypothec carries with it as an accessory the hypothec by which it is secured (Art. 1574 C.C.), so the warranty of the existence of such a debt, when implied by law (Art. 1576 C.C.), involves a warranty of the existence of the hypothecary security. (Fuzier-Herman, Rep. Vbo. *"Cession des Créances* no. 392; S. 1857. 1. 602)—especially when as here it is expressly described in the instrument of transfer as so secured. A conventional warranty of the existence of a debt secured by hypothec should, I think, be given the same effect, and, notwithstanding the two cases in the Cour de Cassation in 1873-4, noted by my brother Mignault, in order to negative such warranty of the hypothec under circumstances such as the present case presents I should require a more explicit exclusion of it than is involved in the words

sans autre garantie que celle de l'existence de la créance.

The question is wholly one of interpretation on which in France the decision of *les juges des faits* is conclusive. Baudry-Lacantinerie, (3 ed.) *"De la vente et de l'échange"*, No. 820, *in fine*.

The subject of the sale in the present instance—what the respondents contracted for—was not merely, nor chiefly, the personal obligation of the hypothecary debtor; it was the security for their investment afforded by the charge of that obligation on certain real property. That charge was the real "matter of the contract"; they agreed to take not a debt, but a debt described as affecting certain named immoveables. That was the thing sold. The transfer of a debt not so secured was not a fulfilment of the essential obligation of the vendor. S. 1898. 2. 131.

All the circumstances of the present case make it impossible to believe that the respondents intended to forego the legal obligation of the appellant as vendor to warrant the existence of the hypothec. (Arts. 1508 and 1576 C.C.) The stipulation whereby the appellant restricted his warranty—

> aux risques des dites cessionnaires qui déclarent être contentes et satisfaites de l'hypothèque garantissant la somme présentement transportée, sans s'en rapporter, d'aucune façon sur la solvabilité du cédant, en ce qui concerne la somme présentement transportée, en capital, intérêt et accessoires

—is, I think, susceptible of meaning either that the purchasers assumed all risks as to the hypothec, including that of its existence, or merely that they took the risk of the sufficiency in value of the hypothecated property and of the solvency of the principal debtor. Where the purchaser did not know the danger of eviction, a stipulation excluding warranty does not entitle the vendor to retain the price unless the purchaser clearly assumed the risk. Art. 1510 C.C.; Baudry-Lacantinerie, Vente et Echange, (3 éd.) no. 401 *in fine*. Having regard to its terms and its place in the contract, and giving due effect to Arts. 1013, 1015 and 1020 C.C., the restrictive stipulation quoted, in my opinion, should not be regarded as excluding a warranty of the existence of the hypothec as a charge on the property it purported to cover not subject to defeasance by reason of any inherent defect existing before the sale. If the wider effect for which he now contends was intended by the defendant I should find it very difficult to acquit him of purposely entrapping the plaintiffs, which would amount to fraud. The resolutory provision to which the title of two

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of the three lots purported to be charged was subject was such an inherent defect existing before the sale. Baudry-Lacantinerie, (3 éd.) *"Vente et Echange"*, no. 352. Its enforcement resulted in the respondents losing the greater part of their security and in a consequent breach of the warranty which in my opinion was given them by the appellant.

The remaining lot unaffected by the resolutory provision was inadequate as security and is not now available having since been sold by the sheriff. The appellant is not in a position to restore the respondents to their former position as holders of a hypothec securing $5,000 on lot no. 693. They have entirely lost that sum of money owing to the fatal defect to which the title they acquired from the appellant to the hypothecary security sold by him was subject. He is in my opinion liable to make good that loss.

BRODEUR J.—Cette cause présente une multiplicité de faits qui rendent d'abord un peu difficile la découverte des points en litige. Il y avait dans l'action des allégations de représentations erronées et de défaut de considération qui ont nécessité la preuve d'une foule de dates et de circonstances jetées un peu pêle-mêle dans le dossier. La cour supérieure a également déclaré qu'il y avait eu fraude, et ce jugement a été confirmé par la cour d'appel. Je dois mentionner cependant que certains juges de la cour d'appel ont virtuellement écarté la question de fraude. De plus, devant cette cour, l'avocat des demanderesses a reconnu que les éléments essentiels de la fraude ne paraissaient pas avoir été prouvés, et il a déclaré d'ailleurs qu'il n'insistait pas sur ce point.

J'ai lu et relu bien attentivement ce dossier, et je vois qu'en effet la preuve ne saurait nous justifier de déclarer que Chauret s'est rendu coupable de fraude.

Mais, tout en reconnaissant sa bonne foi, j'en suis venu à la conclusion qu'il est responsable envers les demanderesses, soit en vertu de la garantie qui incombe à tout vendeur, soit en vertu de la créance hypothécaire qu'il leur devait originairement et qu'elles auraient quittancées sans valide considération.

Les faits nécessaires pour l'élucidation de la cause au double point de vue que je viens de mentionner sont les suivants:

Dame Marie Joubert et sa fille avaient une hypothèque de $5,000 sur le lot n° 693 du quartier Saint-Louis, à Montréal qui leur avait été consentie par St-Germain, le prête-nom de Chauret, comme propriétaire de ce lot de terre. Il y avait deux autres hypothèques, au montant de $8,500, qui avaient priorité. Mais comme la propriété valait environ $20,000, les demanderesses avaient raison de considérer leur hypothèque comme bien assurée.

Chauret, le 19 mai 1916, vendait cette propriété n° 693 au nommé Rabinovitch pour la somme de $22,000 et prenait en paiement une égale somme qui était due à Rabinovitch par une dame Levitt et qui affectait les lots 671, 474 et 475 du même quartier Saint-Louis.

Comme Chauret avait à libérer le lot n° 693 de l'hypothèque de dame Joubert et de sa fille, il s'est mis en instances auprès de ces dernières, par l'entremise de différentes personnes en qui elles avaient confiance, pour leur faire accepter en paiement de leur hypothèque une somme de $5,000 qui serait prise à même l'hypothèque de $22,000 que madame Levitt devait à Rabinovitch. On a représenté à dame Joubert et à sa fille qu'elles auraient un plus fort taux d'intérêt et que leur créance serait mieux assurée, vu qu'elle serait hypothéquée sur des immeubles qui valaient environ $75,000 et qu'il n'y avait que $36,000 ayant priorité. Alors elles ont signé une quittance libérant le n° 693 déchargeant Chauret, et ce dernier leur a cédé et transporté $5,000 à être pris sur la créance Levitt.

Cet acte de transport contient deux dispositions importantes.

Il est déclaré d'abord dans cet acte que Chauret cède et transporte *sans aucune autre garantie que celle de l'existence de la créance* la somme de cinq mille piastres due par Mme Levitt et affectant les lots n^{os} 671, 474 et 475; et à la fin de l'acte il est déclaré que cette somme est transportée

aux risques des dites cessionnaires qui déclarent être contentes et satisfaites de l'hypothèque garantissant la somme présentement transportée,

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sans s'en rapporter d'aucune façon sur la solvabilité du cédant en ce qui concerne la somme présentement transportée en capital, intérêts et accessoires.

Par ces actes de quittance et de transport, Chauret se débarrassait de son obligation personnelle, qu'il avait contractée envers les demanderesses, et il voulait évidemment éviter la garantie contre l'éviction à laquelle tout vendeur de créance est tenu.

Ces clauses, que j'ai citées textuellement et qui ont été soigneusement mises dans l'acte par son notaire, le notaire Dérome, ont été évidemment insérées dans ce but. On ne les a pas expliquées aux cessionnaires, mais on s'est simplement contenté de leur dire que leur hypothèque de $5,000 était mieux assurée sur les lots 671, 474 et 475 que sur le lot n° 693. On s'est bien gardé de leur mentionner que le créancier antérieur, Joseph Lamoureux, avait le droit de se prévaloir d'une clause résolutoire qui aurait pour effet de mettre cette hypothèque à néant sur les deux lots 474 et 475.

En effet, Lamoureux, qui était le bailleur de fonds des lots n^{os} 474 et 475, avait stipulé, dans son contrat de vente de 1913, que si l'acheteur ne lui payait pas les intérêts et le capital du prix de vente, ainsi que les taxes municipales, il pourrait faire résilier le contrat de vente qu'il avait consenti. Par l'exercice de l'action résolutoire il faisait disparaître tous les droits réels concédés sur ces immeubles par des personnes qui n'en étaient devenues propriétaires que subséquemment.

Ayant, en novembre 1916, exercé le droit qu'il avait en vertu de cette clause résolutoire, Lamoureux obtenait la résiliation de la vente, redevenant propriétaire des lots 474 et 475, et les hypothèques que dame Joubert et sa fille avaient sur ces deux lots étaient mises à néant. (4 Aubry et Rau, p. 80, 4ème édition.)

Nous avons à examiner si elles ont un recours en garantie contre Chauret.

En vertu de la loi, le vendeur d'une créance est tenu de garantir à l'acquéreur qu'elle existe (art. 1576 C.C.). L'article 1693, qui est l'article correspondant du code Napoléon, dit que

celui qui vend une créance doit en garantir l'existence *au temps du transport,* quoiqu'il soit fait sans garantie.

Notre article 1576 n'a pas reproduit les mots "au temps du transport" que nous retrouvons dans l'article 1693 du code Napoléon. Malgré que l'article du code Napoléon ne soit pas aussi explicite que le nôtre, on est d'opinion cependant en France que cette garantie couvre même des créances qui auraient une existence juridique lors du transport mais qui serait annulée plus tard pour quelques raisons. Guillouard, Vente, vol. 2, p. 363, n° 829, dit en discutant l'article 1693, après avoir souligné les mots *en garantir l'existence au temps du transport:*

> Le cédant est garant de droit, disons-nous, de l'existence de la créance au moment de la cession.
>
> Il suit de là que si à ce moment la créance est payée, compensée, novée, prescrite, en un mot éteinte par un mode quelconque, le cédant sera garant.
>
> Il en sera de même si la créance a bien une existence juridique lors de la cession, mais qu'elle soit à ce moment atteinte d'un vice qui en fasse plus tard prononcer la nullité, comme l'incapacité du débiteur ou l'irrégularité du titre.

Il ne peut pas y avoir de doute que si la créance est annulée plus tard le cédant est tenu d'indemniser son acquéreur.

Mais Chauret dit: La garantie que j'ai donnée est conventionnelle et ne porte que sur l'existence de la créance: elle ne touche pas à l'existence de l'hypothèque.

Que comporte la vente d'une créance? Est-ce que cela comprend les hypothèques? L'article 1574 C.C. nous déclare que la vente d'une créance en comprend les accessoires, tels que cautionnement, privilège et hypothèque. Le contrat intervenu entre les parties énonçait que cette créance vendue était hypothécaire; et il me paraît bien évident, en lisant l'acte et surtout la clause concernant la garantie, que la convention des parties portait surtout sur l'existence de l'hypothèque et que la garantie légale ne portait pas seulement sur la créance elle-même.

Mais, dit le défendeur Chauret, il a été stipulé dans le contrat que le transport était fait aux risques des cessionnaires qui étaient contentes de l'hypothèque qui garantissait la somme transportée.

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Comme je viens de le dire, le cédant qui vend une hypothèque est obligé en droit de garantir l'existence de cette hypothèque. La stipulation de non garantie ne portait que sur la suffisance de l'hypothèque et voulait dire que si la propriété ne se vendait pas à une somme assez élevée pour payer les cessionnaires, ces dernières auraient à en souffrir; mais cette stipulation ne saurait affecter l'existence de l'hypothèque elle-même. Beaudry-Lacantinerie, dans son traité de la vente, au n° 401, 3ème édition, dit que la clause générale de non garantie est une dérogation au droit commun et qu'il faut revenir au droit commun chaque fois que la clause de non garantie est douteuse.

Je citerai sur ce point un arrêt de la cour d'Orléans confirmé par la cour de Cassation (Dalloz, 1859, 1, 125) et qui se lit comme suit:

> Attendu, en droit, que la vente ou cession d'une créance comprend tous les accessoires de la créance, tels que caution, privilège et hypothèque; que celui qui vend une créance doit garantir l'existence, au moment du transport, non seulement de la créance elle-même, mais encore de l'accessoire légal ou conventionnel qui y est attaché; que cette garantie est de la nature du contrat; qu'elle est due par le vendeur, même en l'absence de toute stipulation, parce qu'il ne peut se dispenser de livrer ce qu'il a promis sans s'exposer aux conséquences de la condition résolutoire, toujours sous-entendue dans les contrats synallagmatiques; que si, en matière de transport de créances, la simple garantie de droit, exprimée ou non exprimée, n'emporte pas l'obligation de répondre de la solvabilité du débiteur, du moins est-il constant que le vendeur est tenu des évictions dont il y aurait une cause ou un germe existant dès le temps du contrat, soit qu'elles procèdent, soit qu'elles ne procèdent pas du fait du vendeur.

Je citerai aussi Aubry & Rau, 4ème édition, p. 442, où il dit:

> Le cédant est, indépendamment de toute convention spéciale, tenu de garantir l'existence et la légitimité de la créance, ainsi que son droit de propriété au moment du transport. Il y a donc lieu à garantie, non seulement dans le cas où la créance cédée se trouvait déjà, au moment du transport, soit frappée de prescription, soit éteinte par compensation, ou tout autre mode de libération, et dans celui où elle n'appartenait pas au cédant, mais encore lorsque le titre dont elle procède vient à être annulé ou rescindé.

Voir art. 1545-1088-1085-2038-2081 C.C.

Le droit hypothécaire cédé par le défendeur Chauret aux demanderesses étant disparu par la résolution du droit conditionnel ou précaire de celui qui avait consenti l'hypothè-

que, il en résulte que les demanderesses ont le droit de se tourner contre leur cédant et d'exercer l'action en garantie. Elles peuvent obtenir la restitution du prix ou des dommages (art. 1510, 1511 C.C.). La restitution du prix, dans le cas actuel, c'est l'hypothèque qu'elles avaient sur le lot 693. C'est ce à quoi Chauret a été justement condamné par les cours inférieures.

Même s'il y avait doute sur le droit des demanderesses d'exercer l'action en garantie, je considère que les demanderesses, dame Marie Joubert et sa fille, devraient réussir à faire annuler la quittance et le transport de créance qu'elles ont respectivement signés et acceptés.

Comme je l'ai démontré plus haut, les demanderesses ont quittancé le défendeur et radié leur hypothèque sur le n° 693 parce que ce dernier leur cédait une créance hypothécaire sur les n^{os} 671, 474 et 475. C'était, en d'autres termes, un échange de créances hypothécaires que les parties faisaient et elles avaient en vue l'hypothèque comme étant la qualité substantielle de la chose vendue et cédée. La considération de la quittance signée par les demanderesses est donc le transport de la créance hypothécaire que Chauret avait sur les lots 671, 474 et 475.

Je veux croire que Chauret était absolument de bonne foi quand il a transporté cette créance hypothécaire affectant ces derniers lots. Les parties aux contrats étaient tous sous l'impression que cette hypothèque était valide et n'était pas sujette à une condition résolutoire. Il me paraît bien clair que si dame Joubert et sa fille avaient connu que cette hypothèque était sujette à une condition résolutoire elles n'auraient pas donné leur quittance et elles n'auraient pas accepté le transport de créance en question. Leur consentement est donc vicié et on doit dire alors que ces contrats sont annulables pour défaut de considération, ou plutôt pour cause erronée. Colin et Capitant, vol. 2, pages 293-296; Pothier, Obligations, n° 17; Larombière, Theorie et pratique des obligations, sur art. 1110.

La jurisprudence en France, dans une cause rapportée dans Sirey, 1898. 2. 131, a décidé que

le contrat de cession de créance, bien qu'il soit fait sans garantie, emporte pour le cédant l'obligation de délivrer au cessionnaire tout ce qu'il lui a promis.

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Chauret, dans le cas actuel, avait promis de livrer une créance hypothécaire. Or, par l'exercice d'une action résolutoire de la part du bailleur de fonds, cette créance est disparue et l'effet de cette résolution est rétroactif (art. 1085 C.C.). Il n'a donc pas livré ce qu'il avait contracté.

Pour toutes ces raisons, l'appel doit être renvoyé avec dépens.

MIGNAULT J.—Le dossier révèle un état de choses assez extraordinaire et certainement d'une grande complication.

Les intimées, madame Lecompte et sa fille Blanche Lecompte, avaient une créance de $5,000 assurée par une troisième hypothèque sur l'immeuble portant le n° 693 du cadastre du quartier Saint-Louis, à Montréal. Le 7 octobre 1915, cet immeuble fut vendu par le shérif et l'appelant s'en porta adjudicataire pour le prix de $11,997.10, selon le factum de l'appelant, le certificat de recherches dit $12,525.00. Le titre du shérif porte la date du 22 mars 1916, mais avant cette date, le 7 décembre 1915, l'appelant vendit l'immeuble n° 693 au nommé Georges St-Germain, qu'on a dit à l'audition, sans contradiction par l'appelant, avoir été le prête-nom de ce dernier. Le prix de vente était $12,500.00, dont $4,000.00 comptant et $8,500.00 payables au vendeur. Le même jour, 7 décembre 1915, l'appelant transporta $6,000.00 à prendre sur les $8,500.00 au nommé Médard Théoret. Le 19 mai 1916, St-Germain revendit le n° 693 à l'appelant pour le prix de $1,000.00, dit avoir été payé comptant, et de plus sujet à une hypothèque de $6,000.00, balance des $8,500.00 susdits. Le même jour, le 19 mai 1916, l'appelant vendit le n° 693 au nommé George Rabinovitch, pour $15,000.00, que le contrat déclare avoir été payés comptant, et de plus à la charge de ladite somme de $6,000.00, balance des $8,500.00.

Dans sa défense, l'appelant allègue que cette vente à Rabinovitch nécessitait le dégrèvement partiel du n° 693. Dans son témoignage, il déclare que St-Germain faisait un échange avec Rabinovitch lui donnant le n° 693 contre les numéros 671, 474 et 475 du même quartier St-Louis. St-Germain, le 7 décembre 1915, le jour de son achat de l'appelant, avait consenti, devant le notaire Gratton, une

obligation hypothécaire de $5,000.00 en faveur des intimés sur le n° 693, cette hypothèque devant être subséquente à une hypothèque de $8,500.00. Il est à remarquer que la vente de l'appelant à St-Germain, le transport par l'appelant à Théoret, et l'obligation de St-Germain en faveur des intimées ont eu lieu le même jour. Il appert au témoignage de l'appelant qu'au moment de la vente du shérif il avait été convenu entre l'appelant et le notaire Gratton, qui représentait les intimées, que celles-ci, au lieu de réclamer sur le prix de vente, consentiraient à prendre une hypothèque de $5,000.00 sur le n° 693. Les intimées ont été colloquées au jugement de distribution pour $4,030.99, mais elles ont renoncé à cette collocation pour prendre la garantie hypothécaire susdite. En faisant consentir cette obligation de $5,000.00 en faveur des intimées par son prête-nom St-Germain, l'appelant échappait donc à la nécessité de payer aux intimées le montant de leur collocation.

Les intimées avaient encore cette hypothèque lorsque l'appelant vendit le n° 693 à Rabinovitch. Mais il fallait, comme il l'allègue dans sa défense, faire dégrever partiellement cet immeuble. A cet effet, l'appelant ayant obtenu, le 19 mai 1916, de Rabinovitch un transport de $22,000.00 à prendre avec préférence sur une somme de $39,000.00, portant intérêt à 7%, que devait à Rabinovitch une veuve Levitt, affectant les lots n^{os} 671, 474 et 475 susdits, comme balance du prix de vente de ces lots, l'appelant fit proposer aux intimées d'abandonner leur hypothèque de $5,000.00 sur le n° 693 et d'accepter à la place le transport de $5,000.00 à prendre sur cette somme de $22,000.00, leur donnant ainsi un intérêt de 7% au lieu de 6% que comportait l'obligation de St-Germain.

Malheureusement pour les intimées elles se laissèrent persuader, et ce transport fut fait devant le notaire Dérome le 23 mai 1916. On peut noter la coïncidence des dates, la vente du n° 693 par St-Germain à l'appelant, la vente de cet immeuble par l'appelant à Rabinovitch, et le transport des $22,000.00 par Rabinovitch à l'appelant ayant été faits le même jour, 19 mai 1916. L'entente sans doute était que l'appelant ferait dégrever le n° 693 qu'il vendait à Rabinovitch. Ceci démontre bien l'intérêt de l'appelant, que les

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avocats de celui-ci mettaient en doute lors de l'audition, à faire consentir les intimées à abandonner leur hypothèque sur le n° 693. Du reste, peu importe l'intérêt de l'appelant, car, telle que je l'envisage, cette cause ne présente qu'une question de droit, savoir, l'effet de la garantie que l'appelant a donnée aux intimées.

Il faut s'arrêter un instant à l'acte de vente des numéros 671, 474 et 475, en date du 27 avril 1916, par George Rabinovitch à Mme Levitt, passé devant le notaire Dérome, qui a créé la créance de $39,000 dont $22,000.000 ont été transportés à l'appelant par Rabinovitch. Cet acte déclare que les propriétés vendues sont affectées de plusieurs hypothèques non déchargées, se montant en tout à $136,916.60, outre les $39,000.00, balance du prix de vente. Le transport des $22,000.00 par Rabinovitch à l'appelant n'est pas au dossier, il n'y en a qu'une note au certificat de recherches, et on ne sait pas quelle garantie elle comportait.

C'est avec quelque difficulté que j'ai pu tirer du dossier les renseignements que je viens de donner, car la cause n'a pas été bien faite. Il faut avoir recours tantôt aux actes produits, tantôt aux résumés d'actes non produits mais mentionnés aux certificats de recherches, et surtout comparer les dates, pour mettre en évidence les faits saillants de cette cause qui, on peut le dire, lui donnent une physionomie toute particulière.

C'est dans les circonstances que j'ai relatées, et toujours dans le but de dégrever le n° 693, ce qui rendait possible la transaction entre Rabinovitch et l'appelant, que celui-ci s'est adressé aux intimées. Madame Lecompte dit qu'on lui a présenté un acte de transport tout signé: l'appelant n'est pas sûr, mais croit avoir signé avant les intimées, et sa signature est la première à l'acte. Cet acte fut présenté à Madame Lecompte par le notaire Dérome, qui devait le recevoir, le notaire Gratton et un jeune avocat du nom d'Allan, ces deux derniers étant supposés être les "aviseurs légaux" des intimées. Ces messieurs n'ont pas été entendus comme témoins, autrement on saurait pourquoi ils ont conseillé aux intimées d'abandonner leur hypothèque sur le n° 693. Il est peut-être permis de supposer qu'on leur a représenté que les hypothèques déclarées à l'acte de vente entre

Rabinovitch et Mme Levitt avaient été radiées, car autrement le conseil qu'ils ont donné aux intimées ne serait pas le fait le moins remarquable de cette cause assez extraordinaire.

Et quant à ces hypothèques, à l'exception de celle de Lamoureux qui était le vendeur originaire, Mme Levitt avait obtenu du juge Bruneau, le 12 mai 1916, un jugement de radiation, mais, chose assurément bien extraordinaire, elle s'est désistée de ce jugement, et le 14 juillet 1916, elle faisait rendre par le juge Martineau un jugement lui donnant acte de son désistement et ordonnant au registrateur de faire disparaître les radiations faites en vertu du jugement du juge Bruneau. Lors de l'enquête, Mme Levitt était décédée et nous n'avons aucune explication du motif de son désistement.

Les intimées ont accepté l'acte de transport préparé à la demande de l'appelant et le même jour, par acte passé devant le notaire Gratton, elles ont donné quittance à St-Germain, c'est-à-dire à l'appelant dont il était le prête-nom, de l'obligation de $5,000.00 assurée par hypothèque sur le n° 693. Leur garantie par le transport était une hypothèque sur les numéros 671, 474 et 475 du quartier St-Louis.

J'analyserai rapidement cet acte de transport du 23 mai, 1916. L'appelant y comparaît et déclare qu'il cède et transporte aux intimées "sans autre garantie que celle de l'existence de la créance", la somme de $5,000.00 à prendre après $6,000.00, déjà transportés ou à être transportés à Ludger Legault sur la somme de $22,000.00 transportée au cédant par George Rabinovitch et faisant partie du prix de vente dû à Rabinovitch par dame Jacob Levitt, laquelle somme, dit l'acte de transport, affecte les immeubles suivants (suit la description des lots n^{os} 671, 474 et 475). L'acte de transport expose que les cessionnaires déclarent avoir pris communication de l'acte de vente entre Rabinovitch et Mme Levitt, en avoir compris les termes, clauses et conditions et en être satisfaits. Et le cédant subroge les cessionnaires dans tous droits, actions, privilèges et hypothèques résultant des actes relatés jusqu'à concurrence de la somme transportée,

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mais aux risques des dites cessionnaires qui déclarent être contentes et satisfaites de l'hypothèque garantissant la somme présentement transportée, sans s'en rapporter d'aucune façon sur la solvabilité du cédant.

Mignault J.

Suit une acceptation du transport par Mme Levitt.

Mme Lecompte et sa fille Mlle Lecompte affirment qu'on ne leur a pas donné communication de l'acte de vente entre Rabinovitch et Mme Levitt. On s'est objecté à cette preuve pour la raison qu'on ne peut contredire un acte authentique que par inscription en faux et non autrement. Mais l'acte de transport se contente de dire que les intimées ont déclaré avoir eu communication de cet acte de vente, le notaire ne dit pas qu'il leur a donné cette communication. La preuve faite ne contredit donc pas les déclarations du notaire. mais seulement une déclaration d'une des parties, et l'inscription en faux n'était pas nécessaire.

On le voit, l'appelant prenait toutes les précautions possibles pour laisser les intimées sans recours contre lui. Mais il a garanti l'existence de la créance et l'acte déclare que cette créance affecte les immeubles décrits en l'acte. Du reste, la garantie de l'existence d'une créance comprend tous les accessoires de cette créance et partant les hypothèques qui en assurent le paiement (Baudry-Lacantinerie, Vente, n° 820). Voyez aussi l'article 1574, code civil.

Mais l'appelant cherche à affaiblir la garantie qu'il a donnée de l'existence de la créance en invoquant la clause citée plus haut par laquelle la subrogation aux privilèges et hypothèques est faite aux risques des intimées. C'est une question d'interprétation de l'acte, et, toujours en interprétant un acte d'après les circonstances de l'espèce, on a pu décider en France que la clause limitant la garantie à l'existence de la créance ne comprenait pas la garantie de l'existence des hypothèques (Dalloz, 1873.1.407; 1874.1.75). Mais ici les circonstances de l'espèce démontrent que ce que les parties avaient en vue c'était l'échange d'une garantie hypothécaire pour une autre garantie hypothécaire, et l'existence de cette dernière garantie hypothécaire était la considération principale du consentement donné par les intimées à l'échange que leur proposait l'appelant. La clause de subrogation où se trouvent les mots "mais aux risques des dites cessionnaires" ajoute qu'elles se déclarent

contentes et satisfaites *de l'hypothèque garantissant la somme présentement transportée.*

Peut-on soutenir que la garantie de l'existence de la créance ne comprenait pas, dans l'intention des parties, l'existence de l'hypothèque elle-même? Je ne le crois pas.

C'est, du reste, je l'ai dit, une question d'interprétation de l'acte, et pour ma part,—nonobstant les articles 1013 et suivants du code civil, qui, comme le disent les codificateurs, ne sont pas des règles impératives mais seulement l'indication d'un moyen de déterminer le sens d'un contrat—je ne puis donner le bénéfice du doute, si doute il y a, à l'appelant dont la conduite dans toute cette affaire me paraît pour le moins suspecte. L'appelant est un homme de profession et l'acte a été préparé d'après ses instructions et envoyé tout signé aux intimées qui ne paraissent pas bien expertes en affaires. J'interprète donc l'acte de transport comme garantissant l'existence de la créance et de ses accessoires, c'est-à-dire l'existence de l'hypothèque, mais comme laissant aux intimées le risque de la suffisance de cette hypothèque, si elle existait réellement au jour du transport.

Or voici ce qui est arrivé quant aux immeubles 474 et 475. Ces immeubles avaient été originairement vendus par le nommé Joseph Lamoureux aux nommés Isaac Kauffman et Louis Raich avec une clause résolutoire déclarant que faute de paiement de la balance du prix de vente et de tout versement d'intérêt ainsi que des taxes, la vente serait *ipso facto* nulle et de nul effet au choix du vendeur. Le 13 novembre 1916, Lamoureux poursuivit Kauffman et Raich, mettant en cause tous les acquéreurs subséquents, y compris Rabinovitch et les héritiers de Mme Levitt, et demandant, en exécution de cette condition résolutoire, l'annulation de la vente à Kauffman et Raich et de toutes les ventes subséquentes, y comprise la vente entre Rabinovitch et Mme Levitt. Jugement fut rendu le 15 janvier 1917, annulant toutes ces ventes.

Il est élémentaire de dire que la condition résolutoire s'opère rétroactivement. Les ventes sont donc annulées dès l'instant qu'elles ont été consenties, et toutes les hypothèques constituées par ces actes de vente sont censées n'avoir jamais existé. L'appelant ayant garanti l'existence de la

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créance et de l'hypothèque et cette hypothèque n'ayant jamais eu d'existence, il y a ouverture à son obligation de garantie (Baudry-Lacantinrie, Vente no° 818. On ne peut objecter que l'appelant a vendu tout le droit qu'il avait, et partant, un droit conditionnel, que ce droit conditionnel existait lors du transport et que son obligation de garantir l'existence de la créance a été remplie par lui. Cette objection ne tient pas compte du principe qui domine la garantie en matière de vente, et qui rend le vendeur garant de l'éviction subséquente à la vente mais dont la cause lui est antérieure. C'est ainsi que l'acheteur d'un immeuble, évincé par un précédent vendeur qui obtient la résolution de la vente, a droit à garantie (Baudry-Lacantinerie, Vente n° 352).

Il est vrai qu'il restait encore l'immeuble n° 671, mais cet immeuble paraît avoir été vendu pour les taxes municipales et avoir été acheté par Lamoureux, qui était le premier créancier hypothécaire, pour $1,000.00. Il suffit d'ailleurs à mon avis que les hypothèques sur les n°s 474 et 475 soient inexistantes pour donner lieu à la garantie qui incombe à l'appelant.

Dans toutes les circonstances de cette cause, je ne puis donner raison à l'appelant dans l'action intentée contre lui par les intimées. Il s'est fait décharger d'une obligation valable contractée pour lui par son prête-nom St-Germain, et dont les intimées auraient été payées, si elles n'avaient pas accepté le transport que leur a fait l'appelant. On peut dire qu'à la demande de l'appelant, et comptant sur sa garantie de l'existence de la créance hypothécaire Rabinovitch, les intimées ont lâché la proie pour l'ombre. L'appelant a peut-être été très habile, mais pas au point, à mon avis, de priver les intimées de la garantie de l'existence de la chose qu'il leur transportait. Et cette garantie suffit pour appuyer le jugement dont est appel.

Je suis d'opinion que l'appel devrait être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis Boyer.*

Solicitors for the respondents: *Pélissier, Wilson & Fortier.*

C. M. HENDERSON.....APPELLANT.

AND

M. E. FRASER AND E. G. HENDERSON..RESPONDENTS.

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*Nov. 9.
*Nov. 27.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Codicil—Legacies in both to same persons—Whether additional or substitutional.

By his will, J. N. Henderson gave, amongst other legacies, to the respondent Fraser $20,000 and to the respondent Henderson $10,000. The testator later made a codicil. The first clause was as follows: "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil." In the two other clauses, he bequeathed to each of the respondents a sum of $25,000.

Per Idington, Duff and Anglin JJ.—The two bequests in the codicil are additional to, and not substitutional for, the gifts made to the same legatees by the will. Davies C.J. and Brodeur and Mignault JJ. *contra.*

Judgment of the Court of Appeal affirmed on equal division of this court.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Hunter C.J. at the trial.

The Montreal Trust Company, trustee under the will, made application to the Supreme Court of British Columbia for the determination of the following question arising out of the construction of the last will and codicil of the late J. N. Henderson, namely: "Whether the legacies mentioned in the codicil were cumulative or whether they were in substitution of the legacies mentioned in the will."

Hunter C.J. held that the legacies given by the codicil were substituted for those in the will. The Court of Appeal, *per* Macdonald C.J.A. and Martin J.A., reversed this judgment, McPhillips J.A. dissenting.

The present appellant is a party to the proceedings, both in his own interest as residuary legatee and as representative of all other legatees, by virtue of an order made in these proceedings.

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

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Tilley K.C. for the appellant: Upon the evidence and under the circumstances in this case, the intention of the testator was to make the legacies in the codicil substitutional.

If any presumption of law arises in this case, it is rebutted by the following circumstances as stated in the factum:

(*a*) The use of the words "I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil", as the first clause in the said codicil, instead of the usual ratification clause, together with the fact that no change was made by the codicil in the provisions of the will, except in the legacies to the respondents;

(*b*) The total estate being sufficient to pay legacies in full and leave a certain amount in the residuary fund if the legacies in the codicil be taken as substitutional, whereas a large deficiency will be occasioned if the legacies are held to be cumulative;

(*c*) The respondents not being treated alike in the will, but being given an equal amount in the codicil.

In re A. F. Bryan (1); *Russel* v. *Dickson* (2); *Hooley* v. *Hatton* (3); *Moggridge* v. *Thackwell* (4); *Allen* v. *Callow* (5); *Barclay* v. *Wainwright* (6); *Bell* v. *Park* (7).

Lafleur K.C. for the respondent. *Prima facie* the gift in the codicil is a new gift not substitutional for or revocatory of the gift in the first.

This presumption is strengthened when the codicil contains no words of revocation.

A clear gift ought not to be taken away except by expressions so clear as to leave no reasonable doubt. *Wilson* v. *O'Leary* (8); *Russell* v. *Dickson* (2); *Suisse* v. *Lowther* (9); *Watson* v. *Reed* (10); *Sawrey* v. *Rumney* (11).

THE CHIEF JUSTICE.—This appeal has given rise to much difference of judicial opinion upon the proper construction to be given to a will and codicil, and as to whether certain bequests of money to two of the nieces of the testator in the codicil should be held to be cumulative or substitutionary to those given to the same nieces in the will.

(1) [1907] P. 125.
(2) 4 H.L. Cases 293.
(3) [1772] 1 Bro. C.C. 390N.
(4) [1792] 1 Ves. 465.
(5) [1796] 3 Ves. 290.
(6) [1797] 3 Ves. 462.
(7) [1914] 1 I.R. 158.
(8) [1892] 7 Ch. App. 448.
(9) [1843] 2 Hare 424.
(10) [1832] 5 Sim. 431.
(11) [1852] 5 DeG. & S. 698.

The deceased testator was a bachelor and died at Victoria, B.C., on the 10th August, 1920, leaving a will dated 16th of May, 1919, by which he devised and bequeathed all his real and personal property to the Montreal Trust Company upon trust to sell and convert the same into money and out of the proceeds to pay his debts, funeral and testamentary expenses and a large number of legacies. Amongst these were, one to his niece Muriel Edna Henderson, wife of Donald G. Munro Fraser, of the sum of $20,000, and another to his niece Evelyn G. Henderson, of the sum of $10,000. There were a number of other legacies and bequests and a residuary devise to his nephew, the present appellant.

The question to be determined is whether the bequests to those two nieces in the codicil were cumulative to those given in the will or were substitutional therefor. That question must be determined by deciding what the intention of the testator was. That intention must be gathered from the language of the will and codicil, and from the conditions surrounding the testator when he made them. It is not without weight in so determining to find, as is admitted here, that if the cumulative rule sought to be followed is adopted the result will be that all of the testator's pecuniary legacies to his other beneficiaries will be cut down 15 per cent, whereas if the codicil bequests are found to be substitutional, there will be no such abatement.

Now turning to the codicil and endeavouring to find the controlling factor from it, namely the intention of the testator, we find that the codicil was made at Long Beach, California, and that he had not his will with him at the time. We can presume this because in the opening paragraph of the codicil he says he cannot remember the exact date of his will.

Then follows the first clause, viz.:

> First: I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

Clauses 2 and 3 containing the bequests to each of the two nieces of $25,000 then follow.

Now it is to my mind absolutely clear that he is thereby confirming his will in every respect *except in regard to the*

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two legacies to his two nieces given by the will which by his codicil he increased, one from $20,000 to $25,000 and the other from $10,000 to $25,000, thus putting both nieces on an equal footing.

I construe the words

save in so far as any part is inconsistent with this codicil

to mean "not consistent" or "at variance with." Now "any part" includes the amount of their respective legacies under the will and he expressly fails to confirm those, evidently to my mind showing a clear intention on his part not to confirm those two previous legacies given in his will. In every other respect he intends to confirm and does so, but with regard to these two legacies of $20,000 and $10,000 respectively he does not confirm the will. On the contrary, as I think, he substitutes for them the sums of $25,000 which he bequeaths to his nieces by the codicil.

The cumulative construction seems to me to ignore absolutely, or at any rate to fail to give any effect to the words confirming the will

save in so far as any part is inconsistent with this codicil.

These important words on that construction are left without any meaning and therefore ignore altogether the testator's *intention*. He confirms the will in every respect save in so far as the changes made in his bequests to his two nieces. With regard to them he does not ratify or confirm his will, but, on the contrary, devises increased amounts to each, giving each $25,000.

I have not heard any suggestion as to any meaning to be attached to these words of the codicil confirming his will

save in so far as any part is inconsistent with this codicil,

unless the suggestion is the correct one that his intention was to ratify and confirm his will in every respect except with regard to these two legacies each of which he desired to increase and did increase.

I have read the cases cited below and in argument here but do not find anything in any of them suggesting that the cumulative rule regarding legacies in a will and a

codicil is more than a *prima facie* one, and one which must in all cases of course yield to the paramount rule that the intention of the testator, if it can be found, or determined, must prevail.

In this case, I think the intention clear that the two codicil bequests are substitutionary and not cumulative to those of the will, and that the intention of the testator that they should be so is also clear from the express words in the first paragraph of the codicil which ratifies and confirms the

> will in every respect save in so far as any part is *inconsistent* with this codicil,

or as I construe the words, *not consistent with,* or *at variance with.* The only part of the codicil altering or varying the will is where the two bequests are increased, as I have stated, and so to his mind were inconsistent with the original bequest made in the will.

On this question of the testator's intention, if it can be found, being paramount over the *prima facie* cumulative rule, I quote from the speech of Lord St. Leonards in the case of *Russell* v. *Dickson:*

> I considered myself at liberty, without trenching upon any rule of law, or breaking in upon any decision, to determine this case upon the intention. There is no rule of law that prevents a court from looking to the intention. Every case that you open says: If you find the intention, you are at liberty to act upon it; and the simple question in this case is: Do you or do you not find the intention? Of that I have already spoken. Then there is the difficulty about the rule of law. There is no case exactly like this nor is it likely that such a case should frequently occur. You must depend upon the principle. If you can find within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary, you are at perfect liberty to act upon the intention, you are not only at perfect liberty, but you are bound by law to give effect to it, provided only that it does not contravene any existing rule of law.

IDINGTON J.—I cannot add much, if anything, useful to that which has been said by the learned judges constituting the majority determining the result now in appeal herein.

Counsel for the appellant has fairly presented in his factum the results of the leading cases which I have con-

[1853] 4 H.L.C. Cases, 293, at pp. 310-311.

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sidered but which by no means convince me that the codicil in question was not intended to be cumulative according to the *prima facie* effect to be given thereto.

Undue importance seems to me to be attached to the word "inconsistent".

I may add that seeing an item of $32,097.27 for real estate in value according to those appraising for the imposition of succession duties, suggests the possibility that the testator attached a much higher value thereto and thus the basis for appellant's conjecture is quite unfounded.

I observe he was careful to suggest due care in the disposition thereof and suggested his brother, who was the father of those benefiting most largely by this will, should be consulted as to his family affairs.

That suggests much to me that might explain the view taken by the testator.

At all events I cannot see my way to reverse the *prima facie* rule to be adopted.

I would dismiss the appeal without costs save as to those of the executors or trustees, while theirs between solicitor and client must be paid out of the estate.

DUFF J.—The point for decision on this appeal can be stated in a sentence or two. The testator by his will left to his niece Muriel Edna Henderson a legacy of $20,000 and to his niece Evelyn G. Henderson a legacy of $10,000. By a codicil he gave to each of these nieces a legacy of $25,000. The question upon which we are to pass is whether or not in each case the gift by the codicil is in substitution for the gift by the will or whether on the other hand the gifts by the two instruments take effect cumulatively.

In order to appreciate the argument on behalf of the appellant it is necessary to read the whole of the codicil which is in the following terms:

I, Joseph Newlands Henderson, of the city of Vancouver, British Columbia, in the Dominion of Canada, but temporarily residing at Long Beach, California, United States of America, hereby declare this to be a codicil to my last will and testament which last will and testament I made during the months of May and June, 1919, the date of which I do not remember.

First: I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

Second: I hereby give and bequeath to my niece Muriel Edna Henderson, wife of Donald George Munro Fraser, said Muriel Edna Henderson being the daughter of my brother Thomas Morrison Henderson, the sum of twenty-five thousand dollars ($25,000).

Third: I give and bequeath to my niece, Evelyn Gladys Henderson, the daughter of my brother Thomas Morrison Henderson, the sum of twenty-five thousand dollars ($25,000).

In witness whereof I have hereunto set my hand and seal this fifteenth day of January, in the year of our Lord one thousand nine hundred and twenty.

Joseph Newlands Henderson (Seal).

The general rule of construction being that *prima facie* where by a will and a codicil two legacies whether of the same or of different amounts are given to the same persons, the legacy given by the codicil is presumed to be additional to that given by the will; the ground from which Mr. Tilley directs his attack on the judgment of the Court of Appeal is that the introductory clause or rather the first paragraph of the codicil means and overcomes this presumption.

Now although it may be, as argued on behalf of the respondent, that the first paragraph is in a sense otiose because the publication of the codicil is in itself a republication of the will as of the date of the codicil, still it is undeniable that paragraph does contain a solemn declaration by the testator of his intention that the dispositions made by the will shall be undisturbed save in so far as the provisions of the codicil are inconsistent with them. And that by implication does of course sufficiently disclose an intention in fact on the part of the testator that in the case of such inconsistency and to the extent of such inconsistency the dispositions of the codicil are to prevail over the dispositions of the will.

The real question is: How far does this carry us? I am unable to agree that it follows as a consequence from this premise that the legacies given by the codicil are to be substituted for those given by the will. And for this reason, *ex hypothesi*, there is substitution if there is inconsistency and there is no substitution unless there is inconsistency and the question therefore necessarily turns on the point, is there or is there not inconsistency? And touching that point the presumption against substitution rests upon the foundation that there is no incompatibility and no inconsistency involved in the giving considered in

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itself of a pecuniary legacy by codicil to a legatee to whom a legacy has already been given by the will. We need not go into the reasons for the presumption. It seems to be founded in good sense; and such great masters of judicature as Lord Cairns and Lord Justice James gave effect to it without hesitation and without doubt. *Prima facie*, at least, therefore Mr. Tilley is not assisted by the first paragraph. *Prima facie* there is no inconsistency between the provisions of the codicil in relation to the legacies in question and the relevant provisions of the will.

Mr. Tilley meets this by the argument that, conceding this to be the *prima facie* construction of the paragraph, it is not its true construction. You must, he says, read the first paragraph with its context, in other words you must read it as an *addendum* to each of the two remaining paragraphs, the two paragraphs giving the legacies under consideration. And read with its context in this way he contends that the fair meaning, if not the necessary meaning, of it is that the provision made by the codicil for each of the beneficiaries mentioned is the provision, that is to say, the only provision the testator is making for those beneficiaries by way of pecuniary legacy.

There is no doubt weight in the contention that the first paragraph should be read as a part of the whole text of the codicil and I think this is so notwithstanding one's predisposition to look upon it as a stereotyped form. But the argument does not, I think, carry the appellant the whole distance. If it appeared that the paragraph on the construction which has been given to it in the Court of Appeal was without operation, we should have a very different case. It is impossible I think, to contend that because, while there is no inconsistency between the legacies in the codicil and the legacies given to the same legatees in the will, there is inconsistency between the codicil and the disposition of the residue by the will and therefore the first paragraph is not in any view wholly nugatory.

The sum of the matter, as will already have been apparent according to my view, is that the appellant's argument is really an attack, when it is closely analysed, upon the presumption against substitution and as such, I say this of course with the greatest respect for those who

take another view, I cannot help thinking that in its effect it is an appeal to the court to substitute one's impression as to the probable intention of the testator for the conclusion one is driven to as to the result of a faithful adherence to the language the testator has employed. A passage is cited in the respondent's factum from a judgment of Lord Justice James in *Wilson* v. *O'Leary* (1), which I cannot forbear quoting:

> I would only add this that I cannot help feeling that this case has occupied more time than it would have done if I had throughout confined myself strictly to that which is my legitimate duty, that is, if instead of endeavouring to find out what the testator meant I had confined myself to endeavouring to ascertain what was the meaning of the testamentary papers which he left behind him.

The appeal should be dismissed.

ANGLIN J.—There is nothing in the codicil which can be said to give expression to an intention to revoke the legacies given to the two respondents in the will. There is no inherent "inconsistency" between the gifts to them in the will and the gifts to them in the codicil—nothing so incompatible that both may not take effect. On the other hand the residuary bequest in the will would certainly be cut down by the legacies given in the codicil. The confirmation of the will was subject to this modification.

I attach no significance to the fact that under the will the bequests to the two legatees were of unequal amounts, whereas the legacies given to them by the codicil are each of the same amount. We have no clue to the motives that actuated the testator on either occasion. Without some knowledge of them any inference of intent that the new legacies should be substitutional would be unsafe and unwarranted. *Prima facie,* therefore, the gifts under both instruments are to be regarded as cumulative. *Russell* v. *Dickson* (2); *Hurst* v. *Beach* (3).

The only extraneous circumstances relied upon to support the inference of a contrary intention on the part of the testator is the fact, now apparent, that, after debts and succession duties have been satisfied, if the bequests in question are cumulative, all the testator's pecuniary legacies

(1) 7 Ch. App. 448 at p. 456.
(2) 4 H.L. Cas. 293
(3) [1819] 5 Madd. 351, at p. 358.

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must abate 15 per cent, whereas, if the gifts by the codicil are substitutional for those in the will, no abatement will be requisite. No doubt if it were clear that that fact had been present to the mind of the testator its significance might be cogent. Yet, even under such circumstances, I can scarcely conceive of the testator, if he meant that there should be a revocation of the gifts made to the respondents in the will, expressing that intention in his codicil by the clause,

> I hereby ratify and confirm the said will in every respect save in so far as any part is inconsistent with this codicil.

He almost certainly would have employed some such phrase as "instead of (in lieu of, or in substitution for) the gifts made to them in my will, I give and bequeath, etc."

But it is by no means improbable that the deficiency in the estate, now ascertained, was quite unknown to the testator. His assets consisted *inter alia* of several parcels of real estate, the actual worth of which must have been problematical, and of various stocks and shares, many of them highly speculative in character and of very uncertain value. It is quite a usual thing for an owner to be optimistic in respect to the value of his own property. Then again the testator may not have realized that his debts would amount to over $13,000, or that succession and probate duties would deplete his assets by a sum exceeding $26,000. In a word, it must be pure conjecture whether the testator appreciated that the additional bequests of $25,000 apiece to his two nieces would more than exhaust the residue of his estate bequeathed by his will to the appellant. As James L.J. said in *Wilson* v. *O'Leary:*

> Where there is a positive rule of law of construction such as exists in these cases, that is to say, that gifts by two testamentary instruments to the same individual are to be construed cumulatively, the plain rule of law and construction is not to be frittered away by a mere balance of probabilities.

In the case at bar I fail to find even a balance of probabilities in favour of the view urged by the appellant.

In my opinion no case can be made for taking the two bequests in the codicil before us out of the ordinary rule

7 Ch. App. 448, at p. 454.

that they should be regarded as additional to, and not as substitutional for, the gifts made to the same legatees by the will. Jarman on Wills (6th ed.) p. 1123; 28 Halsbury L. of Engl. no. 1432.

BRODEUR J.—We are called upon to decide whether the legacies mentioned in the codicil are cumulative or whether they are in substitution of the legacies of the will.

In his will the testator had made several legacies to his ten nephews and nieces, ranging from $2,000 to $20,000. The two respondents, who are nieces, were legatees to the extent of $10,000 and $20,000 respectively. The will had been made in British Columbia on the 16th of May, 1919. A few months later the testator went to California where he made a codicil on the 15th of January, 1920, and died a short time later. By this codicil he declared at first that he ratified and confirmed his will in every respect "save in so far as any part is inconsistent with this codicil"; and then he gave $25,000 to each of his nieces to whom he had given previously by his will $20,000 and $10,000 respectively.

If the $50,000 disposed of by the codicil is to be considered as an addition to the $30,000 given to these legatees by the will, the estate will not be large enough to pay in full the other legatees. If, on the contrary, the legacies to these two nieces are substitutional, all the legacies could be paid in full.

There is not much in the evidence before us to guide us in the construction of this will. We may fairly assume that the testator knew the value of his fortune; and we could hardly say that his intention was to deprive the other legatees of the amount which he had given them, since he confirms everything he has done in his will and the only inconsistencies and differences which are to be found between his codicil and his will are in the legacies which he gives to his nieces.

I consider that his evident intention was to increase the legacy which he had previously mentioned and to substitute in one case $25,000 for $10,000, and $25,000 for $20,000 in the other.

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For these reasons, the appeal should be allowed, the costs to be paid by the estate.

MIGNAULT J.—The only question here, and it is a question of much nicety, is whether the bequests which the late J. N. Henderson made by his codicil to his two nieces, the respondents, were in substitution for or in addition to the legacies which he had given them by his will. The will was executed before witnesses at Vancouver on May 16th, 1919, and, among a number of legacies to relatives of the testator, he gave to the respondent Muriel Edna Henderson, wife of Donald Fraser, $20,000, and to the respondent, Evelyn G. Henderson, $10,000. The testator was in Long Beach, California, when, on January 15th, 1920, he made a codicil to his will which evidently he did not have in his possession, for he says he does not remember its date. By this codicil, after stating in clause one that he ratifies and confirms his said will in every respect,

save in so far as any part is inconsistent with this codicil,

he bequeaths to each of the respondents, by separate clauses, the sum of $25,000.

The first court held that these last legacies were substitutionary; the Court of Appeal, Mr. Justice McPhillips dissenting, that they were cumulative. The appellant, the residuary legatee—and there will be no residue but a deficiency if the bequests are cumulative—now appeals to this court.

As stated by Lord Cranworth in *Russell* v. *Dickson*,

where a legacy is given to the same party in each of two different instruments, a will and codicil, *prima facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice, but of course there may be circumstances to show that the *prima facie* construction is not, in the particular case, the construction to be adopted. What the circumstances are that are sufficient to outweigh the *prima facie* presumption, is extremely difficult to be determined by any rule of *a priori* reasoning. Very small circumstances have sometimes been acted on as sufficient to take the case out of the general rule.

The test is, of course, what the testator really intended, and no case better shows than *Russell* v. *Dickson* (1) that when the intention sufficiently appears to substitute the later legacy for the former, effect will be given to that

(1) 4 H.L. Cas. 293 at p. 304.

intention. As Lord St. Leonards said, in the same case, at p. 310:

> If you can find within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary * * * * you are bound by law to give effect to it.

So in *Russell* v. *Dickson* (1) the testator, in a codicil executed a few days before his death, began by the words:

> Not having time to alter my will and to guard against any risk, * * *

and this language, among other circumstances, was considered as indicating his intention to substitute the legacy contained in the codicil for that made by his will.

Here the testator had in mind that what he was going to do by his codicil would be inconsistent with some parts of his will, which otherwise he wished to ratify and confirm in every respect, and to the extent of such inconsistency he desired to alter his will. There could be no, what I might call intrinsic, inconsistency, by which I mean legacies which cannot be carried out cumulatively, between the will and the codicil, because the bequests in both were of sums of money. Nevertheless the testator, when he said

> save in so far as any part *is* inconsistent with this codicil

was not dealing with a possible, but with an actual, inconsistency assumed by him to exist between the will and the codicil, and in my judgment this is a most important consideration to determine whether the testator intended to add these large legacies to the quite substantial amounts he had already given to his nieces. So the inconsistency contemplated here was one existing in the mind and intention of the testator, as he understood his testamentary provisions, and resulting from something contained in his codicil.

Were the two bequests to these two sisters, the respondents, of $25,000 each, by the codicil, inconsistent with the bequest to them of unequal sums by the will, to wit, $20,000 to Mrs. Fraser, and $10,000 to Miss Henderson? Perhaps not intrinsically, in the sense in which I have used the word, but the real question is whether the testator considered the one inconsistent with the other. And equal treatment of these two legatees in the codicil would

(1) 4 H.L. Cas. 293.

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certainly be inconsistent with unequal treatment towards them in the will. If the intention of the testator in making his codicil, in other words if the scheme of the codicil, was to remove this inequality—and the codicil deals only with these respondents—certainly there would be an inconsistency in his mind between the will and the codicil. Giving effect to the will and codicil cumulatively would leave the inequality; treating the legacies in the codicil as substitutionary for those in the will would remove it.

I have therefore reached the conclusion that in the intention of the testator, which of course must be determined by inspection of the instrument, the legacies made by the codicil were inconsistent with the legacies to the same legatees in the will and that therefore they should not be given cumulative effect.

The appeal should be allowed and the trial judgment restored. Costs out of the estate.

Appeal dismissed.

Solicitors for the appellant: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

Solicitors for the respondents: *O'Brian & McLorg.*

HIS MAJESTY THE KING.....APPELLANT; 1922 *Oct. 10.

AND

THE MANITOBA GRAIN CO.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal—Leave by Supreme Court—Criminal Case—R.S.C. [1906] c. 139, ss. 36 and 41—9-10 Geo. V, c. 32—Canada Grain Act, 2 Geo. V, c. 27, s. 215 (D).

Though sec. 41 of the Supreme Court Act empowers the court to grant leave to appeal "in any case whatever" in which any of certain specified matters are in controversy the right is limited to cases in which an appeal may lie as provided in sec. 36.

A conviction for contravention of sec. 215 of the Canada Grain Act the penalty for which is fine or imprisonment is a conviction in a "criminal cause" and not appealable under sec. 36 of the Supreme Court Act.

MOTION for special leave to appeal from the Judgment of the Court of Appeal for Manitoba (1) holding that sec. 215 of the Canada Grain Act is *ultra vires*.

The defendant was convicted for selling grain on commission without a licence, in contravention of section 215 of the Canada Grain Act. His conviction was quashed by the Court of Appeal, which held section 215 of the Grain Act to be *ultra vires* of the Dominion Parliament. An application for special leave to appeal to the Supreme Court of Canada was refused by the Court of Appeal on the ground that the case fell within the decision of the Judicial Committee in *The King* v. *Nat Bell Liquors* (2) and that there would, therefore, be no jurisdiction to entertain the appeal if leave were granted.

Taylor K.C., for the appellant contended that by the proviso to section 41 (1) of the Supreme Court Act the Supreme Court of Canada is empowered to grant special leave to appeal "in any case whatever", if the validity of an Act of Parliament (*inter alia*) will be involved in the

(1) 32 Man. R. 52. (2) [1922] 2 A.C. 128.

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

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appeal, and that the court can, therefore, grant leave in cases in which the provincial appellate court could not do so.

The defendant was not represented.

The Judgment of the Court was delivered by:

THE CHIEF JUSTICE.—The majority of the court is of the opinion that the proposed appeal would be an appeal in a criminal cause within the exception in section 36 of the Supreme Court Act. The proviso to section 41 (1) enabling this court to grant special leave to appeal only "if special leave to appeal has been refused by the highest court of final resort in the province" implies that the application of the proviso is limited to cases in which the provincial court might properly have given such leave and is, therefore, notwithstanding the generality of the words "in any case whatever", restricted to cases within section 36.

The application is accordingly refused. No costs.

Motion Dismissed without costs.

GEORGE LANDELS AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

THOMAS R. CHRISTIE AND HERBERT O. CHRISTIE (PLAINTIFFS)..... RESPONDENTS.

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*Oct. 18
*Nov. 27

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Negligence—Loss by fire—Finding of trial judge—Inference from facts—Concurrent judicial findings—Interference on appeal.

In an action claiming damages for loss of property by negligence the trial judge held that "the facts proved are more consistent with negligence * * * than with a mere accident." His judgment for the plaintiffs was affirmed by the full court.

Held, that the circumstances disclosed on the trial were such that the courts below were justified in drawing the inference they did and this second appellate court should not disturb the conclusion they reached.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The facts of the case and the question for decision on the appeal are sufficiently indicated by the head-note.

Jenks K.C. and *McKenzie K.C.* for the appellants. The cause of the fire can only be conjectured and is not proved by direct evidence. See *Montreal Rolling Mills* v. *Corcoran* (1); *Canada Paint Co.* v. *Trainor* (2).

It is not a case of *res ipsa loquitur*. *Grand Trunk Ry. Co.* v. *Griffith* (3); *McArthur* v. *Dominion Cartridge Co.* (4).

Milner K.C. for the respondents. Under the facts proved the inference as to the cause of the fire and the consequent negligence of the defendants is almost irresistible. See *Swansea Vale* v. *Rice* (5) per Lord Loreburn; *Richard Evans & Co.* v. *Astley* (6) at page 678.

(1) 26 Can. S.C.R. 595.
(2) 28 Can. S.C.R. 352.
(3) 45 Can. S.C.R. 380.
(4) [1905] A.C. 72.
(5) [1912] A.C. 238.
(6) [1911] A.C. 674.

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

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THE CHIEF JUSTICE.—After hearing the argument at bar I felt very doubtful whether the plaintiffs respondents had established their case.

A careful reading of the evidence did not remove my doubts.

The trial judge dismissed the action as against Landels, one of the original defendants, and from that dismissal there was no appeal. As against the other two defendants the trial judge found

> that the facts proved were more consistent with negligence on their part than with a mere accident,

and that

> there was sufficient evidence of negligence to enable the plaintiffs to recover.

I confess that if I had been trying the action in the first instance, I would have found great difficulty in reaching such a conclusion, but the case was appealed to the Supreme Court of Nova Scotia sitting *en banc* and four of the five judges who heard the appeal dismissed it, and so confirmed the judgment of the trial judge on the ground, as I understand their judgments, that the trial judge's decision

> that the available facts were such that an inference of negligence was more reasonable than that there was no negligence

was correct.

I do not feel, however, so clearly convinced that this inference drawn by the two courts was such an improper one as to justify me in reversing it and allowing the appeal.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—I cannot agree that the learned trial judge had not before him facts capable of supporting a finding against the appellants. There was evidence which, if believed, supplied a possible explanation of the origin of the fire in the probability of there being hot ashes in the boiler room. The dismissal of the action as against Landels presents a difficulty but the trial judge seems to have

treated the action against Landels as based upon the assumption that he was a party to the contract of hiring and consequently as failing when that assumption fell.

Other explanations were suggested but there was nothing in the facts pointing to any of them as an agency actually or probably operative and my conclusion is that there is sufficient preponderance of probability in the circumstances proved in favour of the trial judge's conclusion to cast the burden of explanation upon the appellants—a burden of which the trial judge held they have not acquitted themselves.

The appeal should be dismissed with costs.

ANGLIN J.—With some doubt I concur in the dismissal of this appeal. I am not satisfied that the learned trial judge and the majority of the learned judges on appeal were clearly wrong in holding that, upon such facts as the evidence discloses, it is a more reasonable inference that the fire, which destroyed the plaintiff's mill, was attributable to some negligence of the defendant's than that it was due to some cause for which blame cannot be imputed. If the matter were *res integra* the contrary view taken by the learned Chief Justice of Nova Scotia would not improbably commend itself to my judgment.

BRODEUR J.—The appellants as lessees of the mill belonging to the respondents Christie were bound to exercise care and see that no risk would, in the ordinary course of events, ensue. The fire which destroyed this mill is due to circumstances which render the cause of it unknown. But the evidence in the record is such that a reasonable inference leads us to the conclusion that the fire is due to the negligence of the lessees.

It is the conclusion reached by the trial judge and by the majority of the court *en banc.*

The lessees had left live ashes on the floor which could easily be carried by the wind to the place where the fire was first seen. No person was left there to look after the building. I would not go so far as to say that the doctrine of *res ipsa loquitur* should apply, because all the surrounding circumstances are not entirely within the

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defendants' control and the fire might be the result of a simple accident or the work of an incendiary. But the facts available are such that negligence on the part of the defendants is the more reasonable inference (Halsbury, Laws of England, vol. 21, p. 752).

This appeal then should be dismissed with costs.

MIGNAULT J.—This case comes here after two courts have found the appellants, Fauquier and Porter, liable for the destruction by fire of respondents' mill at River Hébert, N.S. In the appellate court the learned Chief Justice dissented, but the other judges, not however without expressing some doubt, confirmed the judgment of the trial judge who sat without a jury.

The respondents claimed from George Landels and from Gilbert E. Fauquier and Johnson P. Porter, carrying on business under the firm name of Fauquier and Porter, $158 for the use of a saw mill in sawing 316,000 feet of lumber, and damages for the destruction by fire of another saw mill belonging to the respondents, alleging further that the appellants had agreed to rebuild the mill. Landels, acting on behalf of Fauquier and Porter, had entered into an agreement with the respondents for the use of their mill to saw lumber belonging to Fauquier and Porter for the price of 50 cents per thousand feet. This mill was destroyed by fire on November 27th, 1917, while in the occupation of the appellants. The latter paid for the lumber which they had sawn up to the time of the fire, and the following spring erected a new but smaller mill on the same location where they cut some 316,000 feet of lumber. Regarding the new mill as belonging to the respondents by annexation to the freehold, the learned trial judge condemned Fauquier and Porter to pay $158 for this sawing, and $2,757 as damages for the destruction of the mill, in all $2,915. The action was dismissed as to Landels because he had acted as agent for Fauquier and Porter, the learned trial judge apparently not considering whether or not he was personally liable for the destruction of the mill. The respondents did not appeal from the dismissal of the action with respect to Landels.

I see no reason for disturbing the judgment as to the item of $158 for use of the new mill which must be considered as belonging to the respondents.

The difficulty is as to the damages granted for the destruction of the old mill. The respondents alleged in their statement of claim that the appellants so negligently conducted themselves, or their agent and servant Landels so negligently conducted himself, as to cause a fire in the mill by reason of which it was totally destroyed. As I have said, the action was dismissed as to Landels and no appeal was taken from that part of the judgment. The appellants contend that if Landels is not liable for negligence his principals cannot be so held. I would not however deal with the case on so narrow a ground, for the liability of Landels was not considered by the learned trial judge, and the other defendants could have been sued without there being any necessity to make their agent a party to the proceedings.

As to the other defendants, I think the onus was clearly on the plaintiffs to prove negligence. Apparently the plaintiffs considered that it would be sufficient to establish the mere fact of the fire, for that is all they did. The learned trial judge however refused to dismiss the action at the close of the plaintiffs' case, probably because some proof had been made of a promise by the defendants to rebuild the mill. The defendants then called witnesses to testify to the circumstances of the fire and it is on that evidence alone that their liability must now be determined.

The conclusions of the learned trial judge on the issue of negligence may be given in his own words:

> Mr. Milner contends that the defendants are liable for the loss of the mill; that this is one of the cases where the occurrence is itself evidence of negligence; and moreover, that the defendants were negligent in not having proper appliances to put out fires, and in not having a watchman on duty during the night. Mr. McKenzie for the defendants claims that the maxim *res ipsa loquitur* does not apply and that there is no evidence of negligence on the part of defendants. Taking all the circumstances into consideration, I think the facts proved are more consistent with negligence on the part of the defendants than with a mere accident. I think that there is sufficient evidence of negligence to enable the plaintiffs to recover.

This passage of the learned trial judge's reasons for judgment was much discussed at bar, but I think a fair

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construction is that in the opinion of the learned judge, taking all the circumstances into consideration, the negligence of the defendants was more consistent with the proved facts than that the fire was caused by a mere accident. It is true that there is no finding as to the specific act of negligence which caused the fire, but that is no reason why the whole evidence should not be carefully examined to see whether the learned trial judge could find it more consistent with the liability of the defendants than with the theory that the fire was an accidental one.

None of the learned judges in the appellate court thought that the mere fact of the fire was *prima facie* evidence of negligence and I quite agree with them. This disposes of the so called rule *res ipsa loquitur* as applicable to a case like the one under consideration. And had the learned trial judge, at the close of the plaintiff's case, decided the issue of negligence in favour of the defendants, I would have thought that his judgment could not have been assailed. Of course the evidence adduced by the defendants must be considered on this appeal.

We have now before us all the circumstances of the fire and both courts have inferred negligence therefrom. The defendants had been in possession of the mill for about a week, Landels having been placed in control of their sawing operations. The boiler with its furnace was in a shed alongside the main building and the engine room was in the centre of the mill. There were no lamps and the men worked as long as daylight permitted. On the evening in question the men left the mill between five and half-past five. Avard Christie, the fireman, went away with the others but returned about six o'clock, or a little later, and filled the boiler with water. Landels went to the mill at about a quarter to nine. He says he went into the boiler (probably the boiler room) as far as the injector and had a look around. He found that the boiler was warm and that everything was quiet. He then left to go to the cook house but being called by Mr. Christie, one of the plaintiffs, he went into his house, and had been there but a few minutes when Mr. Christie looked out the window and said the mill was on fire. They ran out and first saw the fire at the back of the boiler on the side of

the mill proper. Nothing could then be done to save the building and in about fifteen minutes, Landel says, it was all over.

The impression which the evidence leaves on my mind is that the fire was caused by the hot ashes which the practice, McClary, the engineer, testifies, was to leave in front of the furnace, right in the building, after throwing water on them to extinguish the flames. These ashes were not carried outside as it would have been prudent to do. The night of the fire was quite windy and the mill was all open, McClary says, so the wind no doubt could reach the pile of ashes and scatter embers about. The fire was first seen at the back of the boiler, and the fact that no other cause of fire is suggested renders it probable that the fire was ignited by the hot ashes. The furnace had been cleaned out some time that day, the usual practice as to the ashes no doubt having been followed.

Under these circumstances, the inference appears reasonable that the fire was caused by these hot ashes. It was negligence to leave them at night where they were and where the wind could scatter them about. My conclusion therefore is that the courts below could infer that the fire was caused by the negligence of the defendants. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *John S. Smiley.*

Solicitor for the respondents: *H. A. Purdy.*

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*May 31.
*June 1, 2.
*Oct. 10, 30.
*Dec. 19.

THE DOMINION CANNERS LIMITED, (DEFENDANT) ..... APPELLANT;

AND

HORACE COSTANZA AND OTHERS, (PLAINTIFFS) ..... RESPONDENTS.

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

Workmen's Compensation—Exclusive Jurisdiction of board—Injury by accident—Action against employer—Jurisdiction of court—Acquiesence in proceedings—Evidence—Certificate of board—Ex parte application R.S.O. [1914] c. 25, ss. 60 (1) and 64 (4)—5 Geo. V, c. 24, s. 8 (0).

Sec. 60 of the Ontario Workmen's Compensation Act gives the Compensation Board "exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part (Part I) * * * and the action or decision of the Board thereon shall be final and conclusive and shall not be open to review in any court." Sec. 15 in Part I as enacted by 5 Geo. V, s. 8, provides that the right of compensation shall be in lieu of any action by a workman against his employer in respect of injury by "accident" and that "no action in respect thereof shall hereafter lie." By sec. 15 (2) any party to an action may apply to the Board for a decision as to whether or not the right of action is taken away by the Act "and such adjudication and determination shall be final and conclusive."

Held, that the Board is the only tribunal competent to decide whether or not a common law action can be maintained by a workman against his employer in respect to personal injury sustained in the course of his employment.

Held, also, Duff J. dissenting, that where such an action is brought the court is free, if not obliged, *proprio motu* if want of jurisdiction is not pleaded, to take cognizance of the provisions of the Act and stay the proceeding until the right to maintain it is determined by the board.

Per Duff J. The question whether or not the plaintiff can maintain his action must be raised by way of defence or exception. If the defendant does not plead it or does not ask for a stay he is bound by the judgment given.

The court in an action by a workman will not take cognizance of a decision of the board that the plaintiff's injury did not result from "accident" and did not entitle him to compensation under the Act when such decision is given on an *ex parte* application in the ordinary course and not under sec. 15. Evidence of such decision, if admitted, would not be conclusive. Idington and Duff JJ. *contra.*

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

Where in such an action the defendant submits to the trial judge the question of the right to maintain it and does so in the belief that the court has jurisdiction to deal with such question the decision of the trial judge is not that of a quasi-arbitrator and so non-appealable as it would be if the issue was submitted with knowledge of the lack of jurisdiction and the parties assent to the judge acting virtually as an arbitrator.

Judgment of the Appellate Division (51 Ont. L.R. 166), not dealt with.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The facts of this case are stated in the above head-note. The plaintiffs sued for damages in consequence of having contracted typhoid fever from drinking the water supplied by their employers. The trial judge held that the injury was not caused by "accident" and that plaintiffs could not proceed under the Workmen's Compensation Act. A judgment for damages was entered against the defendant and affirmed by the Appellate Division.

Lynch-Staunton K.C. and *Hobson K.C.* for the appellant.
Bain K.C. and *Peter White K.C.* (*Duggan* with them) for the respondents.

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

IDINGTON J.—The respondent having claimed to have suffered from typhoid fever attributable to the use by some of them of water received from a well of appellant in such a condition as to constitute it a nuisance within sections 73 and 74 subsection (*e*) of the Public Health Act, and which alone served the domestic needs of respondents as dwellers in a tenement of appellant, brought this action on the 14th December, 1920, and served its statement of claim on 12th January, 1921, to which appellant pleaded on 31st January, 1921.

On the 12th February, 1921, the appellant's solicitor served notice that on the trial defendants would move to amend said defence by adding the following paragraph:

The statement of claim discloses no cause of action and the defendants will so contend at the trial. If the plaintiffs suffered the damages

(1) 51 Ont. L.R. 166.

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alleged then the plaintiffs should apply to the Workmen's Compensation Board and are not entitled to maintain this action as same is barred by the provisions of that Act.

On the trial thereof on the opening which began on the 4th of April, 1921, the learned trial judge allowed said amendment and at the same time allowed respondents to amend their statement of claim by making specific references to the said Public Health Act and the Factories Act, being R.S.O. 229, sec. 43.

The trial then proceeded and lasted till the 7th April, 1921, when the sole question of negligence and said statutes relied upon by plaintiffs' amended statement of claim were left to the jury and a verdict was rendered for the plaintiffs (now respondents) and judgment was entered accordingly without any objection thereto.

Appellant gave on the 18th April, 1921, notice of appeal to a divisional court and that was heard before the Appellate Division on the 22nd and 23rd of December, 1921, and judgment was given on the 24th of November, 1921, dismissing said appeal with costs.

In that notice of appeal eight grounds of appeal were taken of which the 4th was as follows:—

> 4. That as to the plaintiffs, Mary Costanza, Philipine Costanza and Horace Costanza, Jr., who were in the employment of the defendant, their remedy if any was to have applied to the Workmen's Compensation Board, and this action is barred by the Workmen's Compensation Act.

The respondents' counsel, either by reason thereof or in consequence of something which transpired during the argument thereof made an application on their behalf to the Workmen's Compensation Board which resulted in the following finding by the board:—

Friday, 25th November, 1921.

Present:—
Samuel Price, Chairman.
H. J. Halford, Vice-Chairman.
George A. Kingston, Commissioner.

In the matter of—
Claim 217246 Matilda Shereno.
217247 Phillipina Costanza.
217248 Mary Costanza.
217249 Horace Costanza.
217250 Rosario Tasca.
217251 Mamie Tasca.

217252 Fannie Tasca.
217253 Lena Tasca.
217254 Antone Tasca.
217255 Rose Dispenza.
217256 Bessie Tasca.
217257 Cosimo Pecoraro.
217258 Russell Pecoraro.
217259 Lucy Pecoraro.
217260 Florence Pecoraro.

Upon consideration of the above mentioned claims, the papers, letters and other material filed, the Board finds that the above mentioned claimants did not sustain personal injury by accident arising out of and in the course of their employment with Dominion Canners Limited, and the said claims are hereby disallowed.

S. Price,
Chairman.

The appeal was taken to this court by the present appellant by notice dated 14th day of February, 1922.

It was set down for hearing, by order, at the foot of the Ontario list, May Term, and heard on the 1st day of June, 1922.

Thereafter on the 10th day of October, 1922, a direction was given for re-argument on the question of jurisdiction and was so partly re-argued, but that re-argument ended in a direction to counsel to file supplementary factums, which were delivered on or about the 13th November, 1922.

During all the time since the action was launched, at least until judgment at trial entered, it was, by section 64 of the workmen's Compensation Act, subsection 4 (R.S.O. 1914, c. 25), which reads as follows,

4. Where an action in respect of an injury is brought against an employer by a workman or a dependent the Board shall have jurisdiction upon the application of the employer to determine whether the workman or dependent is entitled to maintain the action or only to compensation under Part I, and if the Board determines that the only right of the workman or dependent is to such compensation the action shall be forever stayed,

open for appellant to have applied to the board within the terms thereof to have said action stayed.

It has never had the courage to apply either thereunder or under subsection (2) of section 15 of said Act as amended, and has evinced no intention of doing so.

The respondents, on the contrary, had done so as already stated, before the appeal to the Appellate Division had been finally disposed of, with the result above set forth.

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The counsel for respondents tendered on argument the said result duly certified as an answer to the appellant's argument so far as rested upon the said amended plea in the statement of defence as allowed at the trial.

Some one objected that we had decided in *Red Mountain Railway Company* v. *Blue* (1), that we could not receive any such evidence or look at any evidence save that adduced at the trial.

If any one will read said report they will see that though the then Chief Justice so held in regard to what was tendered and there in question, the remaining members of the court had agreed with the judgment of Mr. Justice Duff therein holding that there should be a new trial because the learned trial judge had misdirected the jury and hence all else in that case was but *obiter dicta.*

For my part I see I took the express precaution of declining to pass upon the question now raised.

And I pass no opinion now upon the question so broadly put as if only an ordinary question of hearing evidence is involved.

Section 60, subsection (1) of the Act now in question reads as follows:—

> 60. (1) The Board shall have exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or discretion is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court and no proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by *certiorari* or otherwise into any court.

Surely we are bound to take judicial notice of any such proceeding and not stand upon any decisions such as are cited by the former Chief Justice in his said judgment and which are also cited in some of said factums.

I respectfully submit we must exercise a little common sense in applying any judicial expressions of opinion or decision.

It is proposed in defiance of the board to stay all proceedings herein notwithstanding the imperative language

(1) 39 Can. S.C.R. 390.

of the above quoted subsection declaring it shall not be open to question or review and that no proceedings by or before the board shall be subject to any proceeding in any court.

If the converse had been declared on an *ex parte* application by appellant at any time prior or up to the trial judgment and the learned trial judge had had it brought to his notice, I venture to say he never would for a moment have thought of proceeding further than to make a note of such order.

And if such a thing is conceivable as his doing otherwise, and in due course such a case brought here, what would we have done? And if we had conceivably ordered judgment to be entered—well, I will not pursue that inquiry.

Nor need I say that much as I esteem the due observance of the maxim *audi alteram partem,* there are many things which are judicially done *ex parte.*

And if I understand correctly the daily practice of the board in discharging its duties, it must of necessity do many things of its own motion. It is not a court where counsel is heard. The aim of the whole Act is to eliminate the litigious struggle and strife and the judicial peculiarities in mode of thought and applying the law.

A perusal of the statement of claim indicates, as counsel first conceived its nature to be, that respondents founded this action upon something as remote from the nature of an accident, within the meaning of the Workmen's Compensation Act, as would be an action by one of respondents for an assault and battery by his or her employer.

I am not surprised, therefore, that counsel for appellant in first pleading thereto failed to set up the Act.

One is sorely tempted to surmise that the doing so was an afterthought to try it on the court. It seems to have turned out an astute and confusing move.

Indeed when the trial proceeded after the pleading had been amended no further attention seems to have been paid to the point raised thereby, save counsel for respondents filing a letter from a member of the board which indicates that the well in question had been before it in other cases somewhat like unto those in question herein, for said letter reads as follows:—

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Referring to our telephone conversation to-day, I beg to say that those alleged typhoid cases which came before the Board for consideration were all employees of a firm of contractors—Newman Bros., Limited —who were I understand erecting some structure on the property of the Dominion Canners Co. The names of the parties whose claims were considered were:

J. T. Welsh.	Norton E. Schurr.
Wm. J. Schurr.	Norman W. Rymer.
Lloyd R. Rymer.	George W. Taylor.

These claims were all rejected on the ground that the circumstances did not point to injury by accident within the meaning of the Workmen's Compensation Act.

This clearly indicates the correct conception the board had formed of such a disease and its relation to the said Act.

Nor in the questions submitted by the trial court was any question put to the jury bearing upon the relations between the plaintiffs and the defendant, such as should have been if that question were before the court in the sense pleaded.

I respectfully submit that upon such a record of facts as I have recited this court is not warranted in directing a stay of proceedings unless and until appellant applies for and procures, and files, a certificate from the board.

Of course the appellant may possibly, astutely in line with its past two years course, abstain from further troubling anybody in this case. Meantime the respondents are unjustly, as I respectfully submit, hindered and delayed.

We should, in the absence of any such application by the appellant for two years during which it had deliberately refrained from applying, proceed to deliver judgment in the appeal in the absence thereof, unless that which respondent's counsel has presented will do justice herein.

Prima facie this court is seized of this case, on the evidence presented at the trial, and on the facts so found has no foundation for doing otherwise.

I doubt very much if either section 64, subsection (4), or section 15, subsection (2), was ever intended to extend the time for making such an application as contemplated thereby to the board, beyond a reasonable time or to proceedings in this court.

But in any case I am decidedly of the opinion that in face of the decision of the board, already made, the matter

ends, or should end. And I most respectfully submit that we have no right to criticize or assume that such decision was, or even may have been, arrived at without duly considering the question at every angle, merely because their methods of investigation do not follow our legal forms of doing so. It was to get away from such like forms and methods, and all implied therein, that the statute was enacted.

The past experience of the members of the board, no doubt was sufficient guide and we should at least give them credit therefor, and knowledge, by this time, of the Act, superior, I imagine, to ours.

DUFF J.—The result of my examination of the Workmen's Compensation Act is this. Where an action is brought against an employer by one of his employees alleging the right of reparation arising out of circumstances which may constitute an accident within the meaning of the Act, it is a complete answer to the action that the circumstances do constitute such an accident and that in respect of the accident a right of compensation is given to the workman by the statute. I think it may be an arguable question whether or not it is sufficient to establish that the circumstances do constitute such an accident but it is unnecessary to dwell upon that.

I think the proper inference from the provisions of the statute is that where the employer raises such a defence the authority to pass upon the issue thereby created is solely vested in the Workmen's Compensation Board. The employer may, if he be so minded, apply for a decision upon the point at the earliest stage and if the decision is in his favour it is the duty of the Supreme Court or other tribunal before which the action is pending to stay the action. He may, I think also, raise the defence by plea and establish it by producing proper evidence of the decision by the board.

On the other hand it is open to the workman to apply for and obtain such a decision the moment his writ is issued.

My view, however, is that the contention that no action lies because the matter is one for compensation under the

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Act, in other words, that the right of action is taken away by the statute, is strictly matter of defence or exception. If the defendant permits the action to proceed to judgment without having raised the defence or without having applied for a stay then he is concluded by the judgment as with regard to other exceptions and defences, unless on appeal the Court of Appeal sees fit, in the exercise of its discretion, to permit the defence or exception to be raised there.

So much by way of *conjectio causae*. The autonomy of the board is, I think, one of the central features of the system set up by the Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense in legal proceedings and a canon of interpretation governed in its application by refinement upon refinement leading to uncertainty and perplexity in the application of the Act are avoided. The purport of s.s. 1 of s. 60 (ascribing to the words their minimum scope) seems to be that as regards any proceeding before the board and for the purpose of any such proceeding in relation to a matter in respect of which jurisdiction is given to the board, that jurisdiction is exclusive and the mastery of the board over its own proceedings is supreme. The act or decision of the board in such a case, to use the language of the section,

shall not be open to question or review in any court.

Language could not be plainer. Therefore where the board (for example) makes an order for the payment of money and under s.s. 3 the order becomes a judgment of the County Court, it becomes a judgment of that court only for the purpose of enforcing it. Therefore, with great respect, I am unable to agree with the judgment of the majority of the Court of Appeal in Manitoba delivered by the Chief Justice of that Court in *Canadian Northern Ry. Co.* v. *Wilson* (1), in which the opinion is expressed that an order of the board for the payment of compensation having been made a judgment of the Court of King's Bench under the corresponding section of the Manitoba Act, that court may,

(1) 29 Man. R. 193; 43 D.L.R. 412 at page 425.

if informed that some fundamental principle of procedure such, for example, as *audi alteram partem*, has been disregarded by the board, decline to permit the process of the court to be used for the enforcement of the order. Nobody indeed can too strongly assert the importance of observing the rules of natural justice in all legal proceedings. Nobody could imagine for a moment that the legislature contemplated the possibility of the board in exercising its judicial or quasi-judicial functions disregarding the rudimentary dictates of fair play. But what seems perfectly clear is that the legislation proceeds upon a confident assurance that a tribunal constituted by the Government for the purposes of the Act could be relied upon not to disregard such principles in its proceedings. And I can hardly believe that any tribunal composed of professional men is likely in discharging responsibilities such as those cast upon the board to fail to appreciate the importance of preserving a judicial temper and of performing its duties "conscientiously with a proper feeling of responsibility" to quote Lord Moulton's phrase in a passage of his judgment in *Local Government Board* v. *Arlidge* (1) at page 150 which received the approval of the Judicial Committee in *Wilson* v. *Esquimalt & Nanaimo Ry. Co.* (2), at page 211.

The exclusive authority of the board in respect of proceedings upon an application for compensation or in dealing with a question of assessment or the like is, indeed, quite manifest; but one must admit that the point is not so obvious when one is considering what may be called perhaps for want of a better phrase the auxiliary jurisdiction of the board, the jurisdiction to pass upon a given question for the purpose of determining an issue in a proceeding before another tribunal. It may well be argued that "questions arising under Part I" is not very apt phraseology for describing an issue presented to the Supreme Court in an action brought by a workman in consequence of a defence based upon an allegation that the plaintiff's only remedy is the statutory remedy given by the Workmen's Compensation Act. More apt and precise language could no doubt have been used and one might perhaps have expected more

(1) [1915] A. C. 120. (2) [1922] A.C. 202.

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apt and precise language if s.s. 1 of s. 60 was truly aimed at such questions and the decision of them. Something is to be said, moreover, as to the effect of s.s. 4. In terms, at all events, that subsection covers all cases to which s.s. 1 applies, and yet it is difficult to believe that the legislature intended to give to the board authority to revoke a decision given upon an application made by a defendant in an action in the Supreme Court that the action is or is not maintainable. A provision having such effect might conceivably lead at times to a very regrettable confusion.

Again, if you are to ascribe to the language of s.s. 1 a scope which brings every question as to the construction and effect of any enactment of the Act within the exclusive jurisdiction of the board, using "exclusive" in its ordinary sense, some results would be produced which would to say the least, be startling. For example, a question under section 56 as to the qualification of a member of the board would become exclusively cognizable by the board itself.

Nevertheless I think the argument in favour of the view that the jurisdiction of the board is an exclusive jurisdiction to deal with the defence as to the right to maintain a particular action in the Supreme Court, or rather the question whether or not in a particular case such right has been taken away by the provisions of the Workmen's Compensation Act, may be put upon very solid grounds. The answer is a new answer. It is an answer given by this statute and by this statute a procedure is prescribed or rather a procedure is created by means of which the answer can be made good. It does not, I think, necessarily follow that where a defence or exception is newly created by statute and a procedure is created for putting it forward, that the defendant who desires to avail himself of it must adopt the statutory procedure. I do not think the presumption that the statutory remedy is intended to be the sole remedy is quite so strong as that which arises where a new right is created by statute and a statutory remedy is given. On the other hand when, in addition to the circumstance that the defence or exception is a new one and to the fact that the statutory procedure for establishing it is newly created, there are obvious considerations

to be drawn from the object and policy of the enactment pointing to the conclusion that the procedure provided for determining the issue is intended to be the exclusive procedure, then I can see no reason why effect should not be given to that conclusion unless at all events there are practical considerations which forbid it.

Now it is quite true that when an action is brought by a workman against his employer in a particular case the question whether or not the action is excluded by the statute is in that particular case a question which concerns the workman and the employer alone; that is to say, it is a question and solely a question whether or not the workman is entitled to be paid and the employer is bound to pay a sum of money. On the other hand, if the question as to what does or does not constitute an "accident", if the question whether on a given state of facts an accident has or has not occurred in the course of the workman's employment, or whether the accident does or does not arise out of the workman's employment, if such questions are generally to be passed upon by the Supreme Court with the usual concomitants by way of appeal, it is easy to see the possibility of a jurisprudence arising marked by the not very happy characteristics of that which has grown up out of the English Workmen's Compensation Act. Add to that the possibility of conflict between the decisions of the courts and those of the board and you have potentialities which, at all events, could not be supposed to add to the favourable prospects of the system set up by the statute. Without elaborating the matter further I think there are excellent practical reasons for assuming that the legislature did not contemplate such a duplication of jurisdiction in respect of these questions.

On the other hand I am quite unable, with great respect to those who take a different view, to escape the conclusion that the statute as originally framed put upon the defendant, the employer, the responsibility of taking the necessary steps to enable him to raise the defence. In other words, that the onus was upon him to invoke the jurisdiction given by section 64, subsection 4. There is not a syllable in the statute which suggests that a defendant raising

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the question by plea, for example, could thereby deprive the Supreme Court of jurisdiction to dispose of the action. The statute gave the defendant the right to get a decision upon the issue raised by such a defence from the board and it would be the duty of the Supreme Court obviously to give the defendant due opportunity to exercise his right. But the general jurisdiction of the court over the action remains untouched, in my opinion. The statute declares that in given circumstances the action does not lie, not that the courts have no jurisdiction to deal with it, an obviously different thing. The amendment of 1915 was designed no doubt (in addition to giving a defendant in an action affected by section 9 an opportunity of applying to the board and obtaining a decision upon the question whether the action had been taken away) to give to the plaintiff the opportunity of ascertaining whether or not his action was maintainable. But I am unable to give my adherence to the view that the effect of the amendment of 1915 was to shift the burden from the employer to the workman, a result which I very much fear must follow from the decision of the majority of the court on this appeal. A workman suing in the Division Court, for example, who goes to court with his witnesses would be exposed, according to that view, to the risk of having his suit stayed because, notwithstanding the absence of any contention to that effect on the part of the defendant, it might appear to the judge that possibly there was a case within the Workmen's Compensation Act. I think there is nothing in the Act which justifies a construction exposing the workman to such embarrassment in pursuing his legal rights.

Nor (it is a point which I will not elaborate) do I think there is any reason for assuming that the legislature intended to place such an embarrassing responsibility upon judges. There are cases in which the law casts responsibility upon the judge to act *ex mero motu* where some illegality, for example, is disclosed by the evidence; but these are cases where some public interest is concerned. I am quite unable to understand what conceivable public interest can be affected by the fact that the employer has failed to raise the defence that the plaintiff's right is taken away by the sta-

tute. In such circumstances there is no decision upon the construction or effect of the Act and no possibility of conflicting interpretations. The administration of the Act is not touched, the interest involved is the interest of the parties and theirs alone.

I cannot conceive why such a responsibility should be placed upon the judge.

As to the disposition of the present appeal, the parties concurred in leaving the question whether the action would lie, first to the trial judge and then to the Appellate Division. In the ordinary case of an issue being passed upon by a judge of first instance in a manner *extra cursum curias* there is no appeal from the judgment. But a party having taken part in an appeal from the first judgment without objection is not generally permitted to raise the objection that the matter is not further appealable. *Burgess* v. *Morton* (1) at page 142. But where the matter passed upon is one which by statute is committed to the decision of another tribunal I think different considerations apply and I think the appeal from the decision of the Appellate Division on this question ought not to be heard. And as the parties have taken their chances on a favourable decision from the court itself, I think the matter must be deemed to be concluded by what has occurred.

This is sufficient to dispose of the appeal except as to one point, namely, the question of the plaintiff Horace Costanza's right to recover in respect of loss of services and expenses. On that point I shall express no opinion until the moment arrives for the delivery of final judgment upon the appeal by the court as a whole.

ANGLIN J.—The defendants appeal from the judgment of a Divisional Court of the Appellate Division, confirming, by a majority, the judgment for the plaintiffs rendered after trial before Rose J. and a jury. Three of the plaintiffs sued to recover damages for injuries sustained by them as the result of having contracted typhoid fever from drinking the water from a contaminated well on the defendants' premises while in their employment. The other plaintiff,

(1) [1896] A.C. 136.

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Horace Costanza, sued for consequential damages suffered by him as husband of one and father of two of his co-plaintiffs.

Several grounds of appeal were urged based on alleged insufficiency of the evidence to support the jury's findings that the illnesses of the plaintiffs were due to the cause assigned and that the condition of the well was ascribable to negligence of the defendants. But counsel for the appellant chiefly relied upon the plea, set up by amendment at the opening of the trial, that (except as to Horace Costanza) the present action does not lie because the case is one for compensation under the Ontario Workmen's Compensation Act (4 Geo. V., c. 25) and the right of action to recover damages is thereby taken away (s. 15 (1)). That question was determined adversely to the defendants by the learned trial judge and by a majority of the learned judges in the Divisional Court, who were of the opinion that the plaintiffs had not sustained injury "by accident" within the meaning of s. 3 (1) of the Workmen's Compensation Act. Apparently no objection was taken to the competency of either tribunal to dispose of that question. Indeed no difficulty on that score was suggested during the original argument here.

In the course of their consideration of the case, however, it seemed to the members of the court that there was a serious question whether the jurisdiction of the courts to determine whether or not the action is one the right to bring which has been taken away by the statute had not been ousted by the provisions of s. 60, which confers on the board

> exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Part and as to any matter or thing in respect to which any power, authority or decision is conferred upon the Board, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any court.

Part I of the statute embraces secs. 3 to 104 inclusive. By section 15 as originally enacted, subject to three exceptions, any right of action against his employer for damages to which a workman would otherwise have been entitled is taken away wherever the statute confers on him a right

to compensation, i.e., where, in any employment to which Part I applies the workman has suffered

> personal injury by accident arising out of and in the course of his employment

(s. 3 (1)). By s. 64 (4), which was in the original Act, an employer-defendant in any action is authorized to apply to the Workmen's Compensation Board to determine whether the plaintiff can maintain the action or is entitled to statutory compensation, and if the board should decide that his only right is to such compensation the action is "forever stayed". By s.s. (2) of s. 15 (added in 1915), "any party to an action" is authorized to

> apply to the Board for adjudication and determination of the question of the plaintiffs' right to compensation under this part, or as to whether the action is one the right to bring which is taken away by this part, and such adjudication and determination shall be final and conclusive.

It seems to be quite clear that the question of the plaintiffs' right to bring and maintain this action "arises under" Part I and also that it is

> a matter or thing in respect to which power, authority or discretion is conferred on the Board.

In my opinion by giving to the board

> exclusive jurisdiction to examine into, hear and determine

all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board.

In reaching this conclusion I have not forgotten that the jurisdiction of superior courts is not taken away unless by express language in, or necessary inference from, a statute. *Balfour* v. *Malcolm* (1); *Oram* v. *Brearey* (2). I find here a positive and clear enactment that the jurisdiction of the board shall be "exclusive"— and nothing to warrant a refusal to give to that word its full effect.

The purpose of the legislature apparently was to secure uniformity in the determination of what classes of cases fall within the operation of the Compensation Act by having a single tribunal deal with that question, and also to ensure

(1) [1842] 8 Cl. & F., 485 at p. 500. (2) [1877] 2 Ex. D. 346 at p. 348.

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that no workman injured in the course of his employment should find himself in the position of having been denied damages by the courts because he was, in their opinion, entitled to compensation under the Act, and refused compensation by the board because he was, in its view, not so entitled.

Under the Act as originally drawn only the defendant was empowered to obtain the adjudication of the board on the question of the plaintiff's right to maintain his action. Sec. 64 (4). With the statute in that plight there might have been plausible ground for contending that the intention probably was to require the defendant, as a condition of being allowed to plead the provisions of s. 15 in bar of the action, to obtain an adjudication of the board that the plaintiff was entitled only to statutory compensation and not to maintain the action. If, with the statute in that condition, the court should stay the action until the board should have disposed of the question of the right to bring it, the defendant could scarcely be expected to make the application; the plaintiff was powerless to do so. But a construction of s. 64 (4) that would require the court, in the absence of a certificate from the board that the case is one for compensation and that the workman is therefore not entitled to maintain the action, to assume the contrary is scarcely consistent with the explicit and unqualified language of s. 15 (1), the application of which is in no wise made dependent upon its protection being invoked by the defendant. If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3 (1) of the statute and that ss. 15 (1) and 60 (1) might therefore apply, the court would, I think, be if not obliged certainly free *proprio motu*, to take cognizance of those provisions and stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal. *In re Robinson's Settlement* (1) at pages 727-8; *Coburn* v. *Collins* (2)

(1) [1912] 1 Ch. 717.

(2) 56 Law Times 431.

at page 434; *Crossfield* v. *Manchester Ship Canal Co.* (1). Again the defendant would have no interest to have such stay removed. It was probably to meet these difficulties that s.s. 2 was added to s. 15 in 1915 enabling "any party to an action" to apply for the board's adjudication upon the question whether the action is one the right to maintain which is taken away by the statute.

Under the amended statute, in my opinion, whenever this question arises as a substantial issue in the course of an action the proper course to take is to stay proceedings in the action until it has been adjudicated upon by the board. *Simpson* v. *Crowle* (2) at pages 250, 255. In view of the provisions of s. 20 the workman-plaintiff will be well advised in every case where there is any conceivable ground for contending that his claim falls within the Act to seek the determination of the board at the earliest possible date.

In *Scotland* v. *Canadian Cartridge Co.* (3) this question did not arise. The plaintiff's claim to compensation had there been rejected by the board before the action was begun on the ground that he had not been injured "by accident" within the meaning of that term as used in s. 3 (1). This decision had been reconsidered by the board at the instance of the defendant. Certificates of the board's determination of both applications had been put in without objection. The right of the courts to deal with the action and to decide whether the plaintiff was entitled to recover was not questioned. In two recent cases before the Privy Council referred to by the appellant—*McMillan* v. *Canadian Northern Ry. Co.* (4), and *McColl* v. *Canadian Pacific Ry. Co.* (5)—their Lordships dealt with the appeals as submitted. The question now under consideration was not presented in either case. In the *McMillan Case* (4) owing to the doctrine of common employment there was no right of action under Ontario law apart from the Workmen's Compensation Act, and it gives only a right to compensation recoverable on application to the board: in the *McColl Case* (5) the Com-

(1) [1904] 2 Ch. 123.
(2) [1921] 3 K.B. 243.
(3) 59 Can. S.C.R. 471.
(4) 39 Times L.R. 19.
(5) 39 Times L.R. 14.

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pensation Board had determined that the case fell within the Act and that any right of action had been taken away, and its decision was accepted as conclusive in so far as the right of action was subject to provincial control.

The plaintiffs have applied to be allowed to put in a certified copy of the decision of the board that they

> did not sustain personal injuries by accident arising out of and in the course of their employment with Dominion Canners, Limited,

and accordingly disallowing claims made by them to compensation under the statute, as conclusive that their right to bring this action was not taken away by the Workmen's Compensation Act. They maintain that this document is admissible, notwithstanding any rule or practice of this court to decline to receive evidence that was not before the court from which an appeal is taken (*Red Mountain* v. *Blue* (1); *Michigan Central* v. *Jeannette,* 13th December, 1918), because it bears on the question of the jurisdiction of the court of first instance to proceed with the trial of the action and of the Divisional Court and of this court to deal with it on appeal without a determination by the board that it is not barred by s. 15 (1), and is therefore outside of the stated case on which the appeal is taken (Sup. Ct. Act, s. 73).

The decision of the board appears to have been rendered on the 25th of November, 1921, three weeks after the judgment of the Divisional Court had been delivered and considerably more than a year after the happening of what the plaintiffs allege to have been the accident or accidents which caused them personal injuries, i.e., some time after any claims they could have to statutory compensation had been barred (s. 20 (1)). *Ex facie* it is a decision rejecting a claim for compensation and not an adjudication by the board upon an application made to it under s. 15 (2). Counsel for the respondent further stated, without contradiction, that the decision of the board had been made *ex parte* and without notice having been given to his client and he produced a letter from the Chairman of the board stating that its decision of the 25th of November, 1921, was made in disposing of the claims before it in the ordinary

(1) 39 Can. S.C.R. 390.

course and not upon an application under section 15 (2), the board's practice on such latter applications being to have the opposite party to the litigation notified. On these grounds counsel for the respondent objected to the certified copy of the board's decision being received. He also contended that if admitted it would not be conclusive for the purposes of s. 15 (1) of the statute.

With the latter contention I am disposed to agree. The board in determining that the right of action asserted by a plaintiff has or has not been taken away by s. 15 (1) of the Act or that a plaintiff is or is not entitled only to compensation under the statute, whether on application made under s. 15 (2) or under s. 64 (4), acts judicially. It is empowered to adjudicate upon and finally to dispose of certain rights of the parties.

> It is one of the first principles in the administration of justice,

said Erle C.J., in *In re Brook and Delcomyn* (1) at p. 416,

> that the tribunal which is to decide must hear both sides and give both an opportunity of hearing the evidence upon which the decision is to turn * * * I find the master minds of every century are consentaneous in holding it to be an indispensable requirement of justice that the party who is to decide shall hear both sides giving each an opportunity of hearing what is urged against him.

Seneca's couplet:

> Quicunque aliquid statuerit, parte inaudita altera,
> Aequum licet statuerit, haud aequus fuit,

has often been quoted with approval by learned judges. *R.* v. *Archbishop of Canterbury* (2), at p. 559, per Lord Campbell; *Smith* v. *The Queen* (3) at p. 624, per Sir R. Collier; *Marcoux* v. *L'Heureux* (4) at p. 283 per Duff J. Unless dispensed with by statute, this rule of elementary justice is of universal application. *Bonaker* v. *Evans* (5) at p. 171.

> The laws of God and man both give the party an opportunity to make his defence, if he has any,

said Fortescue J. in Dr. *Bentley's Case* (6) at p. 567. Nor is the application of the principle that no man

(1) [1864] 16 C.B.N.S. 403.
(2) 1 E. & E. 545.
(3) 3 App. Cas. 614.
(4) 63 Can. S.C.R. 263.
(5) 16 Q.B. 162.
(6) 1 Str. 557.

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shall be deprived of his rights without an opportunity of being heard, limited to strictly judicial proceedings. *Cooper* v. *Wandsworth Board of Works* (1) at p. 189.

Under section 60 of the Workmen's Compensation Act, which makes the Board's jurisdiction exclusive and its action or decision final and conclusive, the board is empowered not merely to

> determine all matters and questions arising under this Part, etc.,

but "to examine into, hear and determine" all such matters and questions, etc. There is here at least an implied direction that before determining any matter or question the board shall examine into and hear it. This involves the hearing of all parties interested. The judgment of Lord Lyndhurst in *Capel* v. *Child* (2) at pp. 573-4 is instructive on the import of examination and hearing. The decision of the board tendered by the plaintiff was *ex parte* and was not rendered in the exercise of the special jurisdiction conferred by s. 15 (2) and s. 64 (4) of the Workmen's Compensation Act. In my opinion it should not be accepted as conclusive of the right of the plaintiff, notwithstanding the provision in s. 15 (1), to maintain the action, if otherwise well founded. The board is given explicit authority to reconsider any matter with which it has dealt and to rescind, alter or amend any decision or order previously made: s. 60 (3).

During the course of the argument it was suggested that the defendant having submitted for trial by Mr. Justice Rose the issue whether the plaintiff's right of action had been taken away by the statute and having taken the chance of its determination by a tribunal lacking jurisdiction must accept the judgment rendered as the decision of a quasi-arbitrator and therefore non-appealable. *Burgess* v. *Morton*, (3). Lack of jurisdiction to pronounce it deprives a judgment of any effect whatever (*Archbishop of Dublin* v. *Trimleston* (4) at p. 268, even as against the party who invoked the determination. *Toronto Ry. Co.* v. *Toronto* (5) at p. 815. Where a court is deprived of jurisdiction over a subject by statute no acquiescence—not even express con-

(1) 14 C.B.N.S. 180.
(2) [1832] 2 Cr. & J. 558.
(3) [1896] A.C. 136.
(4) [1849] 12 Ir. Eq. R. 251.
(5) [1904] A.C. 809.

sent—can confer jurisdiction upon it. The remedy against such an excess of jurisdiction by an inferior court is either by appeal, if there be provision for an appeal, or otherwise by prohibition; in the case of the High Court by appeal. *Burgess* v. *Morton* (1). This right of appeal is not lost unless relinquished either expressly or by asquiescence such as is found when parties with knowledge of the lack of jurisdiction in the court assent to the judge hearing and determining the matter virtually as an arbitrator.

Here there was no intention that there should be any determination of the matter *extra curiam* such as would exclude a right of appeal. The proceedings in the trial court and in the Divisional Court were carried on under the belief and on the assumption that those courts were entitled to take cognizance of, and had jurisdiction to adjudicate upon, the issue raised by the plea based on section 15 (1) of the Workmen's Compensation Act. The parties clearly meant to keep themselves *in curia*; the trial judge and the Divisional Court so understood the position; and both courts and parties thought an appeal was open. This is not a case of mere deviation from the *cursus curiae* in dealing with a subject-matter over which the court had jurisdiction—a case in which the taking of an intermediate appeal without challenging the original jurisdiction might preclude its being questioned on further appeal. *Bickett* v. *Morris* (1); *Cornwall* v. *Ottawa & N.Y. Ry Co.* (2). On the contrary, it is a case in which the courts have been divested by statute of jurisdiction over the subject-matter, and in which they have assumed the duty of another tribunal. *Pisani* v. *Attorney General* (3) at p. 522. The plaintiffs are therefore not entitled to have the judgment which they hold treated as unappealable and conclusive in their favour, *Simpson* v. *Crowle* (4) at pages 250, 252-3, 255, 257, as they would have been had there been conscious assent to the question whether the action was one which the statute had taken away their right to maintain being dealt with by the trial judge *extra curiam*.

(1) [1896] A.C. 136.
(2) L.R. 1 H.L. S.C. 47.
(3) 52 Can. S.C.R. 466.
(4) L.R. 5 P.C. 516.
(5) [1921] 3 K.B. 243.

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The judgment of the Divisional Court is a final judgment appealable to this court under s. 36 of the Supreme Court Act; it is our duty to pronounce the decision at which the Divisional Court should have arrived (s. 51, Sup. Ct. Act); and that court in turn should have dealt with the question now before us as the trial judge should have done. Ont. Judicature Act, s. 27 (1).

Making the order which the trial judge, in my opinion, should have made when the issue under s. 15 (1) came to his notice, I would direct that proceedings upon the pending appeal should be stayed to permit of an application being made to the board under s. 15 (2) for its

> adjudication and determination * * * as to whether the (present) action is one the right to bring which is taken away by

Part I of the Workmen's Compensation Act. I see no reason why a certificate of the board's decision should not be filed with the registrar. The appeal may then be disposed of.

BRODEUR J.—I concur with Mr. Justice Anglin.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Proceedings stayed.

Solicitors for the Appellant: *Lees, Hobson & Co.*

Solicitors for the Respondents: *Bain, Bicknell, Macdonell & Gordon.*

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*Nov. 2, 3.
*Nov. 27.

VERA CECIL, EXECUTRIX OF THE ESTATE OF HENRY CECIL, DECEASED (PLAINTIFF) ..... } APPELLANT;

AND

CONRADE WETTLAUFER (DEFENDANT).. RESPONDENT.

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

Contract—Commission—Sale of shares—Commission dependent on payment—Insolvency of buyer—Purchase of assets by seller—Payment or equivalent.

W. having agreed to sell shares in the capital stock of the Orr Gold Mines Co. to the Kirkland-Porphyry Gold Mines Co. entered into a contract to pay W. a commission for services in effecting the sale. The purchase price of the shares was to be paid as follows: $100,000 on transfer to the purchaser and the balance by instalments at specified dates and the commission was to be paid out of the respective instalments. A clause in the contract provided that if the payments were not made by the purchaser W. would be under no liability to pay the commission. The initial payment of $100,000 was made and the commission thereon paid to C. When the next payment fell due the purchaser defaulted and shortly after was placed in liquidation under the Winding-Up Act. The liquidator offered the assets for sale and accepted the tender of W. and H.W., a creditor who had advanced money to the insolvent company for its operations. The successful tenderers received all the assets of the estate including the stock sold by C. and other stock in the Orr Co. and paid the claims of the other creditors. In an action by C. for the balance of his commission there was no evidence that the assets had a cash value equivalent to the amount of the unpaid purchase price of the shares.

Held, Idington J. dissenting, that W. had not received payment for the shares sold to the Kirkland Co. and the commission was not earned.

Per Duff J. By the transaction with the liquidator the contract sale of the shares to the Kirkland Co. was virtually rescinded and the evidence fails to show that what C. received in purchasing the assets was received or given in the performance by the Kirkland Co. of its obligation under the contract of sale of shares.

Held, also, that there is nothing on the record to show that C. did anything to prevent the contract for sale of the shares from being carried out.

Per Idington J. There should be a reference to ascertain the value of the assets purchased from the liquidator.

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

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

The facts are fully stated in the above head note.

Slaght K.C. and *G. F. Macdonnell* for the appellant.

Glyn Osler K.C. and *Munnoch* for the respondent.

THE CHIEF JUSTICE.—After giving full consideration to the argument at bar of Mr. Slaght for the appellant, I remain of the conclusion I reached at the close of the argument that the appeal should be dismissed with costs.

The reasons for the unanimous judgment of the Court of Appeal, affirming the judgment of the trial judge, Middleton J., were stated by Mr. Justice Ferguson. In these reasons the learned judge reviewed all of the somewhat complicated facts out of which this litigation has arisen. I do not think it of any advantage to restate these facts as I fully concur in his conclusions.

The pith of the learned judge's reasons is contained in the latter part of them, which I quote in full:

> Having read the evidence, I am of the opinion that none of the parties to the purchase and sale between Wills and Wettlaufer on the one part, and the liquidator on the other part, looked upon the transaction as a cash sale for $611,000 cash, that none of them considered the bonds and the assets pledged therefor as securities or properties that could be sold or dealt with so as to realize $600,000 cash, or anything like that sum, and unless we must give effect to the form and disregard the substance, I do not think it could be reasonably suggested, let alone found, that the bonds held by the defendant were realized upon in cash —or in something which the defendant voluntarily elected to take instead of cash; the defendant had to save as much as he could from the wreck, and make the most of a difficult situation—and I do not think that in doing so he can, because of the form of his offer, be held to have realized cash or been paid in cash as was contemplated he should be paid before the plaintiff became entitled to commission under the agreement sued upon. It was for the conversion of the plaintiff's property into cash that the plaintiff was to be paid.
>
> Admittedly the shares have not been converted into cash, and I can find nothing in the evidence to suggest that anything the defendant did prevented such a conversion. What the defendant got by his purchase was merely salvage of a part of his property, but not cash.

IDINGTON J. (dissenting).—Since this action was instituted and tried, Henry Cecil, the plaintiff therein and later appellant, has died and been succeeded, as appellant

herein, by his widow who is executrix of his last will and testament.

The said late Henry Cecil and respondent entered into the following agreement:

This agreement made this Fifth day of September, 1918.

Between:—

CONRAD E. WETTLAUFER, of the City of Buffalo, in the State of New York, hereinafter called

The First Party;

and

HENRY CECIL, of the City of Toronto, in the County of York, hereinafter called

The Second Party.

WITNESSETH that in consideration of the efforts of the said Second Party in making the sale of stock of Orr Gold Mines, Limited, the First Party agrees to pay to the said Second Party Ten per cent (10%) upon five hundred and thirteen thousand two hundred and 40/100 dollars, the purchase price thereof, out of the proceeds of said sum as follows:—

(*a*) Five thousand dollars ($5,000) to-day in cash out of the first payment under an agreement made between the First Party hereto and Kirkland-Porphyry Gold Mines Limited. The receipt of which is hereby acknowledged.

(*b*) Ten thousand dollars ($10,000) out of the second payment to be made under said agreement on the 1st day of September, 1919, when such payment shall have been made; and

(*c*) Thirty-six thousand three hundred and twenty and 40/100 dollars ($36,320.40) out of the third payment under said agreement of three hundred and thirteen thousand two hundred and 40/100 dollars, when such payment shall have been made.

Should said payments not be made by the said Kirkland-Porphyry Gold Mines Limited, the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto, and their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of Wm. J. Magavern.

Conrad E. Wettlaufer (Seal).
H. Cecil. (Seal).

This action was brought, on the 22nd of July, 1922, to recover from respondent the balance due in respect of the $46,320.40, balance of commission due under said agreement.

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The respondent and said Kirkland-Porphyry Gold Mines Limited, on the same date as the above agreement was made, entered into a long agreement in writing whereby said respondent agreed to sell and did sell to said company, which agreed to buy and did buy from him, 873,000 shares of Orr Gold Mines, Limited, for $513,200.40, payable as follows:—

"(*a*) One hundred thousand dollars ($100,000.00) on the transfer of the shares referred to in paragraph 1 hereof.

(*b*) One hundred thousand dollars ($100,000.00) on or before the 1st day of September, 1919; and

(*c*) The balance of three hundred and thirteen thousand and two hundred 40/100 dollars ($313,200.40) on or before the first day of September, 1920."

The said first payment thereunder, $100,000.00, was made and the late Cecil then got the $5,000.00 mentioned in above quoted agreement on account of his said commission, but the second and third payments were not made by the said company. They had been secured, not only by the terms of the said agreement, lastly mentioned, but by the promissory notes of the said company, and the collateral security bonds of said company to the amount of $420,000.00 charged upon all the assets of the Kirkland-Porphyry Gold Mines Limited, which, of course, would bind the stock transferred to it in the Orr Gold Mines, Limited, and furnish a controlling interest therein. Practically the respondent thus and thereby got not only the control of the Kirkland-Porphyry Gold Mines Limited for the full amount of this balance of $413,200.40 due him, but also, indirectly, of the Orr Gold Mines, Limited.

The remarkable thing happened, however, that he formed an alliance with one Wills, which I suspect originated before the event of liquidation of the company, on which this case has turned in the courts below.

Though the said Wills had put into the said Kirkland-Porphyry Gold Mines Limited, at and after the time of said agreements and later to develop its resources, a total sometimes stated to be $190,000.00 and at other times said to be $290,000.00, yet he put it (according to the statement

of the case herein) into liquidation shortly after the first of said promissory notes became due.

Thereupon in due course of time an offer was made by the respondent and said Wills which led to the liquidator transferring to them the entire assets of the said company which as already stated practically meant the control of and, I imagine, practically the entire assets of the Orr Gold Mines, Limited, save a possibility not cleared up of rights of its remaining shareholders.

This successful tender was, so far as respondent's share thereof is concerned, based entirely on the surrender of his bonds held as collateral security for the payment of the balance due him.

The learned trial judge held he could not, on his construction of the agreement above quoted, see how the plaintiff then before him could rest at all on the result of said purchase from the liquidator. The price had not been paid by the company and thus the matter ended unless in the case of fraud, which was not charged.

In somewhat like terms the Appellate Division of the Supreme Court of Ontario dismissed the appeal thereto and characterized that got as wreckage.

With great respect, I submit that the true interpretation and construction of the agreement above quoted in full is not, though I admit quite capable of such a construction as given it, been correctly construed and applied in light of the relevant facts and surrounding circumstances.

If to be read in an exceedingly narrow sense and, in the last analysis, effect only to be given to the clause which reads as follows,

> should said payments not be made by the said Kirkland-Porphyry Gold Mines, Limited, the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale,

I can, though not agreeing therewith, quite understand the conclusion of one so reading it.

I should not be surprised to find now-a-days a contract expressly so constituted and be quite agreeable to enforcing it. But it would be of such an unusual character that I would expect it to be framed in other terms than that before us.

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I interpret that in the circumstances presented quite otherwise. It, to my mind, clearly intended not the actual payment of dollars on the dates specified, but the realization of that which would produce in equivalent dollars the stated values.

If the respondent chose to take in exchange another gold mine worth, beyond dispute, double the sum specified, I do not think he could, under this agreement, escape payment of this commission by any such subterfuge. And if the undisputed evidence is to be our guide, that is practically what he has done.

It was not the actual dollars to be paid but the amount in actual dollars to be realized that in fact was present to the minds of the contracting parties now in dispute herein.

The commission was to be derived "out of the proceeds of said sum" which I interpret to mean as the words imply.

And the concurrent agreement between the respondent and the company clearly indicates this was what the parties had in view for the respondent was given a predominant power over the operations of the company to whom he was selling, in section 9 thereof, as follows:—

> 9. IT IS EXPRESSLY AGREED as a condition precedent to the entering into of this agreement, that all expenditures made by the Second Party for salaries, development, mill and plant shall be approved of by a majority in number of a committee of three, two of whom shall be appointed by the First Party and one by the Second Party; it being agreed, however, that one of the consenting members of said committee shall be the nominee of the Second Party. It is also further agreed that the Second Party shall deliver to the said committee all of the bonds of the Company, except those referred to in clauses 2 and 8 of this agreement, such bonds so delivered to the said committee to be released by a majority in number thereof, of whom one shall be the nominee of the Second Party, only as required for financing the Second Party in its operations. It is further agreed that none of the treasury shares of the Second Party shall be sold or disposed of without the approval and consent of the majority in number of said committee, one of whom shall be the nominee of the Second Party. This committee shall exist with full authority in the premises until the notes given to the First Party for four hundred and thirteen thousand two hundred 40/100 dollars ($413,200.40) are fully paid.

It was out of the operative results so produced or otherwise in the course of events to be developed that he expected to be paid and out of that payment be obliged to pay the late appellant his commission.

It is in that light I should look at, interpret and construe this contract.

And hence in the events which have ensued the respondent should pay on the basis of his successful use of that he got and agreed to pay a commission upon.

What that result is appears from the uncontradicted evidence of the late plaintiff, which is as follows:—

Q. How close to the lines of the Orr property is shaft of the Kirkland Gold?

A. 60 feet. I sunk it there for the purpose of proving their property.

Q. Sixty feet from the boundary line of the Orr?

A. Yes.

Q. Is it a vertical shaft, or nearly so?

A. It is so.

Q. And on the 12th of June, 1920, when Wills and Wettlaufer bought the assets, to what depth had this shaft on the Kirkland claims adjoining, what depth had that shaft been sunk?

A. Over 900 feet.

Q. Had there been much lateral work done on that property?

A. Oh, yes, a great deal. They had about two years and a half of ore in sight.

Q. Have you been underground and familiar with it?

A. Yes.

Q. And what were the results and depth on the adjoining property, the Kirkland Claim Gold Mine, at the time in June, 1920—had it proven to be valuable?

A. It would have doubled the value of the Orr, absolutely doubled their value.

Q. It would have doubled the value of the Orr—you mean the ore in the ground, or what?

A. The shares of the Orr, or the exposure of the ore, would have doubled the value of the price of stock or the price of the mine.

Q. Would have doubled the value of the price of the mine, I should have asked you before we left it—take the Orr Mine itself that you have told us about, being 400 feet down, and lateral work done, did the values —were there rich values or otherwise, at the 400 foot level on the Orr property?

A. Yes, we had about $23.80 across twelve feet.

Q. $23.80 across twelve feet—$23.80 to the ton?

A. To the ton.

Mr. Osler: That is on the Kirkland.

Mr. Slaght: No, on the Orr?

A. On the Orr.

Q. On the Orr itself, yes?—A. On the hanging wall of that there is six inches of stuff that would go over $700, not included in that assay.

It seems quite clear that out of the pitiable wreckage the Appellate Division could only see there is much more in sight and probably by this time realized.

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I should therefore direct a reference as to the facts and if so found declare the respondent's obligation to pay under said agreement.

If that is not the practical meaning of the results of the contract in question I fail, with great respect, to understand why so much time and labour was wasted upon it in the courts below.

If to be valued by the last clause alone and the terms of the concurrent contract for bringing about which the commission was to be paid must be discarded and only cash to be considered no more can be said; for then no use of all the effort of respondent's counsel at the trial and in appeal to justify the course of his client.

If that is the meaning of the contract the case is of the simplest character for no one pretends that the actual dollars were ever received.

I would direct a reference to ascertain if the foregoing statements of the late plaintiff are true in substance and in fact, or what are the actual facts.

If as the result thereof it be found that the sale by him to the said company has produced the receipt by respondent of that which is beyond all doubt such as to render him in justice liable to pay said balance of commissions the court on further directions should so declare, and I would reserve such further directions and costs in order that the proper remedy be given.

If the respondent at any stage had got, in lieu of cash, let us say, for example, victory bonds or the like unexceptionable assets, in his dealings with what bonds as were given him as collateral security could he thereby escape the payment of the balance of commission now in question because he had not received actual cash?

I submit not and I question much if the manipulations he has joined in have not produced the equivalent of such victory bonds.

I respectfully submit our law is not so poverty stricken as to render it impossible to produce justice in such a case.

The learned trial judge at the trial ruled out any such evidence expressly on the ground that it would be admissible only upon a reference.

I may remark that the question of any set-off arising out of the previous dealings and claims so made does not seem to me open in this case for whatever may be the facts the assignment thereof to respondent was made two days after the writ was issued in this case and seems out of the case.

There is another aspect of that and it is this, if an account were taken thereof it would involve not only the share of this commission but all the dealings between the deceased and Wills, or him and another.

Surely there has been enough invoked of what is or is not relevant, if the simple reading of this contract is all that is in question and so clear as found by the courts below, to settle the matter.

I cannot accede to that reading of the contract and therefore would allow the appeal and direct the reference I suggest to ascertain the actual facts as to the value of what the respondent has got as the proceeds of what he bargained for and if it is such as in justice to entitle appellant to claim the promised commission and reserve further directions and costs.

The facts so far as developed shew that what was got in the way of assets by the bargain of respondent and Wills with the liquidator, was six mining claims, assignment of lease made by Orr Gold Mines, Limited, to Kirkland-Porphyry Gold Mines Limited, and $29,000 worth of plant, besides the 873,334 shares of stock in the Orr Gold Mines, Limited.

The result was further so manipulated between them that respondent got immediately after the sale of the three first items of said assets to the Orr Gold Mines, Limited, not only his 873,334 original shares therein but also a further issue of treasury stock of said company in which he shared to a large amount.

It would require such a reference as I suggest to clarify all these manipulations and determine the actual resultant value of what respondent got thereout as the proceeds of the said sum referred to in the above quoted bargain for commission.

DUFF J.—By the agreement which is the foundation of the appellant's claim the respondent undertakes to pay 10%

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of $513,240, the purchase price of certain shares of stock in the Orr Gold Mines, Limited, out of the proceeds of the sale, in a fixed series of instalments, $5,000 in cash out of the first payment of purchase money, $10,000 out of the second payment and $36,000 odd out of the third payment. The appellant has received only the sum of $5,000 first payable and sues to recover the balance. It is admitted that the second and third instalments of purchase money were never in fact paid conformably to the provisions of the agreement of sale; and there can be no doubt that according to its literal terms the last clause of the agreement between the appellant and the respondent (which reads as follows

> should said payments not be made by the said Kirkland-Porphyry Gold Mines Ltd., the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale),

would come into operation.

It was contended, however, by Mr. Slaght in a forcible argument that, although the purchase money had not been paid strictly in pursuance of the terms of the agreement of sale, the respondent had accepted in satisfaction and in effect in payment of bonds received by him from the purchaser, the Kirkland-Porphyry Company, as security for the payment of the purchase money certain assets of that company and that this must be regarded as payment of the purchase money for the purpose of giving effect to the contract for commission. Alternatively Mr. Slaght contended that the respondent by his conduct had prevented the execution of the agreement for sale or at all events had interfered with it in a material way and that consequently according to the principle of *Burchell* v. *Gowrie and Blackhouse Co.* (1), and *Upper Canada College* v. *Smith* (2), the plaintiff was entitled to succeed in the action. As to the second of these grounds, I may say at once I can find no evidence to justify a finding that anything done by the respondent seriously augmented the improbability that the sale would be carried out.

As to Mr. Slaght's first point, the appellant could, I think, succeed only by establishing one of two things, either a real

(1) [1910] A.C. 614. (2) 61 Can. S.C.R. 413.

conversion of the property which was the subject of the sale into money, or the acceptance by the purchaser in substitution for cash of something that was truly considered by the parties to be the equivalent of cash.

Now Mr. Slaght rightly pressed upon us the fact that the bonds held by the respondent as collateral security for the performance of the purchaser's obligations under the agreement for sale were, by the very terms of the arrangement with the liquidator, treated as paid and discharged. But while *prima facie* important this fact ceases to be of any decisive significance when it becomes reasonably clear, as I think it is, that in substance, by the transaction with the liquidator, the sale instead of being carried into effect was put an end to. It is true that the transaction did not assume the form of rescission. Moreover another purchaser was interested with the respondent and another property was involved, but I agree with the court below that it is impossible to find on the evidence that what the respondent received was received or given as performance by the purchaser of its obligation under the contract of sale. It seems sufficient to say that it appears to me to be beyond controversy that the transaction with the liquidator did not involve "payment" of the purchase money in any sense contemplated by the contract upon which the action is brought.

The appeal should be dismissed with costs.

ANGLIN J.—In my opinion the conditions of the contract under which the appellant asserts the right to recover a balance of commission have not been fulfilled. The portion of the proceeds of sale out of which alone such balance of commission was made payable never came to the hands of the respondent. Excluding all idea of fraud or collusion, of which there is not the slighest evidence, I find it a little difficult to appreciate how a transaction by which the vendor took back the subject-matter of the sale can be regarded as the carrying of that sale to completion. Neither has it been demonstrated that the assets of the purchasing company, which the vendor acquired, had a cash value equivalent to the unpaid balance of the purchase price. Nor

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am I convinced that satisfactory proof on that point would have entitled the appellant to recover.

On the other aspect of the case I see nothing to warrant a conclusion that the insolvent Kirkland-Porphyry Company would or could have paid, or been made to pay the balance of purchase money due to the respondent if he and Wills had not taken over its assets.

I would dismiss the appeal.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The appellant's argument was directed to show if possible, that the facts here come within a well known rule of law which may be stated in the words of Willes J., in *Inchbald* v. *Western Neilgherry Coffee Plantation Co.* (1) at page 741:

> Whenever money is to be paid to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

The appellant entered into an agreement in writing with the respondent on September 5th, 1918, whereby he was to be paid by the latter a commission of five per cent on the payment to the respondent by the Kirkland-Porphyry Gold Mines Limited, of the purchase price of 873,000 shares of Orr Gold Mines, Limited. These shares were on the same date sold to the Kirkland Company by the respondent for $513,200.40, of which $100,000 was paid immediately on the transfer of the shares, $100,000.00 was made payable on September 1st, 1919, and the balance, $313,200.40 on September 1st, 1920. The agreement between the appellant and the respondent was that the latter would pay the former's commission out of the proceeds of the purchase price, and the appellant received $5,000.00 out of the cash payment of $100,000.00. The contract contained the following clause:

> Should said payments not be made by said Kirkland-Porphyry Gold Mines Limited, the First Party (the respondent) shall be under no liability to the Second Party (the appellant) for the payment of any commission by reason of said sale.

(1) 17 C.B. N.S. 733.

The last two instalments were never paid by the Kirkland company, which, on the petition of one Hamilton B. Wills, who had advanced it considerable sums of money, and notably the money for the first payment of $100,000.00, was put in liquidation as being insolvent.

The appellant's claim for his commission under his contract is based on what happened subsequently to the liquidation proceedings.

Wills and the respondent were both large creditors of the Kirkland company and held between them some $600,000.00 (nominal value) of its bonds. The respondent by the agreement which he made with the Kirkland company on September 5th, 1918, for the sale of the Orr Mines' shares, had received as collateral $420,000.00 (nominal value) of the company's bonds, this of course being to the knowledge of the appellant who signed the agreement as president of the company. And Wills also held bonds of the company as security for his advance.

When the Kirkland company went into liquidation, the liquidator, Mr. Clarkson, advertised its assets for judicial sale, and Wills and the respondent tendered for the same at an amount equivalent to the liabilities of the company, which they stated they understood to be in the neighbourhood of $610,000.00 or $611,000.00. They added that they were bond creditors in the amount of about $600,000.00, having filed their claims therefor.

This tender was accepted by the official referee on the advice of the liquidator, and a formal agreement was entered into between the liquidator and Wills and Wettlaufer for the sale to them of the assets of the Kirkland company (which included the Orr Mines' shares) at an amount sufficient to pay the expenses of the winding-up proceedings and the creditors' claims against the company. These expenses and claims, outside of those of Wills and Wettlaufer, amounted to some $11,000.00 which was paid in cash, the purchasers, of course, not having to pay over money which represented their own claims.

It is evident that this was not a payment by the Kirkland company to the respondent of the balance of the price of the Orr Mines' shares. The condition of the contract

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between the appellant and the respondent was therefore never fulfilled, and under the express terms of the contract the respondent was under no liability for payment of the appellant's commission.

Did the respondent do any act which prevented or made it less probable that the appellant should receive the money payable under the above condition?

It is conclusively demonstrated that the Kirkland company was hopelessly insolvent and could never have met these payments. What money it ever had, as well as the money used for the first payment to the respondent, was furnished by Wills who was under no obligation to continue to finance the company.

But the appellant urges that the respondent used the company's bonds of the nominal value of $420,000.00, which he had received as collateral, to purchase jointly with Wills the assets of the Kirkland company comprising the Orr Mines' shares.

The answer is that these bonds were given to the respondent as collateral in order to secure the payment of the balance of the price of the Orr Mines shares, to wit, $413,200.40, and he could have disposed of them under a contract which he made with the Kirkland company contemporaneously with the sale agreement and which the appellant signed as president of the company. It is not suggested that these bonds ever had any value. There certainly was no payment by the company of the amount which it owed the respondent, and which it was unable to pay, but at the most a taking back of the property for which it had not paid and a surrender of the collateral security the respondent had received. And in no way did the respondent prevent his debtor from paying for the Orr Mines' shares. No other offer was received for the purchase of the assets than that made by the respondent and Wills, and it seems perfectly idle to contend now that a better arrangement could have been made.

It is entirely beside the question to say that Wills and the respondent have made money out of their purchase of the assets of the Kirkland company, and still have the Orr

Mines shares and that these shares have increased in value. The appellant had a conditional contract the condition of which was never fulfilled and the respondent did nothing to prevent its fulfilment. There is no basis for the appellant's action.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur G. Slaght.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*

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*Oct. 10, 11.
*Nov. 27.

PREMIER LUMBER COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

GRAND TRUNK PACIFIC RAILWAY CO. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Carriers—Railways—Misdelivery—Liability—"Loss"—Meaning—Absence of Notice.

The appellant had purchased at Vancouver lumber from the G.W.M. Co. and had sold it to the U.S.L. Co. of Portland, Oregon. The lumber was shipped from Prince Rupert, B.C. to Minneapolis by the G.W.N. Co., consigned to itself, to be carried by respondent's line of railway to Winnipeg and thence to destination by that of the Canadian Pacific Railway Company. The bills of lading were in the standard form known as a "straight bill of lading" approved by the Board of Railway Commissioners for Canada. Each bill was indorsed as follows: "Deliver to Premier Lumber Company, (sgd.) the G.W.N. Co." The bills of lading were held in Vancouver by the Standard Bank of Canada, from whom the appellant had borrowed money, to be handed over to the purchaser on payment being made. The C.P. Ry. Co. without requiring or obtaining surrender of the bills of lading, allowed possession of the lumber to be taken by, or on behalf of, the U.S.L. Co. The appellant company, not having been paid by the U.S.L. Co. for the lumber seeks to recover the price of it from the respondent company, the original carrier, as being responsible under the conditions of the bills of lading for the fault or misfeasance of the second carrier in wrongfully handing over the lumber. The main defence was the failure of the appellant company to give notice of loss which by the bills of lading was made a condition of the respondent's liability.

Held, that the respondent company was not liable.

Per Davies, C.J. and Duff and Brodeur JJ.—Upon the evidence, the U.S.L. Co. obtained delivery of the lumber, without presenting the bill of lading, to the knowledge and with the consent of the appellant company.

The second section of the conditions indorsed on the bills of lading provided that "the carrier * * * shall be liable for the loss * * * caused by, or resulting from, the act, neglect or default of any * * * carrier * * *."

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

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Per Duff J.—Loss by reason of mis-delivery is "loss" within the meaning of section 2 for liability by the initial carrier. Anglin J. *contra.*

The 4th section of the conditions endorsed on the bills of lading provided that "notice of loss, damage or delay must be made to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after the delivery of the goods, or in the case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable."

Per Davies C.J. and Idington, Brodeur and Mignault JJ.—The absence of notice of loss is fatal to the appellant's claim.

Per Duff J.—The notice clause although applicable in the circumstances of the case would afford no defence because after the carrier under a certain clause in the bill of lading had become liable as warehouseman; any "failure to make delivery" could only be a failure after demand by or on behalf of the consignee, and "a reasonable time for delivery" could only mean a reasonable time after demand; there is no evidence of any demand having been made except by the persons to whom delivery was made and consequently the time prescribed never began to run.

Per Anglin J.—"Loss" in sections 2 and 4 means physical loss of the goods as by accident during transit, or through negligence, or by theft, but does not cover non-delivery due to an intentional parting with the goods by the carrier amounting to a wilful misfeasance. The second carrier having wilfully handed over the goods to a party not entitled to receive them, the respondent cannot assert any right to the protection of the notice clause in respect to such an act of misfeasance which did not cause a "loss" within section 2 of the conditions.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 181) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial court and dismissing the appellant's action.

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

Eug. Lafleur K.C. for the appellant.

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

THE CHIEF JUSTICE.—For the reasons stated by my brother Brodeur, in which I fully concur, I would dismiss this appeal with costs.

(1) [1922] 2 W.W.R. 181.

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Not only do I think that the action fails because no notice was given to the carrier at the point of origin, namely the Grand Trunk Pacific Railway Company, within the four months prescribed by the bill of lading in order to maintain an action against the carrier for the alleged failure to make delivery, but the evidence and the exhibits disclose to my mind, that a business custom and practice existed between the Premier Lumber Company and the United States Lumber and Box Company and the Soo Railway Company which fully justified the Soo Railway Company, as between it and the Premier Lumber Company, in delivering the five cars of lumber in question to the United States Lumber and Box Company, or their nominees, without the production of the bills of lading. On this point, see specially the letter from the Premier Lumber Company to the United States Lumber and Box Company where the latter company is instructed to communicate directly to the Soo Railway Company the destination to which they were to forward the lumber and mentioning at least two of the cars now being sued for on the ground of misdelivery as awaiting such forwarding instructions.

IDINGTON J.—This is an appeal from the Court of Appeal for British Columbia maintaining the judgment of the learned trial judge who dismissed the action of the appellant against the respondent.

The action was brought by appellant claiming to recover damages for breaches of several contracts to carry a car load of lumber to Minneapolis, Minnesota, each entered into by the respondent with the G. W. Nickerson Co., Ltd., and each evidenced by a bill of lading made pursuant to the form approved by the Board of Railway Commissioners for Canada, by order no. 7562 of the 13th July, 1909, and subject to the conditions indorsed thereon. These were what are known by the terms of said order of the board as straight bills of lading—original—not negotiable.

The said Nickerson Company nevertheless indorsed these several bills of lading to the appellant company, which claims to have bought the lumber in question five or six months before shipment from the said Nickerson Co.

The appellant company in turn, shortly after said purchase, had agreed to sell same to the United States Lumber and Box Company of Portland, Oregon.

These five carloads were but a fractional part of the entire transactions so respectively entered into between the said several parties, for each sale so made covered in all something like two hundred and fifty cars.

As the bills of lading in question were of the kind above described and declared to be not negotiable, I imagine the objection, amongst others, taken in argument herein, that the appellant could not recover is rather a formidable obstacle in the appellant's way of recovery herein; but upon the conclusion I have reached, it is not necessary I should deal therewith.

It is admitted that these five carloads passed, shortly after reaching Minneapolis in July, 1920, into the possession of the said United States Lumber & Box Co., of Portland, Oregon, as did many other like shipments.

The first condition indorsed on each of said bills of lading is as follows:—

> Sec. 1.—The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

One of these exceptions appears in the 4th condition indorsed, and the part thereof so providing is as follows:—

> Notice of loss, damage or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after the delivery of the goods, or in the case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

No such notice was given until the 4th of February, 1921, and the learned trial judge held that the failure to give same was fatal to the claim of the appellant.

There is abundantly well founded inference of fact, to be drawn from evidence in the numerous letters and telegrams adduced in evidence which satisfies me that a reasonable time for delivery had elapsed more than four months before the inquiry, dated the 4th February, 1921, could have reached the respondent at Prince Rupert, B.C., where it was addressed to, from Vancouver, even if that otherwise could be held such a form of notice as required.

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Idington J.

For example, the appellant wrote on the 24th August, 1920, to the United States Lumber & Box Co. that the Canadian Pacific Ry. Co. had advised the appellant that certain cars named had reached destination Minnesota Transfer, and are awaiting instructions, and said,

this also applies to car G.T.P. 312071—shipped July 26th.

This latter is one of the five cars now in question and appears in a list given in a long letter of 16th October, 1920, from appellant to said United States Lumber & Box Co., which list is preceded by the following sentence:—

Now the situation yesterday previous to receiving these remittances from you this morning was that the following cars shew unpaid on our books, that is unpaid for in full, although heavy payment had been made against them by trade acceptances and in various ways.

Cars nos. 23479, 308798 and 207350, which are others of the five sued for, also appear on same list.

This gives rather an unpleasant impression of the honesty of the claim now made against the respondent.

I need not say that that impression is deepened by reading the letter of the 22nd September, 1920, from the said United States Lumber & Box Co. to appellant relative to car no. 708798, and reply by appellant thereto of the 27th September, 1920.

The letter from the United States Lumber & Box Co. to appellant of the 12th September, 1920, relative to no. 87370, one of those sued for and referred to therein and in argument as the "Huttig Car" and the reply thereto by the appellant dated 13th September, 1920, demonstrate how little the latter had to complain of the holding of the courts below, or of anything relative thereto.

The truth would seem to be that the appellant after making claims, possibly unsuccessfully on others, conceived the idea that it could use the possession of respondent's bills of lading as a means of extorting from it what it had looked to others for.

I do not think I need follow out in detail all the inferences to be drawn from these letters or dwell upon the telegrams that it chose to ignore, pretending it did not know who Hodson, wiring on behalf of the Canadian Pacific Ry. Co., was

I think this appeal should be dismissed with costs.

DUFF J.—The first question for consideration is whether or not there was a breach of duty by the Soo Line in respect of which the respondents would be responsible to the appellants, if notice had been duly given.

Under this head I shall consider whether, assuming there was a misdelivery constituting a breach of contract or an actionable wrong on part of the Soo Line, the respondents are responsible for it. By the contract which is called a "straight bill of lading" the respondents undertook to carry the goods shipped to "its usual place of delivery" at the destination mentioned

if on its road, otherwise to deliver to another carrier on the route to said destination.

And it was further agreed by section 2 of the conditions as follows:—

Sec. 2.—In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing the bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada, or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing the bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage or injury to the said goods shall have been sustained the amount of such loss, damage or injury as may be required to pay hereunder, as may be evidenced by any receipt, judgment or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

By section 6 of the conditions it is also stipulated:—

Sec. 6.—Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays) or in the case of bonded goods, within seventy-two hours (exclusive of legal holidays) after written notice has been sent or given, may be kept in the car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so has been sent or given), be removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

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It is admitted that the goods in question were delivered conformably to the terms of the contract to another carrier (the Soo Line), en route to the destination named in the contract. It is essential therefore to the right of the appellant to recover that the language of section 2 is comprehensive enough to impose upon the respondents liability for "loss" by misdelivery by the Soo Line. Before entering upon a critical examination of section 2 it will be convenient first to notice that by section 6 once a notice of the arrival of the goods at their destination has been given or rather within 48 hours after the giving of such notice, except in the case of bonded goods, the responsibility of the Soo Line for such goods "in car, station or place of delivery or warehouse of" its own is to be measured by the responsibility of a warehouseman. Notice was duly given and the responsibility of the Soo Line therefore was the responsibility of a warehouseman at the time of the misdelivery, which, as above mentioned, I am assuming took place. The responsibility of a railway company as warehouseman for goods received at their destination and held by the company awaiting the consignee's demand for them seems to include responsibility for misdelivery. As Bramwell L.J. said in *Hiort* v. *London & North Western Ry. Co.* (1),

> a misdelivery by a carrier was a conversion. I cannot see therefore why a misdelivery by a warehouseman is not a conversion.

The dictum of Bramwell L.J. is supported by a decision of the Queen's Bench in *Devereux* v. *Barclay* (2). In such circumstances the railway company is not an involuntary bailee responsible only as regards misdelivery for ordinary care on part of its servants. It is an act in breach of its contract of bailment, to deliver possession of the property the subject of the bailment to anybody but the bailor or somebody acting with the authority of the bailor.

Accordingly, on the assumption that there was misdelivery, that is to say, assuming the United States Lumber & Box Company had no right to possession either derivatively from the appellants or otherwise, there was a breach of duty by the Soo Line. Is this a breach of duty in re-

(1) [1879] 4 Ex. D. 188 at p. 194. (2) [1819] 2 B. & Ald. 702.

spect of which a responsibility under the terms of the bill of lading falls also upon the respondent? That depends, as I have said, on the scope and effect of section 2 of the conditions. The precise point is whether there was "loss" by reason of such misdelivery constituting "loss * * * * caused by or resulting from the act, neglect or default" of the Soo Line. "Loss" may mean the being deprived of, or the failure to keep something or the fact that something can no longer be found or, on the other hand, it may mean the detriment or disadvantage involved in being deprived of something, or simply pecuniary detriment or disadvantage. I am giving in substance the pertinent dictionary definitions from the "Oxford Dictionary."

Now it is quite clear that "loss" here means loss of the goods; it does not mean loss in the sense of pecuniary disadvantage sustained by the shipper by reason of the carrier's default. I do not see any reason why it should not be read in the sense of "being deprived of"; and I see no reason why the scope of the phrase should be so restricted as to exclude "loss" in that sense by reason of misdelivery. I think therefore that loss by reason of misdelivery may be "loss" within the meaning of section 2. To hold otherwise indeed would be inconsistent with a dictum of Lord Blackburn and with a decision based upon it as long ago as 1888. In *Morritt* v. *North Eastern Ry. Co.* (1), Blackburn J. (as he then was) had to consider the effect of the exemption in the "Carrier's Act," 11 Geo. IV and 1 Wm. IV, ch. 68, sec. 1, under which no stagecoach proprietors and other common carriers were exempted from liability for "the loss of or injury to" certain enumerated kinds of articles unless certain conditions existed which were not present in that case and at p. 308 he says:—

> It was urged by counsel for the plaintiff that in several cases it had been decided that if a carrier delivered goods to the wrong person by mistake, this was a conversion, and that it followed therefore that the "Carriers Act" did not protect him. I do not think this follows at all. It seems to me that if the Act protects the carrier from loss or injury, it should protect him whether the liability is charged in an action on the case, or in an action of trover, or in an action on the contract. I think this is fortified by considering that he is still liable for anything done feloniously. If it could be maintained that carriers were not protected

(1) [1876] 1 Q.B.D. 302 at pp. 306-8.

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where the act was done negligently so that a railway company were to be answerable if their servant honestly forwards goods to the wrong person, it would be unnecessary to say that they are to be answerable if the servant hands them to another for the purpose of stealing them.

This expression of opinion was followed by a Divisional Court in 1888 (in the case of *Skipwith* v. *Great Western Ry. Co.* (1)). In that case it was held that the railway company having received at its cloak-room a certain bag for safe custody (on the terms that the company was not in certain circumstances to be answerable

for loss or detention of or other injury to any article or property exceeding the value of 5 pounds)

was responsible for the loss occasioned by the delivery of the bag to a person not entitled to receive it. I think therefore that if there is "loss" of the goods in consequence of a misdelivery the respondents are responsible for that "loss" under section 2 of the contract.

An important question arises however whether such "loss" has been proved.

The goods were consigned to Nickerson & Co. who had authorized the appellants to receive them. *Prima facie* the appellants, I agree, proved a case of misdelivery and consequent "loss" (within the sense above mentioned) by proving the failure of the company to deliver on demand coupled with the admission indeed made by counsel that the lumber had been delivered to the United States Lumber & Box Co. *Prima facie* the appellants thereby brought their case within the conditions of liability under the contract.

Other facts, however, developed during the course of the trial, the effect of which it is necessary to consider. The United States Lumber & Box Co. were the purchasers of the goods in question and while as between the railway company and themselves the appellants retained possession of the goods by having them consigned to Nickerson and deliverable to themselves it seems probable that the property had passed to the United States Lumber & Box Co. The five cars in respect of which the dispute arises were only five out of 250 sold by the same shippers to the same purchasers, all of which were delivered by the railway com-

(1) [1888] 59 L.T. 520.

pany to the United States Lumber & Box Co. There is some documentary evidence that with the knowledge and acquiescence of the appellants goods shipped under similar bills of lading were delivered to the United States Lumber & Box Co. without the production of the bills of lading and without any special direction from the appellants. I think the proper inference from the whole of the evidence is that the claim against the railway company followed as a result of unsuccessful efforts to obtain payment from the United States Lumber & Box Co. after possession had to the knowledge of the appellants passed to the purchasers by delivery by the Soo Line. The bills of lading, it must be remembered, are not bills under which the company agreed to deliver the goods shipped to the order of the consignee and in consequence they are not in any sense negotiable instruments. The railway company was entitled to deal with the person entitled to possession of the goods in the absence of notice of some dealing affecting that person's rights.

I think the circumstances in evidence rebut the *prima facie* case made by the appellant because I think they point to the conclusion that assuming there was technically a misdelivery it was a misdelivery from which no "loss" would have resulted within the meaning of the conditions but for the assent of the appellants to what was done.

In this view it is not necessary to consider the question whether the clause in respect of notice applies. But as the other members of the court have dealt with it I shall give my opinion upon it.

The contention grounded upon the principle of *London & North Western Ry. Co.* v. *Neilson* (1), and the decisions of which it is the culmination seemed at first sight well founded but reflection has convinced me that effect should not be given to it. It is always a question whether or not the language employed is sufficiently clear. The exception contained in the contract in question in *Neilson's Case* (1) was to go into effect only when

loss, damage, misconveyance, misdelivery, delay or detention (of the goods) during any portion of the transit or while left in the possession

(1) [1922] 2 A.C. 263.

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of the railway company. The goods were diverted from the course of the agreed transit and the word "misconveyance" was chiefly relied upon. The question was treated in the House of Lords as Lord Sumner observed as "a matter of construction" (p. 279). Lord Dunedin said that the contention of the railway must fail unless the word "misconveyance" was to

> be given a meaning so wide as to override the idea of the agreed transit

(p. 271). The question is here has the word "loss" in the notice clause a meaning wide enough to "override the idea" of the "agreed" delivery to the consignee?

It was argued that here delivery to the consignee or some other person authorized by the consignee to receive the goods is fundamental, is an essential element in the performance of the contract; and that loss by reason of failure in respect of this essential term is not "loss" against which the carrier is protected by the condition. The cases already cited were cases in which in general terms the defendant was protected against liability for "loss" of the goods and loss was considered to include loss in consequence of misdelivery.

Treating the question as a matter of construction, what is the natural meaning of the word "loss" in the notice clause? By the first section the carrier is made liable for "loss or injury to the goods;" the phrase "loss or injury to the goods" is repeated in the second section and more than once through the contract. The first section is an affirmation of the liability of the carrier at common law but it is nevertheless an express declaration of his responsibility and I have the greatest difficulty in holding, indeed I am unable to find any satisfactory ground upon which I can hold, that the word "loss" in the notice clause has a signification less comprehensive than the same word in section 1 and section 2.

A somewhat analogous case is presented in a series of decisions culminating in the decision of the House of Lords in *Atlantic Shipping & Trading Co.* v. *Dreyfus* (1). The

(1) [1922] 2 A.C. 250.

decision of the House of Lords is relevant only as shewing (see the judgments of Lord Dunedin and Lord Sumner) that the House approved of the principle of the judgments in an earlier decision of the Court of Appeal given in *Bank of Australasia* v. *Clan Line Steamers* (2). The dispute arose there with respect to the interpretation of a clause in a bill of lading in these words,

> no claim that may arise in respect of goods shipped by this steamer will be recoverable,

unless made at a stipulated place and within a stipulated time. It is settled that such a stipulation is subject in its operation to the underlying condition of the bill of lading which is that the shipowner shall furnish a ship reasonably fit to perform the contract of carriage, in other words, that stipulation has no application to a claim arising in consequence of damage which is due to the fact of the ship being unseaworthy. This is settled, that is to say, where the claim of the shipper rests upon the condition of seaworthiness attached by law to the bill of lading. The question considered by the Lords Justices was the question whether (the responsibility of the shipowner in respect of unseaworthiness having been explicitly declared in the bill of lading) a claim based upon an allegation of unseaworthiness could be treated as outside the scope of the clause whose construction was in dispute; and the view taken, the view which I have already said was afterwards approved by the House of Lords, was that the clause relied upon must be read as applying to all claims based upon the explicit provisions of the bill of lading. At p. 53 Pickford L.J said:—

> The first part of the clause does not seem to me to do more than express in terms what would be the obligation if it were not there, and it may be said, and it has been said with some force, that that cannot make any difference. If you write in what otherwise must be taken as impliedly written in, it is exactly the same as if you had not written at all. There is great force in that argument, but I do not think it is really sound because I think the effect of writing it in, instead of leaving it to be implied, is that it makes it an express term of the bill of lading which was not so in either of the cases to which I have referred and, making it an express term of the bill of lading, it is more likely that the meaning of the bill of lading exception is that it shall apply to the term which is expressly put into the bill of lading.

(2) [1916] 1 K.B. 39.

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The decision of the Court of Appeal, of course, is not strictly an authority upon the question of the meaning of the bill of lading which it is our duty to pass upon but a similar process of reasoning applied in this case leads to a similar result.

The principal difficulty I have felt with respect to the application of the notice clause arises in this way. The goods in question undoubtedly did arrive at the destination signified. We must assume that notice was duly given within section 6 and after the expiration of 48 hours after notice the carrier became responsible as warehouseman. Any "failure to make delivery" after that could only be a "failure" after demand by or on behalf of the consignee and a reasonable time for delivery could only mean a reasonable time after demand. It seems singular (the goods having arrived at destination, notice having been given of their arrival and demand made by the consignee) that further notice should be required of the fact of non-delivery in consequence of that demand. Still there is no practical difficulty in putting the clause into operation in such circumstances, there is no absurdity, there is no repugnancy and I think one must hold that the clause does apply after arrival at destination and notice to the carrier, in other words, that "delivery" means not delivery at destination but delivery to the party entitled to receive the goods.

In the result the notice clause although applicable in the circumstances of the case would afford no defence because there is no evidence of any demand having been made except the demand by the purchasers and consequently the time prescribed never began to run.

The appeal should be dismissed with costs.

ANGLIN J.—The plaintiff sues as indorsee of five bills of lading issued by the defendant company at Prince Rupert to the G. W. Nickerson Company as shippers and consignees of five cars of lumber to be transported, one to Minneapolis and four to Minnesota Transfer. The cars were hauled by the defendant company to Winnipeg and were there delivered to the Canadian Pacific Railway Company to be taken to their respective destinations.

The plaintiff company had sold the lumber to the United States Lumber & Box Co. but had not been paid for it. The bills of lading were held by the Standard Bank to be handed over to the purchasers on payment being made. The Canadian Pacific Railway Company, without requiring or obtaining surrender of the bills of lading and, so far as the evidence discloses, without any direction either from the G. W. Nickerson Co. or the plaintiff company, allowed possession of the lumber to be taken by, or on behalf of, the United States Lumber & Box Company, who in turn sold it to its customers by whom it was eventually taken over. The plaintiff company now seeks to recover the price of the lumber from the defendant railway company asserting that under section 2 of the conditions of the standard bills of lading it is responsible for the fault or misfeasance of the second carrier which resulted in the wrongful handing over of the goods and the loss to it of the price thereof.

The chief defence made to the action is the failure of the plaintiff company to give the notice prescribed by the following clause in the bills of lading:

> Sec. 4. Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given, the carrier shall not be liable.

It may be assumed that more than four months after a reasonable time for delivery had elapsed before any notice of loss or claim was given by the plaintiff company. In the trial court and on appeal failure to give this notice was held to afford a complete defence to the action.

It is in my opinion at least very doubtful whether upon the facts of this case it falls within the purview of the clause I have quoted. It is not in respect of every "failure to make delivery" that this clause is applicable, but only where the failure to deliver is due to "loss," total or partial, of the goods. The notice must always be of "loss, damage or delay." There is no suggestion that this case is one of "damage" or of "delay" since under these terms delivery either in an injured state or after an undue lapse of time is contemplated. Here there was no delivery what-

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ever. I have no doubt that "loss" in this clause means physical loss of the goods and not money loss suffered by the plaintiff. It means loss of the goods either by the carrier or to the owner or the person entitled to delivery. If the loss be temporary only, it may result merely in delayed delivery. But I am not satisfied that the case is one of loss within the stipulation for notice, where, as here, the inability of the carrier to make delivery is due to his having by the act of himself, or of his servants acting on his behalf, wilfully divested himself of the charge of the goods. "Loss" within the meaning of the stipulation may occur by accident during transit, or it may happen through negligence from which the element of wilfulness is absent, or even by the theft committed either by employees or by strangers. But I doubt that this term, if fairly construed, covers non-delivery due to an intentional parting with the goods by the carrier or his servants amounting to a wilful misfeasance. The provision under consideration applies alike to the case of loss, damage or delay due to the fault of the original or of a later carrier and both are equally entitled to the benefit of it. I find it very difficult to believe that it was intended to enable a carrier who wilfully hands over freight to a person not entitled to receive it to assert a right to the protection of this notice clause in respect of such an act of misfeasance. Goods which have been thus deliberately disposed of by the carrier and of which the situation after such disposition is fully known would not commonly be spoken of as having been "lost." Bayley J. in delivering the judgment of the Court of King's Bench, so indicated in *Garnett* v. *Willan* (1), determined over 100 years ago. I am by no means convinced that there was a "loss" of the goods here in question within the meaning of the stipulation for notice.

But was there a "loss" of them within the meaning of that term as used in the second section of the conditions indorsed on the bills of lading?

Sec. 2.—In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability here-

(1) [1821] 5 B. & Ald. 53.

under, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of the bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada, or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading * * *.

In my opinion this is not a case of "loss" within the meaning of that provision. The preposition "of" has been carelessly or accidentally omitted after the word "loss." I have no doubt that physical loss (in this instance by the carrier) of the goods themselves is the case dealt with and not pecuniary loss sustained by the owner of them. This is a provision which subjects the original or issuing carrier to a greater burden than the common law would impose upon him. Moreover, the section contains an unusual stipulation as to the burden of proof casting not on the plaintiff but on the defendant, the original carrier, the onus, in the case of loss, of proving that it was not caused by the act, neglect or default of any other carrier engaged in the transportation.

Prima facie, in my opinion, the word is here used in the sense of "mislaying" or of "deprivation of possession by misadventure or mere negligence." It may well be that it was thought proper in framing the standard bills of lading which are approved by the Board of Railway Commissioners, to impose on the original carrier liability for loss of the goods in that sense occurring through the fault of the subsequent carrier but not responsibility for the consequences of the latter wilfully parting with the possession of them to a person not entitled to delivery. In construing this clause we should not, I think, treat it as imposing so wide a liability unless upon a fair reading of it the intention to create such an extended responsibility is adequately expressed. In my opinion it is not, and the defendant is on that ground entitled to succeed.

Taking this view of the scope of section 2 does not result in any real hardship to the owner or consignee of the goods. It merely prevents his pursuing an original carrier who has fully discharged his own obligations and leaves unaffected whatever redress the common law may afford him against

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the later carrier to whose fault is attributable the non-delivery of which he complains.

I would, on this ground, affirm the judgment dismissing this action.

BRODEUR J.—In July, 1920, the Grand Trunk Pacific Railway Co. issued straight bills of lading for five cars of lumber consigned to the G. W. Nickerson Company in Minneapolis, Minnesota, or in the Minnesota transfer which is near Minneapolis.

These bills of lading were on forms approved by the Board of Railway Commissioners in 1909.

The routes mentioned in the bills were the G.T.P. and the C.P.R. Soo line.

These bills, though not negotiable, were indorsed by the consignees in favour of the Premier Lumber Co. and were transferred to a bank in Vancouver which seems to have kept them.

It is in evidence that the Premier Lumber Co. had a contract with a United States company called the United States Lumber & Box Co. for a very large number of cars, about 250, and the shipping of these cars was made in different ways. Some were shipped on straight bills of lading not negotiable; some others were carried on order bills of lading negotiable.

The five cars in question in this case were issued on straight bills of lading which should not have been negotiated by indorsement. But they were however transferred to the bank in Vancouver and kept there.

When the cars arrived at the point of destination, the C.P.R., on whose line they were, then notified the Premier Lumber Co. of their arrival and asked for delivery instructions for some of them, if not for all; and the Premier Lumber Co. simply transferred this notice to the United States Lumber & Box Co. which obtained from the railway company the delivery of the cars. Some correspondence was later on exchanged between the Premier Lumber Company and the purchaser of the lumber, the United States Lumber & Box Co., as to some shortage which was found in these cars.

These facts shew very conclusively that the appellant company intended that these cars should be handed over to this United States Company.

Some difficulty arose later on between these two lumber companies as to the payment for these cars. Then the Premier Lumber Co., the shipper, gave, in February, 1921, notice to the G.T.P. that they were holding the bills of lading for these five cars and that they wanted to know what had happened to them. They later on, in September, 1921, instituted the present action against the G.T.P. for the price of these five cars.

The defendant railway company pleaded that they were not liable for the value of these cars, that they were duly delivered to the C.P.R. Co. and that under the bill of lading the plaintiff was bound to give notice in writing for any loss within four months and that their failure to give such notice prevents them from making any claim.

The action was dismissed by the trial judge and his judgment has been confirmed by a majority judgment in appeal.

The case turns largely upon the provision of the bills of lading concerning the notice. This provision reads as follows:—

> Notice of loss, damage, or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

The circumstances of this case are such that the claim made by the Premier Lumber Co. does not look to me as being a very honest claim. They knew that these cars had arrived at destination and it was their duty to take delivery of them from the C.P.R. in presenting the bills of lading if they were negotiable. But though these bills of lading were not negotiable, they had advances made on these bills by their bank. They would have to reimburse the bank for these advances in order to obtain possession of these bills of lading. They virtually suggested to their purchaser, the United States Lumber Co. to obtain delivery of these cars without presenting the bills of lading. Their purchaser obtained delivery to their knowledge and with their

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consent, and several months later they tried, in view of some trouble which arose as to payment of this lumber to claim its value from the original carrier.

If, by the acts of the consignee, the shipper is misled as to the person to whom delivery should be made, the carrier should be excused from liability for a misdelivery caused thereby. Corpus Juris, vol. 10, p. 267.

The railway company is entitled to plead the failure of notice within four months after a reasonable time for delivery has elapsed.

The shipper being aware that the goods had been handed over to his purchaser should have in due time protested against the railway company making delivery of the cars to the United States Lumber Co. But they did nothing of the kind. On the contrary, they concocted plans with their purchaser for deceiving to a certain extent the bank which had made advances on these cars.

They rely on certain decisions in England where the courts had to consider bills of lading in which the carriers endeavoured to limit the general liability cast upon them as carriers by inserting special exceptions; these exceptions were very rigidly construed and, in case of doubt, were construed against the carrier who had stipulated. It is to be noted that in Canada the bills of lading at issue were promulgated by the Board of Railway Commissioners under the authority of the law and should be construed according to the spirit of fairness which the board intended to establish in the relations between the shipper and the carrier.

I do not think then that these English decisions could always be invoked in the construction of the Canadian bills of lading which are the result of a quasi judicial enactment.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—The question here is as to the liability of the respondent on five bills of lading covering the shipment of the same number of cars loaded with lumber and which the appellant alleges were not delivered in accordance with the bills of lading.

The appellant, a company carrying on business at Vancouver, had purchased this lumber from the G. W. Nickerson Company, Ltd., and had sold it to the United States Lumber and Box Co., of Portland, Oregon. The bills of lading were in the standard form known as a "straight bill of lading—original—non-negotiable," approved by the Board of Railway Commissioners for Canada, and they stated that the lumber was shipped from Prince Rupert, B.C., by the G. W. Nickerson Co., Ltd., and consigned to that company. Each bill was indorsed as follows:

Deliver to Premier Lumber Co., Ltd. (Sgd.) the G. W. Nickerson Co., Ltd., M. F. Nickerson.

Four of these cars were to go to Minnesota Transfer and the fifth to Minneapolis, both places in the State of Minnesota, the carriage being by the respondent's line of railway to Winnipeg and thence by what is known as the Soo line of the C.P.R. The appellant had sold and shipped some 200 or 250 cars of lumber to the said United Lumber & Box Co., certain of these shipments having been made on open bills of lading, and the lumber was sent to Minneapolis or to Minnesota Transfer, in order that the purchasers might ship the cars to their customers in different parts of the United States. The bills of lading in question remained in Vancouver and were in the hands of the Standard Bank from whom the appellant had borrowed money, and the appellant expected that the United States Lumber & Box Co. would pay for the lumber there and thus get possession of these bills of lading.

The five cars arrived at their destination in August, 1920, and so far as the record shews they were delivered to the United States Lumber & Box Co. by the C.P.R. without the bills of lading having been obtained and produced by the former company. How and under what circumstances this delivery was made is not disclosed, but I cannot doubt that the appellant was aware of the arrival of the cars, and I also think (as shewn by telegrams and letters received by the appellant from the Lumber & Box Co., complaining of shortage) that the appellant must have known that the United States Lumber & Box Company had obtained delivery of at least two of these cars. Un-

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doubtedly the appellant expected that the latter company would pay for this lumber, but it not having done so, this action was taken against the respondent more than a year after the shipment. The substance of the complaint is that the respondent did not deliver the lumber to the appellant, and the demand is for the value of the goods, to wit, $6,903.54.

The fault here was admittedly that of the connecting carrier, the C.P.R., and the appellant seeks to render the respondent responsible for this fault under section 2 of the bills of lading, the effect of which, in cases where as here the shipment is made under a joint tariff, is to make the initial carrier liable for any loss, damage or injury to the goods from which the connecting carrier is not relieved by the terms of the bill of lading, caused by or resulting from the act, neglect or default of such carrier. And this condition gives the initial carrier the right to recover from the connecting carrier the amount which he may be required to pay for the loss, damage or injury to the goods sustained on the line of the connecting carrier. This liability of the initial carrier for the fault of the connecting carrier is of course in addition to that which he incurs for loss, damage or injury sustained on his own line.

The principal defence is that no notice of loss or failure to deliver in accordance with the bills of lading was given as required by the fourth paragraph of section 4 of the bills of lading which is as follows:—

> Notice of loss, damage or delay must be made in writing to the carrier at the point of delivery, or to the carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the carrier shall not be liable.

This condition is eminently a reasonable one, especially where, as here, the fault is that of the connecting carrier, in view of the liability for that fault of the initial carrier who should have prompt notice thereof in order to secure his right of indemnity against the connecting carrier. And it is obviously important that he should be afforded the opportunity to inquire into the circumstances surrounding

the loss or want of delivery of which he may well have had no knowledge.

But the appellant refers us to a long line of decisions whereby it has been held that the carrier cannot rely on conditions limiting or taking away his common law liability, where he has not carried out the contract of carriage, but the loss was sustained while he was doing something different from what he had contracted to do. The rule may be stated in the language of Scrutton L.J. in the recent case of *Neilson* v. *London & North Western Ry. Co.* (1).

> When a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary intention, they only apply where the excepted events happen in the course of his carrying out the contract, and do not apply where they happen while he is doing something which he has not contracted to do * * * If a carrier wishes to protect himself from liability for the negligence of his servants, he must do so in clear and unambiguous language.

The cases where the carrier has not been allowed to rely on a notice posted up in his office or a condition of the contract restricting his common law liability are cases of gross negligence or of a departure from the contract of carriage, and no case had been cited where the condition, as here, was not a limitation of the common law liability of the carrier, but merely the requiring of a notice of loss as a condition of a claim against the carrier.

Here the appellant has not shewn under what circumstances the lumber which was carried over the prescribed route to the point of destination, was delivered to the purchasers, so no case of gross negligence or of departure from the contract of carriage is established. And, as I have said, the condition as to notice is not a limitation of the common law liability of the carrier, but a most reasonable requirement of the contract of carriage. If any intimation can be said to have been given to the respondent that the lumber had not been delivered in accordance with the bills of lading, it was only on February 4, 1921, more than four months after the arrival of the goods and a reasonable time for delivery had elapsed, when the appellant wrote to the respondent asking what happened to these cars. This, in my opinion, is a bar to the action of the appellant.

(1) [1922] 1 K.B. 192 at p. 201.

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Mignault J.

A question has arisen during consideration of this case whether what happened to these five cars can properly be described as a "loss" of the goods, so as to bring it under the operation of the condition requiring notice. The word "loss" is also contained in section 2 of the bills of lading on which the appellant's action is based, and it would not help the appellant to exclude the condition as to notice, if section 2 would also be inapplicable, by reason of there not having been a "loss" within the meaning of the section. It is difficult to believe that the "loss" contemplated is not of the same nature in the condition requiring notice as in section 2. If I am wrong therefore in thinking that the condition can fairly be applied in this case as a bar to the appellant's action, it would follow that section 2 does not give the appellant the right of action which it has asserted. In any event the appellant could not succeed.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Stockton & Smith.*

Solicitor for the respondent: *R. W. Hannington.*

J. W. MACDONALD (PLAINTIFF).....APPELLANT;

AND

E. PIER (DEFENDANT).....RESPONDENT.

1922
*Oct. 12, 13.
Nov. 27.

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

Practice and procedure—Action to set aside judgment—Statement of claim—Allegation of perjury—New evidence.

In an action to set aside a judgment obtained in the same court, the statement of claim merely alleged that the judgment "was obtained by the false and untrue statements made by the defendant" on material matters of fact at the former trial. In dismissing the action, the trial judge said "that to hear evidence would only leave me in the position that the judge was in when he tried the first action." Counsel for the appellant in this court declined to give any assurance, or even to state, that any evidence materially different from that given at the original trial would or could be adduced. The trial judge dismissed the action and the Appellate Division affirmed his judgment.

Held, Duff J. dissenting, that a new trial should be refused.

Per Davies C.J. and Anglin J.—The dismissal of the action may be regarded as equivalent in effect to an order perpetually staying it as frivolous and vexatious and an abuse of the process of the court, which under the circumstances, should not be interfered with.

Per Idington and Brodeur JJ.—The statement of claim does not sufficiently disclose a cause of action. Duff J. *contra.*

Per Idington J.—The trial judge rightly refused to rehear substantially the same evidence and to review the judgment rendered upon it at the former trial.

Per Idington and Brodeur JJ.—The sufficiency of the allegations in a statement of claim is a matter of practice and procedure and the jurisprudence of this court is not to interfere in such matters.

Per Duff J. (dissenting).—Where the plaintiff's statement of claim sufficiently alleges a cause of action and the plaintiff appears at the trial ready to proceed with his evidence in support of his claim, the trial judge could not properly dismiss the action except upon some admission on behalf of the plaintiff shewing his claim to be unfounded or unforceable. To dismiss the action as an abuse of the process without hearing the evidence in such circumstances would be un-

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

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precedented and contrary to the course of the court. The trial judge did not so proceed but dismissed the action on the ground that the statement of claim shewed no cause of action, and as he erred in this, there should be a new trial.

Per Mignault J.—When it became evident to the trial judge at the second trial that no other evidence than that offered at the former trial would be tendered he was justified in dismissing the action.

Judgment of the Appellate Division ([1922] 1 W.W.R. 1208) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Ives J. at the trial and dismissing appellant's action.

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

Lafleur K.C. for the appellant. The statement of claim discloses a good cause of action. All the material and necessary allegations to constitute an action for fraud were made and particulars of the fraud were given. The plaintiff should have been allowed to proceed and to have his case tried, and evidence heard to show that the statements complained of were in fact untrue. Then the trial judge would have been in a position to decide whether the court at the former trial could in fact have been misled by such statements. *Flower* v. *Lloyd* (2); *Abouloff* v. *Oppenheimer* (3); *Birch* v. *Birch* (4).

Geo. H. Ross K.C. for the respondent. The Supreme Court of Canada should not interfere with matters of practice and procedure.

The statement of claim does not disclose a good cause of action.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I concur and to which I have nothing useful to add, I would dismiss this appeal with costs.

(1) [1922] 1 W.W.R. 1208.

(2) [1878] 10 Ch. D. 327; 46 L.J. Ch. 838.

(3) [1882] 10 Q.B.D. 295.

IDINGTON J.—The appellant by his amended statement of claim sets forth that respondent recovered judgment, on the 22nd December, 1920, against him for the sum of $4,500.58 and the costs of the action.

In the third, fourth and fifth paragraphs of said statement of claim he alleges as follows:—

3. The said judgment was obtained by the false and untrue statements made by the defendant in giving his evidence before this honourable court.

4. The defendant made such statements knowing them to be false and untrue, and with the intent that they should be acted upon by this honourable court, and this honourable court being misled and deceived by acting on such false and untrue statements caused judgment to be given in favour of the defendant in the said action to the loss and detriment of the plaintiff in the action.

5. The following are the false and untrue statements made by the defendant in giving his evidence before this honourable court on the 28th day of October, 1919.

Then follow over six pages of the printed appeal case herein what appears to be a copy of the respondent's evidence in that case; mostly trivial questions and answers and a few which may or may not have been the material matters upon which the decision of the learned trial judge or the referee to whom some questions had been referred, turned.

And following such copy of evidence is the plaintiff's (now appellant's) prayer for relief as follows:—

(*a*) That the said judgment of this honourable court be set aside and vacated.

(*b*) Judgment against the defendant for the said sum of $5,673.82.

(*c*) His costs of this action.

The statement of defence by present respondent thereto denied the allegations in the said fourth and fifth paragraphs of the said statement of claim and further alleged that he would have been entitled to the judgment given in said action even if none of the evidence complained of in the statement of claim herein had been given at the trial; and again that all the statements complained of were litigated in said action and decided against appellant who then unsuccessfully appealed to the Appellate Division. That the plaintiff instituted original proceedings against the defendant for false swearing at the said trial, which

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proceedings resulted in the acquittal of the defendant; and that there is no evidence available to the plaintiff which was not available to him at the time of the said trial, and at the time the appeal was taken therefrom; and that if plaintiff now knows of any evidence which he did not produce at the trial, it was wholly due to his failure to exercise reasonable diligence in his preparation for the trial and the appeal taken therefrom.

The final paragraph of the statement of defence was as follows:—

> (8) The statement of claim does not disclose a cause of action and is bad in law.

No reply to all this or even formal joinder of issue is to be found in the case presented to us.

The appellant's counsel opened the trial hereof by calling appellant and after his examination had proceeded so far as to show what a wide range of irrelevant matter was possible under such pleadings, objection was taken after the record of the former trial had been produced, including the opinion judgments of the learned trial judge thereof and of the referee, that the action could not be maintained, and that the statement of claim herein did not show a good cause of action for different reasons and that evidence along that line could not be properly tendered.

> To this the learned trial judge remarked as follows:—
> The court: Well, I don't know, it occurs to me that if false statements, false evidence is given at a trial and it can be shewn that the evidence so given induced the judgment, and upon shewing that evidence was false, that it did induce the judgment, that that judgment can be set aside. Now have you any authority against that proposition?

Thereupon there ensued an argument of some length of which there is no record, but merely marks indicating that the reporter made no note of what passed between counsel and the court.

At the conclusion thereof the learned trial judge said he had made up his mind on the issue of law so raised, but if it would save expense and trouble he was willing to proceed, but if counsel insisted he was entitled to judgment now.

Counsel for defence insisting, he delivered his judgment as follows:

The court: Well this action as at present constituted will be dismissed on the ground that the pleadings disclose no cause of action. I think that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. MacDonald and upon which he has decided.

This being the result it is quite clear to me that the learned trial judge having the correct conception of the law as expressed before the said argument had concluded from all that appellant's counsel had presented to him, that he was not in a position to do more than ask him to re-hear substantially the same evidence as adduced at the trial of the other case, with nothing materially new and hence he had no right to review the case and reverse the learned judge in the former trial.

In all of this I think the learned trial judge in this case was right and the Appellate Division was therefore right in dismissing the appeal therefrom.

It is elementary law that a judgment obtained by fraud can be vacated and surely perjury, which produces that fraud, falls within such a proposition. And as I read the elaborate opinions of the learned judges of the Appellate Division, none deny the law to be so but four out of five agree that such a case is not properly stated herein. Mr. Justice Beck would allow an amendment by plaintiff if he saw fit. I submit, as I suggested on the argument herein, that therefore there is nothing involved in this appeal but questions of practice and procedure and hence it should not have been entertained if we followed, as we should, the settled jurisprudence of this court in that regard.

The statement of claim herein by no means makes any such case in such a proper manner that any court could or should listen to as a means of enforcing the law which does not permit of such a mode of re-trial and acting upon simply a different view of the facts from that taken respectively by the learned trial judge and referee in the first action.

It is to be observed that the learned trial judge of such action was a member of the Appellate Division who heard the appeal now in question herein, and agreed with Mr. Justice Stuart.

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I submit that a statement of claim in such a case as this should, when relying alone upon alleged perjury of the respondent, as the basis of the fraud alleged to have been practised, at least be quite as concise and definite in pointing out each of the essential statements claimed to have been perjury, as would be required in an indictment for perjury.

Can any one imagine any court trying, or even listening, to an indictment for perjury framed in the way this statement of claim presents the appellant's case?

Again the claim to vacate a judgment on the grounds of perjury cannot succeed unless by new evidence and shewing that the aggrieved party could not by reasonable diligence have been able to discover and bring forward at the trial such new evidence as desired to be presented in the action, and the statement of claim should so allege and give some good reason for such failure.

The statement of claim in question herein entirely fails in this regard and thereby, as well as on other grounds entitled the learned trial judge to rule as he did.

Again one may surmise that one of the substantial features intended to have been relied upon by appellant was what the respondent had stated before the referee relative to the rate of compensation to have been due the appellant by the respondent.

The referee states these parties were in conflict in the evidence given; and that by reason of appellant never having claimed, in the course of the business more than five per cent, contended for by the respondent, and having rendered accounts for several years on that basis without making any reservation that he should go beyond, and then he (the referee) was influenced thereby to accept that as correct.

If I am correct in my surmise as to this item, surely there was not so much basis connected therewith for reaching any such charge as possibly intended to have been made herein relative thereto.

This statement of claim is such a curiosity that I am not surprised that neither party has been able to cite any precedent exactly fitting it; but the many cases cited here

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and below do show that when the plaintiff fails to present a clear and definite case, he must fail.

And I submit that our courts should always, when any pretensions set up as herein, rigidly adhere to the clear and definite requirements of the law in that regard and thus discourage any suitor from hoping to re-litigate any case unless he has used the utmost care and diligence in the preparation of his case or defence and done everything possible to help the trial court to determine aright. I think this appeal should be dismissed with costs.

DUFF J. (dissenting).—The learned trial judge and the majority of the judges of the Appellate Division came to the conclusion that the statement of claim did not in substance disclose a cause of action. Had I come to the same conclusion I should have been prepared to dismiss the appeal on the ground, if on no other, that no adequate reason had been presented for setting aside the judgment of the Alberta courts. The Supreme Court of Alberta has authority to strike out any pleading disclosing no reasonable cause of action in addition to its inherent authority to stay or dismiss actions which on good grounds the court is satisfied are frivolous and vexatious.

An application made invoking the jurisdiction of the court to strike out a pleading as disclosing no reasonable cause of action or defence, as the case may be, is an application which must be determined upon an examination of the pleadings alone, while on the other hand, an application addressed to the inherent jurisdiction of the court to exercise its control over proceedings initiated in abuse of the process of the court is one with which the court deals after being fully informed of the facts and in which evidence may and commonly is offered and received *pro* and *con* from both sides. After a case has come on for trial, it would, I think, be without precedent, the plaintiff being there with his witnesses and ready to present his evidence in support of his case, in support, that is to say, of a claim resting upon allegations disclosing a good cause of action on the face of it—it would, I think, be an unheard of thing for a trial judge in such circumstances to dismiss

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the action as frivolous and vexatious except at all events upon the strength of some admission deliberately made by counsel and establishing that the case made upon the pleadings could not be supported; even in such a case it would be an unusual thing to dismiss the action without the consent of the plaintiff's counsel. Thirty years ago it was held by the Court of Appeal in *Fletcher* v. *London and North Western Railway Company* (1), that a trial judge had no power to non-suit a plaintiff without his consent upon the ground that on the opening statement of his counsel, it must be held that the plaintiff had no cause of action.

But the trial judge in the present case took no such course. He took a course which, having regard to the view of the law expressed by him was, I think, not open to criticism. Taking, as I have said, the view that the statement of claim did not allege the facts constitutive of a right of action to set aside the previous judgment as obtained by fraud he held that the pleading ought to be struck out and the action dismissed accordingly.

That is quite evident from the report of the proceedings at the trial. The learned judge explicitly says:

> This action as at present constituted should be dismissed on the ground that the pleadings disclose no cause of action.

It is true he goes on to say:

> I think, that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. Macdonald and upon which he has decided.

But the learned judge was evidently under the impression that the plaintiff must not only produce evidence which had not been produced at the former trial but that such evidence must be set out in his pleadings or that, at all events, he must in his pleadings allege the discovery of fresh evidence; and that in the absence of such an allegation the plaintiff would not be permitted to offer any evidence other than that which had been produced before the judge who pronounced the judgment impeached. I cannot help saying, with great respect, that this position

(1) [1892] 1 Q.B. 122.

of the trial judge appears to be logically unassailable. If it was necessary that the plaintiff should allege that fresh evidence had been discovered as a condition of the production of such evidence then it is quite obvious that under the pleadings as they stood such evidence could not be produced and the learned judge was quite right in thinking that in the absence of such additional evidence the trial would be a waste of time. The majority of the judges of the Appellate Division dealt with the case, I think, in a similar way and on similar grounds. The principal *ratio* of the judgment of Mr. Justice Stuart and quite clearly the conclusion at which he arrived was that the allegations in the statement of claim were not in substance sufficient to entitle the plaintiff to the relief demanded. His remarks as to the proceedings being vexatious do not convey to my mind the idea that in the absence of any explicit admission by counsel and in the absence of any application to the court to dismiss the action as frivolous and vexatious on the ground that the statement off claim, assuming it to disclose a cause of action, could not be supported by evidence (a proceeding which would have required the plaintiff to make answer and to disclose to the court the nature of the case he was prepared to make)—I do not get the impression, I say, that in the absence of any such admission or any such proceeding calling for an answer from the plaintiff by way of affidavit or otherwise Mr. Justice Stuart would have considered it the proper way to deal with an action based upon a good statement of claim to dismiss it in the middle of the trial as an abuse of the process. The observations of the learned judge are, of course, quite *ad rem* in relation to the point to which he is addressing himself, namely, whether in the circumstances the dismissal of the action should stand or the plaintiff should be given an opportunity to amend and proceed to a further trial; and again, let me say that having taken the view he did as to the allegations necessary to support such an action I think the ultimate conclusion to which he came to is one with which I am not at all disposed to disagree.

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The action was an action to set aside a judgment on the ground that the judgment had been obtained by fraud, the fraud being the fraud of the plaintiff in producing before the court his own perjured evidence. It will help to elucidate what I have to say if I quote at the outset the first paragraph of Lord Cairns' judgment in *Patch* v. *Ward* (1).

> The bill in this case is filed to set aside a decree absolute for foreclosure made as long ago as the month of March, 1849, and enrolled a few years subsequently. Being a decree signed and enrolled, the matter covered by it has become solemnly *res judicata* between the parties to the suit, and the decree must remain unless it can be set aside either upon the ground of error apparent upon the face of it, upon the ground of new matter subsequently discovered or upon the ground of fraud. If it is to be impugned upon the ground of error apparent upon the face of it, or for new matter relevant to the issues in the cause, that must be done by bill of review, the bill of the former case being filed without any leave of the court, in the latter not without leave, and in order to obtain that leave the applicant must satisfy the court that the new matter is relevant to the issues and could not with reasonable diligence have been earlier discovered. There is here no error apparent upon the face of the decree, neither has any leave been applied for or obtained to file a bill of review upon the ground of new matter discovered. The third ground alone remains, and it is that on which the bill is filed, that the decree was obtained by fraud.

I quote this passage because it shows that a supplemental bill claiming a rehearing on the ground of the discovery of fresh evidence is a very different thing from a bill to set aside a judgment on the ground of fraud. I can find no authority anywhere in the books to show that in an action to set aside a judgment on the ground of fraud it is necessary for the plaintiff to set out in his statement of claim the evidence or the nature of the evidence upon which he relies in support of the claim. It is one of the elementary rules of pleading that the pleading is not to allege evidence but that it is to allege the facts which are constitutive of the cause of action. In Sir James Stephen's language, it must allege *facta probanda*, not the evidence by which the facts are to be proved. In view of the very able argument presented by Mr. Ross, I think it is right to point out what this does not mean. It does not mean that in an action to set aside a judgment on the ground of fraud consisting of perjury by one of the parties that

(1) [1867] 3 Ch. App. 203 at p. 206.

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a judgment could be given for the plaintiff solely upon the strength of the evidence which was before the judge who tried the case in which the judgment impeached was pronounced. Upon that point the law is quite clear but it does not follow that notice of the additional evidence must be given in the pleadings or that it is necessary that the pleadings should mention the evidence or refer to the evidence which the plaintiff intends to offer. It is not necessary just as it is not necessary in a case in which corroboration is required by law of the plaintiff's testimony. It would be bad pleading to set out in the statement of claim the manner in which the plaintiff proposed to corroborate his own testimony.

The authorities which influenced the minds of the judges in the court below are the judgment of Lord Selborne in *Boswell* v. *Coaks* (1), and a judgment of the Court of Appeal in *Birch* v. *Birch* (2) as well as the judgment of James L.J. in *Flower* v. *Lloyd* (3).

Lord Selborne's judgment deals with an application to dismiss an action as frivolous and vexatious. He points out that assuming evidence to have been withheld from the court at the former trial from improper motives that conduct was not in itself a sufficient ground for setting aside the judgment unless the evidence withheld was something "material" to "disturb" the judgment impeached, and he comes to the conclusion that the evidence upon which the plaintiff proposed to rely could not be said, on the facts presented, to be material. There are certain observations in Lord Selborne's judgment relied upon by Mr. Ross which, it ought to be noticed, relate only to proceedings in the nature of a bill of review in respect of which under the old practice it was necessary to obtain leave of the court before filing the bill. It is quite clear that no such leave was necessary where the bill was an original bill impeaching a decree as obtained by fraud. That is clear from the passage already quoted from Lord Cairns' judgment as well as from the discussion of the subject in Milford on Pleadings pp. 101-114 (where such bills are

(1) [1894] 6 R. 167.

(2) [1902] P. 62, 130; 71 L.J.P. 58; 86 L.T. 364; 18 Times L.R. 485.

(3) 10 Ch. D. 327.

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clearly distinguished from a bill impeaching a judgment on the ground of fraud), as well as from Maddock's Chancery Practice (vol. 2, p. 709). Lord Selborne's whole judgment proceeds upon the view that in passing upon the evidence offered in proof of the allegation that a judgment has been obtained by fraud the court is bound to act in the spirit of the observations of Lord Justice James in *Flower* v. *Lloyd* (1), and that the plaintiff could only succeed by producing evidence discovered since the former trial in proof of fraud and that on a summary application to dismiss the action as being without foundation the court would examine the facts with care and in order to see whether there had been

> a new discovery of something material in this sense that *prima facie* it would be a reason for setting the judgment aside if it were established by proof.

Lord Selborne's observations indeed have very little direct bearing upon any question in controversy on this appeal. The fraud charged there was the concealment of evidence with the object of misleading the court; and the gist of the decision consists in this, that such an allegation in itself even if fully established, would not be a ground for setting aside the judgment but that the plaintiff must go further and show that the facts withheld were material to the issues in controversy in the proceeding resulting in the judgment. If the plaintiff's action was based on these grounds it was, of course, necessary for him to allege first the concealment of the facts, and secondly, such other facts as might be necessary to make them appear material and of facts of this kind his Lordship says there was neither allegation nor proof. *Birch* v. *Birch* (2) is also a case of an application by the defendant to deal with an action on the ground that it was frivolous and vexatious. The Court of Appeal according to the practice heard evidence *pro* and *con* for the purpose of ascertaining whether or not there was such probability of success as to entitle the plaintiff to proceed with his case. It was held that in the circumstances the plaintiff was really seeking a re-trial of issues already passed upon.

(1) 10 Ch. D. 327.

(2) [1902] P. 62, 130.

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In both these cases an application was made invoking the jurisdiction of the court to deal with vexatious proceedings. The plaintiff was required and permitted to place before the court the evidence upon which his claim was founded and the court scrutinizing the evidence held it in both cases to be too slight to afford any foundation of the plaintiff's claim. In the present case no such application was made, the action had proceeded to trial, the plaintiff was proceeding with his evidence in support of his claim and offered to lay before the court the whole of the evidence which he proposed to adduce. The action was dismissed, not on the ground that the evidence which he was neither called upon to produce nor allowed to produce was insufficient, but on the ground that no cause of action was disclosed by the pleadings, that there was no issue on the record which if found in his favour would entitle him to judgment.

The discussion of *Flower* v. *Lloyd* (1) I postpone for the moment.

We come at once to the question whether or not an action lies to set aside a judgment on the ground that the judgment was obtained by perjury of one of the parties. I quote in full the language of Lord Justice James which shows how grave is the issue presented when the jurisdiction of the court is invoked to set aside a judgment on the ground that it has been obtained through perjured evidence. I quote from pp. 333 and 334 in the report of *Flower* v. *Lloyd* (1):

> But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconciliably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case if the plaintiffs had sustained on this appeal

(1) 10 Ch. D. 327.

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the judgment in their favour, the present defendants in their turn might bring a fresh action to set aside that judgment on the ground of perjury of the principal witness and subornation of perjury, and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means the court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds.

As I have already mentioned Lord Selborne refers to these observations in *Boswell* v. *Coaks* (1) and the passage in which he does it is worth quoting:

> I say that, not by any means dissenting from the spirit of the observations made in *Flower* v. *Lloyd* (2) by that great judge, Lord Justice James, and concurred in by Lord Justice Thesiger, that the court ought to be even more than usually cautious how it attends to all sorts of reasons which may be brought forward plausible upon the face of them, for disturbing such a solemn judgment, having regard to the enormous mischief of unsettling the principle on which the doctrine of *res judicata* is established.

Now Lord Selborne explicitly says that he has no doubt that a judgment may be set aside on the ground of fraud and it is to be noted that the observations of Lord Justice James are not confined in their application to cases where the fraud charged consists of perjury; false answers to interrogatories, misleading production of documents, subornation of perjury are all pointed out in the passage quoted above, and I think that notwithstanding Lord Selborne's expressed approval of the spirit of those observations and notwithstanding the weight and force of the observations themselves one is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used

(1) 6 R. 167. (2) 10 Ch. D. 327.

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for the purpose of obtaining a re-trial of an issue already determined, of an issue which *transivit in rem judicatam* under the guise of impugning a judgment as procured by fraud. Therefore the perjury must be in a material matter and therefore it must be established by evidence not known to the parties at the time of the former trial. Mr. Ross in his very able argument on behalf of the respondent relied upon *Baker* v. *Wadsworth* (1), a decision of a divisional court in which some countenance is no doubt given to the proposition I am now discussing but I am not perfectly clear that in *Baker* v. *Wadsworth* (1) Mr. Justice Wright and Mr. Justice Darling intended really to decide anything more than the point that the case was not clear enough to justify an order for judgment in default of defence. At all events in *Cole* v. *Langford* (2), decided in the same year, another divisional court declined to follow *Baker* v. *Wadsworth* (1). *Cole* v. *Langford* (2) was followed by McCardie J. in *Gordon-Smith* v. *Peizer* (3). The subject is discussed in two cases before the Court of Appeal. *Abouloff* v. *Oppenheimer* (4) and *Vadala* v. *Lawes* (5). The principle upon which both these cases proceeded is that, to quote the judgment in the *Duchess of Kingston's case* (6):

> Although it is not permitted to show that the court was mistaken it may be shown that it was misled.

Where the court is misled by the fraud of the parties that is something which vitiates the most solemn proceedings of courts of justice and as Lord Coke says, it avoids all judicial acts ecclesiastical or temporal. In the very nature of things as Lord Coleridge C.J. said in *Abouloff* v. *Oppenheimer* (4) at p. 302, the question whether the court was misled in pronouncing judgment never could have been submitted to them, never could have been in issue before them and therefore never could have been decided by them. Brett L.J. at p. 307 discusses the judgment of James L.J. in

(1) 67 L.J.Q.B. 301.
(2) [1898] 2 Q.B. 36.
(3) 65 Sol. J. 607.
(4) 10 Q.B.D. 295.
(5) 25 Q.B.D. 310.
(6) 2 Smith Leading Cases, 8th ed. 754 at p. 794.

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Flower v. *Lloyd* (1) and he expressly dissents from the proposition that there can be any doubt that the fraud of the party to the action committed before the court for the purpose of deceiving the court is a ground for setting aside the judgment. In the second of the above quoted cases the subject is discussed in a very instructive way by Lindley L.J. The action was an action on a foreign judgment and the defence was that the court pronouncing judgment had been imposed upon by the shuffling of some documents and the substitution of genuine documents for forged documents in such a manner as to deceive it. Lindley L.J. points out that there are two propositions which are to be reconciled. It is the law that a party to an action can impeach the judgment given in that action for fraud. There is another general proposition that when you sue on a foreign judgment it is not open to the defendant to go into the merits which have been decided in a foreign court and after examining the judgments in *Abouloff* v. *Oppenheimer* (2) he comes to the conclusion that, where the fraud alleged consists in misleading the court by evidence produced by a party knowing the evidence to be false, it may be that for the purpose of establishing the fraud it is necessary to try over again issues already passed upon and that if so, then it is competent to the court before which the judgment is impeached to re-try the merits.

Now it is quite true that in both of these cases the court was dealing with an action on a foreign judgment but it is equally true that no distinction appears to be drawn for this purpose between the status of a foreign judgment and that of a domestic judgment. There is, it is true, a technical difference. A domestic judgment is a contract of record, a foreign judgment gives rise only to a simple contract obligation, but given the jurisdiction of the court a judgment in a foreign court is conclusive against the parties to the litigation to the same extent as a domestic judgment and for my own part I find it difficult to comprehend any ground of distinction for our present purpose between the two classes of judgment.

The appeal should be allowed.

(1) 10 Ch. D. 327.

(2) 10 Q.B.D. 295.

ANGLIN J.—After hearing some evidence given by the plaintiff and arguments of counsel, the learned trial judge dismissed this action, saying:

> This action as at present constituted will be dismissed on the ground that the pleadings disclose no cause of action. I think that to hear evidence would only leave me in the position that the judge was in when he tried the action of Pier v. MacDonald, and upon which he decided.

The same view prevailed with at least two of the learned judges who constituted the majority in the Appellate Division, the third member of the majority of that court basing his judgment on the view that the materiality of the impeached evidence did not sufficiently appear. Under these circumstances the plaintiff comes before this court without offering any assurance, or even alleging, that, if the case be sent back for a new trial, any evidence different from or in addition to that adduced at the original trial before Mr. Justice Scott will be forthcoming.

On this aspect of the matter being drawn to his attention, counsel for the appellant, no doubt because without instructions enabling him to do so, did not offer any such assurance to the court. He did not even state that he was instructed that the evidence at the new trial would in any respect differ from that passed upon by Mr. Justice Scott.

A legitimate, and I think the proper, inference is that the plaintiff has no additional evidence to offer and is unable to put before the court anything which would make it in the least probable that his allegation of perjury on the part of the defendant can be maintained.

Having regard to all that has transpired, including the important fact that a criminal prosecution for the same alleged perjury has already failed, without expressing an opinion as to the cause of the action disclosed by the statement of claim, I think it would be quite improper for this court to interfere with the judgment dismissing this action, which, though differing in form, is in substance and effect the same as an order perpetually staying the action as frivolous and vexatious and an abuse of the process of the court. *Birch* v. *Birch* (1); *Lawrence* v. *Norreys* (2); *Reichel* v. *Magrath* (3).

(1) [1902] P. 62. (2) 15 App. Cas. 210-219. (3) 14 App. Cas. 665-668.

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BRODEUR J.—The question in this case is whether the allegations of the statement of claim are sufficient.

A judgment which has been obtained by fraud can be impeached by means of an action. But in such action the particulars of the fraud should be given and should relate to matter which *prima facie* would be a reason for setting the judgment aside.

The sufficiency of the allegations is in this case a matter of practice and procedure and the constant jurisprudence of this court is that we do not interfere in such matters with the disposition of the case by the courts below. *Ferrier* v. *Trépannier* (1); *Higgins* v. *Stephens* (2); *Russia* v. *Proskouriahoff* (3).

The plaintiff has had several opportunities to amend his statement of claim in order to show that the evidence which he would adduce would not be the same as the one on which the first action was decided but he has failed to do so.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—This is an action to have vacated and set aside a judgment whereby, in an action by the present respondent against the present appellant, the latter was declared accountable to the respondent on certain transactions between them. The appellant alleged, in his statement of claim, that the judgment was obtained by reason of false and untrue statements made by the respondent in giving his evidence, which statements were untrue to the knowledge of the respondent and were made with the intention that they should be acted upon by the court. Issue was joined on this statement of claim and the trial began, the appellant's counsel having called his client as his first witness. After some questions had been put to the appellant and answered, the respondent's counsel objected that his adversary had no right to offer the evidence of the appellant to make out a case of perjury against the respondent. A discussion took place between counsel on this objection and finally the learned trial judge

(1) 24 Can. S.C.R. 86. (2) 32 Can. S.C.R. 132.
(3) 42 Can. S.C.R. 226.

reached the conclusion that the pleadings disclosed no cause of action and that, should he hear evidence, he would find himself in the same position as the judge was when he tried the former case. The action was therefore dismissed.

I am not at all ready to say that the plaintiff's statement of claim disclosed no cause of action, but it must have been evident to the learned trial judge that the evidence being tendered would be the same as in the previous case. Counsel for the appellant never suggested that he had any other evidence of the fraud and perjury which he had alleged as the basis of his action. And before this court counsel for the appellant could give no assurance that any evidence was available to the appellant other than that adduced in the first trial.

Under these circumstances, no useful purpose would be served in sending back the case for trial and I concur in the judgment dismissing the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, McLaws, Sinclair & Redman.*

Solicitors for the respondent: *Short, Ross, Selwood, Shaw & Mayhood.*

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*Oct. 23.
Nov. 27.

C. L. DUFORT (PLAINTIFF).....APPELLANT;

AND

MARIUS DUFRESNE (DEFENDANT)....RESPONDENT.

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

Contract—Partnership—Dissolution—Profits—Division—Art. 1013 C.C.

In 1909, the respondent, carrying on on his own account the practice of a civil engineer, employed the appellant as his assistant. On the 1st September 1912, the respondent entered into a contract by private writing with the appellant and one Héroux to carry on the same undertaking under the name of "Marius Dufresne." The agreement provided *inter* alia that the profits realized ("bénéfices réalisés") at the expiration of each year should be divided, 80 per cent to the respondent and 10 per cent to each of the others. The agreement was silent as to what was to become of the fruits of work done during the term of the partnership that should remain uncollected upon its expiration. On the 31st of December, 1912, all moneys received during the four months of the existence of the partnership, including those paid on account of work done by the respondent before the 1st September, 1912, were distributed between the partners. At the date of the dissolution of the partnership, on the 31st December, 1916, a new agreement was passed between the appellant and the respondent by which the former was hired by the latter for the year 1917 at a salary of $150 a month plus 10 per cent of the "bénéfices realisés" during that year. The appellant, over two years after the first agreement had terminated, claimed 10 per cent of the moneys collected by the respondent after the dissolution of the partnership for work done during its existence.

Held, that, as the meaning of the provisions of the written agreement is not free from obscurity, the intention of the parties may be ascertained by taking into consideration the surrounding circumstances and by examining the conduct of the parties themselves in so far as it throws light on the interpretation they have placed upon their contractual rights. The contract so interpreted gives the appellant no claim on the profits realized after the expiration of the agreement.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court at Montreal, Duclos J., and dismissing the appellant's action.

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

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

Chs. Laurendeau K.C. and *Arthur Brossard K.C.* for the appellant.

Eug. Lafleur K.C. for the respondent.

IDINGTON J.—The respondent had carried on his business of a civil engineer, land surveyor and architect for some years in the town of Maisonneuve.

The appellant served him as an assistant in 1909, and up to the formation of the contract presently to be referred to, getting such compensation from time to time as his services were mutually agreed to be worth.

On the 1st September, 1912, respondent and appellant and one Héroux entered into a contract by private writing to carry on the said business under the name of respondent and, unfortunately, the said writing was so ambiguously expressed that it has given rise to this action of the appellant, in February, 1919, over two years after the said agreement had terminated as it did, and at the end of 1916 everything seemed to have been settled to the mutual satisfaction of all concerned and the appellant had entered into and served respondent, under another agreement in writing, for over a year, without making the claim now set up.

The mode of compensation of the appellant and said Héroux, by said respondent, was expressed in said first mentioned writing, as follows:—

> Les bénéfices réalisés seront partagés à l'expiration de chaque année dans la proportion suivante: les dits Héroux et Dufort prendront chacun dix pour cent (10%) de ces bénéfices et le dit Marius Dufresne prendra la balance, soit quatre-vingt pour cent (80%).
>
> Chacun des associés prélèvera sur les recettes de la société à titre de salaire, pareille et égale somme de cent cinquante piastres ($150) par mois.

The salaries thus provided for were paid and, at the end of each year, 1912, 1913, 1914, 1915 and 1916, respectively, a settlement was made on the basis thus specified, and of the account book kept by the respondent, or rather a competent person whom he was bound to employ for the purpose of keeping said book.

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Statements were made out at the end of each of the years 1912, 1913, 1914, 1915, and 1916, which included all the receipts which had come into the hands of respondent for each of said years derived from the earnings of his business, not only for each current year but the previous years as well, and settlements made on that basis.

The appellant pretends herein that, notwithstanding that mode of dealing and the said express language of the agreement, he is entitled to an accounting by respondent for anything earned during said period and to share therein.

The learned trial judge acceded to such pretension, but upon appeal to the Court of King's Bench that judgment was reversed.

If ever there was a case in which the interpretation and construction of the agreement could and should be helped by steps leading up to the contract and that done by the parties concerned therein after the business provided for by the contract had been entered upon, I think this is one.

We find that those so concerned in this contract began by a literal adherence to its terms at the end of the year 1912, and that the cash received by respondent during the entire year of 1912, for work previously done as well as for the year 1912, was brought into the account and the percentage allowed and paid appellant and Héroux respectively, as provided by the above quotation from the agreement, though the time they had worked under same had only been for four months of the said year.

The Court of King's Bench was guided largely by this conduct of the parties as the correct interpretation of their contract and in doing so was, I think, absolutely right.

Numerous other like features of this case which appear in the evidence, and especially the yearly settlements in subsequent years as if final up to the respective times when made, tend to confirm me in the opinion that the judgment appealed from is right.

The appellant in argument and in his factum especially seems to incessantly repeat that as this agreement used the word *"société"* therefore all that appears relative to what the bargain governing this *société* really was, must be dis-

carded because usually the terms of such an agreement in fact are different and the law relevant thereto would work out a different result.

The law does not prohibit parties from making any agreement they choose, even for a *société*. And as this agreement even if taken to be for such a contractual relation was terminable by either of the three parties thereto giving three months' notice, it was the duty of the appellant to have taken, at the end of 1912, the objection he is now taking.

Parties can measure the share they are to receive out of the operations of a partnership by any rule they choose to lay down and to alter same if they see fit, and their conduct is often in any case the evidence of a contract.

The clear intention of the parties so manifested herein was that all the appellant or Héroux ever were expected to get out of the business in question was the $150 a month each, and the percentage of net receipts as settled at the end of each current year in the manner provided for and adopted.

In justice to Héroux I may say that we are told he makes no pretension to the contrary.

Any other claim such as made herein might by virtue of the mode of reasoning put forward, as well have been made to a third of the profits beyond that specified and in the way specified.

The appeal should be dismissed with costs throughout.

DUFF J.—The agreement of the 1st September, 1912, unquestionably is framed in such a way as to give rise to difficulties of construction. The respondent Marius Dufresne had been carrying on on his own account practice as engineer, surveyor and architect and the document before us was brought into existence for the purpose of recording the arrangement between himself and the appellant Dufort and another engineer Héroux whom he was associating with himself in his practice. The document begins with a declaration that all parties consent

de nous mettre en société comme ingénieurs civils, arpenteurs géomètres et architectes sous la raison sociale de "MARIUS DUFRESNE" avec bureau à Maisonneuve susdit, aux conditions suivantes * * *

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It is agreed that each shall give his whole time to the affairs of the *"société"* that each is to receive a salary of $150 a month and that at the end of each year *"les bénéfices réalisés"* shall be divided, the respondent receiving 80 per cent, and each of the others 10 per cent of such *"bénéfices."* It was stipulated that the partnership should continue for an indeterminate period with the right of any one of the partners to retire upon giving three months' notice and finally it was agreed:

> En cas de décès ou d'abandon des affaires par l'un des associés, ses intérêts dans la présente société cesseront immédiatement, mais la somme représentant sa part des bénéfices réalisés jusqu'alors demeurera dans la société pour lui être payée seulement à l'expiration de l'année alors courante.

The furnishings of the office and the professional instruments were to be supplied by the respondent and were to be his property. On the face of it the instrument appears to deal only with the cash receipts from the business during the partnership period. The instrument is silent on the subject of partnership accounts in respect of work done during the partnership period, but not collected until the expiration of it and does not explicitly deal with moneys received on account of work done by Dufresne before the date of the so-called partnership.

I think it may fairly be said that as regards these points the provisions of the written instrument are not so unequivocal as to be entirely free from obscurity.

The rule of interpretation for such a case (in substance it is the same in the province of Quebec as in France), seems to be well settled. Where the language of a private convention is doubtful or obscure, to quote Huc, Commentaire du Code Civil, vol. 7, Art. 175,

> le juge doit, avant tout, rechercher quelle a été la commune intention des parties pourvu cependant que cette intention paraisse douteuse. Cette intention peut d'ailleurs être recherchée, en dehors de l'acte, dans d'autres écrits et les circonstances de la cause. Comme aussi l'éxécution donnée par les parties à une convention en sera souvent le meilleur interprète.

The authorities recognize in the most explicit way the principle adverted to in the concluding words that the conduct of the parties in the execution of a contract expressed

in doubtful language affords a very important clue to their real intention. Thus Demolombe, Code Civil, vol. 25, par. 36:

36. Il faut encore mettre au rang des règles les meilleures d'interprétation, quoique notre code ne la mentionne pas, celle que fournit l'éxécution qui a été donnée par les parties de la clause de leur convention, dont le sens est maintenant controversé entre elles.

L'exécution de la clause, c'est l'interprétation vivante et animée.

C'est, en quelque sorte, l'aveu de la partie, et à moins qu'elle ne prouve que l'exécution, qu'elle y a donnée, a été le résultat d'une erreur, il est logique et équitable qu'elle ne soit pas, en général, admise à revenir contre son propre fait:

Talis enim præsumitur præcessisse titulus, qualis apparet usus et possessio.

Tels sont les termes, dans lesquels on pourrait, d'après Dumoulin, poser notre règle.

To the same effect is Laurent, vol. 16, no. 504:

504. Toullier remarque, d'après Dumoulin, que le moyen le plus sûr de fixer le véritable sens d'une convention est de s'attacher à la possession, à l'interprétation que les parties ont faite elles-mêmes de l'acte, par la manière dont elles l'ont exécuté. La jurisprudence a consacré cette maxime. "Lorsque les actes présentent quelque incertitude, dit la cour de cassation, l'interprête le plus sûr en est l'exécution volontaire, formelle et réitérée que leur ont donnée les parties intéréssées, qui se rendent ainsi non recevable à méconnaître ensuite leurs propres faits." Dans l'espèce il s'agissait de fixer la contenance d'une forêt soumise à des droits d'usage. Cette contenance, mal précisée dans le titre de concession, se trouvait déterminée dans les plans et cartes topographiques postérieurs, dressés en présence des usagers at approuvés par leur exécution volontaire et réitérée. La cour de Metz adopta cette délimitation. Pourvoi en cassation fondé sur le violation du titre constitutif. Le pourvoi fut rejeté, parce que la cour n'avait fait qu'interpréter le titre par l'exécution que les parties contractantes lui avaient donnée.

The passage in Toullier to which Laurent refers is in vol. 6, no. 320. In 1840, it may be added, la Cour de Cassation (S., 40. 1. 789) laid it down that

lorsque les actes présentent quelque incertitude l'interprête la plus sûr en est l'exécution volontaire, formelle et réitérée que leur ont donné les parties intéréssées, qui se rendent ainsi non recevable à méconnaitre ensuite leurs propres faits.

The passage cited above from Demolombe was quoted and applied by Mr. Justice Girouard in *The City of Quebec* v. *The North Shore Railway Co.* (1), and this principle was the basis of a judgment of this court in *Cliche* v. *Roy* (2) where Mr. Justice Girouard, speaking for the court, adopted

(1) [1896] 27 Can. S.C.R. 102, at pp. 124 and 125.

(2) [1907] 39 Can. S.C.R. 244.

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the reasons for judgment given by Lacoste C.J. of the Court of King's Bench which proceeded upon the ground that les parties elles-mêmes ont interprèté l'acte dans ce sens là.

I agree with the finding expressed in the considérants of the Court of King's Bench in the following words:

> Considérant que seuls les deniers perçus pendant l'existence de l'arrangement devaient tomber dans le fonds à partager, et que c'est l'interprétation que les parties ont elles-mêmes donnée à leurs conventions, en particulier lors du premier partage.

The fair meaning of the document of the 31st December, 1916, is, I think, that under the agreement expressed in that document the cash receipts from the 31st December, 1916, were to be divided as therein specified. The fact that the parties entered into this arrangement taken together with the disposition of the proceeds received during the partnership term for services rendered and business done by the respondent before the partnership arrangement was made sufficiently, I think, support this considérant embodying the unanimous opinion of the Court of King's Bench.

The appeal should be dismissed.

ANGLIN J.—It may be conceded that the parties to the agreement of the 1st September, 1912, contemplated a partnership of some description. Nevertheless the terms of that partnership and the rights of the partners to share in its profits are defined, with more or less exactitude, in their agreement. The distribution of profits realized—"*bénéfices réalisés,*"—which I would translate "net cash receipts," is explicitly provided for. The agreement is silent as to what is to become of the fruits of work done during the term of the partnership that should remain uncollected upon its expiry. Taking into consideration, however, as I think we should, the clause of the contract which deals with the rights of a retiring partner or the representatives of a deceased partner and the agreement made between the parties to this action to take effect from the 31st of December, 1916, the date of the dissolution of the partnership constituted by the agreement of September, 1912, I find enough doubt as to the meaning of the parties to the latter agreement to bring it within the purview of Art. 1013 C.C. I know of no better means of solving that doubt than the

conduct of the parties themselves in so far as it throws light on the interpretation they have placed upon their contractual rights. The inclusion in the *"bénéfices réalisés"* distributed amongst the partners between the 1st September, 1912, and the 31st of December, 1916, of all monies received during that period on account of work done by Marius Dufresne before the former date makes it reasonably clear why no provision was made as to the distribution of monies due for work done during the term of the partnership but uncollected when it expired. Such monies were not meant to form part of the funds to be divided between the partners, but were to belong to Dufresne, no doubt to offset the monies earned by him before the partnership began but included, by arrangement of the parties within the *"bénéfices réalisés"* in which they participated.

Mr. Justice Dorion has expressed views very similar to those which I entertain and have endeavoured to state.

The appeal, in my opinion, fails.

BRODEUR J.—Il s'agit dans cette cause d'une convention que Dufort appelle un acte de société et que Dufresne désigne un contrat de louage de services.

Dufresne exerçait seul depuis plusieurs années sa profession d'ingénieur civil et d'arpenteur, et il avait à son service le demandeur Dufort et un nommé Héroux qui étaient aussi tous deux ingénieurs civils. Désireux d'améliorer la situation de ses aides et profitant d'une grande prospérité dans ses affaires, Dufresne décida de les faire participer dans ses bénéfices, et ils firent tous les trois à cette fin la convention qui nous est soumise et qui est faite sous seing privé.

Ce contrat, qui est daté du 1er septembre 1912, comporte que Marius Dufresne, Dufort et Héroux "consentent" à se mettre en société comme ingénieurs "sous la raison sociale de ' Marius Dufresne,' " que chaçun des associés prélèvera sur les recettes de la société à titre de salaire "$150 par mois," que les bénéfices réalisés

seront partagés à l'expiration de chaque année dans la proportion suivante: les dits Héroux et Dufort prendront chacun 10% et Dufresne prendra la balance 80%; (que) la société est contractée pour un temps indéterminé, chacun des associés ayant le droit de se retirer

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en donnant trois mois d'avis, que le mobilier du bureau et les instruments d'arpentage seront fournis par Dufresne et seront sa propriété, que ce dernier verra seul aux finances et signera les chèques; et le contrat se termine par la clause suivante, qui est la plus importante pour la décision du litige et qui se lit comme suit:

> En cas de décès ou d'abandon des affaires par l'un des associés, ses intérêts dans la présente société cesseront immédiatement, mais la somme représentant sa part des bénéfices réalisés jusqu'alors demeurera dans la société pour lui être payée seulement qu'à l'expiration de l'année alors courante.

A la fin de la première année, les parties ont réglé les bénéfices réalisés et on a fait entrer dans les recettes non seulement l'argent perçu pour la valeur des travaux exécutés depuis le 1er septembre 1912, date de la convention, mais aussi les deniers perçus pour les travaux exécutés avant le 1er septembre 1912. En d'autres termes, on a fait entrer en ligne de compte des travaux dont Dufresne, sans la convention, était incontestablement le seul et unique bénéficiaire. Dufort et Héroux se sont trouvés par ces règlements de fin d'année à profiter non-seulement des travaux qui avaient été faits depuis leur convention, mais aussi de ceux faits antérieurement. Les opérations financières de l'année ont donc été acceptées par les parties pour déterminer les bénéfices réalisés par la "société."

La convention a pris fin en décembre 1916, sur notification de Dufresne. Ce dernier a voulu déterminer les "bénéfices réalisés" suivant les recettes et les dépenses de l'année. Mais Dufort demande par sa présente action de faire entrer dans ces bénéfices la valeur des travaux qui ont été exécutés depuis la convention de 1912 et pour lesquels aucun argent n'a encore été versé dans la caisse.

Afin de décider ce litige, il s'agit d'abord de savoir si la convention doit être considérée comme un acte de société.

Il me semble que les parties ont bien voulu considérer leurs conventions comme constituant un acte de société.

Ils ont formé une raison sociale et ils ont à diverses reprises au cours de l'acte parlé de relations qu'ils ont qualifiées de relations sociales. Le contrat réunit les éléments essentiels de la société, c'est-à-dire qu'il est pour le bénéfice common des associés et que chacun d'eux y apporte son

habileté et son industrie et qu'il y a participation dans les profits (Arts. 1830-1831 C.C.)

Je sais que la nature d'un contrat ne doit pas être déterminée par la qualification que les parties ont donnée à un acte quand il est certain que cette qualification est contraire au véritable caractère de la convention; mais nous ne devons nous écarter du sens littéral des mots que lorsqu'il est certain que les parties les ont pris dans une acception impropre. (Baudry-Lacantinerie, 2ème édition, nos. 556-557).

Dans le cas actuel, les parties, ce me semble, ont bien entendu exprimer leur volonté de former une société; et, en réalité, le litige ne porte que sur l'actif qui doit y entrer ou en être exclu.

Cela nous ramène alors à examiner la question qui est de savoir si la valeur des travaux faits avant la formation de la société mais payés durant son existence fait partie de la société; et si, par contre, les travaux faits pendant la société, mais non payés à sa dissolution, doivent être pris en considération pour déterminer les "bénéfices réalisés" dont parle le contrat.

S'il y a doute à ce sujet, nous trouvons dans la conduite des parties contractantes la véritable intention qu'elles avaient. Ainsi dans le premier règlement qui s'est fait en 1912 et dans les années subséquentes, on a calculé les "bénéfices réalisés" sur les recettes et les dépenses de chaque année sans rechercher si ces recettes et ces dépenses couvraient la valeur des travaux exécutés avant l'existence de la société ou non. Si Dufresne a perdu le bénéfice des travaux qu'il avait exécutés lui-même, il me semble juste et équitable qu'il ait également à la dissolution, le bénéfice des travaux qui ont été exécutés pendant la société mais dont cette dernière n'avait pas perçu la valeur.

D'ailleurs l'intérêt du demandeur serait bien minime, car un contrat de louage de services fait entre Dufort et Dufresne en 1917 donne à Dufort de nouveau 10 pour cent sur les honoraires perçus durant l'année par Dufresne, déduction faite des dépenses et salaires payés. Si plusieurs comptes sont restés impayés pendant l'année 1916, il est

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à présumer qu'ils ont dû être perçus en 1917 en grande partie et que Dufort aura alors sa part dans ces comptes.

Pour ces raisons l'appel doit être renvoyé avec dépens.

MIGNAULT J.—Les parties sont des ingénieurs civils et arpenteurs-géomètres et elles ont pris cette qualité dans le contrat du 1er septembre, 1912, invoqué par chacune d'elles. Elles paraissent aussi avoir agi comme architectes, avec ou non le droit de le faire, peu importe. Le 1er septembre, 1912, l'appelant et l'intimé ont signé, avec M. Joseph P. Héroux, un contrat préparé par eux.

Une des questions soulevées est de savoir si ce contrat constitue un contrat de société; l'appelant le soutient, l'intimé, au contraire, dit que c'est un contrat de louage d'ouvrage. L'appelant avait été à l'emploi de l'intimé avant le 1er septembre 1912. L'arrangement de cette date a duré entre les trois parties jusqu'au 31 décembre 1916. Après cette date il y a eu un contrat de louage d'ouvrage pour une année entre l'appelant et l'intimé, le premier louant ses services au second.

Après avoir examiné le contrat du 1er septembre 1912, je suis d'avis que c'est un contrat de société. Les parties déclarent expressément qu'elles consentent à se mettre en société, et les mots "société" ou "associés" sont répétés presque à chaque clause. Sans doute les termes dont les parties se servent pour désigner le genre de contrat fait par elles ne constituent pas toujours un indice infaillible de la nature juridique de ce contrat, mais cela aide beaucoup à découvrir quelle a réellement été leur intention, et si les conventions peuvent se concilier avec la description que les parties en ont faite, cet indice peut être accepté comme décisif par les tribunaux. Le contrat en question renferme tous les éléments du contrat de société, car la convention de partager dans les pertes, qui manque ici, découle de la stipulation de partage dans les bénéfices, et la loi la sous-entend (Art. 1831 C.C.). Il y a donc eu société.

La solution de cette première question en faveur de l'appelant n'entraîne pas nécessairement la conséquence que son action était bien fondée. Il reste à déterminer quelle part l'appelant devait retirer dans cette société. Si

cette part, outre le salaire qui a été payé, est seulement dix pour cent des bénéfices réalisés pendant la société, l'appelant a reçu tout ce qui lui revient et l'action en reddition de compte qu'il intente à l'intimé se trouve sans objet.

Une difficulté m'a d'abord frappé. Dans la clause où il est question du partage des bénéfices, les trois associés sont placés sur le même pied, sauf que l'intimé reçoit quatre-vingt pour cent de ces bénéfices et l'appelant et Héroux dix pour cent chacun, les sommes à être retirées par les trois associés pour leur salaire étant égales. On n'a pas pourvu au partage de ce qui pourrait être payé après la fin d'une année pour l'ouvrage fait pendant cette année. Tant que la société a duré il ne pouvait y avoir de difficulté, car les sommes ainsi payées pour services antérieurs comptaient parmi les bénéfices réalisées pendant l'année où elles avaient été perçues et la clause de partage s'y appliquait. Mais la prétention que soulève l'appelant est de partager dans les sommes reçues par l'intimé depuis la dissolution de la société pour des ouvrages faits pendant son existence. Il dit que chaque fois que la société faisait un ouvrage pour le compte d'un de ses clients, elle acquérait un droit de créance contre ce client et chaque associé avait le droit de partager dans cette créance quand elle était payée, que ce fût pendant la société ou après sa dissolution.

On répond que par les partages annuels que les parties ont faits, elles ont autrement interprété leur contrat; que dans les quatre derniers mois de 1912, la société ayant commencé le 1er septembre de cette année, on a divisé parmi les associés tous les bénéfices reçus sans égard au temps où l'ouvrage avait été fait, donnant ainsi à l'appelant dix pour cent pour des travaux exécutés par l'intimé avant le commencement de la société; et que cette méthode a été suivie durant toute l'existence de la société, les associés n'ayant partagé que les sommes actuellement reçues pendant l'année. Et on dit que les parties ont ainsi démontré que dans leur intention rien que les bénéfices actuellement reçus ou réalisés durant l'existence de la société ne pouvait entrer dans la masse à partager entrer entre les associés.

Ce raisonnement qui a prévalu devant la cour d'appel ne me satisfait pas. Il est probable que l'intimé a laissé entrer

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dans la somme partagée en décembre 1912 quelque chose qui n'aurait pas dû y figurer, mais il n'en résulte pas, à mon avis, que les parties aient eu l'intention d'interpréter leur acte de société. Les autres partages annuels ne fournissent aucun argument à l'intimé, car on n'a partagé que ce qui seul pouvait être divisé, c'est-à-dire le surplus des recettes après le paiement des dépenses.

Mais un argument bien plus formidable résulte du contrat que l'appelant a fait avec l'intimé après la dissolution de la société. Ce contrat, qui devait durer une année à compter du 31 décembre 1916, n'est pas daté, mais l'intimé dit qu'il a été fait à la fin de janvier ou au commencement de février 1917; il y est déclaré que

> Mr. Leroux Dufort recevra à la fin de l'année dix pour cent des bénéfices réalisés durant l'année; les bénéfices seront établis de la manière suivante, le surplus des honoraires perçus durant l'année déduction faite des dépenses et salaires payés durant l'année.

L'appelant, en vertu de ce contrat qui est un louage de services, devait recevoir de l'intimé, outre son salaire, dix pour cent des bénéfices réalisés durant l'année, c'est-à-dire dix pour cent du surplus, déduction faite des dépenses, des honoraires perçus durant l'année. Il devait être évident, quand ce contrat a été fait, que ce surplus d'honoraires comprendrait des honoraires payés, durant l'année 1917, pour des travaux exécutés auparavant, c'est-à-dire pendant l'existence de la société. La stipulation par l'appelant, comme employé de l'intimé, d'un pourcentage sur les recettes de 1917 sans distinguer les honoraires pour travaux anciens de ceux pour travaux nouveaux, indique à mon avis qu'il reconnaissait qu'il n'avait plus rien à réclamer, comme associé, sur des honoraires qui seraient payés après la dissolution de la société pour des travaux antérieurs. Et un tel contrat fait immédiatement après la dissolution de la société est à mon avis une interprétation des conventions sociales qui lie l'appelant, et un abandon par lui de toute prétention à autre chose que les bénéfices réalisés pendant l'existence de la société.

Il ne faut pas oublier non plus que c'était toujours le bureau de l'intimé qui continuait avant, pendant et après la société. En d'autres termes, l'intimé, qui avait établi un bureau pour l'exercice de sa profession, s'est associé l'appe-

lant et Héroux pendant un certain temps, mais c'était toujours le bureau "Marius Dufresne" qui subsistait. Cela répond à l'objection de l'appelant que s'il n'a pas droit aux sommes perçues après la dissolution de la société pour des travaux antérieurs, l'intimé lui-même n'y a pas droit, car la clause de partage s'applique aux trois associés et ne leur donne le droit qu'aux bénéfices réalisés durant l'année. D'ailleurs, si l'intimé a payé à l'appelant tout ce qui revient à ce dernier comme associé, peu importe ce qu'il fait du résidu, car ce résidu n'appartient certainement pas à l'appelant. Ce serait quelque chose qui n'aurait pas été mis dans la société.

Je crois que l'appel doit être renvoyé.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur Brossard.*

Solicitor for the respondent: *J. A. Bonin.*

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*Oct. 17
*Dec. 19.

JOSEPH P. MORIN (PLAINTIFF).....APPELLANT;

AND

THE HAMMOND LUMBER COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Contract—Sub-contract—Default of contractor—Recission—Arrangement with sub-contractor—New contract or guarantee—Statute of frauds.

A lumber company gave G. a contract to cut and drive logs and a sub-contract for part of the work was given to M. Before his contract was completed G. absconded and the company treated his contract as abandoned and took possession of the logs cut. M., to whom nothing was due by G. at that time, had an interview with the president of the company, who said to him: "You will keep on with the work exactly as you were to do with G.; you will finish your contract. Put your wood where you expected to put it with G. I will pay you. You are not dealing with G. any more, you are dealing with us. Make your drive and I will pay you. I will pay you your contract as G. was supposed to pay you." M. completed his contract but payment was refused.

Held, that the undertaking by the company to pay M. was not a contract to answer for a debt of G. which the Statute of Frauds required to be in writing but was a new and independent contract entailing liability on the company when performed.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the judgment at the trial in favour of the defendant company.

The facts are sufficiently stated in the above head-note

P. J. Hughes for the appellant. The company made a new contract with appellant and not one to answer for a debt of another. See *Guild* v. *Conrad* (1), *Conrad* v. *Kaplan* (2), *Leake on Contracts* (7 ed.) 165.

Stevens K.C. for the respondent referred to *Fitzgerald* v. *Dressler* (3), *Williams* v. *Leper* (4).

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

(1) 63 L.J.Q.B. 721.
(2) 18 D.L.R. 37.
(3) 7 C.B.N.S. 374.
(4) 3 Burr. 1886.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, in which I fully concur, I would allow this appeal with costs.

IDINGTON J.—The respondent, having a right to cut timber on a basis of paying therefor according to terms set forth in the agreement giving such right, entered into a written contract with one Grandmaison to cut about five million feet thereof; haul the logs so cut to a point or points on certain rivers, and then to drive such logs as were floating on the said respective streams to certain other points. Said Grandmaison sub-let the work to the extent of about a million feet to the appellant by another written contract embodying all the terms of the first, so far as fitting such a sub-contract, but on such terms as apparently to produce a profit to Grandmaison. Idington J.

In the contract between him and respondent there was nothing binding the latter to make advances to aid the contractor, though evidently such was contemplated as likely to become necessary, and advances were made from time to time.

The last of said advances was $12,000 with which Grandmaison absconded.

The respondent then availed itself of the power given it in the contract to stop operations thereunder, and to take possession of the logs cut and all the equipment used up to that time in the execution of the contract by Grandmaison.

This unexpected condition of things led appellant, accompanied by three of the assistants he had helping him to carry out his sub-contract, to go to Van Buren where respondent's headquarters were, to find out what was to be done by each of the parties hereto under the circumstances.

The president of respondent, on its behalf, and appellant verbally agreed that appellant should go on and complete the work he had agreed with Grandmaison to do. It is upon that verbal agreement that this action is brought. The said parties differed very widely in the terms thereof.

The appellant's story practically amounted to a substitution of respondent for Grandmaison, as appellant's paymaster, under the sub-contract, including both what had

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been done and that already named but not done, for that which yet remained to be done.

The respondent contended that it incurred no such liability but only to pay for cost of work to be done and a *per diem* wage to the appellant.

The jury was asked to find which story was true and adopted the appellant's version, the result of which was a verdict for plaintiff, now appellant, of $10,000.

The objection was taken throughout, in pleadings and at the trial, that this agreement so far as relative to the work done up to the making thereof, was void under the Statute of Frauds because it was not reduced to writing.

That view was upheld by the learned trial judge who dismissed the action on that ground. And on appeal therefrom to the Appeal Division of the Supreme Court of New Brunswick, the majority of that court, consisting of the Chief Justice thereof and Mr. Justice Grimmer, dismissed the appeal.

Mr. Justice Crocket, dissenting therefrom, held that the appeal should be allowed.

The learned trial judge, and Chief Justice Hazen who wrote the opinion which prevailed in appeal, seem, I most respectfully submit, to attach too much importance to the persistent contention of counsel for appellant that, short of an actual novation of contract, whereby the original debtor would be absolutely discharged, no contract involving an obligation for the payment of the debt of another could be maintained unless reduced to writing.

I cannot assent to such a proposition. There are numerous cases—indeed too numerous to mention—conflicting entirely therewith.

If there happens to be an actual novation of contract of course that ends all doubt or difficulty. But by no means do the cases resting thereon decide that there must be novation of contract before liability can arise on a verbal contract which involves the obligation of payment of another's debt.

The question raised herein I submit is whether or not this case falls within the true meaning of the decision in

the case of *Sutton* v. *Gray* (1), where Lord Esher expresses himself, on page 288, as follows:

> If he is totally unconnected with it except by reason of his promise to pay the loss, the contract is guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemity, not of guarantee, and section 4 does not apply.

Even this, from so careful an authority in the use of language, may be interpreted too widely.

The case of *Davys* v. *Buswell* (2), illustrates how far it was attempted to be strained.

In these cases, as authorities on which they respectively rest or were sought to be rested, there are cited the leading cases which turned on the distinction between the words of the statute being a special promise to answer for the "debt, default or miscarriage of another" and the manifold ways in or by which a contract of indemnity may be called into existence, and yet not be that kind of special promise, within the Statute of Frauds.

In this case now in hand we will be, I submit, if we allow this appeal, far within the line drawn in *Couturier* v. *Hastie* (3), or *Sutton* v. *Gray* (1), just cited, and not invading the law as laid down since.

I therefore think this question, upon the Statute of Frauds as defence, should be decided accordingly.

There are other features of the case, such as the liens against the logs in question, that might, I suspect, have been made more effective in answering the objections resting upon said Statute of Frauds than was done at the trial.

The Woodman's Lien Act was cited to us on the argument and there were men engaged in the appellant's part of the work who were entitled under said Act to have made, at the time the agreement in question was entered into, good their claim under said Act. And I find three of these men were those who accompanied appellant to Van Buren on the occasion when the agreement in question was entered into, and returned satisfied with the assurance given appellant by respondent's president to help complete the work appellant had undertaken.

(1) [1894] 1 Q.B. 285. (2) [1913] 2 K.B. 47.
(3) 8 Ex. 40.

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One of these at the trial swore that $850 was still due him for such services.

Another giving evidence put his claim yet due for similar services at $1,783.

Such possibilities, including that of appellant's own claim (for subsection 2 of section 2 of the Act seems wide enough to support a fairly arguable claim on his behalf in that regard) may have been discarded for good reasons arising out of the local jurisprudence in applying the Act.

But whether such claims are absolutely well founded in law or not, they, or the possibilities thereunder, were likely to have presented to a business man's mind the actual situation in such a way as to render the assumption of Grandmaison's indebtedness not such an improbable thing as the learned trial judge and the learned Chief Justice in appeal seem to have thought.

And if the claims against appellant by his men were such as could have been registered under the said Act at the time this agreement was entered into, then there existed another possible feature of this case bringing it absolutely within the decision in the case of *Fitzgerald* v. *Dressler* (1).

Perhaps it is in principle within the ruling in that case. I need not, for obvious reasons, already stated, follow that line of thought.

I cannot find the answers of the jury so inconsistent and conflicting as is urged upon us as to render the verdict worthless. Indeed the outstanding features of the case, that the contract of respondent with Grandmaison was for a higher figure than the basis of appellant's with him, and the profit implied therein stood against any probable loss in the assumption thereof instead of the original liability to Grandmaison under his contract especially in light of the one-sided kind of contract that was giving respondent every possible means of protecting itself, guided by an experience of forty years as its president claimed to have had.

Once the $12,000 was got back from Grandmaison, and that no doubt counted on, respondent does not seem to have made any such improbable sub-contract with appel-

(1) 7 C.B.N.S. 374.

lant as the learned trial judge and the majority in the court below seemed to hold the jury had found.

It is only as to the probabilities, or improbabilities if you please, that any of these features are worthy of consideration and that only before the jury.

There is no plea of fraud presented. And the alleged want of consideration presented as an argument here and below, has nothing to rest upon as a matter of law if the story found true by the jury is correct, or the finding of the jury. Elementary English law does not, unless in case of fraud, require or enable the courts to pass upon the measure of consideration if there is in truth a consideration as herein is presented.

In deference to the argument presented I have made many of the foregoing suggestions. I feel myself, however, so much in accord with the reasoning in Mr. Justice Crocket's judgment that I adopt same and need not proceed further than to say I would allow the appeal with costs throughout.

DUFF J.—Grandmaison had a contract to cut and drive the respondent company's logs and the appellant had a sub-contract with Grandmaison for the execution of part of this work. Grandmaison, on becoming insolvent, absconded, while the appellant's sub-contract remained unexecuted in part. Under some arrangement with the respondent the appellant finished driving the logs he had cut under his sub-contract. The jury found that the appellant's account of this arrangement was the true one; but the Appeal Division have held that accepting that account, the arrangement amounted to a guaranty of the obligations undertaken by Grandmaison under the sub-contract with the appellant and that the arrangement, not being evidenced in compliance with the 4th section of the Statute of Frauds, was unenforceable. The evidence of the appellant accepted by the jury was to this effect:—

> Grandmaison has gone away; you will keep on with the work exactly the same as you were to do with Grandmaison; you will finish your contract. Put your wood where you expected to put it with Grandmaison at the mouth of Little Forks. I will pay you. You are not dealing with

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Grandmaison any more, you are dealing with us. Make your drive and I will pay you. I will pay you your contract as Grandmaison was supposed to pay you at the mouth of the brook.

I concur with the conclusion of Crocket J. that the evidence interpreted in light of the situation establishes the existence of a new and substantive undertaking by the respondents and not a contract of suretyship.

Grandmaison by the terms of his contract agreed to complete the work in the spring of 1921, and payment for it was due on the 1st April, 1921, but the contract expressly declared that cash or supplies and equipment to the estimated value of the work done might be advanced as the operation progressed and that such advances should be used only for the purposes of carrying out the contract, and that any diversion of them should be deemed an act to defraud the company. It was further provided that the company might "stop operations" at any time should the contractor be indebted to it in excess of the value of the work done or if the contractor should fail to fulfil any of the conditions of the contract. Up to the 1st of April the respondent had advanced $81,000 to Grandmaison, including the sum of $12,000 advanced on the 31st March with which Grandmaison absconded leaving New Brunswick and going to Quebec where he deposited part of the money in his son's name in a bank. This the respondents treated as a breach of the contract and they accordingly took possession of the logs cut by Grandmaison himself as well as by his sub-contractors, including the appellant.

Obviously in these circumstances it became impossible for the appellant to carry out his sub-contract with Grandmaison without the consent at least of the respondents. The terms of the appellant's sub-contract were virtually the same, *mutatis mutandis,* as those of Grandmaison's contract with the respondent. The contract price was payable by Grandmaison on the 1st June, 1921, as an entirety although the contract contemplated advances in cash and supplies if necessary during the course of its execution. These, however, Grandmaison was under no legal obligation to make. The appellant no doubt immediately, as a result of the respondent's act in taking possession of the

logs, acquired a right of action against Grandmaison on the principle of *Inchbald* v. *Neilgherry Coffee Co.* (1); that is to say, he became entitled to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of contract. *Lodder* v. *Slowey* (2).

He also became entitled to sue for damages for breach of Grandmaison's implied undertaking not to prevent or hinder the performance of the work he had contracted to do. *United States* v. *Peck* (3); *Mackay* v. *Dick* (4).

In these circumstances it is quite clear of course that the appellant and the respondents might have arranged that the appellant should proceed with the execution of his sub-contract with Grandmaison, and that, treating that contract as still on foot, the respondent should become responsible to the appellant for the performance of Grandmaison's obligations under it. But on the other hand the respondents were entitled to stipulate that the appellant in driving their logs should do so only under the arrangement with them, and not as a sub-contractor with Grandmaison, and indeed they might very well consider it in the circumstances important that they should not in any way recognize any of Grandmaison's sub-contracts. It is agreed on both sides, notwithstanding differences in other vital matters, that the appellant was to "have nothing more to do with Grandmaison," that he was to deal exclusively with the respondents; in other words, it was the basis of the arrangement between the appellant and the respondents that Grandmaison's contract was to be treated as rescinded.

Such being the facts, it seems clear that the undertaking by the respondent to pay was an independent undertaking and not a contract of suretyship. A contract of guaranty necessarily presupposes the existence of a principal obligation. As the sub-contract with Grandmaison was treated as rescinded, there remained in the contemplation of the parties no obligation under that contract to pay the contract price in whole or in part, in other words, no principal obligation to which a contract of guaranty could attach.

(1) 17 C.B.N.S. 733.
(2) [1904] A.C. 442 at p. 452.
(3) 102 U.S.R. 64.
(4) 6 App. Cas. 251.

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The appeal should, for these reasons, be allowed and judgments given with costs in all courts for the amount of the verdict.

ANGLIN J.—The jury was quite within its right in accepting the plaintiff's version of his arrangement with the defendant company rather than that of its president. Nor do I find any such inconsistency in the answers of the jury as would justify setting them aside. Mr. Justice Crocket has, in my opinion, satisfactorily dealt with these aspects of the case.

While I am also prepared to accept the conclusion of that learned judge that the Statute of Frauds is inapplicable, I am not satisfied with the soundness of the view, on which I understand him to base that conclusion, that the defendant's ownership of the logs and its interest in the Grandmaison contract for taking them out suffice to exclude the application of the statute under the test stated in the note (*l*) to *Forth* v. *Stanton* (1). The evidence discloses no liability on the part either of the defendant or of his property for any sum due by Grandmaison to the plaintiff except such as arises from the express promise sued upon. *Davys* v. *Buswell* (2). If the plaintiff had a lien on the defendant's logs which he had taken out for Grandmaison the case would fall within the test under consideration and the statute would not apply. But a case of lien was neither presented nor established.

Assuming that the contractual liability of Grandmaison to the plaintiff continued and that it was that liability that the defendant undertook to meet in consideration of the plaintiff completing his contract, I would feel obliged to hold the statute applicable notwithstanding the absolute and unconditional promise to pay made by the defendant. *Beattie* v. *Dinnick* (3). On such an assumption I think the plaintiff's case could be put more strongly on the ground that the immediate and main object of the agreement between Morin and the defendant company was to have the logs, cut by the former and of which the latter

(1) [1871] 1 Wm. Saun. 233. (2) [1913] 2 K.B. 47.
(3) 27 O. R. 285

had taken possession, driven to the mouth of the river and thus made available for its purposes, and that payment of any debt of Grandmaison to Morin was a mere incident or ulterior consequence of the arrangement. *Harburg India Rubber Co.* v. *Martin* (1); *Sutton* v. *Grey* (2); *Emerson* v. *Slater* (3).

But, as is pointed out by my brother Duff, the effect of the jury's finding accepting the plaintiff's version of his agreement with the president of the defendant company is that the contract of the latter with Grandmaison and that of Grandmaison with the plaintiff were treated as having been abandoned. Grandmaison had absconded; the defendant company had taken possession of the logs; the plaintiff had no money to complete his drive, even if the defendant would have allowed him to do so under his contract with Grandmaison; without its consent he could do nothing further. On the other hand, no debt was due to Morin by Grandmaison; under the terms of the contract between them none could be due for several months after the completion of the drive. I agree with my learned brother that the defendant company did not undertake to become responsible to Morin for the fulfilment of Grandmaison's obligation under his contract, but, on the contrary, they insisted on Grandmaison's contract and subcontract being entirely superseded and entered into an original and independent undertaking to pay the defendant certain moneys, regardless of any liability of Grandmaison, in consideration of the plaintiff undertaking to drive the logs cut by him to the mouth of the river. I agree with Crocket J. that this formed an independent consideration sufficient to support the defendant's promise to pay Morin.

I also incline to agree with my brother Duff that there was no principal obligation of Grandmaison in the nature of a debt within the fourth section of the Statute of Frauds which the parties contemplated should be guaranteed by the defendant. Both contracts with Grandmaison were

(1) [1902] 1 K.B., 778, 786.
(2) 60 L.T., 354, 355; [1894] 1 K.B., 285, 288.
(3) 22 How. (U.S.) 28, 43.

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treated as having been abrogated and the basis of the new arrangement was that Morin should have nothing more to do with him.

BRODEUR J.—I entirely concur with the opinion expressed by Mr. Justice Crocket in his dissenting judgment in the court below, and it would be useless for me to add anything to what he has so ably said on the question of law as well as on the interpretation of the findings of the jury.

As it is said in Halsbury, vol. 15, p. 462,

> the true test whether the Statute of Frauds applies is to see whether the person who makes the promise is, but for the liability that attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise.

If the promise is made by a person connected with the business, then the Statute of Frauds does not apply. This principle has been enunciated in several decisions. *Couturier* v. *Hastie* (1); *Sutton* v. *Gray* (2).

In the present case, I am not surprised as to the defendant company making the agreement alleged by the plaintiff and undertaking that the latter should complete his contract and that he would be fully paid for all the work which he had done; otherwise the defendant might be exposed to very serious damages. It must have made some sales of the lumber which was being cut during the winter on its timber limits. There were some liens on this timber. It could not take possession of the logs without discharging these liens. Law suits could have been brought by different persons and could have stopped the driving of the logs during the short time which is available for that purpose. It could experience a great deal of trouble in finding the large number of men necessary to complete delivery of the logs, since all this organization had been made through its principal contractor who had absconded. Then instead of acting as a madman, as it has been suggested, I find that it has acted very wisely in simply continuing the sub-contracts which had been made by Grandmaison.

(1) 8 Ex. 40.

(2) [1894] 1 Q.B. 285.

For these reasons, I am of opinion that the verdict of the jury in favour of the appellant should stand and that the judgment of the court below should be reversed with costs throughout and that the plaintiff's action should be maintained.

MIGNAULT J.—I have no difficulty in reconciling the answers made by the jury to the questions put to them, and may simply refer to the judgment of Mr. Justice Crocket on this point.

In my view, following the breach by Grandmaison of the contract between him and the respondent and of the sub-contract between him and the appellant, both these contracts were treated by the appellant and the respondent as being at an end. The arrangement made by them, whether the plaintiff's or the respondent's evidence be accepted, was an entirely independent contract, and in no way a promise to answer for Grandmaison's debt. The jury believed the appellant's testimony as to this arrangement, and I agree with the reasons of my brothers Duff and Anglin for considering it entirely outside the Statute of Frauds.

I would allow the appeal with costs throughout and give judgment to the appellant for the amount of the jury's verdict.

Appeal allowed with costs.

Solicitor for the appellant: *J. E. Michaud.*

Solicitors for the respondent: *Stevens & Lawson.*

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*Jan. 15.

IN RE J. H. ROBERTS.

Jurisdiction—Habeas corpus—Applicant in custody under provincial Act "B.N.A. Act," [1867] s. 92 (14), s. 101—"Supreme Court Act," (D) 38 V., c. 11; R.S.C. 1906, c. 139, ss. 3, 35, 62—(Q) 13 Geo. V., c. 18.

The appellant in custody in the city of Quebec under the authority of a special Act of the legislature for an alleged offence against the privileges, honour and dignity of the provincial legislature of Quebec asked, pursuant to section 62 of the "Supreme Court Act," for the issue of a writ of *habeas corpus*.

Held that, owing to the absolute limitation imposed by the concluding words of section 62 "under any Act of the Parliament of Canada," the judge of the Supreme Court of Canada is without jurisdiction to grant the application.

MOTION by the applicant for the issue of a writ of habeas corpus.

The facts are fully stated in the judgment of Mr. Justice Anglin.

Armand Lavergne K.C. and *Lucien Gendron* (*Antoine Rivard* with them) for the applicant.

Chas. Lanctot K.C. and *Aimé Geoffrion K.C.* for the Attorney-General for Quebec.

ANGLIN J.—By s. 92 of the "B.N.A. Act" exclusive legislative jurisdiction is conferred upon the legislature of each province in relation to

(14) the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of civil and of criminal jurisdiction.

By s. 101 of the same Act it is enacted that

the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a general Court of Appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada.

In 1875, under the power thus conferred upon it, the Dominion Parliament established the Supreme Court of Canada as a Court of Common Law and Equity and a court

*PRESENT:—Mr. Justice Anglin in Chambers.

of record, (38 V. c. 11). The Supreme Court continues to exist to-day as

> a general court of appeal for Canada and as an additional Court for the better administration of the laws of Canada

("Supreme Court Act," R.S.C. [1906] c. 139, s. 3). Both in its constitution and in its jurisdiction, the Supreme Court is a purely statutory court. It

> has, holds and exercises an appellate, civil and criminal jurisdiction throughout Canada

(s. 35), subject to certain qualifications and restrictions specified in other sections of the "Supreme Court Act." Notwithstanding the comma after the word "appellate" in s. 35 (not found in the original s. 15 of the statute of 1875, c. 11), that section relates only to the appellate jurisdiction of the court. An attempt to confer on it general, original, civil and criminal jurisdiction would hopelessly transcend the power given by s. 101 of the "B.N.A. Act," and would seriously impinge upon provincial legislative jurisdiction under s. 92 (14) of the "B.N.A. Act." From the appellate jurisdiction are specially excluded, *inter alia.*

> proceedings for or upon a writ of habeas corpus * * * arising out of a criminal charge.

As to the purview of the term "criminal charge," *vide Mitchell* v. *Tracey* (1); *Nat Bell Liquors* v. *The King* (2).

The original jurisdiction of the court, in order to keep within the limits prescribed by s. 101 of the "B.N.A. Act," is confined to "the better administration of the laws of Canada." Hence the restriction imposed by s. 62 of the "Supreme Court Act" which confers on

> every judge of the court, except in matters arising out of any claim for extradition under any treaty, concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in a criminal case under any Act of the Parliament of Canada.

The limitation imposed by the concluding words of this section is absolute. *Re Sproule* (3); *Ex parte MacDonald* (4); *Re Potvin* (5), and *Re Dean* (6). Except for the pur-

(1) [1919] 58 Can. S.C.R. 640.
(2) [1921] 62 Can. S.C.R. 118; [1922] 2 A.C. 128 at pp. 166-8.
(3) [1886] 12 Can. S.C.R. 140.
(4) [1896] 27 Can. S.C.R. 683, at p. 687.
(5) Cass. Dig. (2 ed.) 327.
(6) [1913] 48 Can. S.C.R. 235.

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pose of inquiry into commitments in criminal cases under an Act of the Parliament of Canada, a judge of this court possesses none of the original powers and is subject to none of the duties in regard to *habeas corpus* of the ordinary courts of common law, whether arising under the common law itself or conferred by Imperial or by provincial statutes. "For the better administration of the laws of Canada" such powers are not requisite. Not only have they not been conferred on this statutory court either explicitly or by necessary implication, as would be necessary, but the implication from the terms of s. 62 negativing their existence is irresistible. *Expressio unius est exclusio alterius.*

The applicant, Roberts, as appears by his petition, is held in custody at Quebec for an alleged offence against the privileges, honour and dignity of the provincial legislature of Quebec and under the authority of special legislation enacted by it. (13 Geo. V, c. 18). The cause of his commitment is that Act of the legislature. There is, in my opinion, no ground whatever for suggesting that it is in a criminal case under any Act of the Parliament of Canada.

On that simple ground I am satisfied that I am without jurisdiction to entertain the present application for the issue of a writ of *habeas corpus ad subjiciendum.* Entertaining this opinion without any doubt, I think I should not exercise the discretionary power of referring this application to the court. Rule 72; *In re Gray* (1).

If advised that I am mistaken the applicant is not without redress. Section 62 gives him a special right to appeal to the court from my refusal of the writ.

The application will be dismissed, but, as is customary [Cameron, S.C. Prac. (2 ed.) p. 300], without costs.

Motion dismissed without costs

(1) [1918] 57 Can. S.C.R. 150.

THE CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

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*Nov. 3, 7.
*Dec. 19.

AND

THE DEPARTMENT OF LANDS AND FORESTS OF THE PROVINCE OF ONTARIO ..... RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railway company—Highway crossing—Cost of construction and maintenance—Seniority—Existing and potential highways.

The Dept. of Lands and Forests, Ont., applied to the Board of Railway Commissioners for orders directing the C.P. Ry. Co. to construct at its own cost an overhead crossing over its right of way at a point in the Township of Eton and a highway crossing in the Township of Aubrey. The board granted both applications and gave leave to the company to appeal to the Supreme Court of Canada. The order for leave stated that the title of the company was obtained under authority of the Provincial Act, 59 Vict. c. XI, and was expressly made subject to the provisions of sec. 2 thereof, namely, "such transfer * * * shall not be deemed * * * to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the land hereby intended to be conveyed." It also stated that when the Act was passed there were existing common and public highways across the lands intended thereby to be conveyed but none at either of the points in question and none laid out in the area covered by the Townships of Eton and Aubrey. Further that by an order in council passed in 1866 in respect to lands on the northerly shores of Lakes Huron and Superior an allowance of five per cent of the acreage should be reserved for roads and the right was reserved to the Crown to lay out roads where necessary.

Held, per Davies C.J. and Duff, Brodeur and Mignault JJ., that the phrase "rights of the public with respect to common and public highways existing at the date hereof" should receive its ordinary grammatical construction, namely, rights of the public in existing highways; and that as there were highways existing on the right of way the rights of the public were only protected in respect thereto. *Canadian Pac. Ry. Co.* v. *Dept. L. and F.* (58 Can. S.C.R. 189) expl.

Per Duff J. The lands transferred being occupied by a railway constructed by the Dominion Government, the transfer of the latter was not one of the kind contemplated by the order in council which primarily related to patents granted under the Ontario Land Acts.

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

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Per Anglin J. The legislature could not have intended that sec. 2 of 59 Vict., c. XI, would only protect public rights in the scattered trails over the hundreds of miles covered by the right of way in question and must have meant to protect such rights which were *in posse* under the order in council when the Act was passed; but as the order in council only applies to lands on the northerly shores of lakes Huron and Superior, and the townships of Eton and Aubrey are not so situated, there is no reservation of rights in respect to the highways in question on this appeal and the province of Ontario has no right reserved to construct crossings over the railway.

Idington J. did not deal with the merits of the appeal, being of opinion that the order of the board did not present such a stated case as required by law to give this court jurisdiction.

APPEAL from the decision of the Board of Railway Commissioners for Canada that the cost of constructing crossings of the Canadian Pacific line of railway in the Kenora District should be borne by the company.

The order of the board granting leave to appeal from its decision reads as follows:—

Order No. 32294

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Wednesday, the 12th day of April, A.D. 1922.

HON. F. B. CARVELL, K.C., Chief Commissioner.

S. J. McLEAN, Asst. Chief Commissioner.

J. G. RUTHERFORD, C.M.G., Commissioner.

In the matter of the application of the Department of Lands and Forests, Northern Development branch, province of Ontario, hereinafter called the "Applicant," for an order directing the Canadian Pacific Railway Company, hereinafter called the "Railway Company," to provide and construct an overhead crossing, at its own expense, over its right of way on the line between Lots 6 and 7, Concession 1, in the Township of Eton, District of Kenora, Province of Ontario;

And in the matter of the application of the applicant, under section 256 of the Railway Act, 1919, for an order directing the Railway Company to provide a suitable highway crossing where its railway intersects the line between Lots 10 and 11, Concession 6, in the Township of Aubrey,

District of Kenora, Province of Ontario, mileage 73 of the Railway Company's Ignace sub-division, file Nos. 30870 and 28140.

Upon the application of the Railway Company, and upon consideration of the submissions made on behalf of the Railway Company and the applicant; and upon its appearing that the Railway Company's railway through the townships in question was constructed in the year 1883, and that the right of way on which the said railway was constructed was conveyed to the Railway Company by Letters Patent issued under authority of the Dominion of Canada, dated 29th March, 1904, having been previously conveyed to the Dominion of Canada by an order in council made by the Lieutenant-Governor in Council of Ontario, dated 3rd June, A.D. 1897, and issued under the authority of the statute of the province, 59 Victoria, chapter XI;

And upon its appearing that at the time of the passing of the said statute, 59 Victoria, chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed;

And upon its appearing that the Railway Company's title was, under the terms of the said order in council dated June 3, 1897, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which section provides—

> "Such transfer shall be deemed to be subject to any agreement, lease, or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the order in council making the transfer, and the order in council shall not be deemed to have conveyed, or to convey, the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed"—

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And upon its appearing that, under the terms of the order in council, made on the recommendation of the Commissioner of Crown Lands, dated August 6, 1866, it was provided that in respect of lands on the northerly shores of lakes Huron and Superior, an allowance of five per cent of the acreage be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary;

And upon its appearing that the townships of Eton and Aubrey are situated upwards of 200 miles westerly of Fort William;

And whereas the time within which an appeal herein from this Board to the Supreme Court of Canada might be made, was extended until the 18th day of April instant;

And whereas, in the opinion of the Board, a question of law arises as to the effect of the above statute and orders in council—

It is ordered that leave be, and it is hereby, granted the Railway Company to appeal to the Supreme Court of Canada upon the following question of law, namely;

"Whether, upon the facts stated by the Board, the title of the Railway Company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the Railway Company's right of way, as applied for by the applicant herein."

(Signed) F. B. CARVELL,

Chief Commissioner,

Board of Railway Commissioners for Canada.

The reasons for the decision of the board were prepared by Mr. McLean, Assistant Chief Commissioner, and were concurred in by Commissioner Rutherford. He held that the order in council of 1866 is still in force, that the points in question on the railway are on the northerly shores of Lakes Huron and Superior, and that public rights in crossings on highways laid out under authority of the order in council are preserved by sec. 2 of 59 Vict., c. XI.

Tilley K.C. for the appellant.

F. E. Titus for the respondent.

THE CHIEF JUSTICE.—This case comes before us by way of appeal, granted by the Board of Railway Commissioners, from two orders of the board authorizing the construction of highways across the railway in the Township of Aubrey and Eton and ordering that the construction and maintenance should be borne by the railway company.

The facts stated by the board were that,—

Upon its appearing that the railway company's railway through the townships in question was constructed in the year 1883, and that the right of way on which the said railway was constructed was conveyed to the railway company by letters patent issued under the authority of the Dominion of Canada, dated 29th March, 1904, having been previously conveyed to the Dominion of Canada by an Order in Council made by the Lieutenant Governor in Council of Ontario, dated 3rd June, A.D. 1897, and issued under the authority of the statute of the province, 59 Victoria, chapter XI;

And upon its appearing that at the time of the passing of the said statute, 59 Victoria, chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed;

And upon its appearing that the railway company's title was, under the terms of the said Order in Council, dated 3rd June, 1897, made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act, which section provides—

"Such transfer shall be deemed to be subject to any agreement, lease, or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the Order in Council making the transfer, and the Order in Council shall not be deemed to have conveyed, or to convey, the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed"—

And upon its appearing that under the terms of the Order in Council made on the recommendation of the Commissioner of Crown Lands, dated August 6, 1866, it was provided that in respect of lands on the northerly shores of Lakes Huron and Superior, an allowance of five per cent of the acreage be reserved for roads, as is done in Lower Canada, and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary;

It is ordered that leave be, and it is hereby granted, the railway company to appeal to the Supreme Court of Canada, upon the following question of law, namely:

"Whether upon the facts stated by the Board, the title of the railway company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein."

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The Chief Justice

The admitted fact found by the board that at the time of the passing of the statute of the province, 59 Vict., c. XI, *there were common and public highways existing across the lands intended to be conveyed by that Act,* appears to me to be the controlling factor in determining the true meaning and intent of the statute and order in council under which the railway company obtained its title.

That title was, under the terms of the order in council, dated 3rd June, 1897, made expressly subject to the conditions and limitations contained in sec. 2 of the provincial Act which provided, *inter alia,* that the

> Order in Council making the transfer shall not be deemed to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof, within the limits of the land hereby intended to be conveyed.

It is admitted that there were such highways then existing and in my opinion the language of the section cannot be construed as applicable to the highways now in question and which are only now sought to be opened and provided.

Reference was made at the argument to the case, known as the "Kirkpatrick Case," before this court (1) *Canadian Pac. Ry. Co.* v. *Dept. of P.W. of Ontario,* where it was held that in view of the finding of fact by the board in that case, that *there were no highways in the district when the railway company acquired title,* the condition of sec. 2 of the Act must be construed as meaning

> the rights of the public existing at the date hereof in common and public highways,

and as including rights in highways to be laid out under the reservation for roads by the order in council of 1866. As these potential highways existed before the crossing (asked for), the company being the junior occupant was properly charged with the expense.

Under the facts stated in that case and on which the decision of the court was based, namely, *that there were no highways in the district when the railway acquired title,* the decision of the court seemed to be the only one that

(1) 58 Can. S.C.R. 189.

could be given. I may be pardoned for quoting a paragraph from my own judgment in that case:

> I confess that if I had to answer the question submitted to us without regard to the findings on the questions of fact of the Railway Board, I should hesitate a good deal before answering in the affirmative * * * If there were no public highways laid out at the date the statute was passed, it would be without meaning or effect unless it (the statute) was held to apply to potential highways which might be opened from time to time under the reservation of the five per cent area provided for in the order in council of 1866. If there are two meanings which may be given to the language of a public statute one of which would render the statute meaningless and ineffective for the purposes it was meant to cover and the other which would give effect to the statute, I take it the latter must be adopted.

In the case now before us it appears that the court in the *Kirkpatrick Case* (1) was misled as to the determining factor whether or not there were any existing highways when the statute was passed.

It is now stated that there were such existing highways and in my judgment the language of section 2 cannot apply to potential and non-existing highways such as we now have to deal with in this case and the language of the section must be given its plain and natural meaning and confined to then existing common and public highways and as not having in view, or being applicable to, non-existing highways.

I would allow the appeal, with costs.

IDINGTON J. (dissenting).—This is an appeal from the Board of Railway Commissioners for Canada upon what is alleged to be a stated case pursuant to the provisions of the Railway Act in that regard.

Counsel for appellant in his argument herein suggested that some of us, if not all, in the case of *Canadian Pac. Ry. Co.* v. *Department of Public Works of Ontario* (1), had misapprehended the facts.

I suggested that that furnished a good reason for going back to the board and having their case properly stated inasmuch as it did not appear to me to be so.

I suggested the same to counsel for the respondent.

My suggestion met with no response.

(1) 58 Can. S.C.R. 189.

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I found then that the so-called stated case in the previous submission, above cited, was in substance identical in its terms with that now submitted herein, save in the difference in township and district in which the respective highways in question were situated.

Indeed this case as submitted would seem to have been copied from the other.

What are the facts as found by the board?

Are we to travel through the judgment of the board to find same, as argument of counsel seemed to indicate was intended?

I most respectfully submit not, in face of the dispute relative thereto and the suggestion of a misapprehension of same when similarly stated in a case of much less complicated character.

And if we turn to the order which stated the case and should contain a concise statement of the relevant facts giving rise to the application of the question of law supposed to be raised by the case, are we to speculate at large, as it were, upon what may be the question of law arising, and are we to assume as a matter of fact that the order in council of 1866, before confederation in fact, related to those lands now in question?

I need not enlarge, for any one looking at the map must be puzzled as to that. It is either relevant or it is not. Yet it is a question of fact which might well affect the dubious language of the Act and the grant made thereunder.

I may point out that the cases such as *Bischop* v. *Toler* (1), and *In re County Council of Cardigan* (2), shew, as do many others to be found in Boulton's Law and Practice of a Stated Case, how far this case as stated falls below what is required.

I must therefore hold it should be dismissed for that reason alone.

DUFF J.—This appeal raises a question touching the construction of certain words of an Act of the Legislature of

(1) 59 J.P. 807; 73 L.T. 402. (2) [1890] 54 J.P. 792.

Ontario, c. 11, 59 Vict. I think it will be convenient to set out the statute in full. It is in these words:—

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The Lieutenant Governor in Council may in his discretion transfer to the Dominion of Canada any lands heretofore taken and occupied by the Canadian Pacific Railway for the road-bed, stations, station grounds, and other purposes of the said railway and included in the plans of the railway deposited by the company in the office of the Minister of Railways and Canals, the same being so transferred to enable the Government of Canada to fulfil its obligations to the said company in that behalf with respect to the railway. The lands so transferable shall be the lands lying between the terminus of the Canada Central Railway near Nipissing known as Calendar Station, and the western boundary of the province of Ontario, near Rat Portage and between the junction at Sudbury on the main line of the Canadian Pacific Railway for the Algoma Branch and the River Saint Mary.

2. Such transfer shall be deemed to be subject to any agreement, lease or conveyance affecting the same made by the Government of Ontario before the passing of this Act, as well as to the limitations and conditions, if any, in the Order in Council making the transfer, and the Order in Council shall not be deemed to have conveyed or to convey the gold or silver mines in the lands transferred, or to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

3. Such transfer by Order in Council shall be as binding on the province of Ontario as if the same were specified and set forth in the Act of this legislature.

Subsequently by order in council (under this statute) of the 3rd June, 1897, the land occupied by the C.P.R. for road beds, stations and station grounds and other railway purposes between Fort William and Cross Lake were vested in the "Government of the Dominion of Canada" subject to certain conditions not material and

subject to conditions and limitations specified in section 2 of the (Act of 1896.)

The point in dispute arises in this way. By an order in council of the 6th August, 1866, certain provisions were made in respect of a survey of "lands on the northerly shore of Lakes Huron and Superior" and for the establishment of roads in that part of the country. And it was provided for that purpose that

an allowance of 5 per cent of the acreage of lands be reserved for the roads, as is done in Lower Canada, and that a clause be inserted in the

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letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

It is stated in the case submitted that at the time of the passing of the Act of 1896, there were existing highways; but it is now contended by the province that the effect of the statute is to reserve to the Crown in right of the province the right

> to construct and maintain public crossings over the railway company's right of way

in conformity with the spirit of the order in council of August, 1866. Whether this right is reserved or not is the question to be decided on this appeal.

On behalf of the province it is argued that the statute preserves not only the rights of the public in existing highways but that it reserves a right to the Crown to lay out and construct highways over the lands granted.

The more natural construction of the section appears to be that which treats the words

> existing at the date hereof within the limits of the lands hereby intended to be conveyed

as an adjectival phrase qualifying highways and the words

> within the limits of the lands hereby intended to be conveyed

as an adverbial element qualifying "existing." This appears to be the grammatical construction of the language.

I can see no reason for departing from the grammatical and ordinary sense of these words. I do not forget Lord Macnaghten's language in *Vacher & Sons* v. *London Society of Compositors* (1) at p. 118, where he says that in the absence of a preamble as a rule there are only two cases in which it is permissible to depart from the ordinary and natural sense of the words in an enactment; those two cases being, 1st, where the words taken in their natural sense lead to some absurdity, and 2nd, where there is some other clause in the body of the enactment inconsistent with or repugnant to the clause in question construing in the ordinary sense the language in which it is expressed.

(1) [1913] A.C. 107.

I am unable to discover any absurdity or repugnancy arising from reading the words according to their natural sense nor indeed can I, without straining the language to a degree for which there appears to be no justification, find anything in the statute which reserves to the provincial government the right which is now claimed.

Read as they stand, without any kind of distortion, the words seem quite apt to reserve the rights of the public in respect of existing common and public highways, the rights of the public (that is to say the rights of His Majesty's liege subjects) to use such highways for what may be called highway purposes, rights not vested in the Crown as proprietor but generally under the guardianship of the Crown as *parens patriæ*. As applied to highways existing at the time, that is to say, at the critical time, the date of the passing of the Act, the language seems to be clear, precise and apt.

Let us consider the effect of the statute under the alternative construction proposed. The right claimed is, as already mentioned, the right to construct and maintain public crossings over the railway company's right of way. Now the rights reserved to the Crown by the order in council cited above obviously become operative only when a title has passed from the Crown to a grantee. Strictly the right reserved to the Crown is a right to lay out highways over the lands granted and to assume such part of those lands as may be necessary without compensation up to 5 per cent of their area. It may be conceded that these rights reserved to the Crown are rights which do not depend upon the terms of the patent but in all cases to which the order in council applies they exist by virtue of the order in council itself whatever the terms of the instrument of grant may be; and I think it would not be an exaggerated or non-natural construction of the phrase used in the second section of the statute of 1896 ("rights of the public") to read it as comprehending these rights of the Crown exercisable in respect of lands granted for the purpose of providing highways. The language is not very apt for such a purpose it is true, but I think that would not be an inadmissable construction. But it is a very different

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matter to treat this order in council as giving rise to rights in the "public" in the sense above mentioned (all His Majesty's subjects) in land still ungranted and still vested in the Crown.

The whole allodial title in such a case is in the Crown and, except as regards highways established by law, that title is burdened by no "rights of the public" in any accurate sense of the term in relation to highways. As a famous American judge recently said that "such words as 'right' are a constant solicitation to fallacy." *Jackman* v. *Rosenbaum* (1), at page 8 per Holmes J. It is the duty of public officials charged with the administration of Crown lands to act according to law; and the "public" using the term as denoting the body of citizens in whom reposes what Mr. Dicey calls the "political sovereignty" of the province, has perhaps in some loose sense a "right" to have this duty observed. But even here "public" has not the same meaning as it has when one speaks of the "rights of the public" in a highway.

There is no good reason I apprehend for ascribing to the phrase "rights of the public" used in this statute any such vague indefinite import; "rights of the public" as applied to such a subject as highways means according to the ordinary signification of the words rights of a class known to the law and capable of legal protection at least in some proceeding by the Crown *ad vindicatam publicam*. I can see no reason why they should not be given effect to according to that meaning.

Again the lands conveyed by the statute were already in occupation for the purposes of the railway already constructed by the Dominion Government under the authority of statute in execution of the undertaking given by the Dominion in the British Columbia terms of union. Under the Expropriation Act the proper Dominion officials had authority in so far as the Dominion Parliament could grant such authority, to enter upon the Crown lands of the province for the purpose of constructing public works, the procedure for doing so being laid down in the Act. The Lake Superior section of the railway was built almost wholly through the Crown lands of the province with the

(1) 67 L. ed. (U.S.R.) 7.

knowledge of everybody in Canada and it must be assumed, after the lapse of forty years, that the Government proceeded either in conformity with the procedure laid down by statute or that it did so with the consent of the provincial government. That the Dominion had authority to enter upon and take provincial lands for this purpose seems to be the necessary result of the decision of the Privy Council in *Attorney General of British Columbia* v. *Canadian Pac. Ry. Co.* (1). Whatever may be thought as to the general scope of the principle laid down in that case it is conclusive upon this point at least, that the Dominion in execution of the agreement with British Columbia in relation to the construction of the Canadian Pac. Ry. had authority to enter upon and take the Crown lands of a province for the purpose of constructing the railway agreed upon. One has no difficulty in understanding the desire of the company to have a conveyance from Ontario in order to set at rest any possible question as to the regularity of its title but for the purpose of the present question it must be taken that the lands were lawfully in the occupation of the railway for railway purposes; and in such circumstances authority to construct and maintain a highway over the railway could only be given by the Dominion Parliament. *Attorney General of Alberta* v. *Attorney General for Canada* (2).

I can find nothing in the order in council which makes it applicable to such a case. It is an order in council primarily applying to lands granted to a subject by letters patent. It is not an instrument framed in contemplation of the transfer of lands to a Government department or other public authority for the purpose of constructing a government railway or other public work. Nor can I see anything in the statute of 1896 pointing to an intention to reserve to the Provincial Government a right to construct and maintain works which could only be exercised under authority given by the Dominion Parliament.

The previous decision presents no difficulty. It proceeded upon a misapprehension of fact.

The question should be answered in the negative.

(1) [1906] A.C. 204. (2) [1915] A.C. 363.

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ANGLIN J.—By leave of the Board of Railway Commissioners, given under section 52 (3) of the Railway Act, 1919, the Canadian Pacific Railway Company appeals to this court on the following question of law:—

> Whether, upon the facts stated by the Board, the title of the railway company is subject to a prior right reserved in the Crown to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein.

The decision of the board being final on questions of fact which it has determined (s. 52, s.s. 6 and 10 (*a*)) and the submission being "upon the facts stated by the board" we look to the order granting leave for the facts upon which we are to proceed. *Inter alia* it is therein stated that the right of way of the appellant consists of property conveyed to it by Dominion letters patent (1904) which had been previously conveyed to the Dominion by order in council of the Lieutenant-Governor of Ontario (27th of May, 1897—a date probably erroneously given instead of the 3rd of June, 1897) issued under the authority of the statute of the province, 59 Vict., c. XI (assented to on the 7th of April, 1896), and that

> the railway company's title was * * * made expressly subject to the conditions and limitations contained in section 2 of the said provincial Act.

Although the Dominion letters patent of 1904 now before us omit the clause, found in the letters patent of other lands granted in 1906 (which were before the court in the *Kirkpatrick Township Case* (1) at page 194), making the title thereby conferred on the railway company expressly subject to

> the limitations and conditions and the reservations set forth in the Order in Council of the Lieutenant Governor of our said province of Ontario, dated, etc.,

in my opinion the facts stated by the board preclude the contention addressed to us that the appellant obtained by the grant of 1904 rights authority to confer which is vested in the Dominion for railway purposes and which are paramount to and override any conditions, limitations or reservations that accompanied the transfer of the provincial

(1) 58 Can. S.C.R. 189.

title to the Dominion as prescribed by section 2 of the provincial statute. Upon "the facts stated by the Board," which constitute the hypothesis upon which the question of law is submitted to us, what we are asked to determine is whether the statutory declaration that any transfer made under the authority of the 59 Vict., c. XI,

> shall not be deemed * * * to affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof

reserved to the Crown the

> right to construct and maintain public crossings over the railway company's right of way, as applied for by the applicant herein,

—nothing else and nothing more.

Upon the statement of fact made by the board in the submission of the *Township of Kirkpatrick Case* (1), that

> no highway was laid out across the said railway before title to its right of way was acquired,

this court there determined that the words,

> rights of the public in common and public highways existing at the date hereof,

in section 2 of the Act, 59 Vict., c. XI,

> must be construed as meaning "the rights of the public existing at the date hereof in common and public highways" and as including rights in highways to be laid out under the reservation

of 5 per cent for roads made in the survey of the township pursuant to the policy established by an ante-confederation order in council of 1866 of the late province of Canada made under the authority of C.S.C., c. 22, s. 7.

We are now confronted with the statement of fact, made in the board's order granting leave to appeal,

> that at the time of the passing of the statute, 59 Vict., c. XI, there were existing common and public highways across the lands intended to be conveyed by that Act.

This new statement of fact, no doubt, takes away the ground on which the judgment of the majority of this court proceeded in the *Township of Kirkpatrick Case* (1) and I agree that the court is not bound to regard the construc-

(1) 58 Can. S.C.R. 189.

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tion there put upon the language of the reservation made in section 2 of the 59 Vict., c. XI (O.) as at all conclusive in the case now presented.

But with respect for the views of my colleagues who are of a contrary opinion, I remain unconvinced that in providing for the transfer to the Canadian Pacific Railway Company of a right of way over provincial Crown lands from Calendar to the Manitoba boundary, a distance of many hundreds of miles, the only public rights of crossing which the legislature and Government of Ontario intended to protect were in respect of the few scattered trails which the railway then intersected and that they meant to forego, so far as they might effect the railway right of way, whatever rights it had been provided should be reserved for the construction of public highways by the order in council of 1866. Merely to avoid repetition, on this aspect of the matter I refer to what I said in the *Township of Kirkpatrick Case* (1). In the whole area of the townships of Eton and Aubrey with which we are now dealing, and through which the railway runs for 123 miles, the fact, as now stated by the board, is that no highways were laid out at the date of enactment of 59 Vict., c. 11.

These townships were surveyed after the passing of that statute. The fact that in them a reservation of 5 per cent for highways has been made is therefore in itself of no significance. If the territory included in them should be regarded as part of the "lands on the northerly shore of Lakes (*sic.*) Huron and Superior" dealt with by the order in council of 1866 (as the township of Kirkpatrick was admitted to be in the former case (1) at pp. 191 and 195) the same "rights of the public" which prevailed there must, I think, have been respected here. I should perhaps add that a reservation by the Crown of the rights of the public in regard to highways actually existing would scarcely seem to have been necessary, whereas in regard to highways not located, but for the sites of which there was provision in the 5 per cent reservation directed to be made in surveys, such a reservation would be eminently proper and reasonable.

(1) 58 Can. S.C.R. 196-7.

But in the present case the applicability of the order in council of 1866 to the territory included in the townships of Eton and Aubrey is in issue. It is not affirmed in the order granting leave to appeal. On the contrary, while the order in council is recited in that order and is also included as one of the documents in the case, the recital of it is immediately followed by the statement that

> the townships of Eton and Aubrey are situated upwards of 200 miles westerly of Fort William.

An Ontario departmental map put in with the case shews that the District of Rainy River, in the province of Ontario and part of the State of Minnesota, lies between those townships and Lake Superior. The eastern boundary of the townships of Aubrey and Eton will, if produced southerly, extend through the District of Rainy River into the State of Minnesota and will never reach Lake Superior, but will pass many miles west of its extreme western end.

Notwithstanding these facts the learned Assistant Chief Commissioner in his reasons for judgment held that the territory comprised in these townships fell within the description "lands on the northerly shore of Lake Huron and Superior." I was for some time disposed to think that we should accept that finding as "final" under s. 52 (10*a*) of the Railway Act, because the recital of the order in council of 1866 in the board's order granting leave to appeal would seem to imply its relevancy. On further consideration, however, in view of the omission from the board's order of the explicit finding on that point contained in the learned commissioner's opinion, of the specific statement that the two townships are situated 200 miles west of Fort William, and of the fact that the question to be determined by us is whether there has been a reservation of rights to the Crown covering the points at which the applicant has applied for the construction of public crossings, I now regard the applicability of the order in council of 1866 to these localities as one of the matters involved in the question submitted, no other reservation of rights than that made by such order in council having been suggested.

With very great respect, I am of the opinion that the territory comprised in the townships of Aubrey and Eton

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cannot be regarded as "lands on the northerly shore of Lake Huron and Superior," and that the order in council of 1866 therefore does not apply to it. No other reservation of right in regard to highways in that territory, before the 7th April, 1896, having been preferred, it follows that upon the case as now presented it must be held that no

> right reserved in the Crown to construct and maintain public crossings over the (appellant) railway company's right of way, as applied for by the applicant,

has been shown: and if no such right, of course no such "prior right."

I would for these reasons answer the question submitted in the negative and would therefore allow the appeal.

BRODEUR J.—This is an appeal from the Board of Railway Commissioners on a question of law under the provisions of the "Railway Act."

The question which the board has given leave to submit reads as follows:

> Whether upon the facts stated by the Board the title of the company is subject to the prior right reserved in the Crown to construct and maintain public crossings over the company's right of way, as applied for by the applicant herein.

In order to fully understand the bearing of this question it is necessary to state briefly what are the facts and the circumstances which have given rise to the present appeal.

In 1866, an order in council was passed by the government of the day directing that out of the lands on the northerly shore of Lakes Huron and Superior an allowance of five per cent of the acreage of lands be reserved for roads and that a clause be inserted in letters patent for the lands accordingly, also reserving the right of the Crown to lay out roads where necessary.

In 1883, the Canadian Pacific Railway was built in the northwestern part of Ontario under Dominion legislation. At that time the townships of Eton and Aubrey, in which the crossings in issue in this case are situated, were not proclaimed; and it was only in 1896 and 1897 that they were surveyed in accordance with the provisions of the order in

council of 1866. No road allowances were laid on the survey plans, but in the grants of lands subsequently made five per cent was reserved for roads.

As it was contended by some that the Dominion Parliament could not authorize the taking of provincial Crown lands for the construction of a Dominion Railway (*Attorney General of British Columbia* v. *Canadian Pacific Ry. Co.* (1), it was suggested that legislation should be passed by the province of Ontario for the purpose of setting this contention at rest; and, in 1896, the legislature of this province authorized the transfer of the lands occupied by the Canadian Pacific Railway on the condition that the grant should not

affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof.

In 1897 the Ontario Government vested in the Dominion of Canada the lands occupied by the Canadian Pacific Railway from Fort William to the western boundary of Ontario, which included the rights of way through the two townships above mentioned. This grant of the Ontario Government was made on the condition above quoted of the statute of 1896.

It has now become necessary to open highways in these townships and the Railway Board has decided that the right of way of the railway company being subject to the rights of the public with respect to the common and public highways existing means that the condition covers not only existing highways, but potential highways.

This question is not a new one; it came before us in 1918 in a case concerning the construction of a crossing in the township of Kirkpatrick (1). In this *Kirkpatrick Township Case* (1) the majority of the court came to the conclusion, on the construction of facts stated by the board, that there were no highways in the district when the railway company acquired title and that the rights of the public included rights in potential highways to be laid out under the reservation for roads by the order in council of 1866.

In the facts now submitted to us, it is formally stated that there were highways existing in the district.

(1) [1906] A.C. 204. (1) 58 Can. S.C.R. 189.

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I did not then concur in the view expressed by the majority of the court. It seemed to me impossible that it could be suggested that from the District of Nipissing to the western boundary line of Ontario there were not highways existing when the law of 1896 was passed; and I quoted different Ontario statutes which, according to my mind, would controvert this suggestion. I was of the view that the statute of 1896 had to be construed according to the ordinary grammatical rule *ad proximum antecedens fiat relatio* and the words

> rights of the public with respect to common and public highways existing at the date hereof

mean not rights then existing with respect to highways, but rights of the public with respect to highways then existing. The participle "existing" qualifies not the substantive "rights" but the substantive "highways," because it is nearer the latter than the former. My construction of the facts submitted to us and of the statute did not prevail and I was, with my brother Mignault, in the minority.

With the facts which are now submitted to us by the board, it is evident that the legislature of Ontario did not intend to refer in its legislation of 1896 to potential highways, but to the highways built and established at the time it was passed.

For these reasons the appeal should be allowed with costs and we should answer negatively the question submitted to us; and we should state that the title of the railway company is not subject to the prior right reserved in the Crown to construct and maintain a public crossing over the railway company's right of way.

MIGNAULT J.—In the case of *The Canadian Pacific Ry. Co.* v. *Department of Public Works of Ontario* (1), referred to in the judgment appealed from as "The Kirkpatrick Case," I expressed the opinion that the question of seniority should be decided in favour of the railway company. My brother Brodeur was of the same view, but the majority of the court decided otherwise, holding that the highway and not the railway company was senior. In that

(1) 58 Can. S.C.R. 189.

case, the statement of facts on which the judgment of the court was based declared expressly that

no highway was laid out across the said railway before title to its right of way was acquired under the said Order in Council.

Here the case submitted by the Railway Board states that

at the time of the passing of the said statute, 59 Victoria (Ontario), chapter XI, there were existing common and public highways across the lands intended to be conveyed by that Act, but no such highway was in fact located at either of the points now in question, nor were any highways laid out in the area covered by the townships of Eton and Aubrey which were then unsurveyed.

The Ontario statute here referred to authorized the Lieutenant Governor in Council of Ontario to transfer to the Dominion of Canada certain lands occupied by the Canadian Pacific Railway between Calender Station, at the eastern extremity of Lake Nipissing, and the western boundary of Ontario, and in the former case I said that I could not assume that there were no highways in this large tract of land covering several hundred miles. It now turns out that there were highways across the lands intended to be conveyed by the Act, and the case stated for the opinion of this court expressly so declares.

I think this difference of statement of fact sufficiently differentiates this case from the previous one and leaves me free to decide (as I think it should be decided) the question of seniority in favour of the company without it being necessary to repeat what I said in the former case. I feel all the less hesitation in distinguishing the two cases because the portion of railway over which it is proposed to carry the highways in question was originally built by the Dominion of Canada under the authority of the Dominion statute, 37 Vict., c. 14. For the purpose of this work Parliament could and did authorize the Dominion Government to take provincial Crown lands; *Attorney General for British Columbia* v. *Canadian Pacific Ry. Co.* (1). And the grant of this portion of the railway, to wit the portion between Fort William and Manitoba, made by the Dominion to the appellant on the 29th March, 1904, under the

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

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authority of the Dominion statute, 44 Vict., c. 1, is in no wise based upon the Ontario statute above referred to, and contains no restrictions whatever in respect of highways.

I would allow the appeal with costs and answer the question submitted in the negative.

Appeal allowed with costs.

Solicitor for the appellant: *W. N. Tilley.*

Solicitor for the respondent: *F. E. Titus.*

THE ROYAL BANK OF CANADA.....APPELLANT;

AND

THE EASTERN TRUST COMPANY...RESPONDENT.

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*Oct. 16, 17.
*Dec. 19.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Bankruptcy—Authorized assignment——Railway Co.—Prior assignment of book debts—(D) 9-10 Geo. V, c. 36, s. 30 (1); 10-11 Geo. V, c. 34.

A company incorporated as a railway and mining company entered into an agreement with the purchaser of the property of a similar company under which it operated, for a few months, the short line of railway covered by the purchase. The purchaser having, then, made default in his payments, the former owners resumed possession of the property. Shortly after the company which had so operated made a voluntary assignment under the Bankruptcy Act.

Held, Idington and Brodeur JJ. dissenting, the said company was not a "railway company" within the meaning of sec. 2 (*k*) of the Bankruptcy Act and its assignment was authorized under the provisions of that Act.

Shortly before going into bankruptcy the company made an assignment of its book debts which under sec. 30 (1) of the Act was void if the assignor did not comply with the requirements of provincial legislation as to registration, notice and publication thereof.

Held, that the assignment was void as against the trustee in bankruptcy though there was no such provincial legislation.

APPEAL from a decision of the Supreme Court of New Brunswick on a case stated between the parties hereto.

Case stated to the court on the application of The Eastern Trust Company, trustee in bankruptcy of the estate of the Inverness Railway and Collieries Limited.

1. The Inverness Railway & Coal Company is a body corporate, incorporated by special Act of the legislature of Nova Scotia for the purpose of owning and operating a mining undertaking at Inverness and elsewhere in the county of Inverness and for the purpose of owning and operating a railway in said county and the said company had duly built a railway from Canso to Inverness and had

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

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operated the same in the carrying of freight and passengers and had operated mines at Inverness up to the 20th day of July, 1920.

2. The National Trust Company, Limited, is a body corporate and the mortgagee of the entire railway and mining undertaking of Inverness Railway & Coal Company and trustee for bondholders under a trust deed.

3. By agreement in writing, which appears in schedule "A" hereto, and which was dated the 16th day of June, 1920, said Inverness Railway & Coal Company, Limited, and the National Trust Company, Limited, agreed to sell the entire undertaking of the said Inverness Railway & Coal Company to Myron E. C. Henderson upon the terms therein expressed and in pursuance of said agreement said Myron E. C. Henderson entered into possession of the properties therein described on the 20th day of July, 1920.

4. The Inverness Railway & Collieries, Limited, is a body corporate, incorporated under the provisions of the Nova Scotia Joint Stock Companies Act on the 28th day of July, 1920, for the purpose of carrying on a mining and railway undertaking. In accordance with the provisions of the Railway Act, Revised Statutes of Nova Scotia, 1900, and amendments thereto, said Myron E. C. Henderson notified, copy of which notice is hereto annexed as schedule "B", the Commissioner of Mines on the 20th day of July, 1920, that he had purchased the said properties, but no notification was ever given the said Commissioner of Mines by or on behalf of the Inverness Railway & Collieries, Limited, of that company's intention to run or operate a railway. On the 21st day of July, 1920, said Myron E. C. Henderson and Inverness Railway & Collieries, Limited, entered into the agreement hereto attached as schedule "C".

5. Said Inverness Railway & Collieries, Limited, as agents of said Myron E. C. Henderson operated the said railway from on or about the 21st day of July, 1920, up to and until the 7th day of February, 1921, when the said Inverness Railway & Coal Company and the National Trust Company re-entered into possession of the properties on default having been made by said Myron E. C. Henderson under his agreement.

6. The Royal Bank of Canada, on the 27th day of December, 1920, received an assignment of book debts from Inverness Railway & Collieries, Limited, and a copy of such assignment is hereto attached as schedule "D".

7. For the purposes of this application only (and not debarring or estopping the trustee of the Inverness Railway & Collieries, Limited, from denying or disputing the fact in any other or subsequent proceeding and specially reserving to the trustee its rights, if any, to set aside said assignment of book debts as having been given without adequate or any consideration) it is admitted the Royal Bank of Canada gave present cash value on taking such assignment of book debts.

8. On the 26th day of February the Inverness Railway & Collieries, Limited, made an assignment under the provisions of the Bankruptcy Act to The Eastern Trust Company, trustee in bankruptcy.

9. Two questions are raised for the consideration of the judge in bankruptcy:

(*a*) Whether the assignment made by the Inverness Railway & Collieries, Limited, to The Eastern Trust Company was authorized under the provisions of The Bankruptcy Act;

(*b*) Assuming such assignment be valid, whether the general assignment of book debts to the Royal Bank is void as against the trustee in bankruptcy.

The Judges of the Supreme Court of Nova Scotia were equally divided in opinion as to the answer to be given the first question. The second was answered by the majority in the affirmative.

A. W. Stewart for the appellant. The Inverness Ry. & Collieries Co. was a railway company and not subject to The Bankruptcy Act. See *International Coal Co.* v. *County of Cape Breton* (1).

Jenks K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal is from a judgment of the Supreme Court of Nova Scotia on a stated case sub-

(1) 22 Can. S.C.R. 305.

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mitted to that court in which two questions were asked as follows:

(a) Whether the assignment made by the Inverness Railway & Collieries, Limited, to the Eastern Trust Co. was authorized under the provisions of the Bankruptcy Act;

(b) Assuming such assignment to be valid, whether the general assignment of book debts to the Royal Bank is void as against the Trustee in Bankruptcy.

The learned judges were equally divided upon the answer to be given to the first question which consequently was not answered. The second question was answered by three of the justices in the affirmative and by Mr. Justice Russell in the negative. I am of the opinion that both questions should be answered in the affirmative.

My brother Anglin in his reasons for judgment has expressed my views and conclusions on both these questions and I have nothing useful to add to those reasons.

Respondent company should have its costs.

IDINGTON J. (dissenting).—This is an appeal from the Supreme Court of Nova Scotia which heard a stated case, submitted by the respondent to the judge in bankruptcy who in turn submitted it to the said Supreme Court, whereby answers were sought to the following questions:—

(a) Whether the assignment made by the Inverness Railway & Collieries, Limited, to The Eastern Trust Company was authorized under the provisions of the Bankruptcy Act;

(b) Assuming such assignment to be valid, whether the general assignment of book debts to the Royal Bank is void as against the Trustee in Bankruptcy.

The said court was equally divided as to the first question and formally declared it to be unanswered, but, by a majority, answered the second question in the affirmative.

The case is brought here by leave consented to by the parties hereto.

For the reasons assigned by Mr. Justice Chisholm in the court below, I would answer said first question in the negative.

It seems to me that in light of such an answer by the majority of this court the second question should not be answered for it ends all possibility of invalidating the

assignment of book debts by virtue of the Bankruptcy Act and there is no other ground pretended before us upon which it can be held to have been void.

I submit, therefore, the appeal should be allowed, with costs, if claimed.

DUFF J.—The judgment of Mr. Justice Mellish presents the considerations governing the disposition of this appeal exactly as I conceive them. I can usefully add nothing to what he has already said.

ANGLIN J.—The material facts of this case are detailed by Mr. Justice Mellish. Upon them I am satisfied that the Inverness Railway & Collieries, Limited, was not a "railway company" within the purview of the exception in the definition of the word "corporation" in the Bankruptcy Act. I also agree with the unanimous view of the learned judges of the Supreme Court of Nova Scotia that the appellant bank is an "other person" within the meaning of that term as used in section 30 (1) of that statute.

On what I may call the main question, I am of the opinion that section 30 (1) clearly avoids, as against the trustee in bankruptcy of the assignor, every general assignment of book debts so far as they remain unpaid at the date of an authorized assignment in bankruptcy by such assignor, except in cases where provsion is made by provincial legislation for the registration, notice and publication of such assignments of book debts and there has been compliance therewith. If the intent of the Bankruptcy Act had been to avoid general assignments of book debts only where provincial statutes providing for registration, notice and publication have not been complied with, section 30 (1) would certainly have been expressed in very different terms—if, indeed, it would have found a place in the statute at all. I cannot conceive of Parliament expressing the intent for which the appellant contends in the terms found in subsection 1 of section 30. I entertain no doubt whatever that as against the trustee in bankruptcy of the assignor such a general assignment as that made to the appellant bank is avoided as to all debts

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covered by it which remained unpaid at the date of the authorized assignment in bankruptcy.

The appellant, in my opinion, derives no assistance from section 32, which, as I read it, is expressly subject *inter alia,* to the provisions of section 30 (1) found under the caption "Settlements and Preferences."

Both questions submitted by the special case should be answered in the affirmative.

The respondent is entitled to its costs.

BRODEUR J. (dissenting).—The first question of the stated case is whether the assignment made by the Inverness Railway and Collieries, Limited, to the Eastern Trust Company was authorized under the provisions of "The Bankruptcy Act."

Prior to the 20th July, 1920, the Inverness Railway and Coal Company, a body incorporated by special Act of the Nova Scotia Legislature for the purpose of owning and operating a mining undertaking at Inverness and elsewhere in the county of Inverness and for the purpose of owning and operating a railway in the said county, had duly built a railway from Canso to Inverness and had operated the same in the carrying of freight and passengers, and had also worked a coal mine at Inverness. It had mortgaged its entire railway and mining undertaking to the National Trust Company, Limited, as trustee for bondholders under a trust deed. On the 16th of June, 1920, the Railway Company and the National Trust Company entered into an agreement to sell the entire undertaking of the former company to Myron E. C. Henderson, who took possession of the properties described in the agreement on the 20th July, 1920, the agreement having been approved on the day previous by a judge of the Supreme Court of Nova Scotia.

In accordance with the Nova Scotia Railway Act, section 269, Henderson, on the 20th July, 1920, notified the Commissioner of Public Works and Mines that he had purchased the railway and intended to operate it.

The Inverness Railway and Collieries, Limited, was incorporated under the Nova Scotia Joint Stock Companies

Act on the 28th July, 1920 (this date is inconsistent with the date given as the 21st July, 1920, for the agreement between Henderson and the Inverness Railway and Collieries, limited, but both dates are taken from the record) for the purpose of carrying on a mining and railway undertaking.

On the 21st July, 1920, an agreement was entered into between Henderson and the Inverness Railway and Collieries, Limited, whereby the former conveyed to the latter all his rights, powers and privileges under the agreement of sale to him by the Inverness Railway and Coal Company and the trustees for the bondholders, with power to use the name of the vendor (Henderson), and it was agreed that the Inverness Railway and Collieries, Limited, would assume all Henderson's obligations under the said agreement of sale, that it would pay him $200,000, which he had paid to his vendors, that Henderson would thereafter hold the railway and any letter of licence which might be issued to him as trustee for the Inverness Railway and Collieries, Limited, and would permit the latter to operate the railway as his agent, and that the parties would promote and endeavour to obtain from the legislature any necessary legislation, the expense thereof to be borne by the company.

The stated case alleges that, as agent for Henderson, the Inverness Railway and Collieries, Limited, operated the railway from the 21st July, 1920, until the 7th February, 1921, when the Inverness Railway and Coal Company and the National Trust Company re-entered into possession of the properties on default having been made by Henderson under his agreement.

On the 26th February, 1921, the Inverness Railway and Collieries, Limited, made an assignment under "The Bankruptcy Act" to the Eastern Trust Company, trustee in bankruptcy.

The question submitted is whether this assignment was authorized under "The Bankruptcy Act."

By section 9 of that Act it is provided that any insolvent debtor, whose liabilities to creditors provable as debts under the Act exceed $500, may make to an authorized trustee appointed pursuant to section 14 with authority in

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the locality, an assignment of all his property for the general benefit of his creditors, and this assignment is referred to in the Act as an "authorized assignment."

The word "debtor" is defined in the Act (section 2, subsection (*o*)) as including

> any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him, (*a*) was personally present in Canada, or (*b*) ordinarily resided or had a place of residence in Canada, or (*c*) was carrying on business in Canada personally or by means of an agent or manager, or (*d*) was a corporation or member of a firm or partnership which carried on business in Canada.

And the subsection goes on to say that where the debtor is a corporation as defined by this section, the *Winding-up Act* shall not extend or apply to it.

This definition of the word "debtor" makes it necessary that we should refer to the definition of the word "corporation" (subsection (*k*)), which is as follows:

> "Corporation" includes any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock, nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

I may merely advert to subsection (*aa*) stating that "person" includes corporation and partnership. In my opinion, it does not help in this inquiry.

Therefore, to fall under "The Bankruptcy Act" a "corporation" must be a company incorporated or authorized to carry on business by or under an Act of Parliament or of a provincial legislature, or a company wheresoever incorporated having an office or carrying on business within Canada, but must not be, *inter alia*, a "railway company."

The Bankruptcy Act does not define the term "railway companies" which we find in subsection (*k*). These words therefore should be given their ordinary meaning, and would certainly include a company incorporated for the purpose of carrying on a railway undertaking. It is true that the Inverness Railway and Collieries Co. had two purposes, a mining and a railway undertaking, but the latter purpose was not, we were informed, a subsidiary one. The

railway is some 61 miles in length, it carries freight and passengers. Of course, the other purpose of the company, coal mining, would not take it out of the operation of "The Bankruptcy Act." But, if one may hazard the surmise, the intention of Parliament was probably to prevent the operation of a railway, which is in the public interest, from being hampered by proceedings under The Bankruptcy Act. And if this company can be said to be a "railway company," notwithstanding its other purposes, it is excepted from the Act.

I have duly considered Mr. Jenks' contention that this company, while having the capacity, has not the authority to operate a railway, under the Nova Scotia Railway Act which, in the case of the sale of a railway, requires that the purchaser, who

> has not any corporate powers authorizing the holding and operating thereof,

should give notice to the Commissioner of Public Works and Mines, and thereafter obtain legislative authority to hold, operate and run the railway (sections 269, 270, 271). If I may say so, the construction advocated by Mr. Jenks, and which would restrict the natural meaning of the words "railway companies," appears to me forced and artificial. And, even supposing that section 269 applies to a company incorporated for the special purpose of operating a railway, which seems rather doubtful, would such a company be any the less a "railway company" because it had to give some notice before it operates a railway? A similar construction might take this company entirely out of the definition of a "corporation," for it could be asserted that until it gives this notice it is not a company authorized to carry on business. Surely the character of a company should be determined by reference to its charter of incorporation. I may add that a full consideration of the facts stated here and of the agreements entered into has convinced me that there was operation in fact of the railway, and therefore the carrying on of business as a railway company, with possibly the use of Henderson's name as a shield. But in every way the company appears to have acted as a railway company and no doubt incurred liabilities as such. It there-

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THE ROYAL BANK OF CANADA v. THE EASTERN TRUST COMPANY.

Brodeur J.

fore was excepted from the operation of "The Bankruptcy Act" and could not make an assignment under section 9 of that Act. I would answer question 1 in the negative.

As to the second question submitted by the stated case it is not necessary for me to answer it. The main question on this appeal, according to my mind, is whether the Inverness Railway and Collieries, Limited, was authorized to make an assignment under the provision of The Bankruptcy Act. As I have come to the conclusion that this company does not come under the purview of the latter Act, it is useless to consider whether some assignment of book debts which the company made to the Royal Bank is valid against the trustees in bankruptcy. This question involves the consideration of an Act which does not apply to this company.

In view of my conclusion on the first question, the second one becomes merely academic.

The appeal should be allowed with costs and the first question answered in the negative.

MIGNAULT J.—I take no part in this judgment.

Appeal dismissed with costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *L. A. Lovett.*

HEDLEY SHAW (DEFENDANT).....APPELLANT;

AND

A. L. MASSON (PLAINTIFF).....RESPONDENT.

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*Nov. 2.
*Dec. 19.

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

Action—Specific performance—Contract—Fraud—Money paid under contract—Right to rescission.

The court will not decree specific performance of a contract obtained by fraud of the plaintiff even when the defendant has not offered to return money received under the contract.

Per Duff J. In this case the money was paid on account of an admitted debt and the debtor could not impose conditions.

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

In an action for specific performance of a contract the trial judge held that it was obtained by fraud and dismissed the action. The Appellate Division concurred in the finding as to fraud but decreed performance of the contract on the ground that defendant had not offered to return money paid as required by its terms and could not therefore obtain rescission nor restore land transferred to him which had been sold for taxes. The defendant appealed to the Supreme Court of Canada.

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

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

IDINGTON J.—The respondent bought from one E. S. Blain lot 18, block 176, according to a plan of record in the Land Titles Office for the Saskatoon Land Registration District as plan Q-3, for the sum of $45,000.

Thereafter, on the 16th November, 1912, by an agreement of that date made between the said Blain of the first part, said Hedley Shaw of the second part and the said respondent of the third part (which recited said purchase and

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

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that there was then still owing and unpaid under the articles of agreement, witnessing said purchase, the sum of $22,500, with interest thereon at the rate of 8 per cent per annum from the 10th day of October, 1912, to said Blain and that he had agreed to assign all his interest therein and in the said lands and all moneys still owing and unpaid under said purchase agreement, to the said Hedley Shaw) the said Blain assigned the said agreement for purchase and all moneys owing thereunder and said lands to the said Shaw.

The said Blain covenanted thereby that in default of said respondent Masson paying said balance of purchase money, he, Blain, would pay same and the interest as specified.

The respondent also by said tripartite agreement covenanted therein with said Shaw to pay him the said balance of purchase money and interest as aforesaid.

The said security was thus acquired through the firm of McCallum and Vannatter, brokers in Saskatoon, acting for said Blain.

Shaw resided in Toronto and, when an instalment of $11,250 of said principal, and interest on the whole for six months, was about to fall due, forwarded his said security through the Imperial Bank to Saskatoon for collection by it. When doing so he wrote Mr. McCallum of said firm of brokers a brief note, dated 29th March, 1913, in regard thereto and another security of the like character, stating the amounts respectively due, the one on the 12th of April and the other on the 10th of April, and that he was notifying the said parties of his sending said documents to the Imperial Bank for collection. And then, by the last sentence of his said letter, said:

> I would like if you would also notify them that these payments must be met, and if you should have any good agreements offered you about that time you might advise me.

On the 29th they replied that they had notified said parties, and ended by saying that they would try and get an agreement of about the "right size to submit to you as soon as the money is paid."

On the 7th of April they wrote Shaw that they had a letter from Masson stating that he expected to be in Saskatoon early in April "and would be prepared to make his payment on the Blain agreement."

Meantime they had submitted another investment to him and in regard thereto he replied by saying

> I will do nothing with this until the agreements that are now due are paid.

On the 19th April, 1913, Shaw wrote McCallum as follows:

> I received your letter of the 7th instant, also your wire of the 11th. I have had no word from the Imperial Bank that either one of the agreements has been paid, and the parties interested have not even written about them.
>
> I will notify the bank that if these agreements, also Irving's Mortgage are not paid by the 1st May, to take the necessary proceedings immediately to collect same.

And on the 1st of May, 1913, McCallum & Vannatter, writing in regard to other matters, say as follows:—

> Mr. Masson from Ottawa has not arrived yet, but in talking to a friend of his he stated that he expects Mr. Masson daily, and understand he expects to make his payment as soon as he reaches here, which will also be turned over to you.
>
> As soon as we collect some more money for you, will submit an agreement, but will not do so until we get the money out of your Saskatoon agreements, when we hope to put up something to you which you will consider favorably.

When Masson did arrive a few days later he does not seem to have been quite as prepared to pay as his evidence pretends he was, if another letter from McCallum, on the 6th May, 1913, to Shaw is to be relied upon, amongst other things announcing arrival of Masson, but saying:

> He is not positive whether he will be able to make the full payment or not as he is expecting some money and has not received it yet. In any case he will be able to pay a goodly portion of it.

Such was the situation when the following telegrams passed between McCallum and Shaw:—

May 6th, 1913.

Hedley Shaw,
c/o Maple Leaf Milling Co.,
Toronto, Ontario.

Have interviewed Masson, and he wishes to obtain title to Lot 18, Block 176. To do this he offers agreement for sale covering 50 feet of

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good business property south side of river sold April 30th to good eastern parties for $25,000. On this there was a cash payment made of $6,250, leaving a balance due of $18,750 in three equal payments in six, twelve and eighteen months with interest at eight per cent. In addition to this agreement he will pay $5,750 cash. Can recommend security in property offered and all parties good. This pays 23 per cent without deducting any bonus on October payment due by Masson to you. Wire at once if can accept.

D. J. McCallum.

Toronto, Ont., May 7th, 1913.

D. J. McCallum:—

To-day's value Masson agreement twenty-three thousand five hundred and fifty, with twelve thousand, two hundred and fifty now due, balance due in five months. Prefer getting money as can use to good advantage elsewhere. However, if Masson will pay six thousand and you say agreement and parties are as good security as agreement giving up, you may close.

Hedley Shaw.
May 8th, 1913.

Hedley Shaw, Esq.,
Toronto, Ontario.

Arranged proposition according our wire excepting cash will be $6,000. Consider new agreement good and you will still hold Masson's covenant. Will write you fully to-morrow.

D. J. McCallum.

So far from agreement of Easton offered in exchange being, as stipulated by Shaw in his said telegram of 7th May, 1913, as good security as agreement he was asked to give up, it seems to me quite clear that was not the case.

The agreement he was asked to give up (of which I have set forth above the facts it evidences) was for only half the purchase price of the land securing it, whilst that Easton agreement was for three-quarters of the purchase price of the land.

How such an audacious misrepresentation came to be made (if made in the sense respondent contends for) by the parties making it passes my comprehension, unless moved by a fraudulent purpose.

It turned out that the Easton contract which was tendered was not in fact the real contract which then existed between Easton and Masson.

That had been entered into between Masson, as vendor, and Easton, as purchaser, and was negotiated for Masson by the said McCallum & Vannatter in the previous October when the cash payment of $6,250 was made, and interest on the balance of $18,750, at 8 per cent per annum

had fallen due with an instalment of $6,250 of principal, on the 30th of April, 1913, when it was well known to both Masson and said firm that Easton could not meet his payment then due.

Under such circumstances they were driven to substitute another contract as if entered into on the 30th of April, 1913, at which date instead of in the previous October, the cash payment was pretended to have been made, and this substituted contract was executed by Masson but not by Easton until some time after appellant Shaw had become suspicious and had repudiated the transaction set forth in above quoted telegrams.

Exactly when it was executed by Easton does not appear in evidence. He was unable through illness to attend the trial.

Ingram who is supposed to have attested his signature was not called as a witness.

But we have in the correspondence a letter from McCallum & Vannatter, dated 7th June, 1913, to Shaw trying to induce him to reconsider his determination not to carry out the proposal, in which they tell him they had sent the papers to Renfrew, where Easton resided, to be completed.

I think this is much more cogent evidence than what counsel before us, driven to despair apparently, suggested was to be found in some remarks of Mr. McCarthy when arguing one of the many points discussed at the trial, happened to refer to it as if it had been executed in May.

He was neither intending to make an admission of that kind nor, in what he was arguing then was the exact date of execution by Easton an essential feature—so long as the matter he was referring to indicated the signing by Easton was after what had transpired and was being put forward as a completed contract, when in fact it was not.

It was this pretended Easton agreement of 30th of April, 1913, that was made the basis of the assignment by Masson to Shaw, and is sought herein to be made the material part of the basis of this action for specific performance.

But curiously enough (though one of the reasons which McCallum, or MacCallum & Vannatter, persistently

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pressed on Shaw in their letters trying to induce him to accept this assignment and thus carry out the alleged agreement to exchange the Easton agreement for that of Blain, was the value of Masson's covenant for due payment by Easton) Masson now pretends herein that such a covenant was a fraud upon him and ought to be deleted from said assignment.

The existence of such a covenant binding Masson for the due payment by Easton, is the only respectable excuse for the said firm assuring Shaw that the one security might be taken as the equivalent of the other, but even that could not justify it, for Masson's means of payment seems to have been dependent on his wife's will and means to pay.

Even if otherwise, I am unable to see how an exchange of securities, which in their essential feature depended on the value of the land, securing either, such misrepresentations as impliedly made relative to their being of equal value, can be in any way justified or in any respect held to have been a due fulfilment of the express condition of Shaw's reply: "And you say agreement and parties are as good security as agreement giving up, you may close."

It was clearly expected McCallum could say so honestly. Indeed, curiously enough, McCallum did not in his reply expressly venture so far. The parties never were in fact *ad idem* when telegrams duly scrutinized.

It seems to me absurd to call the securities that would be afforded for payment of the $17,500 balance on land, bought only for $25,000, as the equivalent of $18,500, or even $23,400 on land bought for $45,000. I assume, as no evidence to the contrary, these prices represent what was then believed to be respective value of each.

I have no hesitation in holding that an assurance given Shaw to that effect was not given in good faith, or within the terms of the conditions he had imposed as basis for such temporary and conditional assent as he gave.

I agree with the finding of the learned trial judge that the whole dealing was vitiated by the fraud carried out in the substitution of the actual Easton agreement by another fabricated transaction.

Indeed I cannot help coming to the conclusion that the whole transaction was so saturated with fraud that even if

McCallum & Vannatter could be held to have been agents of Shaw whilst so deceiving him, the case would fall within the rule laid down in *Mortlock* v. *Buller* (1), and followed by many cases since, and hence no relief by way of specific performance can be properly founded thereon.

But it seems clear beyond any doubt that the firm of McCallum & Vannatter was the agent of respondent Masson, and merely, so far as Shaw was concerned, a means of communication used by respondent in his dealings in question herein with the said Shaw, who was in Toronto, whilst Masson and his agents were in Saskatoon. What was said in the telegram by Shaw to said agents might as well have been said direct to the party making the proposal, and if he receiving it had so replied, and thereby falsely assured the other of the facts as to value, there would be no basis thus furnished for a binding contract.

McCallum, the senior member of said firm, had died in November, 1915, and hence the only actual witness who could speak to the relations between Masson and said firm was Vannatter, and he swears distinctly that they got two hundred dollars from Masson as commission for their services in bringing about the alleged agreement now in question and never got nor pretended to claim from Shaw any commission.

It was suggested in argument that said firm had been acting as agent for Shaw in other matters, and hence an inference might be drawn as to the actual relation between them. In like manner they had been acting previously for Masson in bringing about the sale to Easton.

A perusal of the entire evidence including the correspondence leads me to the conclusion that they were, so far as Shaw was concerned, merely brokers selling securities of the class in question and looked to their clients, offering securities such as those in question herein, for their commission.

Of course such a relationship would naturally give rise to much correspondence between them and investors like Shaw, tending to give their relation another colour.

(1) 10 Ves. 292.

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We have a fairly good test in this very case of how Shaw looked upon their relations.

Although he had bought the Blain security now in question from Blain through them, when it came to a question of collecting same he entrusted that to, and sent the documents to, the bank, and at the same time writing to them respectively and acquainting their agents of his having done so, and asking that they call and pay what was due.

At the same time, as I infer, it was by way of mere courtesy to the brokers that he notified them of what he had done.

Be all that as it may if there was anything beyond what I suggest there was no evidence adduced directly bearing upon the point, except that of Vannatter who seems to have given his evidence fairly and without prejudice.

I cannot see how Masson can escape the consequences of what was done on his behalf and to which he was an actual party in the framing up of the deceptive substitution of the Easton agreement by another which was, I hold, fraudulent.

For these reasons alone I submit the judgment of the learned trial judge is correct and the Appellate Division in error in setting same aside.

In deference to what is said in the said appellate court's judgment, I respectively submit that there being fraud, which is not denied therein, no relief should have been given by way of specific performance.

What seems to me, I most respectfully submit, to be undoubted law is the statement of the relevant law in Fry's Specific Performance, 4th ed. at page 306, par 703, that where there is fraud in the obtaining of the contract or in the course of its performance, there is ground for the cancellation of the contract and, *a fortiori,* that it presents to the party defrauded a complete defence to an action for specific performance.

This aspect of the law seems, I most respectfully submit, to have been overlooked by the majority in the Appellate Division, which treated the action as one for rescission and reversed the learned trial judge's judgment, although Mr. Justice Middleton in his brief dissenting

judgment, pointed out how he deemed the fraud to be an impossible barrier to relief sought.

Notwithstanding the fact that Shaw had in his letter to McCallum, c/o McCallum & Vannatter, of the 29th May, 1913, pointed out some reasons for suspecting the value of the Easton agreement as a security, and after getting their explanations, on the 11th of June, 1913, had sent the following telegram to them,

Toronto, Ont., June 11th, 1913.

D. J. McCallum,
care McCallum & Vannatter,
Saskatoon.

Your letter June 7th received, don't consider property new agreement good security, don't care to take new agreement unless substantial payment say twenty-five hundred dollars made on property, please advise. Hurst balance money due must be paid immediately.

H. Shaw,

and that he had thus distinctly refused to carry out the alleged arrangement unless so modified as therein required the respondent failed to bring any action until this one, on the 17th November, 1917. Four years and a half seems, under such circumstances, rather a long time to wait before bringing an action such as this.

Meantime the Easton property was sold for taxes apparently in 1915 and 1916, and Easton had failed entirely to meet his payments according to the terms of his agreement in question, and the respondent had failed to meet his obligations under his covenant in the assignment by him to Shaw on Easton's default, or to tender Shaw payment of same.

That presents rather a remarkable case of non-observance of the rule laid down by Lord Alvanley in *Milward* v. *Earl Thanet* (1), that

a party cannot call for specific performance unless he has shown himself ready, desirous, prompt and eager

which has in substance remained good law to the present day.

Then if we try to apply herein common law to this alleged contract its fraudulent character still remains a good defence.

(1) 5 Ves. 720n.

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And if there were no such defence available damages would be the only relief, in which case the duty of the respondent would have been to minimize the damages by such other steps as available to him in way of reselling the thing he alleges he had sold, to say nothing of his express covenant to pay on Easton's default.

Not the least curious of the many features presented by this case is the attempt to delete that covenant although the evidence is that such is the usual form of contracts in Saskatchewan, in transferring such like securities as the Easton agreement.

Indeed that was brought home to the respondent, if he never knew before, by the assignment of his own contract with Blain by the latter, to which he was a party, and wherein Blain had to give his covenant to pay on Masson's default.

The printed forms are identical except for a few immaterial words.

That covenant of the respondent was part of the agreement tendered by his agents McCallum & Vannatter in execution of the alleged agreement now sued on and is thus part of the foundation of this action.

Yet the judgment appealed from retains for respondent the right to insist, in a modified way not clear, on his peculiar contention when before the Master in Ordinary.

I need not pursue this matter further than to point out that Shaw uniformly adhered to his imperative condition that there must be at least $2,500 added to the original proposal for exchange in order to bring the Easton security up to the standard of equality he had insisted on in his telegram giving a conditional assent to the respondent's proposition.

The correspondence, after his refusal to carry out the proposal as made by respondent through his agent McCallum & Vannatter, does not seem to me to help or hinder either party.

It discloses that respondent's said agents hoped to secure such further payments by Easton as would reduce the amount of his liability and thereby induce Shaw to look upon the securities sought to be exchanged as nearly equivalent in substantial value.

I am of the opinion that for the foregoing reasons this appeal should be allowed with costs here and in the appellate division and the judgment of the learned trial judge be restored.

DUFF J.—The appeal turns upon two telegrams in the following terms:—

May 6th, 1913.

Hedley Shaw,
c/o Maple Leaf Milling Co.,
Toronto, Ont.

Have interviewed Masson, and he wishes to obtain title to Lot 18, Block 176. To do this he offers agreement for sale covering 50 ft. of good business property on south side of river sold April 30th to good Eastern party for $25,000. On this there was a cash payment made of $6,250, leaving a balance due of $18,750 in three equal payments of six, twelve and eighteen months with interest at 8 per cent. In addition to this agreement he will pay $5,750 cash. Can recommend security in property offered and all parties good. This pays 23 per cent deducting any bonus on October payment due by Masson to you. Wire at once if can accept.

D. J. McCallum.

Toronto, Ont., May 7th, 1913.

D. J. McCallum:—

To-day's value Masson agreement twenty-three thousand, five hundred and fifty, with twelve thousand, two hundred and fifty now due, balance due in five months. Prefer getting money as can use to good advantage elsewhere. However, if Masson will pay six thousand and you say agreement and parties are as good security as agreement giving up, you may close.

Hedley Shaw.

The authority given to McCallum was an authority to accept the terms of May 6th. McCallum professed to enter into an arrangement of a very different character. In fact he attempted with Masson's approval to use his authority in a manner which both of them must have known was not consistent with good faith towards Shaw. Shaw on discovering this was entitled to repudiate the whole thing as a fraud upon him, which he did. In the circumstances the agreement was not an enforceable one.

The point chiefly insisted upon was that Shaw could not retain the moneys paid by Masson and at the same time repudiate the agreement which McCallum professed to make with Masson. This argument plainly fails of effect when the relations between Shaw and Masson are remembered. Masson was the debtor to Shaw who held as

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security a lien upon lands which Masson had purchased from him. Masson proposed that Shaw should accept in exchange for this security a lien upon other lands and certain additional payments. Shaw consented subject to the condition that Masson's debt to him should be reduced by a named amount. The debt was overdue. The moneys paid by Masson were paid in performance of his obligation to Shaw and were applied in reduction of the debt.

Shaw's right to retain the moneys paid was an unconditional right on two grounds, in the first place, and this of course is quite conclusive, it was paid in reduction of the existing debt, in performance of the existing obligation and not in execution of any fresh obligation to be undertaken by Masson. In the second place, the common law rule is quite plain that the general principle *solvitur in modo solventis* is subject to an exception in cases in which the money paid is admitted by the payer to be due. The authorities are conclusive that a debtor paying an admitted debt cannot lawfully attach conditions to the payment; and that the creditor receiving the money does nothing wrongful in retaining it, although he disregards the conditions. *Miller* v. *Davies* referred to by Lord Esher in *Day* v. *McLea* (1) at page 612; *Ackroyd* v. *Smithies* (2); *Day* v. *McLea* (1). The retention of the money in such a case is not a trespass; a count for money had and received would not lie because the view of the law is that where the money is admitted to be due there is nothing *contra equum et bonum* in retaining it.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiff sues for specific performance of a contract whereby, in consideration of making a cash payment of $6,000 and transferring to the defendant all his interest in a sale agreement whereby one Easton had purchased from him certain property in Saskatoon, the defendant, who had acquired the interest of one Blain, as vendor, under an agreement for the sale of certain other property, agreed to convey such latter property to the plaintiff and to relieve him from liability for payment of

(1) 22 Q.B.D. 610. (2) 54 L.T. 130.

the purchase price thereof. The plaintiff also claimed that the contract sued upon should be reformed by the excision from it of a personal guarantee by him of the Easton payments. The defendant denied the making of the contract sued on and, by amendment, pleaded that, if given, his assent thereto had been procured by fraud.

The learned trial judge found that a condition upon which the defendant had, by his telegram of the 7th of May, 1913, authorized acceptance of the plaintiff's offer—namely, that McCallum and Vannatter, agents at Saskatoon, should assure him that the Easton agreement and parties were as good as the Blain agreement and the parties to it—had not been fulfilled; and he also maintained the charge of fraud. As stated by Meredith, C.J.O., the defendant

> had no knowledge of the true nature of the transaction between the plaintiff and Easton until it was divulged by the plaintiff in giving his testimony at the trial.

The action was accordingly dismissed in the trial court.

The Appellate Divisional Court agreed that the fraud alleged by the defendant had been established. It found, however, that there had been a binding acceptance of the plaintiff's proposal and that, inasmuch as the defendant retained and made no offer to refund $5,000 of the $6,000 cash payment which he had received and the Easton property had been sold for taxes in the interval, the defendant was not entitled to rescission of the contract and should be ordered to carry it out. The reformation asked by the plaintiff was not granted. Specific execution of the contract as drawn was accordingly decreed at the instance of the party held to be chargeable with fraud in procuring it. Such a result is startling, to say the least.

While disposed to agree with the construction put by the Appellate Court on the telegram of the 7th of May and to regard what took place as a fulfilment of any conditions it imposed, I am inclined to think that the plaintiff's real difficulty in regard to the making of the contract sued upon lies deeper—that it consists in the non-existence of the subject matter in respect to which the defendant intended to contract. The proposition made to him and of which

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acceptance was authorized by his telegram of the 7th of May was for the transfer to him of an agreement by Easton for the purchase of land dated the 30th of April, 1919, already made. There was in fact no such agreement at that time. The plaintiff never contemplated the taking of an agreement which was yet to be made, and was in fact made only on the 8th of May.

But the finding of fraud imputable to the plaintiff, confirmed by the Appellate Divisional Court, rests upon evidence quite adequate to ensure its not being disturbed in this court, and upon that finding this action in my opinion must fail. It would indeed be an extraordinary case in which specific execution of a contract so tainted could be decreed. It may be that as a pre-requisite to seeking rescission the defendant would have been obliged to proffer restitution of the money paid him by the plaintiff. But fraud is a personal bar to specific performance which may be set up by a defendant not entitled to rescission. Fry on Specific Performance (5 ed.) section 749. The defendant is not seeking the aid of the court either to obtain rescission or for any other purpose. He is merely resisting a demand for specific performance. The plaintiff owed him more than $11,000 upon a contract still in his hands. I cannot see that the application by the defendant in reduction of that indebtedness of the $5,000 paid him precludes his contesting the plaintiff's claim in this action. I am rather inclined to take the view that commended itself to Mr. Justice Middleton as to the essence of the transaction between the parties and the nature and effect of the fraud perpetrated. But in any aspect of the matter the plaintiff is not entitled to the relief for which he sues.

There is no counter claim. The judgment must therefore be confined to a dismissal of the plaintiff's present action leaving either party to assert such further rights and claim such other remedies as he may be advised.

BRODEUR J.—I concur in the result.

MIGNAULT J.—Both the learned trial judge and the Appellate Divisional Court found that a fraud was committed by the respondent in representing to the appellant

that the agreement of sale between the respondent and Easton was made on April 30, 1913, whereas it had really been made on October 30, 1912, and Easton had failed to meet the payment on account of capital which became due on April 30, 1913, to wit, $6,250. Easton had applied for an extension of time to effect this payment, and McCallum and the respondent conceived the idea of making a new sale agreement between the respondent and Easton, dated six months after the real one, in order to induce the appellant to accept it and to agree to "switch" the Blain agreement of sale to Masson, which had been transferred to the appellant, for the Masson agreement of sale to Easton. I think this fraud has been brought home to the respondent, whether or not McCallum was his agent, for the learned trial judge believed the statement of Vannatter, McCallum's partner, that the respondent was aware of the contents of McCallum's telegram to Shaw of May 6, 1913, wherein the false and fraudulent representation as to the date of the Easton agreement was made.

The appellant thus deceived had authorized McCallum to accept the Easton agreement for the Blain agreement, subject to the payment by the respondent of $6,000. McCallum obtained a cheque for $5,200 from the respondent, and sent to the appellant $5,000 to be credited on the proposed exchange of agreements, retaining $200 for commission. He subsequently collected $1,000 from Easton, to wit, $750 for interest due Masson and $250 paid by Easton for a time extension, and this $1,000 he held to be paid to the appellant when the latter would have signed (which he never did) a transfer of the land covered by the Blain agreement.

Notwithstanding that the Appellate Divisional Court concurred in the trial judge's finding of fraud, it appears to have looked at the case as if the appellant had asked for the rescission of the agreement on which the respondent's action was based. And for the reason that the appellant could not obtain rescission without returning the $5,000 he had received from the respondent, and which he did not offer to return, and without also returning the land the respondent had agreed to sell to Easton, and which had been sold for taxes, the appellate court granted specific

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performance of the agreement between McCallum and respondent.

The respondent had indeed prayed for the specific performance of this agreement, but the defendant did not counterclaim and was content to ask for the dismissal of the action. There was therefore no demand for rescission, but only one for specific performance, which was met by a denial of the alleged agreement. The appellant discovered the fraud only at the trial and amended his statement of defence by setting up that by reason of this fraud the respondent was not entitled to ask for specific performance of the agreement.

The question is therefore whether the respondent can obtain specific performance of an agreement procured by fraud. The only answer in my opinion should be in the negative. The respondent's action therefore fails. Whatever other rights the respondent may have in view of the appropriation of the $5,000 by the appellant for a purpose other than that for which it was paid to him, it is clear that he cannot come before the court and ask that it exercise its equitable jurisdiction by decreeing specific performance of an agreement tainted by fraud.

I would therefore, with respect, allow the appeal and restore the judgment of the learned trial judge which dismissed the action, leaving to the parties such other remedies, if any, to which either of them may be entitled. The appellant should have his costs here and in the Appellate Divisional Court.

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*

Solicitors for the respondent: *Ewart, Scott, Kelley & Kelley.*

CANADIAN VICKERS, LIMITED, (DEFENDANT) ..... APPELLANT;

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*Nov. 10.
*Nov. 27.

AND

A. G. SMITH (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Master and servant—Liability—Machine throwing off steel particles—Guard—Goggles—Arts. 1053, 1054 C.C.—Art. 1384 C.N.

The respondent, a skilled and experienced workman, employed by the appellant company, was in charge of a lathe for paring down steel rods. From the machine, when normally operated, particles of steel dangerous to the eyes flew in different directions. A steel shaving having struck respondent's right eye and ruptured the eye-ball, necessitating the extraction of the eye, the respondent brought action for $5,000 damages.

Held, Davies C.J. dissenting, that as the injury had been caused by a thing under the appellant's care without human agency intervening, the case fell within the purview of article 1054 C.C.; the consequent *prima facie* liability was defeasible only by the appellant "establishing that it was unable by reasonable means to prevent the act (le fait) which had caused the damage"; and, upon the evidence, the appellant had failed to do so. *Quebec R.L.H. & P. Co.* v. *Vandry* ([1920] A.C. 662) and *City of Montreal* v. *Watt & Scott* ([1922] 2 A.C. 555) followed.

Per Davies C.J. dissenting.—The respondent had the onus of affirmatively establishing that a guard upon the machine was feasible and practicable having in view the efficiency of the machine and therefore was a reasonable means of preventing the injury, which he failed to discharge.

Per Duff J.—Any physical object handled or directed can be a cause of damage within the meaning of article 1054 C.C.; an automobile, for example, containing within itself its own forces of propulsion causing harm by impact is a "thing" causing "damage" within the meaning of that article.

Per Duff J.—As between the appellant and the respondent, it cannot be assumed under article 1054 C.C., but must be proved, that the machine which the respondent was operating was a thing in the care of the appellant.

Per Brodeur J.—The appellant is also liable under article 1053 C.C.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 443) affirmed, Davies C.J. dissenting.

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

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APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Martineau J. and maintaining the respondent's action for $5,000.

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

Cook K.C. and *Heney* for the appellant. The use of goggles by the appellant's workmen in connection with the operation in question was impracticable and unnecessary.

In any event, the appellant complied with its legal duty in regard to goggles by providing the same for the use of its skilled mechanics who thoroughly understood the character and dangers of the work in which they were engaged.

No legal duty was placed on the appellant to force its expert workmen to wear these goggles.

The use of a guard over the cutting tool of the lathe was impracticable, unnecessary and unknown, and the failure of the appellant to devise such a guard which nobody else had devised or used on a machine which had safely been operated for over three years would not in law constitute an act of negligence attaching legal responsibility for injury.

The determining cause of the accident was the fault and negligence of the respondent himself in placing his head too close to the machine while the same was in operation and in not properly attending to his duty.

Ogden K.C. and *Popliger* for the respondent. Under Art. 1054 C.C., as interpreted by the Privy Council in *Quebec Ry. L.H. & P. Co.* v. *Vandry* (2), it was incumbent upon the appellant to exculpate itself by affirmative proof that it could not have prevented the accident, which evidence had not been made.

THE CHIEF JUSTICE (dissenting).—After reading the evidence in this case, I am not prepared to hold that the suggested guard upon the machine which the plaintiff was operating when he was injured was practicable having

(1) [1922] Q.R. 32 K.B. 443.

(2) [1920] A.C. 662.

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regard to the working efficiency of the machine. There is no evidence which affirmatively establishes that proposition and it appears to me that the absence of such evidence is fatal to the plaintiff's claim.

The plaintiff, himself a skilled workman, aged about 28, admitted that it was not customary in factories for guards to be placed on machines of the kind he was operating when injured. No one else stated that such guards were customary or known. The machine manufacturers had never supplied them. The provincial inspectors had never suggested their use. Neither in Canada nor elsewhere were they shewn to have been used.

I think the duty of proving that such a guard was feasible and practicable, having in view the efficiency of the machine, lay upon the plaintiff, and that the defendants could not be held liable for such an accident as happened to the plaintiff unless such evidence was given.

In the late case of *City of Montreal* v. *Watt & Scott* (1), their Lordships of the Privy Council explained what was meant by them in the case of the *Quebec Railway Light, Heat & Power Co.* v. *Vandry* (2) as to the proper construction of article 1054 of the Quebec Civil Code, namely, that the words "unable to prevent the damage" meant

unable by reasonable means to do so and did not denote an absolute inability.

It becomes then a vital question as to whether the suggested guard, having regard to the necessary efficiency of the machine being operated, was a reasonable means of preventing such damage as the plaintiff suffered here. In other words, was it practicable?

No evidence was given to shew that it was. And the universal absence of its use anywhere on similar machines would, it seems to me, lead to the conclusion that it was not.

As to the conclusion that it was the duty of the defendants to have compelled the workmen to wear goggles, the learned judge found that their use was impracticable and

(1) [1922] 2 A.C. 555.

(2) [1920] A.C. 662.

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that no fault could be imputed to the defendants in that regard. I can only say that I agree with him and the learned dissentient judges of the Court of King's Bench on that point.

For these reasons, I would allow the appeal and dismiss the action.

IDINGTON J.—For the reasons assigned by the learned trial judge, and those in appeal agreeing therewith, I would dismiss this appeal with costs.

DUFF J.—As regards the merits of the appeal as a whole I do not dissent from the conclusion at which the court has arrived. There are points, however, of great importance raised in the course of the discussion and to some extent considered in the judgments of the Court of King's Bench which cannot, I think, properly be passed over without an observation or two.

And first, I am unable to agree with the suggestions which have been advanced as to the limited scope of Art. 1054. By that article there are three conditions of responsibility. One is that the plaintiff shall have suffered damage, another is that the damage shall have been caused by a "thing" and the third is that the "thing" causing the damage shall have been under the care of the defendant or of some person for whose conduct he is responsible *vis à vis* the plaintiff. The responsibility is the legal result of the concurrence of these factors unless the defendant brings himself within the exculpatory clause by shewing that the damage could not have been avoided by him through the use of means which he might reasonably have been expected to employ.

I confess I am unable to understand the contention that a physical object handled or directed (as an automobile, for example), cannot be a cause of damage within the meaning of Art. 1054. This view seems to me to involve the assumption that the more complete the control the defendant has over the physical object which is the cause of the harm the less cogent is the presumption against him of responsibility. I cannot understand why, for example, an

automobile containing within itself its own forces of propulsion causing harm by impact may not be a "thing" causing "damage" within the meaning of Art. 1054.

It is quite true that until recently the courts in France seem to have been committed to the doctrine which limits the application of Art. 1384 to cases of damage caused by the "fait autonome" of the thing. That doctrine appears, however, to have been discarded and it is worth while I think to quote in full the note of M. René Demogue in 20 Rev. Trim. at p. 734 in the following words:

La Cour de Cassation (ch. civ. 6 nov. 1920, D. 1921. 1. 169) a rendu un arrêt qui marque une étape dans la théorie de la responsabilité du fait des choses. Un incendie éclatant dans une gare est alimenté per des résines qui s'y trouvaient et il gagne des installations voisines. La cour a déclaré "qu'il n'est pas nécessaire que la chose ait un vice inhérent à sa nature susceptible de causer le dommage, l'art. 1384 rattachant la responsabilité à la garde de la chose, non à la chose elle-même." Aussi a-t-elle cassé l'arrêt qui, pour refuser d'appliquer l'article 1384, déclarait que la cause du dommage doit résider dans la chose et que la résine n'avait pu s'enflammer spontanément. Cette solution est en opposition avec la jurisprudence antérieure des cours d'appel (v. Bordeaux, 26 oct. 1909, S. 1914, 2. 214 en note; Paris, 23 mars, 1911, S. 1913, 2. 302), La portée de l'arrêt actuel est considérable. On pourra l'invoquer pour obtenir indemnité si un incendie se communique du mobilier d'une maison à la maison voisine, si un objet manié ou dirigé cause un dommage. Ce sera donc la consécration de cette idée sociale: quiconque a le profit d'une chose mobilière doit supporter le dommage qu'elle occasionne. Cette base donne à cette innovation une chance très sérieuse de se consolider.

L'arrêt précise un autre point. La responsabilité de l'article 1384 ne peut être détruit que par la preuve d'un cas fortuit ou d'une force majeure non imputable au défendeur. Il ne suffit pas de prouver que l'on n'a commis aucune faute ou que la cause du dommage est inconnue. Ainsi se trouve condamnée l'opinion d'un arrêt antérieur qui se contentait de l'impossibilité de déterminer la cause de l'accident (Req. 30 mars, 1897, S. 98, 1. 65) Il faut prouver un fait déterminé: ainsi le terme de présomption de faute paraît insuffisante. Il y a une responsabilité légale ne comportant que des causes précises d'exonération. Par là encore la responsabilité se trouve étendue.

This note by the eminent commentator may well serve as a warning against the risk of adopting too readily as a guide for the application of Art. 1054 C.C. the decisions of the French courts on the subject of *responsabilité*.

The note also brings into relief the fact that the development of *la jurisprudence* on this subject in France has gradually come under the influence of a definite doctrine of social responsibility, a doctrine on its legal side known as *le risque créé*. It cannot be too rigorously insisted upon

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that the natural meaning of the language of Art. 1054 cannot properly be expanded in deference to any such doctrine. Art. 1054 lays down a rule of the law and the scope of the rule must be ascertained by the usual means of interpretation.

That brings me to a point raised by this appeal in respect of which there has been no discussion but which I think it is my duty to mention. And that is the question, whether or not, as between the appellant company and Smith, the machine which Smith was operating was a thing in the care of the appellant company. In France it has been assumed that in such circumstances the machine was in the care of the employer, but the assumption rests upon an application of the doctrine above referred to—the doctrine that the person who derives the profit from the operation of a movable thing must incur the loss incidental to the operation of it. That is not an admissible ground upon which a similar view as to the effect of Art. 1054 can be based.

Whether or not in the particular circumstances of this case the conclusion that the machine was in the company's care within the meaning of this article is a point upon which I express no opinion. We have had no argument upon it.

ANGLIN J.—In my opinion this case falls within the purview of Art. 1054 C.C. It is a case of damage caused by a thing under the defendant's care. Not only is all contributory fault on the part of the plaintiff negatived, but human intervention, either by him or by any other person, was not a factor in the causation of the injury. *Montreal Tramways Co.* v. *Frontenac Breweries* (1). The plaintiff was operating the defendant's lathe in the normal way necessary for the work on which he was engaged: the flying off of the metal chips was an inevitable consequence of such operation. As put by Mr. Justice Dorion:—

> Si l'action de l'ouvrier n'a été pour rien dans l'accident, c'est donc le fait de la machine qui l'a causé, et il incombe au gardien de la chose de se disculper.

(1) [1921] Q.R. 33 K.B. 160.

That he can do, as held by their Lordships of the Judicial Committee in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1) only by

establishing that he was unable to prevent the act (le fait) which has caused the damage

—which, as their Lordships' later judgment in *City of Montreal* v. *Watt & Scott* (2), explains, implies "unable by reasonable means."

The burden of establishing this exculpation falls on the defendant. The learned trial judge found that the plaintiff had affirmatively established that the absence of a guard on the machine constituted fault sufficient to entail responsibility under Art. 1053 C.C. The majority of the learned judges of the Court of King's Bench approved of that finding and also held that failure of the defendant to insist on the workman operating the machine in question using goggles amounted to actionable fault. There is evidence in the record to support both findings. The efficiency of the precautions which were found to have been wrongfully omitted is probably established; their practicability seems to be much more open to question. I am by no means satisfied that I should have found that it had been affirmatively established. On the other hand, giving to the findings made below the weight to which they are entitled, I am not prepared to say that it is so clearly proven that the defendant was unable by the use of one or other of these means—both certainly reasonable in themselves if efficient and practicable—to prevent the act (*le fait*) that caused the damage for which the plaintiff seeks to recover that the judgment in his favour, affirmed on appeal, should be set aside here.

BRODEUR J.—Que cette cause soit décidée sous l'autorité de l'article 1053 ou de l'article 1054 du code civil, je suis d'opinion que la défenderesse, la compagnie Vickers, a engagé sa responsabilité.

Y a-t-il eu faute de la part de la compagnie? Je n'hésite pas à dire que oui.

(1) [1920] A.C. 662.

(2) [1922] 2 A.C. 555.

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Cette machine à laquelle travaillait Smith était incontestablement dangereuse. La preuve a été contradictoire sur ce point, mais le juge qui présidait au procès a ordonné une expertise; et l'expert, dont la compétence ne saurait être mise en doute, vu qu'il est à la tête de l'école technique, a fait fonctionner cette machine et a rapporté que dans sa marche normale elle pouvait causer l'accident dont le demandeur Smith a été le victime.

Le patron d'un établissement industriel est obligé de protéger ses ouvriers contre les dangers qui peuvent être la conséquence de leur travail; il doit prévoir non-seulement les causes habituelles mais même possibles des accidents, et il doit prendre les mesures propres à les écarter. Sirey, 1878. 1. 412.

Dans le cas actuel, il est en preuve que cette machine dont se servait Smith a projeté de menues parcelles ou brindilles d'acier qui lui ont atteint l'œil et qui en ont nécessité l'ablation.

La compagnie aurait dû installer un écran ou un appareil qui aurait pu protéger l'ouvrier contre ce danger. Elle ne l'a pas fait.

Elle a prétendu que l'installation de cet appareil n'aurait pas permis une production aussi considérable. Cette prétention ne saurait la relever de sa responsabilité. Est-ce que la vie ou la santé de l'ouvrier ne demande pas une protection constante de la part de son patron; et ce dernier a-t-il le droit de sacrifier son ouvrier pour avoir une production plus considérable? C'est là faire parade d'un égoisme qui ne saurait avoir grâce devant les tribunaux. Le patron doit veiller à la sûreté de son employé.

Mais le patron dit: Nous n'avons jamais eu d'accidents sur cette machine, et l'écran qu'on me demande d'installer n'est en usage dans aucune usine. Sur ce point, il y a conflit dans la preuve. Le demandeur a prouvé que pour des machines semblables offrant le même danger, on se servait d'une couverture ou d'un écran. De plus, il a demandé de rouvrir son enquête pour prouver que des machines absolument semblables étaient munies de cet appareil protecteur. Le juge n'a pas cru nécessaire d'accorder cette demande, étant convaincu évidemment que la preuve était déjà assez forte pour donner gain de cause au demandeur.

Si cette cause doit être décidée sous l'autorité de l'article 1054, si le dommage a été causé " par une chose qui était sous la garde " de la compagnie Vickers, il incombait à cette dernière de prouver qu'elle n'a pu empêcher le fait qui a causé le dommage. La présomption de faute édictée dans ce cas ne peut être détruite que par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable. Dalloz, 1920.1.169.

La défenderesse n'a pas été en position de détruire cette présomption de faute qui était édictée contre elle. Elle a, je crois, mis au dossier tous les faits qu'il lui était possible d'invoquer. Et cependant, non-seulement elle n'a pas été capable de repousser cette présomption, mais le poids de la preuve est plutôt en faveur du demandeur et est à l'effet qu'il y a eu négligence de la part de la défenderesse.

Pour ces raisons, son appel doit être renvoyé avec dépens.

MIGNAULT J.—The case established here clearly falls within Article 1054 of the civil code as construed by the Judicial Committee in *Quebec Railway, Light, Heat & Power Co.* v. *Vandry* (1), and *City of Montreal* v. *Watt & Scott* (2), being a damage caused by a thing under the care of the defendant. The lathe which caused the injury was in perfect order and was operated as it should have been, the plaintiff being a skilled and experienced workman. In the proper and normal use of the lathe, particles of steel, the evidence shews, would fly in all directions from the eccentric rod which was being pared down, and one of these particles struck the plaintiff's right eye and it had to be removed. The damage here was therefore caused by the thing, to wit the lathe, which the defendant had under its care, and not by any human agency negligently setting the thing in motion. See the distinction made by my brother Anglin in *Curley* v. *Latreille* (3), in which I fully concur.

In the *Watt & Scott Case* (2), their Lordships explained the meaning of their decision in the *Vandry Case* (1), and these two decisions should be read together. It is there-

(1) 1920 A.C. 662. (2) [1922] 2 A.C. 555.
(3) [1920] 60 Can. S.C.R 131 at p. 140.

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fore authoritatively determined that article 1054 establishes, for damages caused by a thing which a person has under his care, a liability which is defeasible only by proof of inability to prevent the damage. Further, in the *Watt & Scott Case* (1), in addition to the views they had expressed in the *Vandry Case* (2), their Lordships stated that "unable to prevent the damage complained of" means "unable by reasonable means." It does not denote an absolute inability.

It will be interesting to compare the construction placed by the Judicial Committee on article 1054 of the Quebec code with probably the latest pronouncement of the Cour de Cassation in France as to the effect of article 1384 of the French code. See Cass. civ., 16th November, 1920, Dallox, 1920.1.169. with annotation by Mr. R. Savatier. The first paragraph of article 1384 is construed as establishing a presumption of fault which the defendant can only rebut

par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable. Il ne suffit pas au gardien de prouver qu'il n'a commis aucune faute, ni que la cause du dommage est demeurée inconnue.

The exculpatory paragraph of article 1384 C.N. is by its terms restricted to the specific cases therein mentioned, In Quebec, in a matter coming within the first paragraph of article 1054, it suffices for the defendant to prove that he was unable, by reasonable means, to prevent the damage complained of.

Was this defendant unable by reasonable means to prevent the damage complained of? The learned trial judge thought that the defendant should have placed a guard over the lathe to prevent the chips from flying in the operator's face. It is urged that to do so would have been impracticable, that it would have interfered with the proper working of the lathe. I would be very slow to hold that the person having machinery under his care should resort to impracticable or unreasonable means to prevent injury occurring by reason of the normal working of the machinery. But having carefully read the evidence, I think it stops short of clearly shewing that it would have been impracticable to place a guard over this lathe to stop the

(1) [1922] 2 A.C. 555. (2) [1920] A.C. 662.

flow of clippings. The non-use of goggles was not considered as a fault by the learned trial judge, and it is unnecessary to say whether it would have afforded a reasonable means of preventing the injury. In my opinion, the defendant has not succeeded in placing itself within the protection of the exculpatory paragraph of article 1054.

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cook & Magee.*

Solicitor for the respondent: *G. Popliger.*

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*Nov. 13.
*Nov. 27.

C. GROSS (PLAINTIFF) .....APPELLANT;

AND

H. D. WRIGHT (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Agreement—Breach—Party wall—Narrowing of wall contrary to agreement—Proper remedy—Injunction—Specific performance.

A party wall agreement between appellant and respondent provided that respondent might build the wall two feet or more in thickness, half on each property, the middle line to coincide with the boundary line. The respondent built a wall the foundation, basement and first story of which were in accordance with the agreement, but he narrowed the second story by four inches on his own side of the wall, and the third story by a further four inches, keeping the wall on the outside (appellant's side) perpendicular. After it had been erected for some years and formed a wall of respondent's building, the appellant, alleging he had recently discovered the breach of agreement. sued for a mandatory injunction to compel the respondent to pull down that part of the wall not erected in compliance with the agreement and for specific performance of same.

Held, that these facts did not constitute merely a breach of contract for which recovery of damages would be a proper remedy, but a trespass, and that the appropriate remedy is to grant a mandatory injunction as prayed for by the appellant.

Per Idington J. The appellant has also the right to ask for specific performance of the agreement, and the respondent should be ordered to rebuild the wall of the same thickness of two feet.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 1028) reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial and dismissing the plaintiff's action.

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

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

(1) [1922] 2 W.W.R. 1028.

Geo. F. Henderson K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur and to which I have nothing useful to add, I would allow this appeal with costs.

IDINGTON J.—The appellant owned lot 11, and respondent Wright lot 12, in a certain survey on Hastings street, one of the best business streets in Vancouver.

The appellant had built on his said lot a frame building which in the rear part thereof was found to have encroached upon said lot 12.

In 1908 the said respondent Wright desired to build upon his said lot 12.

The foregoing circumstances seem to have led to the said parties entering into an agreement dated 31st January, 1908, whereby appellant, by the first operative clause thereof, bound himself to remove from the eastern boundary of said lot 11 so much of his said building as should be necessary in order to enable said respondent Wright to build the party wall thereinafter provided for at his own expense as and when required by him for the purpose of constructing his said building and the proper building and construction of the said party wall.

The second operative clause reads as follows:—

2. The party of the first part may build a party wall of brick or other material two feet or more in thickness on any part or the whole of the boundary line between the said lots Nos. 11 and 12, and under the sidewalk on Hastings street from the northern boundaries of said lots, which the party of the second part shall have the right to use as herein provided, the middle line of which shall coincide with the said boundary line, and the said party of the first part shall have the right to enter in and upon said lot No. 11 and build and construct the said wall and when any portion of the wall so to be built by the party of the first part shall be used by the party of the second part his heirs or assigns, the party of the second part, his heirs or assigns, shall forthwith pay to the party of the first part, his heirs or assigns, one half of the cost price of the building and construction of the whole thickness of the portion of such wall so used by the party of the second part, his heirs or assigns, and in estimating the portion of such wall so used, the cost thereof shall be estimated on the cost of the whole height of the wall for the width used from the foundation to the top thereof, and the sum of money to

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be paid by the party of the second part, his heirs and assigns, to the party of the first part, his heirs and assigns, shall, until paid, remain a charge upon the said land of the party of the second part, and shall be an incumbrance and charge upon said land, being lot No. 11. The party wall to be constructed by the party of the first part to be approximately as shewn upon the sketched plan annexed to this agreement, subject to such alterations therein as the party of the first part may see fit from time to time to make. In case of total destruction of the said party wall by fire or otherwise this agreement and all covenants and agreements herein contained shall terminate. And it is agreed that the covenants herein contained shall run with the land, but no covenant herein contained shall be personally binding on any person except in respect of breaches during his or their seizin or title to the said lands.

The third operative clause provided that though one half of the said wall should be situated upon appellant's land, it should remain and be the property of respondent Wright until such time as appellant should use and pay respondent therefor as same would be so used and then the latter should own that portion of the wall so used and paid for

but the same shall remain intact and be for the mutual enjoyment and benefit of both of the parties.

thereto and until then the said respondent Wright in the meantime should have the use, benefit and enjoyment of the whole of said wall.

Then followed a clause relative to chimneys, which is not material for our consideration herein, and a further clause for reference to arbitration as to value of price mentioned above, not important herein.

The 6th clause is as follows:—

6. And it is further agreed that the wall built by virtue of this agreement shall be of good materials and workmanship, and when built shall be and remain a party wall.

Some few months after these parties had duly signed and sealed the said agreement the respondent had begun the building of a four-story brick building on his said lot 12, using in the foundation of the western wall thereof the agreed space assigned for such use as a party wall between him and appellant, the said owner of lot 11.

That foundation was a little over the two feet in thickness named in the agreement. Mr. Watson, the said respondent's architect (whose evidence I take as absolutely reliable) tells that before beginning the said foundation of

the said party wall the ground was surveyed by competent surveyors and the line drawn between the said lots 11 and 12, and a pin driven into the ground at the street line in front to mark and indicate said division line, and such line so determined was rigidly observed in laying the said foundation wall, so that one half of it was on the appellant's said land and the other half on the said respondent's lot.

That wall, in order to conform with the terms of said agreement, should have been carried up to the top of the four stories, intended to be and actually built by the said respondent, in such manner and form that each foot upwards should have rested equally on the respective properties of said parties to said agreement.

Whether it might have been contracted in thickness as to be less than two feet as it reached the upper stories I need not say.

The respondent Wright directed the contractor and architect when reaching the second story so to contract the thickness of the wall after reaching the top of the ground floor in height that instead of being two feet or more in thickness it should be, as it became under his directions, as testified by Watson the architect, as follows:—

Q. How was the wall on the right side?—A. It is set back.

Q. Set back on what stories?—A. On the first floor and second floor. The plans were prepared for a three-story building but we built four stories.

Q. Both walls in the basement are perpendicular?—A. The basement and ground floor is perpendicular, 2 feet 1 inch thick. The next floor is 1 foot 9 inches; the wall on the next floor 1 foot 4 inches; the next floor a brick and a half, 12 inches.

Q. With a little mortar would make it?—A. A brick and a half.

On the western side, being that next and upon appellant's lot 11, the wall is absolutely perpendicular and in the result in the fourth story rests entirely, or substantially so, upon appellant's said lot.

The space thus secured by respondent for use on his own side is said to be the equivalent of a room ten by twelve feet.

If that had been all that needed to be herein considered we might let the judgment below stand, but it is very far

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from being the gravest or chief cause of concern to the appellant herein. He never discovered the trick thus played upon him until ten or twelve years later when he had decided to build upon his lot 11 a brick building which for the first time would involve the use of the party wall, in the sense in which I read it. Then he certainly was confronted with a number of very serious problems. If he wished to use the wall to go beyond the second story he could not do it conformably with the city by-law in that regard.

The respondent suggests that the thickness of the wall to conform with the city by-law could be obtained by adding to that now existent by means of building up inside and on lot 12 the necessary additional thickness.

The inspector of buildings, called to give evidence on this suggestion, did not seem disposed to say so or at least properly refused to pass thereon until such a concrete case was presented for his consideration.

There is another class of expert evidence on the point which clearly demonstrates to my mind that the adding of a new wall to attain the desired thickness would not add to the strength of the wall because the old wall having been up so many years had settled, and the new supplemental wall would settle and not adhere to the old wall.

Hence it seems to me quite impracticable to rely and act upon the suggestion made and obtain any satisfactory results.

The learned trial judge acted upon the submission of trespass made by the pleadings and gave nominal damages, but at the same time granted an injunction restraining the respondents from continuing the said trespass, but allowed two years in which either to complete the wall in question so as to make it conform with the said agreement and the said order restraining the respondents.

He relied upon the case of *Stollmeyer* v. *Petroleum Development Co.* (1), which was a case of nuisance.

The Court of Appeal by a majority reversed the said judgment; held that substantial damages were the only

(1) [1918] 87 L.J.P.C. 83.

remedy and directed a new trial. Mr. Justice McPhillips would simply have dismissed the appeal.

I respectfully submit that specific performance of the agreement, which is prayed for by appellant's pleadings, and recognized in the judgment of the learned Chief Justice in appeal as a remedy, is the only appropriate remedy.

The remedy by way of damages, from any angle I can look at it, seems entirely inadequate.

They could only be adequate if the appellant should receive damages equal to the value of the part of lot 11 which respondent Wright has used, and the abandonment by appellant of his title thereto, and he or his assigns so driven to build a wall of his, or their, own; and the further cost of breaking up his building already built two stories high and using, pursuant to the agreement, the present wall as a party wall. In short a new agreement being made damages might suffice.

There is a peculiarity in the agreement which seems, I respectfully submit, to have been overlooked by the courts below. It is this: That it is in a sense absolutely unilateral for it gives no rights to the appellant unless and until the respondent has exercised the option given by the second clause of the same which provides that the said respondent Wright may build a party wall, but nowhere binds him to do so.

Having done so the agreement has been so far part performed by him that the occupation of the appellant's land by him, pursuant thereto, enables us to act upon the principles relative to specific performance in a way that absolute justice can be done between the parties which cannot be effectively obtained in any other way.

The theory of trespass does not fit the actual case as presented.

The appellant, much less his assignees, cannot, as is usual in party wall agreements, enter, by virtue of this peculiar agreement, upon the said land and do anything to protect his rights in his own property. The agreement, in effect, forbids that, or any effective remedy except specific performance.

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It was suggested that the appellant having used one part of the wall and refusing to pay therefor had disentitled himself to relief.

The respondent never having built even that so far used, as his agreement bound him to, is not in a position to set up such contention, and cannot claim active relief in that regard, unless and until he has performed his obligations under the agreement.

It has been suggested also, that as the appellant has no present intention of building further, he is not injured and hence has no claim for damages.

Surely that is a most effective answer to the pretention that damages would be an effective remedy.

It is just by such a mode of reasoning that respondent would hope to escape paying adequate damages or a court be disabled from giving what would be adequate relief. So much would be dependent upon speculative estimates that appellant is entitled to have the contract specifically performed in a way which would add something tangible and appreciable to the market value of the remainder of appellant's property.

It is no unusual thing for a man possessed of vacant property, adjoining other vacant property on which the owner desires to build, to enter into an agreement of this kind. If the party wall that is to be erected on such terms is completed and the parties have agreed then there is created an inducement for others seeking for a site to build on to buy the vacant lot with the right to use said party wall and build thereon, but exactly what such an asset is worth is most speculative in its character. When such an agreement is not in fact carried out but the property left by a trick of respondent in the situation this is, the remedy by specific performance being applied, adequate compensation either way may incidentally thereto be given in a way to do approximate justice between the parties.

The respondent Wright claimed in his evidence the right to build two storys additional to the four he had built, and evidenced an intention to do so, but later admitted as fol lows:—

Q. Is the interior structure of the first and second stories such that you could erect two additional stories on your building?—A. What do you mean by first and second?

Q. The ground floor and the next floor?—A. It may have to be reinforced from the first story.

Q. It may have to be reinforced right from the basement?—A. No, I think not.

I assume that under the agreement he may have the right to add two stories provided the foundation, and upward, of the party wall is carried up the two feet or more in thickness.

But his idea of reinforcement by a new wall is entirely contrary to what the evidence already referred to establishes, and is impossible unless the wall is demolished entirely down to the point where the two feet in thickness was departed from.

Unless respondents distinctly abandon such right and intention, and appellant agrees to his doing so, I conclude that the wall must be demolished down to the part where the two feet thickness of wall was departed from and the respondents be ordered to rebuild same of the said thickness of two feet as specified in the agreement and that on or before the 21st October, 1923, according to the specification in the agreement.

And in such event the appellant should pay the respondents then or so soon as determined the half of the cost price of the construction of the said party wall so far as used by the appellant up to said date.

If, however, the appellant is content to refrain from insisting upon the terms named in the agreement and satisfied with a wall twenty-one inches in width from the point where the wall was reduced as originally built from two feet to twenty-one inches in thickness, that then the existent wall shall be demolished down to that point to the top of the four existent stories and in accordance with the terms otherwise specified in said agreement.

In such event as that the wall so carried up will not be in conformity with the original agreement and the same will rest upon the land conceded by the appellant in a greater proportion than upon the respondent's land, due compensation should be made by them for the difference to be

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determined by the local registrar of the court or other party those concerned may select in settling the minutes of judgment herein.

Such wall of reduced thickness shall be available for the use of the appellant or his successors in title according to the terms specified in the agreement as if of the agreed thickness therein contemplated but subject to the foregoing reduction as provided for above.

Of course this suggestion adopting with compensation to appellant for the use of a greater part of his land than would be contributed by respondents can only be acted upon if a twenty-one-inch wall for such a four-story building as existent, or a six-story building as contemplated by respondent, can be made conformable with the city by-law relative to party walls.

Little authority has been cited us by either side but the only case cited by respondents, *Weston* v. *Arnold* (1), seems so far from touching anything involving the principles applicable to this case that one is surprised to find such a citation supposed to be useful herein.

On the other hand the only case cited by appellant, *Shelfer* v. *City of London Electric Lighting Co.* (2), is in point as to the question of preferring the application of the recognized principles of equity jurisprudence relative to specific performance in lieu of damages.

The paucity of citations of authorities is no doubt owing to the extraordinary methods the respondent Wright adopted and pretended to be founded upon a very plain agreement which he chose to violate, though pretending such violation was in pursuance of the terms of the agreement, which gave him contrary to the usual terms of a party wall agreement, a free hand, except in one plainly specified option which he chose to exercise in a most unjustifiable way.

The right to specific performance, so far as the contract in question is concerned once the respondent actually accepted and acted upon the contract so as to render it operative, seems to me elementary law unless so far as met by the contention that damages are an adequate remedy

(1) [1873] 8 Ch. App. 1084. (2) [1895] 1 Ch. 287.

if this case can be brought within any such case as the courts have so held as a reason for refusal thereof.

The cases on which I rely for the application I am making of the law relative to specific performance being granted when damages are an inadequate remedy, are to be found in Fry on Specific Performance, at p. 26 and following pages, and Dart on Vendors and Purchasers, chapter on Specific Performance and especially at pp. 989 *et seq.* of 5th ed. and cases cited therein.

And as to the application of compensation see Fry on Specific Performance, Part V, c. 3 (6th ed.).

But one case, *Powell* v. *The South Wales Ry. Co.* (1) (to which I am indebted to Dart in Vendors and Purchasers, cited at p. 990 of the 5th ed. thereof) decided by V. C. Wood, seems in principle to cover the whole ground herein both as to the execution of a work, in that case a drain, and the question of compensation.

I regret that we have not had on this branch of the case as I have dealt with it, any argument.

I would therefore suggest, if my views are agreed upon by the majority of the court, that if the parties concerned cannot agree, the minutes may be spoken to.

I would allow the appeal and decree specific performance on the foregoing terms, with costs to the appellant throughout.

DUFF J.—The appellant and the respondent are owners of adjoining building lots in Vancouver and in 1908 they entered into an agreement by which, among other things, the respondent was given the privilege of erecting a wall, described as a party wall, not less than two feet in thickness upon any part of the whole of the boundary line between the two lots, the middle line of the wall to coincide with the boundary line, and the respondent was to have certain rights in relation to this wall when so constructed. The respondent proceeded in due time to build a wall properly placed in conformity with the terms of the agreement, one half on each side of the boundary line and he proceeded in this way to the height of 12 feet. The wall was raised to a further height of 36 feet but with

(1) [1855] I Jur. N.S. part 1, 773.

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the thickness reduced progressively at different stages to 12½ inches at the top. The whole of this reduction of thickness was made on the respondent's side, the wall on the appellant's side presenting an even surface from top to bottom. The appellant having, years afterwards, discovered what had taken place, the action out of which this appeal arises was brought. The learned trial judge granted an injunction directing the demolition of the wall down to the point at which the dimensions of it ceased to conform to the specification of the agreement but stayed the operation of the injunction for two years to enable the parties to arrange matters. The Court of Appeal reversed this judgment substituting an inquiry as to damages. The question on the present appeal is whether or not the judgment of the trial judge should be restored.

I am unable to agree with the view of the case taken by the Court of Appeal. That view was that the plaintiff's sole ground of complaint was that there had been a breach of contract and that as it was not a case in which the court would, according to its practice, order the contract to be specifically executed, the plaintiff's only right was to recover damages. I am unable to agree with this because it seems to me quite clear that the conduct of the respondent was tortious. His authority to enter upon the appellant's land was an authority strictly limited. It was for the purpose of constructing a wall which should be placed half on his side of the line and half on his neighbour's side. This term of the agreement as to the situation of the wall is not a mere incident, it is of the very essence of the licence granted to the respondent. The moment he began to reduce the thickness of the wall on his own side of the line while maintaining unreduced its thickness on the other side he became a trespasser. He became a trespasser because having authority to enter upon his neighbour's property for a certain purpose he was using it for another purpose for which he was not authorized to enter. The principle is well illustrated in the cases touching abuse of rights of way. *Dovaston* v. *Payne* (1). I may add that treating the reciprocal rights and duties of the parties to this agree-

(1) 2 H.Bl. 527.

ment as within the domain of contract alone it is quite clear that the respondent came under an implied undertaking not to make that part of the wall resting on the appellant's land thicker than the part resting on his own.

In these circumstances what is the appropriate remedy? Lord Justice Scrutton has recently pointed out in a case in which the subject of mandatory injunction was a good deal discussed how difficult it is to discover in the decided cases any definition enabling one to draw a line exactly between the conditions in which a mandatory injunction will be granted and the circumstances in which it will not be granted. *Kennard* v. *Cory* (1). In that case the Court of Appeal sustained an order made by Mr. Justice Sargant requiring the defendant to execute certain works in the nature of repairs. The order was made upon an application under leave to apply reserved in the judgment given at the trial and the case largely turned upon the scope of the inquiry as to damages which had been granted and that of the original injunction and leave. The original injunction as interpreted by the Court of Appeal was an exercise of jurisdiction of a somewhat unusual character and affords a more than ample precedent for the order of the trial judge in the present litigation.

The circumstances of this case indeed seem to bring it within the analogy of more than one well marked class of cases in which the Court of Chancery exercised its jurisdiction by granting specific relief without hesitation. I must premise before particularizing that it seems quite clear that the trial judge proceeded on the view that the appellant remained in ignorance down to the time the proceedings were taken of the fact that the agreement had been violated by the respondent. My own conclusion is that the fact was concealed. The suggestion made by the respondent himself that although he knew what was being done he had no design of infringing the appellant's rights is one that postulates a degree of indifference to the rights of others which a court of equity could not treat as innocent. In such matters standards must be objective standards.

(1) [1922] 2 Ch. 1 at p. 21.

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The case therefore falls within the class dealing with the responsibilities of persons who, having obtained an advantage on faith of an undertaking to do something for the benefit of another, seek to retain the advantage while escaping the obligation through some technical loophole. Equity has always in such cases insisted upon the performance of the duty where the advantage could not be surrendered or on the surrender of the advantage where it would not compel the performance of the duty; and an excellent illustration is to be found in those cases in which a railway company having taken lands from a landowner on terms of performing certain works, the court in departure of its general practice to refuse orders for the construction of works has required the railway company to carry out its undertaking. *Wolverhampton and Walsall Ry Co.* v. *London and North-Western Ry. Co.* (1). The case is within that principle in its general features for the respondent has taken advantage of an authority conferred upon him for a strictly defined purpose clandestinely to use it in violation of the good faith of the agreement. Again the work complained of was constructed in breach as we have seen of the explicit terms of the agreement and it is within the analogy of those cases in which it has been held that the court will grant a mandatory injunction to restrain the violation of such an agreement. *Morris* v. *Grant* (2); *McManus* v. *Cooke* (3); *Manners* v. *Johnson* (4).

The case moreover is within the principle of *Goodson* v. *Richardson* (5). The defendant in that case had without the consent of the owner of the soil laid certain water pipes under a highway and Lord Selborne at p. 224 said:—

> I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.

There can be no distinction in principle between getting possession clandestinely and getting possession by agreement for a given purpose and then surreptitiously using

(1) [1873] L.R. 16 Eq. 433.
(2) [1875] 24 W.R. 55.
(3) [1887] 35 Ch. D. 681.
(4) [1875] 1 Ch. D. 673.
(5) [1874] 9 Ch. App. 221.

the possession so acquired for another purpose. There is no doubt, as laid down by the Lords Justices in *Kennard* v. *Cory* (1), that the primary point for consideration in every case where the question is injunction or no injunction is whether or not the wrong complained of is a wrong "for which damages are the proper remedy," to use the phrase of Lindley L.J. in *London & Blackwall Ry. Co.* v. *Cross* (2), that is to say a complete and adequate remedy; and I have no doubt that it would have been competent to the court to direct an inquiry as to damages wide enough to include damages suffered by reason of diminution of the value of the appellant's land. See judgment of the Master of the Rolls in *Kennard* v. *Cory* (1) at p. 13, and of Warrington L.J. at p. 18. But on the other hand as Lord Selborne and the Lords Justices point out in *Goodson* v. *Richardson* (3), a very important element in the value of land may be the right to exclude a particular trespasser or the right of the owner to have specific works erected as in the *Wolverhampton Case* (4). It is quite clear that the trial judge did not think that damages ascertained according to any principle upon which it would be feasible to assess them would afford an adequate remedy. I am unable to say that the Court of Appeal disagreed with this because the Court of Appeal proceeded upon a basis which, with great respect, as already mentioned, was not, I think, the right basis. I am unable to say what view the Court of Appeal would have taken if they had agreed with the trial judge that the conduct of the respondent amounted to an actionable wrong. Being myself far from satisfied that damages would afford adequate reparation, I think the appeal should be allowed and the judgment of the trial judge restored.

ANGLIN J.—By an agreement made between the parties in 1908 the defendant obtained the right to enter upon and utilize 12 inches of the plaintiff's land for the erection of a party wall of not less than 24 inches in thickness of which the centre line should coincide with the boundary line between their respective properties. The defendant built the

(1) [1922] 2 Ch. 1.
(2) [1886] 31 Ch. D. 354 at p. 369.
(3) 9 Ch. App. 221.
(4) L.R. 16 Eq. 433.

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wall. It was in substantial compliance with the agreement as to the basement and the first or ground floor story. For the second story the wall was only 21 inches in thickness—12 inches on the plaintiff's land and 9 inches on the defendant's land. For the third story the total thickness was 16½ inches of which only 4½ inches was on the defendant's land. For the fourth story the wall had a thickness of 12½ inches of which only one-half an inch was on the defendant's land. A fire parapet carried above the roof and 9 inches thick was wholly on the plaintiff's land.

The wall was perpendicular on the outside, or the plaintiff's side, and he remained unaware that from the second story up it did not conform to the contract until shortly before he brought this action. Nothing amounting to acquiescence, or even to laches such as might disentitle him to relief by injunction has been shewn.

Upon the evidence it is reasonably clear that the existing wall cannot be added to by further construction on the defendant's property so as materially to strengthen it or make it at all equivalent to a wall originally built according to the requirements of the contract. While it seems probable that the wall as constructed would have sufficient strength to serve as a party wall for a four-story building of comparatively light construction, such as an office building, to be erected on the plaintiff's land, it has not been shewn that under the existing by-laws of Vancouver the plaintiff would be allowed to utilize it as a party wall for such a structure. Moreover, it is quite clear that it would not suffice as a party wall for a warehouse or for any other building intended to carry a heavy weight, and probably not for a building of lighter construction of more than four stories in height. Even if in a position to make some use of the wall as a party wall the plaintiff would therefore find himself restricted in the use to be made of his land to an extent materially greater than would have been the case had the party wall been built as agreed upon.

The evidence of the architect, Watson, shews that the departure from the terms of the agreement was decided upon by the defendant when the plans for his building were in course of preparation and before work on the party wall had begun.

Upon these facts the learned trial judge held that a trespass had been committed on the plaintiff's land by the erection of the narrowed wall above the top of the first story, and enjoined the continuance of such trespass, but suspended the operation of the injunction for two years to enable the defendant to make the wall conform to the agreement.

The Court of Appeal (Macdonald, C.J.A., Galliher and Eberts JJ.A., McPhillips, J.A. diss.) being of the opinion that there had been no trespass but merely a breach of agreement, and that the wall as erected

is a good and sufficient wall for the purpose for which it was built,

set aside the judgment of the trial court and substituted for it a judgment awarding the plaintiff such damages (if any) as he had sustained by the defendant's breach of contract,

the amount of such damages, if any, to be arrived at by ascertaining the value to the respondent (plaintiff) of the space the use of which he has been deprived of by the appellant, Wright, building the said wall

as he did, and a new trial to assess such damages was directed.

The plaintiff appeals and asks the restoration of the judgment of the learned trial judge. There is no cross-appeal by the defendant, who, on the contrary concedes that the wall is not built according to the terms of the agreement and, with a view to escaping an immediate injunction, offers either to strengthen it by additional construction on his side, or, if that he not feasible, to rebuild from the second story up such portion of it as the plaintiff may desire to use as a party wall whenever he shall be prepared to carry on his building.

With great respect, if damages should be the appropriate remedy, the measure of them should not be restricted to the value of the space lost to the plaintiff by the wall being narrowed wholly on the defendant's side instead of equally on both sides. In the first place the perpendicularity of the wall on the plaintiff's side was in strict conformity with the contract. That caused no loss of space to which he was entitled under its terms. What should be allowed as damages would be such sum as would, as nearly as money compensation could do so, place the plaintiff in

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the same position as he would have held had the wall been erected according to the terms of the contract.

But is his remedy properly restricted to the recovery of damages? Is he not entitled to the mandatory injunction which the learned trial judge granted him?

Whatever might have been the case had the original entry been lawful—i.e., had the defendant when he began to build the wall intended to construct it according to the terms of the agreement and determined to narrow it, as he did, only while it was in course of construction,—whether or not upon that state of facts the view taken by the Court of Appeal, that the cause of action is not for trespass but only for breach of agreement, or, perhaps more accurately, for an abuse of licence, would have been correct, (The *Six Carpenters' Case* (1); Smith's Leading Cases, (12 ed. 146, 156) the defendant, having obtained a licence to enter upon the plaintiff's land only for a defined purpose, his entry for a different purpose was in my opinion clearly a trespass, which he continued by erecting the wall as he did and still continues by maintaining it. The determination to build the wall otherwise than as agreed upon having been arrived at before the work was begun, the original entry itself was not authorized by the licence given by the agreement.

Again, the evidence satisfies me that the departure from the agreement was intentional and deliberate and was made for the purpose of securing to the defendant such additional space as he would thus obtain and probably also in order to save him a portion of the cost of constructing a party wall of 24 inches in thickness from top to bottom. The positive testimony on this point given by the architect, Watson, should, I think, be accepted rather than the plaintiff's denial. This case seems to present an instance of wanton disregard of a plaintiff's rights, and perhaps also of an attempt to steal a march on him. *Colls* v. *Home & Colonial Stores, Ltd.* (2); *Jones* v. *Tankerville* (3). To quote the language of Lord Selborne L.C. in *Goodson* v. *Richardson* (4):

(1) [1826] 8 Co. 146a.
(2) [1904] A.C. 179, at p. 193.
(3) [1909] 2 Ch. 440 at p. 446.
(4) 9 Ch. App. 221, at pp. 224-5.

I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.

The plaintiff has therefore established an invasion of his legal right not trivial either in its character or in its consequences—if indeed the latter need be considered in a case of trespass such as this, *Goodson* v. *Richardson* (1). No doubt, unless under circumstances of peculiar aggravation, (Kerr on Injunctions, 5th ed., pp. 43-4) the jurisdiction to grant a mandatory injunction, especially where it involves subjecting the defendant to such serious loss as the tearing down of the party wall must in this instance entail, should be exercised with great caution and only if the remedy by damages is inadequate. *Colls v. Home & Colonial Stores* (2). But the jurisdiction itself is undoubted even when the injury has been completed before action is brought, *Durell* v. *Pritchard* (3); *City of London Brewery Co.* v. *Tennant* (4), and such an order has more than once been made. *Baxter* v. *Bower* (5); *Attorney General* v. *Parish* (6). It seems to be the remedy to which a plaintiff is entitled where the defendant has deliberately placed an unauthorized erection on his land. *Holmes* v. *Upton* (7).

Here we have a case of wilful trespass involving substantial injury, adequate compensation for which it is almost impossible to estimate—so much so that the removal of the wall so far as it is not in compliance with the agreement appears to be the only remedy by which justice can be done to the plaintiff. *Shelfer* v. *City of London Electric Lighting Co.* (8). The court has not the right to compel the plaintiff to part with his exclusive legal right over his own land for something different from that for which he bargained as the consideration for foregoing

(1) 9 Ch. App. 221, at p. 224.
(2) [1904] A.C. 179, at pp. 193, 212.
(3) [1866] 1 Ch. App. 244.
(4) [1873] 9 Ch. App. 212, at p. 219.
(5) [1875] 23 W.R. 805; 44 L.J. Ch. 625.
(6) [1913] 57 Sol. J. 625.
(7) 9 Ch. App. 214n.
(8) [1895] 1 Ch. 287, at pp. 310-11, 322.

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it. *Cowper* v. *Laidler* (1). That in effect will be done if the mandatory injunction sought be refused. Any damages which the plaintiff could reasonably expect to recover would not give him full compensation for the injury done him should the wall be allowed to remain as it now stands.

Under these circumstances, although the expense to which the defendant will be put may be considerably greater than any actual benefit the plaintiff may derive, the plaintiff insisting on the relief of a mandatory injunction to restrain continuation of the trespass is in my opinion entitled to it. *Woodhouse* v. *Newry Navigation Co.* (2).

The defendant at the trial and again in this court offered, if allowed for the present to retain the wall as it stands, an undertaking to rebuild it so as to conform to the contract from the top of the first story upwards whenever the plaintiff should determine to carry up the one-story building now erected on his land. But such an undertaking would not be satisfactory; nor, if put in the form of a judgment, would it afford the plaintiff adequate relief. The agreement is registered against his land. He may at any time desire to sell it and an outstanding question as to the party wall would probably have an adverse effect, if not on the prospect of sale itself, at least on the price obtainable.

The defendant has not so conducted himself as to be an object of sympathy. If the mandatory injunction to be granted will entail serious loss to him he has only himself to thank for the situation in which he is placed. I accept the view of the late Mr. Justice Clement that a stay of the operation of the injunction for a period of two years is reasonable in view of the fact that the plaintiff appears to have no present intention either of proceeding with his building or of selling his land.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored, modified, if necessary, so that demolition above the

(1) [1903] 2 Ch. 337 at p. 341.

(2) [1898] 1 Ir. R. 161, at pp. 173, 174.

point at which the wall ceases to be not less than 24 inches in thickness will be directed, as the learned judge no doubt intended.

BRODEUR J.—The parties in this case, who are owners of adjoining lots, agreed in 1908 that a party wall of at least two feet in thickness should be built by Wright one-half on each lot. The first story was built according to the agreement; but in the upper stories Wright narrowed the wall on his side and kept it perpendicular on Gross' side. In that way, Wright gained some space for his own property.

Gross, having recently discovered that Wright had not properly fulfilled the agreement, took the present action for trespass, for demolition and for specific performance.

The trial judge maintained the action, but the Court of Appeal decided there was no trespass but simply a breach of agreement which entitled Gross to damages for the loss of space occasioned by the wrongful building. Gross appeals from this judgment.

It is in evidence and it was so found by the trial judge that the wall as it now exists is of sufficient strength to carry any structure Gross is ever likely to put on his lot; and if I could satisfy myself that Wright was in good faith in constructing the wall as he did and in giving to himself more roomy space, I would be inclined to leave the wall as it is upon payment of reasonable indemnity (*Delorme* v. *Cusson* (1)). But the evidence of Wright's architect shows that he was instructed to construct the wall as he did in order that he (Wright) would have more room on the inside. Damages could be substituted for a mandatory injunction; but where, as Kerr on Injunctions, 5th ed. p. 44 says,

> the defendant has been guilty of sharp practice or unfair conduct or has shewn a desire to steal a march upon the plaintiff,

then the remedy should be by injunction. The courts are not instituted for legalizing wilful wrongful acts; and, as it is stated in *Shelfer* v. *City of London* (2),

(1) [1897] 28 Can. S.C.R. 66. (2) [1895] 1 Ch. 287.

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the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is willing and able to pay for the injury he may inflict.

Wright, in virtue of his contract with Gross had a licence or authority to enter on his neighbour's property for a certain purpose; but this did not justify an entry for another purpose and the doing of acts not authorized by the license. (Cyc, vol. 38, p. 1061.)

The law is to the effect that if a land is subject to a certain right, a person who unlawfully uses such land for any purpose other than that of exercising the right to which it is subject is a trespasser. (Halsbury, vol. 27, p. 847.)

Applying these principles to the present case, it seems to me that the action instituted by Gross should be maintained, that the defendant should be considered as a trespasser and that all the wall which is not in conformity with the contract should be demolished.

The appeal should be allowed with costs of this court and of the Court of Appeal and the judgment of the trial judge should be restored, with a modification which would make the formal judgment clearly carry out the decision of the judge as expressed in his notes.

MIGNAULT J.—In my opinion, in building his wall as he did, the respondent committed a trespass on the appellant's land for which the only adequate remedy is an injunction to the effect indicated in the reasons for judgment of the learned trial judge. I would allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *McInnes & Arnold.*

Solicitors for the respondent: *Gwillim, Crisp & McKay.*

THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

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*Oct. 11, 12.
Dec. 19.

AND

ROBERT WILSON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

AND

WILLIAM ROUTLEY (PLAINTIFF).....RESPONDENT.

THE MUNICIPALITY OF THE CITY OF PORT COQUITLAM (DEFENDANT). } APPELLANT;

AND

DOLSON CRAIG AND OTHER (PLAINTIFFS) RESPONDENTS.

ON APPEAL PER SALTUM FROM THE SUPREME COURT OF BRITISH COLUMBIA

Negligence—Municipal corporation—Fire originating in fire hall—Damage to adjoining property—Liability—Presumption of negligence—Onus—Misdirections of jury—Part of fire hall occupied by fire chief—Breach of municipal by-law in constructing chimney—Directions at a new trial in compliance with a judgment of an appellate court not appealed from—Res judicata or acquiescence.

The appellant municipality owned a wooden building described as a fire hall, in which a fire broke out which spread and destroyed property belonging to the respondents. The appellant, in preparing rooms for one McK., its chief of police and fire chief, had employed a plumber and paid the cost of installing a stove pipe, bought by the appellant, extending from the kitchen stove, which was the property of McK. The pipe passed through a wooden ceiling, thence through an attic and thence out of the building through a wooden roof. A municipal by-law required that in such a case the pipe should be "enclosed in brick or tile walls with a space of at least three inches between the enclosing walls and the smoke pipe from bottom to top." Non-compliance with this by-law and that compliance would have prevented the escape of fire were admitted. Some time before the fire occurred, the stove had been removed by McK. and another substituted, and one of the sections of the pipe

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

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was shortened in a manner which, it was alleged, added to the risk of fire. The trial judge directed the jury that the fact that a fire first broke out in appellant's premises was *prima facie* evidence of negligence and that the onus was on the appellant to acquit itself of liability by showing that the fire began accidentally; but he refused to direct that the appellant municipality was not liable for anything resulting from the act of McK. in making the pipe less safe. The verdict of the jury involved a finding that the fire originated from cinders or sparks escaping from the stove pipe into the attic.

Held, Mignault J. dissenting, that the appellant municipality was liable.

Held, also, Mignault J. *contra,* that there had not been misdirection as to the appellant's liability for the act of its servant McK. The appellant being responsible for the setting up in the first place of the stove, it was within the normal scope of McK.'s duty as appellant's servant to take notice of anything calculated to make the use of it a source of danger; McK.'s knowledge of what was done when the stove was changed was the knowledge of the municipality because his occupation was their occupation, and therefore McK.'s negligence was appellant's negligence.

Held, further, that owing to the jury's finding as to the cause of the fire, in view of the existence of its own by-law and of the fact that the fire would not have occurred if the by-law had been complied with, the appellant was *prima facie* liable for not having taken reasonable means to prevent harm to its neighbours by the escape of the fire it had authorized and that the charge of the trial judge, if textually open to criticism, was in substance unassailable. Mignault J. *contra.*

Per Idington and Mignault JJ.—The fact that directions given to the jury conformed to views expressed by the Court of Appeal in setting aside a former judgment dismissing this action and ordering a new trial does not prevent their correctness being challenged on appeal from the judgment based on the verdict at such new trial.

APPEAL *per saltum* from the judgment of the Supreme Court of British Columbia maintaining the respondents' actions.

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

Farris K.C. for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Duff, in which I concur, I would dismiss this appeal with costs.

IDINGTON J.—Three actions were brought against appellant for damages alleged to have arisen from a fire originating in its fire hall, by reason of the negligence of said appellant, its servants or agents, and so spreading therefrom as to destroy real and personal property of each of the respective plaintiffs.

An order was made that the first of said actions should be tried as a test case and the others be stayed meantime, and I presume abide the result of such trial.

That case was accordingly tried and the verdict of the jury was for the defendant which upon appeal to the Court of Appeal for British Columbia was set aside and a new trial directed.

Upon the second trial which took place before Mr. Justice Morrison, the verdict of the jury was for the plaintiff and judgment entered accordingly with a direction that the damages should be determined by the registrar of the court.

Judgment was also entered in each of the others of the three cases in the same terms as in the case so tried.

Thereupon a motion was made before the Court of Appeal for leave to appeal to this court *per saltum* and such leave was given covering all the judgments in each of the three cases in question.

The objection was taken from the bench in course of the argument herein that the judgment in the action tried by granting a new trial overruled the direction of the learned trial judge on the first trial and as there was no appeal therefrom to this court it had the effect of creating a *res judicata* fatal to this appeal.

I cannot so hold for I think our decision in the cases of *Western Canada Power Co.* v. *Bergklint* (1), *Lavin* v. *Gaffin* (2), and *Kinney* v. *Fisher* (3), rather seem to ignore such a ground, though maintained by my brother Mr. Justice Duff.

I am on record in the second of these cases, if not all, as holding that the record of the judgment merely granted a new trial and did not pretend to definitely decide any point raised in argument.

(1) 54 Can. S.C.R. 285. (2) 61 Can. S.C.R. 356, at p. 360.
(3) 62 Can. S.C.R. 546 at p. 554.

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And in the lastly mentioned of these cases I pointed out that if the court below had so intended it could have so declared and put upon the party concerned the burden of appealing here before raising it again in the course of the new trial.

I still adhere to that view and in this case more decidedly so for the reason that Mr. Justice McPhilips, with whom Mr. Justice Eberts concurred, constituting the majority deciding, specifically declared that even if he erred in the view taken by him as to the direction of the trial judge, he explicitly held and declared that the verdict then in question was against the weight of evidence and perverse, and for that reason there must be a new trial, which left the whole matter open on the second trial and it was clearly conducted accordingly.

The material before the court herein upon which the Court of Appeal gave leave to appeal *per saltum* here, does not appear in the printed case before us.

Incidentally to my investigations of the point thus raised another of more serious import occurred to me as to the power to make such an order since the recent amendment to our Act. But as no such point taken in the argument I do not see that it should now be raised even if worth arguing.

Counsel before us did not seem to me desirous of taking the position suggested and above dealt with and I suspected felt bound by a possible assent when before the Court of Appeal to the course of coming here *per saltum* in hopes of ending the litigation at less expense.

In argument, however, counsel for appellant seemed desirous of giving to the charge of Mr. Justice Morrison the complexion that he was taking the view that he was bound by everything Mr. Justice McPhillips had said.

A perusal of the charge does not so impress me and I think it was clearly intended to apply the correct view of the law and that he succeeded therein.

And if a single sentence therein quoted by counsel for appellant is capable of the construction that he sought to place thereon—namely that, if a fire lawfully existing on the premises spread without any negligence, to the property of the plaintiff, then the defendant was liable unless and

until he the defendant established it was accidentally that it spread.

No such construction, I respectfully submit, can fairly be attributed to what the learned trial judge said.

The case was tried throughout, as it was claimed by the pleadings to rest, upon the negligence of the defendant (now appellant) or that of its servants for whom it must be held responsible and was so presented to the jury by the learned trial judge.

The appellant in preparing a place for its fire chief to live in by day and night, so that he would be close to the fire engine and other apparatus for extinguishing a fire, saw fit to use a bare stove pipe, reaching from the kitchen stove, up through a board floor above, and thence up to the roof of the attic, and unprotected in any way, such as directed by its own by-law which was in accord with common sense and ordinary procedure.

This was done by the tinsmith or plumber, whom the appellant employed to do the work, and paid therefor.

The by-law in question provided, amongst other things, as follows:—

> Metallic chimneys or smoke pipes shall not be used inside any building in such a way as to pass through the floors or roof of the same unless such metallic smoke pipe or chimneys are enclosed in brick or tile walls with an air space of at least three inches, between the enclosing walls and the smoke pipe from bottom to top. All outside metallic smoke stacks to be thoroughly anchored and guyed.

This is the rule which was laid down by appellant for others to follow and anything short of its observance by the appellant, unless something equally as safe, was in my opinion, gross negligence, such as should not, I submit, be tolerated or palliated by any court of justice, in such a case as this.

If the three-inch air space that section provides for between the metal and the brick or tile walls to enclose it, had existed, there never would have been that accumulation of soot on the part in question where the fire originated, and there would have been no fire such as in question.

The confusion apt to be created by telling about a new stove being brought in and substituted by the fire chief

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for the one first placed there, is all beside the question that was to be tried. He may or may not have made matters worse when so substituting one stove for another, but if he did he was the servant of the appellant in charge of that place and especially for the purpose of protecting the respondents and others from fire and his acts of negligence in that connection are such as his employer, the appellant, was in law responsible for.

Confusion is again apt to arise from the argument of counsel for appellant as to the law relevant to actions founded on a by-law.

It is not necessary to rest on any such right of action, nor was that contemplated by the learned judge's charge. The by-law is cogent evidence against appellant of what kind of care should be taken when a stove pipe is passed up through an attic board floor and thence to the roof to prevent such use of a stove pipe unless and until guarded in some such way as the by-law indicated.

This action is rested in the statement of claim solely upon negligence.

I am by no means to be taken as holding that it might not have been rested on that by-law alone for I have not seen why I should pass an opinion on such an irrelevant suggestion, though there might have been found serious objection if that had been the ground taken.

We have not the entire by-law before us as it would doubtless have been, and should have been, if any such attempt had been made to enable the court to apply the law as laid down by Lord Cairns in the leading case of *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (1), where he held that it must depend to a great extent on the purview of the particular statute in question.

The learned judge's charge heard by counsel was objected to briefly on a single point made by counsel for plaintiff and that explained without further objection and then appellant's counsel, he says, handed up some written memorandum not produced, of his objections.

The learned trial judge then took up the three points so made, point by point, and answered same to the appar-

(1) 2 Ex. D. 441.

ent satisfaction of the counsel, for nothing more was said by counsel anent same. If there was error in such explanation it was the duty of counsel to have pointed it out.

The second might have been more happily expressed but I can see no likelihood of it in any way having misled the jury.

If he had used the word "evidence" in support of the cause of action, instead of simply cause of action, when saying he could only repeat his explanation and so expressing what he said, it would perhaps have been better.

But no one could properly be misled by what was said. We must bear in mind the charge as a whole and its meaning so read, and credit the jury with common sense.

The third point in explanation was in substance a mode of putting in plain English which the jury could understand what lawyers and judges, when speaking to each other, refer to in latin as *res ipsa loquitur,* a perfectly well understood principle of law relative to evidence of negligence.

I see nothing in any of these, or other objections, to justify setting aside a verdict obtained on very clear evidence of negligence once the jury had got over the really difficult part of the case raised on much conflicting evidence to determine whether the fire originated from causes internal or external in relation to the fire hall.

Once they decided in favour of the former proposition the case was a simple one.

And with regard to this finding appellant does not now complain.

I think therefore the appeal should be dismissed with costs.

DUFF J.—The argument on this appeal touched upon heads of the law under which there are points still unsettled and in respect of which there is room for considerable difference of opinion; but the case before us is, I think, without difficulty once the facts and proceedings are clearly understood. The appellant municipality had a wooden building, described as a fire hall, in which a fire broke out in August, 1920; the fire spread and destroyed some property of the respondent. The building was primarily used

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as a place for keeping the fire engine and other apparatus for fire extinguishment used by the municipality. One McKinley, who was the chief of police and fire chief was in charge of the building for the municipality, occupying with his family certain rooms. In one of these rooms there was a stove which was the property of McKinley to which was attached a pipe that passed through a wooden ceiling, thence through an attic and thence out of the building through a wooden roof. This pipe was supplied by the municipality and the municipality paid the expense of putting it in. Some time before the fire broke out the stove was removed and another substituted and one of the sections of the pipe was shortened in a manner which, it was alleged, added to the risk of fire.

The principal controversy of fact at the trial was whether the fire which destroyed the building originated from cinders or sparks escaping from the stove pipe into the attic or from cinders alighting on the roof emanating from some source outside the premises. It is quite clear, I think, and it was not disputed on the argument that the verdict of the jury necessarily involved a finding that the fire originated from the stove.

At the time the stove and the pipe were set up there was in force a by-law requiring certain precautions to be taken to reduce the risk of fire from metal stove pipes or chimneys passing through a wooden or plaster partition or roof. The by-law required that in such cases the metal pipe should be surrounded by a casing of brick and it was not disputed that if the directions of the by-law had been complied with the precautions prescribed would have afforded sufficient protection in the circumstances in which the fire arose.

The responsibility of the occupier of a building or other premises for damage caused by a fire lighted there and escaping was from the earliest times governed by a rigorous rule.

> The law imposed (says Mr. Holdsworth, 3 Hist. of English Law at p. 309), a duty upon all householders to keep their fires from damaging their neighbours. Hence if a fire arose in a house by the act of any of the servants or guests, and damage was caused to the house of others, the owner was liable. He could only escape from liability if he could shew that the fire had originated from the act of a stranger.

The phrase "act of a stranger" is explained by the language of the authority cited by Mr. Holdsworth, Y.B. 2 Hy. IV Pasch, pl. 6:

Mes si home de hors ma meason encounter ma volunte boute la fewe en le straw de ma meason * * * de ceo jeo ne serra pas tenus de responder a eux.

A stranger is a person who is not one of my household either as guest or servant and who acts against my will. Act of God would no doubt also have been an answer. *Tuberville* v. *Stamp* (1), per Holt C.J. Indeed the law on this head might be considered an application to a special case of the principle which afterwards came to be recognized as the rule in *Rylands* v. *Fletcher* (2). It is true that the old form of declaration ran *quare negligenter custodivit ignem suum in clauso suo,* but *negligenter* here does not mean negligently in the sense of modern law. The import of it was that the defendant has failed to observe his legal duty to prevent his fire escaping and damaging others. *Lord Canterbury* v. *The Queen* (3), per Lord Lyndhurst. The law was changed by the statute of Anne and again by the statute of 14 Geo. III, c. 27, sec. 86) which no doubt is in force in British Columbia, and by which it was provided:

No action, suit, or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidentally begin.

There are points still unsettled as to the effect of this statute. It was held in *Filliter* v. *Phippard* (4), that a fire is not accidental within the statute if it begins through negligence and it may be taken to be the law that fires intentionally lighted and fires arising through negligence are outside the statute and that responsibility in respect of them is governed by the common law. On principle, since the statute creates an exception to the general rule, the onus ought to be upon the defendant alleging that the statute applies to shew that the fire did accidentally begin; but the point is no doubt an arguable one with the weight of *dicta* probably in favour of an answer in the opposite sense,—the view accepted by Macdonald C.J., in this case.

(1) (1697) 1 Salk. 13.
(2) L.R. 3 H.L. 330.
(3) 12 L.J. Ch. 281.
(4) [1847] 11 Q.B. 347.

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It is not necessary I think to pass upon the point for the purposes of this appeal. Again the judgments of the Lords Justices in the recent case of *Mosgrave* v. *Pandelis* (1), suggest some interesting questions; whether, for example, a fire which originated in a coal or cinder escaping from a domestic stove is, for the purpose of applying the statute, to be treated as beginning with the lighting of the fire in the stove or with the fire kindled through the agency of the escaping fragment. The effect of the statute as constructed by *Filliter* v. *Phippard* (2) is to impose upon the occupier of premises in which a fire is lighted at the very lowest the duty to take all reasonable precautions to prevent the fire getting beyond his own premises and doing injury to others; and an obligation to take reasonable precautions in dealing with such a dangerous element as fire is an obligation to take special care, *Ellerman* v. *Grayson* (3). The dictum of Atkin L.J. was expressly approved in the House of Lords by the Lord Chancellor as well as by Lords Finlay and Parmoor. To express this concretely in its application to the case before us the appellant municipality owed (at least) an obligation to its neighbours to take special care that the fire lighted by its servant in the stove should not, through the emission of cinders or otherwise, cause a fire to start in some unprotected part of the building which might spread beyond the premises and expose the neighbouring property to the risk of injury. If the view of Sir Henry Duke expressed in *Mosgrave* v. *Pandelis* (2) be the correct view the obligation was higher than this; it was an obligation to compensate a person suffering damage as the result of the escape of a fire intentionally lighted by their servant in the stove.

The jury having found that the fire originated through the escape of burning material from the stove and it being undisputed that the injurious consequences of the escape of such material would probably have been avoided if the precautions prescribed by the by-law had been observed, it is doubtful indeed whether a verdict in favour of the municipality by the jury could, given these premises, have been sustained as a reasonable finding. The municipality

(1) [1919] 2 K.B. 43.
(2) 11 Q.B. 347.
(3) [1919] 2 K.B. 514.

by its council had in execution of statutory powers imposed the duty upon the owners of buildings to take the prescribed precautions. In so doing they had formally declared not only that these precautions ought reasonably to be expected from owners but that the considerations in favour of the adoption of them were so cogent and so obvious as to justify the council calling into play its legal authority in order to make the observance of them legally obligatory. I am unable to understand by what process the conclusion could be arrived at that the municipality taking neither these precautions nor any other precaution in substitution for them was taking all reasonable means to prevent harm by the escape of the fires it had authorized.

It seems at least to be beyond dispute that when the learned trial judge told the jury that *prima facie* the failure to observe the precautions laid down by the by-law was negligence he was giving a direction of which the municipality had no ground to complain.

These considerations afford also a complete answer to the objection that the learned trial judge misdirected the jury in telling them, as it may be conceded for the purpose of discussion he did, that the onus was on the municipality to acquit itself of the responsibility for the fire. I must observe in passing and I think it is quite clear that the learned trial judge stated in effect to the jury that they must first satisfy themselves that the fire originated on the appellant's premises. Assuming that to be found against the municipality, a finding involving, of course, the conclusion that the fire was caused by the escape of burning matter from the stove, the learned trial judge would have been quite right in directing the jury on any theory of the law that on the admitted facts (the existence of the by-law and the absence of the precautions prescribed by the by-law) the onus was on the municipality to acquit itself of responsibility; and even assuming on this point that the charge is open to some criticism textually it is impossible, I think, to assail the substance of it successfully.

Mr. Farris in his able argument dwelt upon the part played by McKinley, the fire chief, and argued that the jury should have been directed that the municipality was not responsible for anything resulting from what McKin-

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ley did in making the pipe less safe when the change of stoves occurred. I think the trial judge was right in refusing to give that direction. The responsibility of the municipality was as occupier of the fire hall. It was admitted that as regards the room in which the stove was McKinley was in occupation of it as the servant of the municipality as "fire chief."

That the premises should be sufficiently heated to make them habitable was a necessary incident of McKinley's occupation. The municipality was indisputably responsible in fact as well as in law for the setting up in the first place of a stove with metal pipes. It would be within the normal scope of McKinley's duty as servant of the municipality to permit the use of the stove for the purpose of heating the apartment. It would be within the normal scope of his duties as "fire chief" to take notice of anything calculated to make the use of the stove for heating purposes a source of danger to the building or the contents of the building; if he had observed, for example, that sections of the pipe had become disconnected in such a way as to constitute a manifest danger when the fire was lighted; so when the first stove was replaced by the second if the manipulation of the pipe created a danger or was likely to create a danger, then it was his duty as caretaker to see to it that the stove was not thereafter used until the defect was remedied. This was his duty and his knowledge of what was done when the pipes were changed was the knowledge of the municipality because his occupation was their occupation. McKinley's negligence therefore in permitting the stove to be used after the change was made was the negligence of the municipality.

On the assumption that the relevant fire is the fire that started in the attic, the question was this, was this fire ignited by matter escaping from the stove through the negligence of the municipality, that is to say, through the negligence of somebody for whom the municipality is responsible? Now the fire was put in the stove by or by permission of the servant of the municipality who was occupying the premises for the municipality who was aware of the *ex hypothesi* negligent setting up of the pipes which had taken place some time before. As between the municipal-

ity and the caretaker, the caretaker was no doubt guilty of a grave dereliction of duty on this hypothesis in lighting a fire in circumstances which exposed the building to the risk of being burned but he was nevertheless about the municipality's business and for the negligent conduct of that business it is responsible.

The old authorities lay down in general terms that the occupier of a house is responsible for fires set by his guests and by his servants. For example, in the authority cited above from Mr. Holdsworth's book, vol. III, it is stated at p. 309:

Si mon servant ou mon hosteller mette un chandel en un pariet, et le chandel eschiet en le straw, et arde tout ma meason et le meason de mon vicine auxi, en cest case jeo respondra al mon vicine del damage que il ad, *quod concedebatur per curiam.*

And in *Crogate* v. *Morris* (1), it is said:

If my friend come and lie in my house and set my neighbour's house on fire the action lieth against me.

On the other hand it has been laid down that the occupier is not responsible for the fire brought about by the act of a servant who is doing something entirely outside his employment, *McKenzie* v. *McLeod* (2); the theory apparently being that the act of the servant in such circumstances is the act of a "stranger."

But here we have a servant who admittedly as servant occupies for his master and whose occupation is therefore his occupation and who moreover as incidental to his occupation has his master's authority to light fires. An interesting case having a general similarity to the present came before the High Court of Australia a year or two ago. *Bugge* v. *Brown* (3). The defendant who was the owner of grazing land employed a servant who was entitled as part of his remuneration to be supplied with cooked meat. On one occasion the servant was supplied with raw meat with instructions to cook it at a certain house. Notwithstanding his instructions he lighted a fire in the open and by his negligence it escaped and damaged the plaintiff's land. It was held that the defendant was responsible on

(1) 1 Brownl & G. 197.
(2) 10 Bing. 385.
(3) 26 C.L.R. 110.

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the principle that where the act done is one of a class of acts which in given circumstances would be part of or incidental to the servant's duty the master is responsible unless the servant so acts as to make him a stranger in relation to his master with respect to the act he has committed so that what he does is the unauthorized act of a stranger. The same principle was applied in *Black* v. *Christ Church* (1). The present case presents even less difficulty because of the admission that McKinley's occupation was the occupation of the municipality.

What I have said is sufficient to dispose of the grounds upon which the appeal is based and I do not refer to the other questions discussed on the argument.

The appeal should be dismissed with costs.

ANGLIN J.—I concur with my brother Duff.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J. (dissenting).—There are three cases here which were tried together and consolidated for the purposes of this appeal.

The appellant obtained from the Court of Appeal of British Columbia special leave to appeal *per saltum*, under section 37 of The Supreme Court Act (Canada), from three judgments of Mr. Justice Morrison giving effect to a general verdict of a jury in favour of the respondents in three actions claiming damages for the destruction of their buildings and furniture by a fire which started on the appellant's property.

The trial before Mr. Justice Morrison was the second trial of the respondents' actions. A first trial had taken place before Mr. Justice Murphy and a jury, and the verdict being in favour of the present appellant, judgment was rendered accordingly. The present respondents appealed from these judgments to the Court of Appeal on the ground of misdirection to the jury by the trial judge and also on the ground that the verdict was against the weight of evidence, and they succeeded in their appeals. The judgment of the court was rendered by Mr. Justice

(1) [1894] A.C. 48 at p. 55.

McPhillips, with whom Mr. Justice Eberts concurred, the Chief Justice dissenting. In his reasons for judgment, Mr. Justice McPhillips found error in the direction given to the jury in that the jury were told that the onus of proving negligence was on the plaintiffs and not on the defendant in whose building the fire originated, and against whom therefore there was established a *prima facie* case of negligence. Mr. Justice McPhillips further expressed the opinion that in not constructing its chimney in the manner required by its by-law, the defendant committed a breach of a statutory condition which imported negligence, and that the trial judge erred on this point in his charge to the jury. He also said that the defendant was liable for the condition of the building and for the acts of its servant, McKinley, in whose premises the fire originated. The conclusion of Mr. Justice McPhillips was that the learned trial judge had misdirected the jury, but that at all events the verdict of the jury was against the weight of evidence and perverse, and he ordered a new trial.

No appeal was taken from the judgment of the Court of Appeal, but a new trial took place and the learned trial judge (Mr. Justice Morrison) charged the jury in substantial compliance with the judgment of the Court of Appeal as rendered by Mr. Justice McPhillips, possibly adding thereto when he told the jury that where a thing is shewn to be under the management, control or custody of the defendant or its servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the event arose from want of care on the part of the defendant (see *Scott* v. *London and St. Katherine Docks Co.* (1).

The verdict this time having been against the present appellant, the latter now appeals by leave directly to this court and the grounds of its appeal are solely that the learned trial judge misdirected the jury. The direction here in question having been given to the jury in substantial compliance with the judgment of the Court of

(1) 3 H. & C. 596.

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Appeal, this appeal really questions the soundness of the latter judgment from which the appellant did not appeal. The question now is whether it should be allowed to do so.

The respondent objects that there is *res judicata* against the appellant; that the direction given to the jury in the second trial was the proper direction; or at least that the appellant having acquiesced in the judgment of the Court of Appeal and taken the chances of a new trial cannot now complain that the jury were charged in compliance with that judgment.

I do not think that the doctrine of *res judicata* applies here. What was decided was that the first judge misdirected the jury and the first trial was set aside. A second trial took place and the second judge charged the jury substantially as the Court of Appeal decided the first judge should have done. The appellant now claims that the second judge misdirected the jury. Nothing was determined, unless it could be said to have been determined in advance, with respect to the correctness and legality of the charge to the jury in the second trial, but at the most there was an expression of opinion as to the proper direction to give the jury in a case such as that disclosed by the evidence adduced in the first trial. This does not therefore bring the matter within the rule of *res judicata.*

The objection of acquiescence by the appellant, or, more properly expressed, the objection that the appellant is now estopped from contending that directions given to the jury in substantial compliance with the judgment of the Court of Appeal, are misdirections in law,—is certainly a much stronger one. I have carefully looked at the cases, but have failed to find any case where a judgment ordering a new trial was held to estop a party from afterwards contending in the new trial that the jury should not be charged as the appellate court held that the first judge should have charged them. It may however be noted that Halsbury (Laws of England) vol. 13 vo. *Estoppel,* no. 463, says:

> Provided a matter in issue is determined with certainty by the judgment, an estoppel may arise where a plea of *res judicata* could never be established * * * A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him.

But none of the decisions referred to in the notes were in connection with new trials. There are however two decisions of this court in which a somewhat similar question arose in reference to the effect of an order for a new trial.

In *Western Canada Power Co.* v. *Bergklint* (1), Mr. Justice Duff, at p. 299, said:—

> There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin* (2), and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3), (see especially p. 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given). It seems quite clear that for this purpose we are not confined to the formal judgment *Kali Krishna Tagore* v. *Secretary of State for India* (4), and *Pether-permal Chetty* v. *Mumandi Servai* (5).

I have carefully examined the cases cited by my learned brother but in none of them had a new trial been granted, the question being as to the effect of a former judgment in proceedings between the same parties.

But in *Kinney* v. *Fisher* (6) a new trial of a libel action had been ordered and all the judges of the appellate court had expressed the opinion that the letter containing the alleged libel was written on a privileged occasion. The head-note of the report of the decision of the appellate court (7) is misleading, for it assumes that the action was dismissed. The report itself shows however that the court was evenly divided, as to the dismissal of the action, and in the result, which the report does not mention, a new trial was ordered. At the new trial the action was dismissed at the close of the plaintiff's case and on a second appeal the appellate court, again expressing the opinion that the occasion was privileged, sent the case back for retrial on the issue of malice. The defendant then appealed to this court, but his appeal was dismissed by a majority

(1) 54 Can. S.C.R. 285.
(2) [1909] A.C. 615 at p. 623.
(3) 11 Ind. App. 37.
(4) 15 Ind. App. 186 at p. 192.
(5) 35 Ind. App. 98, at p. 102.
(6) 62 Can. S.C.R. 546.
(7) 53 N.S.R. Ep. 406.

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on the ground that as the first order for a new trial was without restriction and the evidence given on the former trial was not before the court, there was no *res judicata* on the question of privilege. Mr. Justice Duff dissented from the judgment in this court, relying on the opinion he had expressed in the *Bergklint Case* (1).

Kinney v. *Fisher* (2) would seem therefore to support the argument that no question of *res judicata* can arise here, nor would it leave room for the contention that independently of *res judicata* there is ground for estoppel, for the order for the new trial, in this case as in *Kinney* v. *Fisher* (2), was made without restriction. It is proper to add that here the new trial was ordered not merely because, in the opinion of the appellate court, the trial judge had misdirected the jury, but because it was considered that the verdict was against the weight of evidence. It would have been, to say the least, very unlikely that this court would have set aside an order for a new trial under these circumstances, (Cameron's Practice and cases cited, vol. 1, p. 197 et seq.), and the failure of the defendant to appeal from the judgment of the court of appeal does not necessarily shew that it acquiesced in all the reasons for which a new trial was ordered.

Coming now to the merits of the present appeal, which is brought here solely on the ground of misdirection by the learned trial judge, the appellant, in its factum, particularizes the alleged misdirections as follows:

1. In directing the jury that there was a presumption of negligence against the defendant if the jury found that the fire originated on its premises.

2. In directing the jury that "where the thing is shown to be under the management, control or custody of the defendant or its servants * * * and the accident or incident is such as in the ordinary course of things does not happen if those who have the management use proper care it affords reasonable evidence in the absence of explanation by the defendant that the event arose from want of care on the part of the defendant."

3. In directing the jury in effect that this presumption could only be rebutted by showing it was "pure accident," namely, that it was due to "some extraneous circumstance or condition over which the agent or servant or employee of the municipality had no control."

4. In directing the jury that the municipality was liable for the acts of its servant (the chief of police) in changing the stoves.

(1) 54 Can. S.C.R. 285. (2) 62 Can. S.C.R. 546.

5. In directing the jury that the breach of the building by-law was the breach of a statutory duty *prima facie* giving a right of action to the person injured.

I will deal with each of these alleged misdirections in the order mentioned.

1. Consideration of the first point raises the important question of the liability of a person for damage caused by a fire which originates on his premises.

A short but authoritative statement of the law, before it was changed by statute, may be found in the judgment of Lord Tenterden C.J., in *Becquet* v. *MacCarthy* (1):

> By the law of this country before it was altered by the statute 6 Anne c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house.

The change made by statute (see 14 Geo. III, ch. 78, sect. 86) was as follows:

> 86. No action, suit or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall * * * accidentally begin, nor shall any recompense be made by such person, for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.

The object of the statute is to relieve a person from liability when the fire begins accidentally, and it is of the nature of an exception to the general rule of liability. It would seem to follow that the onus of shewing that the fire did begin accidentally is on the person who claims the benefit of the statute in order to escape from the legal presumption of negligence. In other words, the statute affords a defence, and it is not for the plaintiff to shew, in the first instance, that the fire did not begin accidentally; he can rest on the presumption until the defendant has rebutted it by shewing that the fire began accidentally.

I think therefore there was no misdirection as to the first point.

2. The words which the appellant quotes from the learned judge's charge are taken from the judgment of

(1) 2 B. & Ad. 951.

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Erle C.J., in *Scott* v. *London & St. Katherine Dock Co.* (1), and are generally considered as expressing the rule *res ipsa loquitur*. This rule admits of a presumption of negligence similar to the one just adverted to. Inasmuch as by law the person in whose premises a fire begins is liable for the damage it causes to neighbouring property unless he shews that it began accidentally, no prejudice could be caused by stating to the jury the rule in the terms of *Scott* v. *London & St. Katherine Dock Co.* (1), which is very largely to the same effect as the other rule. This ground of alleged misdirection therefore also fails.

3. Taken with the context, I do not think that the few words quoted by the appellant amount to misdirection. The learned judge correctly stated that there is a presumption of negligence against the person on whose premises a fire originates. He then added that it is for such person to show that the fire was accidental. The distinction between "accident" and "pure accident" is perhaps a difficult one for the jury's understanding. Nevertheless I do not consider that the jury were misled. The learned trial judge had previously told them that it was for the defendant to satisfy them that he was not, as charged by the plaintiff, negligent in the handling of that fire. Subject to what I will say on the question whether the defendant here is liable for the acts of McKinley who occupied the premises where the fire originated, I think this objection to the finding of the learned trial judge is not well taken.

4. The fourth objection is that the learned trial judge misdirected the jury in telling them that the municipality, that is to say this defendant, was liable for the acts of its servant, McKinley, in changing the stoves.

McKinley was an employee of the appellant, being chief of police and fire chief. With his wife and child, he lived in rooms at the rear and on the second story of the fire hall, one of these rooms being the kitchen where the stove in question was installed. The free occupation of these rooms as a dwelling was granted by the appellant to McKinley probably as one of the considerations of his con-

(1) 3 H. & C. 598.

tract of employment, and this, I think, is the scope of the appellant's admission that as a servant of the appellant McKinley was in lawful occupation or possession of the room in which the said stove or range was situate, for the admission cannot mean that that as a servant of the appellant McKinley kept house for his wife and child in these rooms. The evidence justifies the conclusion that McKinley was in as full control of these rooms as he would have been had he rented a house from the appellant. The municipality had paid for the installation of the stove pipe, but the stove was furnished by McKinley, and the new stove or range put in during the preceding winter, which necessitated the shortening of the pipe, was paid for by McKinley, who had no authority from the appellant to effect this change. In respect to this point, there was a material difference between the two trials because an admission made in the first trial that the appellant had paid for the erection of the stove and pipe was withdrawn with the permission of the court in the second trial.

In my opinion, the relation of master and servant between the appellant and McKinley did not extend to, or engender liability for, acts performed by the latter in keeping house for himself and his family in his own dwelling, whether this dwelling was a part of the fire hall or a separate building belonging to the appellant. In other words, nothing he did in his own dwelling for the purposes of housekeeping was in the course of McKinley's employment as a servant of the appellant. I may add that in the decisions dealing with the legal presumption of negligence where a fire is communicated from a building in which it originates to another building belonging to a different owner, I have found no case where this presumption was asserted against the owner or lessor as distinguished from the occupier or tenant of such a building. It seems to me that the foundation of the presumption is occupation of the premises where the fire originates and if, as here, the owner does not occupy the building or part of building where the fire took place he would seem to be outside the rule. But it is probably sufficient to decide here that when McKinley installed or changed his stove and shortened the stove pipe, and when he lit the fire, he was not acting in

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the course of his employment as a servant of the appellant, and with respect, I think the learned trial judge should have so directed the jury. This objection, therefore, appears to me to be well taken.

5. The learned trial judge directed the jury as a matter of law that the non-performance of the statutory duty imposed by the building by-law, causing injury to a member of the class for whose benefit the by-law was imposed, *prima facie* gives a right of action to the person injured. There might be no quarrel with an abstract proposition of this kind (*Groves* v. *Wimborne* (1)), but the difficulty is to determine whether the by-law, of which we have only three extracts, is a by-law of this character. In the absence of the whole by-law, and in view of what I have said as to the fourth objection of the appellant, I do not think it necessary to express any opinion with respect to the direction of the learned trial judge on this point.

I have however reached the conclusion that there was material misdirection of the learned trial judge in instructing the jury that the appellant was, as McKinley's employer, responsible for the latter's act in changing the stove or stove pipe, and on that ground I think the verdict cannot stand.

I would allow the appeal with costs and order a new trial.

Appeal dismissed with costs.

Solicitor for the appellant: *G. A. King.*

Solicitors for the respondents: *Bird, McDonald & Co.*

(1) [1898] 2 Q.B. 402 at p. 407.

HIS MAJESTY THE KING (DEFENDANT) . . APPELLANT; 1922

*Oct. 13, 16.
Feb. 6.

AND

J. S. ZORNES (SUPPLIANT) . . . . . RESPONDENT.

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

Crown—Liability of—Government Telephone System—Person injured by driving into loose wire—Negligence of Crown's servants—"The Public Utilities Act" (Alta.) S. (1915) c. 6—"Interpretation Act" (Alta.) S. (1906) c. 3—Alta. S. (1917) c. 3, s. 30.

Section 2 (b) of the Alberta Public Utilities Act provided that "the expression 'public utility' means and includes every corporation * * * "; and in 1917, the following words were added by the legislature (c. 3, s. 30): "also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones." Section 31 (2) of the same Act provides that "the public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works."

Held, Davies C.J. and Mignault J. dissenting, that the Crown, as represented by the Government of Alberta, is liable in damages, upon proceedings by petition of right, for personal injuries sustained by reason of the negligence of its servants in allowing a loose wire forming part of the Government Telephone System to fall and lie upon a public highway.

Judgment of the Appellate Division ([1922] 1 W.W.R. 907) affirmed, Davies C.J. and Mignault J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J., and maintaining the respondent's petition of right.

The respondent in his petition alleged that he was driving over a public highway along which the Crown through the Minister of the Department of Railways and Telephones of the Province of Alberta owned and operated a telephone line subject to the provisions of "The Public Utilities Act, 1915," c. 6, and that he was injured by reason of his automobile becoming entangled in a loose

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

(1) [1922] 1 W.W.R. 907.

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wire which the department, its officers or servants, had negligently, carelessly and illegally allowed to lie upon the highway. A fiat had been granted by the Attorney-General under "The Alberta Petition of Right Act, 1906, c. 20," but when the case came on for trial and before any evidence had been taken, the objection raised by counsel for the Crown that no action could lie for a tort was sustained, and the action was dismissed with costs. The Appellate Division reversed this judgment and ordered a new trial.

Eug. Lafleur K.C. and *R. A. Smith* for the appellant.

S. R. Wallace and *Louis Côté* for the respondent.

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Mignault and would allow the appeal.

IDINGTON J.—I am of the opinion that subsection 2 of section 31 of the Public Utilities Act of Alberta, which reads as follows

> the public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

means just what it says, and that it was intended to mean that, and to furnish a remedy for such like incidents as in question herein, when arising from want of due care and hence causing unnecessary damage.

I do not see why a remedy for damages arising from want of due care in the operation of any public utility, should be something which appellant, in his wide sphere of activities in Alberta, should be advised against providing, or refused the consent of the Legislative Assembly therefor.

I therefore assume the needed remedy was furnished in said language and its obviously legal effect, if to be given any, is that I have above suggested.

Some effect is usually sought to be given the language used by the legislature, and I can see nothing more apt to apply such language to, when found in such relation as it is, than to furnish the needed remedy I suggest.

I do not see any reason for disturbing the learned trial judge's findings of fact and, agreeing as I do with the reason-

ing of Mr. Justice Stuart and Mr. Justice Beck as well as that of the learned trial judge presented respectively in the proceedings below, when finding, in said subsection 2 of section 31 above quoted, a remedy for what is complained of, I need not say more than I have done, except to add that I think this appeal should be dismissed with costs.

DUFF J.—This appeal raises a question touching the effect of section 31 (2) of the Alberta Public Utilities Act:

> The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its works.

Assuming that "public utility" comprehends the province of Alberta (His Majesty the King in right of his province of Alberta) as owner of the Alberta Government Telephones, I can only say, with the greatest respect for other opinions, that this enactment does not (on that assumption) appear to me to be of doubtful meaning. "Responsible" in such a context in a statutory enactment can, I think, be no less comprehensive than "responsible in damages." There is moreover ample evidence that the default through which the respondents suffered the damage complained of was a default in "carrying out, maintaining or operating" the telephone system.

That being so, it follows, I think—still proceeding upon the same assumption that "public utility" comprehends the province in its character as owner of "Government Telephones"—that petition of right is the appropriate procedure for asserting the Crown's responsibility. Normally petition of right does not lie for tort; but that rests upon the ground that in point of substantive law the Crown is not liable, that is to say, the Crown owes no duty to the sufferer to make reparation for the torts of its servants. Section 31 (2) creates the duty to make reparation with its correlative right; and *ubi jus ibi remedium*. One cannot conceive the legislature vainly creating an unenforceable right to recover damages. It is implied that the courts of the province have jurisdiction to enforce the right and to do so by the appropriate procedure. The law in such cases makes the necessary implications to avoid the injustice and the scandal of the denial of substantive rights because of technical defects in procedure.

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The objection that petition of right does not lie for the enforcement of statutory rights is without substance. The Petition of Rights Act gives jurisdiction to the court to award damages and I think that should be construed as extending to all cases in which a duty reposes upon the Crown by law to pay damages.

The critical question, therefore, is this: Does "public utility" in section 31, ss. 2, bear a sense which imposes upon the province—the Crown in right of the province—the responsibility established as against such bodies generally by the subsection? And this is the point upon which naturally Mr. Lafleur directed the weight of his argument. The question subdivides itself into two branches.

The first, is whether "public utility" in this context and construed with reference to the interpretation section (section 2, s.s. b) does, upon a fair interpretation of these provisions, denote among other "corporations, firms and persons" to which it applies, the province of Alberta in its character of owner of the "Alberta Government Telephones"; and the second branch of the question is whether, assuming that to be so, there is here in this provision, when it is read in light of the Act as a whole, a clear and plain manifestation of legislative intent to impose such a responsibility upon the Crown.

These points may be considered in the order in which I have stated them. Subsection (b) of section 2 must be quoted in full. These are the words:—

(*b*) The expression "public utility" means and includes every corporation other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this province, their lessees, trustees, liquidators, or receivers, appointed by any court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production, transmission, delivery or furnishing of water, gas, heat, light, or power, either directly or indirectly, to or from the public; also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones.

The last clause is due to an enactment of 1917 (section 30 of c. 3 of the statutes of that year). This enactment simply added the words

also the Alberta Government Telephones now managed and operated by the Department of Railways and Telephones.

By a statute of 1906 (the general Interpretation Act) "Alberta Government" means, generally speaking, His Majesty in right of the province of Alberta, and the phrase "the Alberta Government Telephones" is virtually the equivalent of "the Telephones of His Majesty in right of the province." The only admissible view, I think, of the effect of this enactment of 1917 is that the Provincial Government Telephone System is added as a concrete addition to the "systems, works, plants, equipments," comprised in the general description immediately preceding. I think that is the correct reading of the enactment because the only alternative reading is to treat the enactment as directing the construction of the phrase "public utility" wherever it appears in the Act, in such a manner as to include "the Alberta Government Telephones" as a "public utility." This alternative is forbidden, I think, because as regards a considerable number of the most important provisions of the statute, the effect of such a substitution would be to make nonsense of the provision unless we are to treat the amending enactment as conferring upon the Government system legal personality, an implication which I think would not be justified. Section 20, for example, which defines the jurisdiction of the board uses "Public Utility" in subsections b, c, d, e, f, and g, in a sense necessarily implying in the object denoted by the phrase, a legal entity, capable of acting juridically, capable of being a party to legal proceedings, a party to contracts, and generally of ownership of property and of being the subject of rights and duties. If the Province as owner of a telephone system falls within the operation of these clauses as a "public utility" then no difficulty arises in respect of the application of them. On the other hand, if it is the system as a system which is brought by the amendment within the class denoted by "public utility" the alternatives are obvious. Either the system has been endowed with legal personality in which case the language of the clauses would be sensible with reference to the system or, on the other hand, the system is entirely excluded from the operation of them. To give to the enactment of 1917 such

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a construction as to exclude "the Government telephones" from these provisions of the Act, would be to render the enactment of 1917 largely nugatory and the courts will go very far in supplying omissions in elliptical phraseology and in discarding redundancies in order to avoid such a result. *Salmon* v. *Duncombe* (1).

The other alternative, the alternative of implying the creation of a legal personality must, as I have already said, also be rejected.

If the enactment is read in the manner which I have suggested the "corporations, persons and firms" comprehended within the class "public utility" are, by this reading, made to include the corporations or persons owning or operating "the Government telephones," and the words "Alberta Government" having by statute the significance above pointed out, no technical or other difficulty arises in reading the word corporation or the word person as including His Majesty in right of the Province. The Crown is technically a corporation sole, and is of course in the legal sense a person capable of being a subject of rights and duties.

There is some ineptitude in the phrasing of the amendment of 1917, but for the reasons I have mentioned the reading is, I think, amply justified.

I come now to the question upon which the appeal really turns. Looking at the provisions of the statute as a whole, is an intention manifested with sufficient clearness to bring the Provincial Government within the scope of s.s. 2 of section 31 to satisfy the rule of construction, a rule based upon good sense and upon inveterate legislative practice as well as judicial authority, that responsibility is not to be deemed to be imposed upon the Crown by legislative enactment, unless the intention to do so has been expressed in language which is unmistakable? I quite agree that even though the argument on the exegetical side were more rigorous than it is, still if from the purview of the statute as a whole, sufficient evidence of a contrary intention appeared to create a real doubt as to the effect of the section when read in light of the other parts of the Act, the answer to the question just propounded must be in

(1) [1886] 11 App. Cas. 627.

the negative. The question is one by no means free from difficulty. Mr. Lafleur did, I think, make good his point that there are many provisions of the statute, and in particular those relating to the enforcement of orders of the board for the payment of money and those relating to penalties which obviously could not be put into operation against the Crown.

This is a circumstance of weight which, however, is not conclusive. The definitions of the interpretation clause are not applied when such application produces inconsistency or absurdity and in the sections referred to such would be the result of the literal application of the definition of public utility in its entirety. No such difficulty arises respecting section 31 (2). There is nothing absurd or even startling in bringing the Crown in its character of owner of such enterprises within the scope of such a provision.

At this point s.s. (a) of section 3 becomes very significant. The Act is thereby declared to be applicable to "public utilities" as defined

> which are now or may hereafter be owned or operated by or under the control of the Government of the province.

A statutory corporation, therefore, consisting of members nominated by the Government, or a joint stock corporation controlled by the Government through ownership of its shares, if answering the definition of "public utility" is not to be excluded from the provisions of the Act, and I can see no reason why, in such a case, the provisions of the Act generally (including section 31, subsection 2) should be held not to be operative. This is evidence, I think, that the scheme of the Act proceeds upon the policy that "public utilities" fairly coming within the description furnished by the interpretation section are, except where the context or the subject matter of the provision otherwise requires, to be subject to each of the provisions of the Act. This again throws light upon the enactment of 1917, and I think the proper inference is that the Government telephones were brought within the orbit of the system established and that the provisions of the Act must be held to be operative in relation to the Government telephones and to the Crown as owner of them according

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to the natural meaning of the words in which they are framed with the exception of those provisions in which some absurdity or inconsistency would thereby be produced.

The appeal should be dismissed.

ANGLIN J.—For the reasons stated by Mr. Justice Stuart in his opinion of the 22nd June, 1922, I am satisfied that the finding of the trial court that the injury sustained by the plaintiff was due to negligence in the maintaining and operating of the Government telephone lines cannot be disturbed. There appears also to have been a breach of the duty imposed by section 31 (c) of the Public Utilities Act (1915, c. 6), which prescribes that

all poles shall be as nearly as possible straight and perpendicular.

A consequence of such negligence and breach of statutory duty was an undue interference with the public right of travel in contravention of section 31 (a), resulting in the injury of which the plaintiff complains.

In my opinion, the damage suffered by the plaintiff was "unnecessary damage" caused in maintaining and operating a work which would have entailed responsibility under section 31 (2) of the Public Utilities Act on the public utility controlling it, if a private person, firm or body corporate. I cannot accede to the view that the application of section 31 (2) is confined to cases in which there has been an exercise of statutory powers in excess of what is reasonably necessary for the accomplishment of the purpose for which they are conferred. I see no reason for so restricting the operation of that provision. Though not required to fix any other "public utility" with responsibility for injuries caused by negligence, it is necessary for that purpose in the case of Government telephones, and, for the reasons indicated by Mr. Justice Beck, I think it should be so applied. Where telephone wires of a public utility fall because of negligence either in maintaining or replacing, or in failure to replace in due season the poles which carry them, or because of a breach of clause (c) of subsection 1 of section 31, and as a result injury is caused to persons using a highway, we have a case of damage

caused in the maintaining or operating of the works of the telephone system and, in my opinion, the fact that the falling of the wires and allowing them to interfere with traffic on a highway was due to negligence or to breach of a statutory duty necessarily implies that the damage thereby caused was "unnecessary." If the application of subsection 2 should be confined to cases of damage caused by a breach of one of the clauses of subsection 1 of section 31, such a case is here presented. There was a breach of clause (c) which at least contributed to the fall of the pole and the consequent presence of wires on the highway in contravention of clause (a).

The wording of the concluding clause of the definition of "public utility" (s. 2 (b))

also the Alberta Government telephones now managed by the Department of Railways and Telephones

is no doubt awkward and unsatisfactory. But a perusal of the Public Utilities Act makes it reasonably certain that the effect given to those words by Mr. Justice Stuart in his opinion of the 22nd of February, 1922, as meaning not telephones operated by the Government, but the Alberta Government itself and therefore "H.M. The King in his right as exercised by the province of Alberta," must be what the legislature meant them to have. It was never intended, for instance, to create a liability *in rem* in the case of the Government Telephone System (s. 31 (2)). Sections 20 (c) and 40 further indicate the difficulties that would ensue from a strict construction of the concluding clause of the definition such as the appellant contends for. Moreover upon that construction s. 3 (a) would seem to be quite superfluous. Applying s.s. 7 of s. 7 of the Interpretation Act (c. 3 of 1906) as we should, we have in s. 31 (2) of the Public Utilities Act an enactment that "H.M. The King acting for the Province" of Alberta shall be responsible (i.e. answerable to a person injured whether in body or in property) for damage caused by the negligent carrying out, maintaining or operating of (*inter alia*) the Alberta Government telephones in my opinion sufficient to overcome the prerogative exemption of the Crown from liability for torts of its servants recognized at common law.

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In the Alberta Petition of Right Act we find provisions which, though probably not designed to confer a right to recover from the Crown in respect of torts, are quite wide enough to furnish a procedure by which such a right, when otherwise created, may be exercised. As Mr. Justice Beck points out we have in the Privy Council decisions in *Attorney General of the Straits Settlement* v. *Wemyss* (1), and *Farnell* v. *Bowman* (2), the highest authority for the utilization of the procedure by petition of right to obtain relief to which the Public Utilities Act confers the right.

I find it unnecessary to express any opinion upon the question whether a consequence of the Dominion or a Provincial Government engaging in a commercial enterprise is a *pro tanto* abrogation of the prerogative exemption from responsibility for tort: *The Queen* v. *McLeod* (3); *Farnell* v. *Bowman* (2); *Attorney General of Straits Settlements* v. *Wemyss* (1). The Crown, when empowered by statute to enter upon an undertaking, does so subject to the limitations, restrictions and conditions which the legislature has imposed upon the carrying of it out. *Attorney General* v. *De Keyser's Royal Hotel* (4).

The appeal in my opinion fails.

BRODEUR J.—The respondent Zornes has presented a petition of right claiming that he has suffered damages on account of the negligent construction and operation of the telephone system owned by the Alberta Government.

The latter denies liability on the ground that the King could not be sued in tort.

That is the issue which is now submitted to our consideration.

As a general proposition, there is no remedy against the King for compensation in damages; but they can be obtained from the officer who did the wrong. *Canterbury* v. *Attorney General* (5).

But in many countries and provinces the governments are in the habit of undertaking works which are usually performed by private individuals and companies; and it

(1) [1888] 13 App. Cas. 192.
(2) [1887] 12 App. Cas. 643.
(3) [1882] 8 Can. S.C.R. 1.
(4) [1920] A.C. 508, at p. 540.
(5) 12 L.J. Ch. 281.

is then found expedient to provide remedies for injuries suffered in the course of these works. *Attorney General of Straits Settlement* v. *Wemyss* (1).

The telephone system in Alberta was operated for some years by a private company. But the legislature decided to acquire this telephone system and to have it operated by the government; and it was put under the management of the Department of Railways and Telephones.

In 1915 the Public Utilities Act was passed and a board of Public Utility Commissioners was created; and it was declared that the Alberta Government telephones would be considered as a "public utility."

Section 31 of the Act provided that any public utility having for its object the construction, working and maintaining of the telephone lines should be submitted to the orders of the Commission and should not interfere with the public right of travel, that the wires should not be less than 16 feet above any highway; that all the poles should be as nearly as possible straight and perpendicular; and an article was added as subsection 2:

The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of the said works.

It is alleged in the petition of right and found in the verdict rendered after trial that the Alberta Government telephone has been the cause of damage to the respondent on account of a defective wire which broke and became loose on the road, and that there were telephone poles down on the road which had caused the accident in question.

Taking into consideration the general proposition which I have enunciated above concerning the liability of the Crown for tort, I am of the view that the provisions of The Public Utilities Act, and mainly of s. 31, create a liability affecting the Government and rendering the latter responsible for the torts which it caused in the carrying out of its telephone system. If some governments want to undertake works which are not considered of a governmental purpose, it is no wonder that the legislature should apply to those governments the same liability which is applied to private individuals or companies carrying on the same works. It is clear to me that the legislature

(1) 13 App. Cas., 192.

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of Alberta has imposed upon the government the liability for damages which is now claimed by the respondent.

For those reasons the appeal fails and should be dismissed with costs.

MIGNAULT J. (dissenting).—All of the judges of the court below were of the opinion that the claim of the respondent against the Crown, being of the nature of an action in tort, could not be justified under the provisions of the Alberta Petition of Right Act (c. 20 of the statutes of 1906). In this I agree. The Petition of Right Act provides a remedy where liability of the Crown exists by law and creates no new responsibility. There being no liability of the Crown for a tort committed by its servants, and the latter alone being responsible for the consequent damages, such a tort confers no right of action which can be asserted against the Crown by means of this remedy.

The majority of the appellate court however considered that the Alberta Public Utilities Act (c. 6 of the statutes of 1915) created a liability which could be invoked against the Crown by petition of right. With this conclusion I find myself unable to agree.

It is of course a fundamental principle of law that the Crown is not bound by a statute unless it be specially mentioned therein. (Beal, Legal Interpretation, 2nd ed., p. 292). And in Alberta the statute of which the object is to give to the subject a right of action against the Crown by petition of right, does not include the right to sue the Crown in tort, and it thus differs from the Exchequer Court Act, sec. 20, which expressly confers on the Exchequer Court jurisdiction to hear and determine, among other matters, every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work. It would therefore seem surprising, may I say so with all possible deference, that the right of an action *ex delicto* against the Crown, which the Petition of Right Act does not confer, should be found in another statute the object of which is certainly not to enlarge the remedies of the subject against

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the Crown. I will therefore very carefully examine this statute in order to see whether it is open to the construction which has been placed upon it.

The Alberta Public Utilities Act is a type of statute which is derived, I believe, from the United States, but which has been widely adopted in the different provinces of Canada. Its object is to deal with certain public services in which the community at large has a great interest, such as transportation, telegraph or telephone lines, and the furnishing of water, heat, light or power. The statute defines the words "public utility"—I abbreviate—as meaning and including corporations, firms, persons or associations of persons that own, operate or control any system or works for the conveyance of telegraph or telephone messages, or for the conveyance of travellers or goods over a railway, street railway or tramway, or for the production or furnishing of water, gas, heat, light or power to or for the public. The statute creates a board known as the Board of Public Utility Commissioners, which has jurisdiction over these public services or public utilities, the powers of which utilities are carefully restricted, the whole for the better protection of the public. It would certainly seem most unlikely that in such a statute should be found any interference with, or modification of, the constitutional principle that the King can do no wrong.

But in Alberta, as well as in some of the other provinces, the provincial government has undertaken to carry on some of the public services to which I have referred. In 1908 a statute (c. 14) was passed by the Alberta Legislature empowering the Government to purchase, lease, construct and operate telephone or telegraph systems, and we are informed that under this authority the Government took over the Bell long distance telephone line, so that, outside some municipal or local lines, the telephone service of the province is practically controlled and carried on by the Government.

So when the Public Utilities Act was adopted in 1915 the definition of "public utility" in section 2 was made to include

also the Alberta Government telephones now managed and operated by the Department of Railways and Telephones.

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And the argument is that inasmuch as by subsection 7 of section 7 of the Interpretation Act (Alberta) c. 3 of the statutes of 1906 the expression "Government," "government of the province" or "Alberta Government" used in any Act whenever enacted means His Majesty the King acting for the province, the words I have quoted from the definition of "public utility" must be read as if the definition said "also His Majesty's telephones in Alberta now managed and operated by the Department of Railways and Telephones."

It is sometimes fallacious to rely too strongly and without sufficient discrimination on a statutory definition for, as is expressly stated in section 2, such a definition does not apply where the context otherwise requires. And when this Public Utilities Act is carefully read, it becomes obvious that in many of its sections the expression "public utility" cannot be construed as meaning the Alberta Government telephones, or His Majesty's telephones in Alberta. I could give a number of instances, but will mention only a few. Thus sections 33 and 75 refer to municipal corporations owning or operating any public utility within the meaning of this Act. This obviously cannot mean the government telephone system. Sections 51 and following deal with orders made by the Board of Public Utility Commissioners, which may be orders for the payment of money to be levied by the sheriff, and which when registered shall constitute a lien and charge upon the lands of the party ordered to pay. This clearly seems inapplicable to government property. Moreover penalties are provided by sections 80 and following against persons and public utilities affected by orders of the board, and it can scarcely have been contemplated that these penalties could be levied from the Crown by reason of anything contained in the definition of "public utility" in the Act.

We now come to section 31 by which it is claimed that the Crown's liability to answer for the torts of its servants has been expressly enacted by the legislature. I will quote the whole section down to and including subsection 2.

In the case of a public utility which has for its object the construction, working or maintaining of telegraph, telephone or transmission lines,

or the delivery or sale of water, gas, heat, light or power, the following conditions shall be fulfilled, over and above those which may be prescribed by the board, that is to say:—

(*a*) The public utility shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building;

(*b*) The public utility shall not permit any wire to be less than sixteen feet above such highway or public place, or erect more than one line of poles along any highway;

(*c*) All poles shall be as nearly as possible straight and perpendicular;

(*d*) The public utility shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree;

(*e*) The opening up of any street, square or other public place, for the erection of poles, or for the carrying of wires underground, shall be subject to the supervision of such person as the municipal council may appoint, and such street, square or other public place, shall, without unnecessary delay, be restored as far as possible to its former condition;

(*f*) If, in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed by cutting or otherwise, the public utility shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of the public utility so doing such person may remove such wires and poles at the expense of the public utility.

(2) The public utility shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works.

This section is in the part of the statute bearing the title "Restriction on powers of public utilities." Subsection 2 assumes that in carrying out, maintaining and operating any of its works the public utility may cause some damage or inconvenience, and its responsibility only begins when the damage caused is "unnecessary," that is to say in excess of any damage which may be incident to the carrying out or operation of the work. In so far as public utilities generally are concerned, no such provision is required to render them liable for their torts, or for the negligent exercise of their statutory powers. These powers are not charters to commit torts, and so, even in the absence of the subsection, there is no doubt that under the common law the plaintiff, in a case like this one, would have an action against the public utility which the latter could not defeat by pleading the statute.

The question, however, is whether he has such an action against the Crown when it operates a public utility, and whether subsection 2 of section 31 takes away the King's prerogative of not being liable for the torts of his servants. Bearing in mind that the prerogatives and rights of the

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Crown are not affected by a statute unless they are specially mentioned therein, I would not be disposed to give to s.s. 2—even considering the Alberta Government Telephones as comprised in the meaning of the term "public utility"—the effect of conferring a right of action *ex delicto* against the Crown, the more so as this subsection in no way refers to claims against the Crown, but merely, and probably unnecessarily, makes public utilities generally responsible for unnecessary damage caused by their operations. This distinguishes this case from the decisions of the Judicial Committee in *Farnell* v. *Bowman* (1), and *Attorney General of the Straits Settlement* v. *Wemyss* (2), where a statute dealing expressly with claims against the Crown was construed as giving a right of action in tort.

It is suggested that when the Crown undertakes a commercial enterprise it should be subject to the same liability as private individuals. This, however, is a matter of policy for the consideration of the legislature, for, without appropriate legislation, the court is powerless to interfere. In the court below it was considered that sec. 31 gave a right of action in tort against the Crown, for the learned judges recognized that there must be apt legislation to permit of such action. With regret, for the respondent's claim seems to be a meritorious one, I am unable to place this construction upon the statute.

I therefore see no escape from the conclusion that the appeal should be allowed with costs throughout and the respondent's action dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *R. Andrew Smith.*

Solicitors for the respondent: *Joseph A. Clarke & Co.*

(1) 12 App. Cas. 643.

(2) 13 App. Cas. 192.

THE CITY OF MONTREAL (DEFENDANT), APPELLANT;

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*Oct. 26, 27.
*Feb. 6.

AND

THE DANIEL J. McANULTY REALTY CO. (PLAINTIFF) ..... } RESPONDENT.

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

Expropriation—Subdivision lots—Five lots taken for municipal sewage plant—Damages to remaining lots—Compensation—Nuisance—Fees of counsel and expert witnesses—Art. 407, 1589 C.C.—Montreal City Charter, (Q) 62 V, c. 58, s. 421.

In 1911, the respondent bought a block of land, 347 arpents in superficies, which it laid out as a residential building subdivision containing about fifteen streets and over 3,300 lots, which was treated as one holding. For the benefit of this subdivision the respondent, in contracts of sale or agreements to purchase lots, imposed conditions prohibiting uses of the lots which might depreciate adjoining parts of the property and, with the exception of one street, restricting the buildings to be erected thereon to residential buildings constructed at least ten feet from the front of the lots. During 1912, 1913, and 1914, about a third of the lots were disposed of subject to these restrictions. In February, 1916, the city of Montreal gave public notice of the expropriation of five of these lots required for the construction of an Imhoff tank, which is a sewage filtration plant. A board of arbitrators having been named in accordance with the provisions of the city charter, the respondent claimed before it compensation in respect of, first: the actual value of the lots taken; and secondly damages arising from the expropriation because of the consequent reduction in the selling value of the other lots unsold. The allowance of $896.66 for the value of each of the five lots was not contested; but the arbitrators having declined to recognize the claim under the second head and also having refused to allow the respondent what it has paid for counsel fees and expert witnesses, the respondent brought action to set aside the award.

Held, that the respondent was entitled, over and above the actual value of the five lots expropriated, to compensation for consequent depreciation in the value of its adjacent lands. Although there was as much connection between the lots taken and those still owned and controlled by the respondent as existed between the lands taken and those left in the hands of the expropriated owners in the *Cowper Essex Case* (14 App. Cas. 153) and the *Sisters of Charity Case* ([1922] 2 A.C. 315), (the *Holditch Case* ([1916] 1 A.C. 536, being therefore quite inapplicable), the decision in the present case should not rest upon these decisions owing to differences in language

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

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between the relevant clauses of the governing statutes. (Brodeur J., however, expressing no opinion on such differences). The respondent's right to compensation for injurious affection of land must be decided by applying the principles of the general law of the province of Quebec contained in article 407 C.C. which carries that right unless it is excluded by special laws (Art. 1589 C.C.); and such right is assumed by Article 421 of the Montreal City Charter, paragraph 1 of which confers the right to expropriate lands "required for any municipal purposes whatsoever," paragraph 2 authorizing the arbitrators to take into consideration any increased value of the lands still remaining with the owner and setting the same off against the "inconvenience, loss or damages resulting from expropriation," and paragraph 3 prescribing the rule or measure by which indemnity for expropriation is to be ascertained and providing that the compensation shall include "damages resulting from the expropriation."

Held, also, that in view of the provisions of the city charter, s. 436, as amended by (Q) 4 Edward VII, c. 49, s. 21, the respondent was not entitled to claim, as part of its compensation, counsel fees and the costs of expert witnesses.

APPEAL from the judgment of the Court of King's Bench, Appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action.

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

Chs. Laurendeau K.C. and *G. St. Pierre K.C.* for the appellant.

Geo. H. Montgomery K.C. and *Paul St.-Germain K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—The respondent, as its name implies, being a company engaged in buying and re-selling at a profit, if possible, had acquired a large tract of land for the purpose of re-selling subdivisions thereof under a scheme whereby it was clearly designed to create a residential district free from any of the undesirable results likely to flow from the acquisition by any one of any part thereof, and using that so acquired for purposes of a character likely to be obnoxious to others, merely wishing to acquire and use for purposes of dwelling there.

Such a scheme is sometimes aided by city by-laws and, short of that, is generally carried out by restrictive covenants binding him acquiring any part from using that he acquires in a way to destroy, or tend to destroy, the residential character so desired to be created.

Needless perhaps to say that such a scheme generally enhances the prices at which the lands would be sold in separate subdivisions and also facilitates the ready sale thereof.

The respondent had continuously and consistently acted upon this scheme and secured its due execution by selling only with such restrictive covenants on the part of each purchaser of any part of the subdivisions as to secure such result.

In course of doing so it had sold over a thousand lots each and every one of the purchasers being so bound. It thus became a very valuable asset in connection with the remaining lots in the way of selling same.

When matters stood in that position the appellant saw fit to use its powers of expropriation for the purposes of acquiring five of said subdivisions to be used for the construction of an Imhoff Tank in connection with the city sewerage and in obedience to the representations of the Provincial Board of Health and surrounding municipalities against the city's mode of dealing with its sewage.

The Board of Commissioners having charge of the compensation to be awarded the respondent in respect of such expropriations, by a majority refused to allow anything to respondent in way of compensation or damages in respect of this invasion of its rights in the premises impairing the efficacy of said scheme and tending to destroy the selling value of its remaining property.

The respondent then brought this action in the Superior Court to restrain the homologation of the award and set same aside unless and until due consideration given by the board to the respondent's right in said regard.

There was another but minor item of complaint in regard to expenses to which I will later refer.

Meantime I wish to deal only with the measure of compensation or damages arising from what I have above referred to.

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The article 421 of the City Charter, which governs the rights of the parties in that regard, is as follows:—

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damage resulting from the expropriation.

It is to be observed that the language used herein is not that of the English Lands Clauses Consolidation Act of 1845 which has given rise to so very much litigation to determine the meaning of the words "injuriously affected."

The words "and the damages resulting from the expropriation" are more elastic and comprehensive than in the said English Act or our own Canadian Railway Act.

If given a rational interpretation the language used in this article can be made to do justice between the parties concerned.

The learned trial judge in said action, and the King's Bench in appeal, have, in my opinion, in this regard, taken the correct view. From the latter's judgment this appeal is taken.

The case of *Canadian Northern Ontario Railway Company* v. *Holditch* (1), and in the appeal from our decision (2), upholding the judgment of this court, is much relied upon by appellant.

I most respectfully submit that there is no resemblance in principle between the cases. There the question was the broad one that if a railway had expropriated a single or several lots in no way connected with the other lots in the same survey, or the ownership thereof, the proprietors of these lots, so expropriated, could not claim anything in respect of the others.

I may be herein permitted to quote from what I said in that case. I said at p. 272 of the said reports as follows:—

> The second of these sections, 193, is as follows:
> "193. The notice served upon the party shall contain:
> "(*a*) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and,

(1) (1914) 50 Can. S.C.R. 265. (2) [1916] 1 A.C. 536.

"(*b*) a declaration of readiness to pay a certain sum or rent as the case may be, as compensation for such lands or for such damages."

Read this as if both lands and power were combined though apparently disjoined, and whence can we draw the power of the arbitrators to assess and award damages in respect of other lands? Each lot taken by appellant is an independent, separate and complete property in itself. It is easily conceivable that a number of such properties might be so united together as to render them one compact whole, but that is not what in fact exists here.

In the Act upon which the *Cowper-Essex Case* (1) turned, it will be observed that the injuries to "lands held therewith" and "other lands" than taken and the "severing" of those from lands taken, are expressly provided for as subjects of compensation.

I abide by these expressions of opinion and applying them to the case in hand I do find, as set forth above, a connection between the ownership of those lots of which the compensation for, or damages resulting from, the expropriation thereof, has to be determined, and the other lots yet unsold.

And I may also quote from the opinion of Lord Sumner, delivering the judgment of the Judicial Committee, as follows:—

> They were sold out and out. No restrictive covenants were taken. There was no building scheme other than the lay out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership) and elected once for all to treat this multitude of lots as a commodity to trade in.
>
> The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.
>
> * * * * *
>
> There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

This language of Lord Sumner not only makes clearer than I had what might be such a connecting link between that expropriated and what remained unexpropriated as to allow consideration thereof as basis for such like claims as set up herein.

(1) [1889] 14 App. Cas. 153.

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I cannot see what the question (seriously discussed by counsel for appellant herein) of whether or not a servitude has been created, has to do with this case.

The respondent has acquired rights he may enforce and protect his purchasers by way of injunction, whether a servitude exists or not.

There is another principle applicable to all such cases and which needs not to rely upon such narrow distinctions as may be said to be involved in that view.

It is this, that the compensation must be based on what the land is worth to him from whom it is taken and thus include such incidental bases of compensation as may be here in question by virtue especially of the language in art. 421 above quoted. And it is very usual in such cases of most ordinary character to add 10 per cent to the valuation to cover much less important items than respondent sets up herein and the former has in many cases been maintained by this court.

This case may not need to be rested at all, from that point of view, upon the term "damages" alone, or as interpreted in other cases depending upon other statutes.

The law and the relevant decisions thereupon may be found set forth in Cripps on Compensations, at pages 102 *et seq.* of the 5th edition.

I am suggesting these alternatives not so much that I feel the judgment below needs them for its support, as that I see in the results ahead a possible world of litigation for the parties concerned according to the view taken of the relevant law upon which the respondent's claim is rested.

The judgment appealed from is, in my opinion, in this regard, absolutely correct whichever way we look at it.

The cross-appeal on the other question of costs of preparation and at the trial before the board, I would dispose of by saying that it has been correctly disposed of by the court below. Possibly if in that court I might not have given general costs of the appeal when the party appellant failed in what seemed to me the substantial grounds of appeal but our jurisprudence is against meddling with decisions merely as to costs.

I would give no costs of this cross-appeal but I would dismiss the appeal herein with costs.

DUFF J.—This appeal presents a question as to the application of sec. 421 of the Montreal Charter which, so far as material, is in the following words:—

421. (62 Victoria, chapter 58, as amended by 3 George V, chapter 54, section 20)—The city of Montreal may hereafter even without any previous application from the proprietors or other interested parties, but on a report from the Board of Commissioners, approved by the absolute majority of the members of the council, acquire by mutual agreement or by expropriation of any immovable, part of immovable or servitude situated within the limits of its territory or outside of the same, which it may require for any municipal purposes whatsoever, including the opening, widening and extension of its streets through the territory of another municipality, and, to that end, may acquire the land it may deem suitable by mutual agreement or by expropriation, by following the procedure indicated in the charter.

Indemnity, in case of expropriation, shall include the actual value of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation; but when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immovables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

The respondent company is the owner of a property known as "Montreal Park," a property consisting of some 347 acres which was divided into some 3,300 lots and placed upon the market. Sales ceased about 1914, up to which time about one-third of the property had been sold. In February, 1916, the appellant municipality gave public notice that it would apply for the appointment of commissioners to determine the price and indemnity to be paid for certain immovables which the city proposed, under section 421 et seq. of its charter to acquire for the construction of an "Imhoff Tank." The immovables described included four of the lots forming part of Montreal Park and, at a later date, a fifth of these lots was added. The respondent company claimed compensation in respect of first: the value of the lots taken, and 2nd, damages arising from the expropriation in consequence of the reduction in the selling value of other lots in Montreal Park. The arbitrators declined to recognize the claim under the second head. Mr. Justice Maclennan, of the Superior Court, whose judgment was affirmed by the

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Court of King's Bench, sustained the claim of the respondent holding that damages ought to have been assessed under that head. The corporation appeals. The undisputed fact is that the market price of some, at all events, of the unsold lots of Montreal Park have suffered and will suffer depreciation by reason of the municipal work. And the question is whether this loss is something in respect of which the respondent company is entitled to compensation as comprised within the elements of damage denoted by the phrase " the damages resulting from expropriation."

Mr. Laurendeau on behalf of the appellant municipality, contending for a negative answer to this question, puts his case in this way. Art. 421, he argues, defining the measure of the compensation the owner of an expropriated immovable is entitled to receive, limits such compensation to the damages arising " from the expropriation " in addition to the " actual value " of the immovable; and this does not, he says, include a right to compensation in respect of the use of the property taken, that is to say, for damages occasioned by the execution of the municipal purpose for which it is taken. The execution of the municipal purpose may or may not involve something which is an actionable nuisance. If it can be lawfully carried out by the municipality without calling into play any authority other than that lawfully exercisable by a proprietor, then the right of the municipality to carry it out is merely one of its rights as proprietor and in respect of doing so no compensation is justly payable beyond the actual market value of the land.

On the other hand, he argues, if the municipality in order to execute the municipal purpose is obliged to do something constituting as against its neighbours an actionable wrong, they have their legal remedies and the expropriated owner among them with reference to any injury he may thereby suffer in relation to the property retained by him. There is nothing, he argues, in art. 421, abridging the legal rights of the municipality's neighbours. In a word, Mr. Laurendeau contends that in the circumstances of the present case the arbitrators rightly took the view that the respondent company stands, with respect to the use to which the property taken is to be put by them, in

precisely the same position as that of any other neighbouring proprietor, no better, no worse.

This contention raises a most important question and I shall first consider it exclusively with reference to the language of this article 421, read, of course, in the light of the Civil Code and of principles which must be taken from authoritative decisions to govern the character of the right to compensation under the law of Quebec. The right to compensation is given by art. 407 of the Civil Code, an article which reproduced art. 545 of the Code Napoléon which in its terms is merely declaratory of a settled principle of the ancient law of France. It is in these words:—

> 407. No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid.

Art. 421, then, proceeds upon the fundamental assumption that the expropriated owner is entitled to a "just indemnity." Now there is one principle of compensation law affecting the question as to what is comprised in a just indemnity which is well settled in the Province of Quebec. It is stated in these words by Lord Buckmaster in *Fraser* v. *Fraserville* (1);

> the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired

The Privy Council was here applying art. 5795 of the Revised Statutes of Quebec (The Cities and Towns Act) where the arbitrators are directed to ascertain the

> value of the immovable together with whatever goes in compensation of the value of such immovable;

and he is stating a principle which had been adopted and acted upon by the Court of King's Bench following the judgment of the Privy Council in *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (2), in which Lord Dunedin dealing with a case in which the compensation provisions of the Dominion Railway Act applied, said:

(1) [1917] A.C. 187 at p. 194 (2) [1914] A.C. 569, at p. 576.

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The law of Canada as regards the principle upon which compensation for lands taken is to be awarded (it should be carefully noted that Lord Dunedin's observation is limited to the case in which land is actually taken) is the same as the law of England * * * * (and he proceeds) the value to be paid for is the value to the owner * * * * not to the taker

It seems almost too obvious for remark that if the public authority desiring property for a public purpose and treating with an owner for the purchase of a part of a property owned by him to be devoted to that purpose, a consideration of greater or less importance according to the circumstances entering into the determination of the price may be the nature of the purpose for which the part to be taken is required. If it is to be taken for a gas works, for example, the owner will naturally require a price which will, in some degree at all events, compensate him for the depreciation in value to his other property which remains in his hands. If he is in a position to dictate terms, nobody would call it an unreasonable thing that an owner in such circumstances should exact a price which would fully compensate him for the depreciation in value suffered by the property retained.

Without analyzing too closely the phrases "actual value" in art. 421 and "damages resulting from expropriation," I cannot escape the conclusion that these words, read in the light of the article quoted above and of the principle that the value to be ascertained is the value "to" the owner, are sufficient to evince an intention to provide in such circumstances for full compensation; and it appears to me, moreover, not to be doubtful that such elements of depreciation as I have indicated, are elements which enter into the account for the purpose of determining the amount of such compensation. It is of little importance whether you bring such elements under the head of "actual value" as being an indemnity for depriving the owner of the power which his ownership in itself confers upon him to prevent the execution of the public work upon his land, or whether you treat it as falling under "damages resulting from expropriation."

It is true that this article itself makes no provision apparently for compensation to persons whose lands are not taken but who nevertheless suffer injury in their business or property by reason of the execution of a municipal work; but that can afford no sound reason for declining to give effect to the principle embodied in the article of the code according to the measure defined by the article of the charter.

The argument on behalf of the appellant municipality proceeds indeed upon the postulate that "expropriation" within the meaning of art. 421 is employed in the restricted sense of signifying merely the transfer of title from the proprietor of the immovable to the municipality.

I shall briefly indicate some of the reasons which appear to me to forbid acceptance of that view. The authority given is an authority to take for some municipal purpose and in assessing compensation it must be assumed that the municipality is not abusing its power, but will devote the property taken to the purpose for which it is authorized to take it. The nature of the project is published to the world and the mere fact of taking the property for a given purpose may by reason of the public anticipations in respect of the nature of the work which is to be carried out have such an effect in giving character to the locality as to diminish or enhance the value of adjoining property. It matters not, as the Law Lords point out in *Cowper-Essex Case* (1) that such a result may be due to an unreasonable prejudice against localities subjected to the presence of such works. Undesirability and consequential depreciation of value arising from such circumstances is a common experience and such depreciation is something which can be quantitatively estimated. And I can think of no reason why, being as it is one of the consequences of the process of "expropriation," using "expropriation" in the sense of the process of taking the property for the municipal purpose for which it is required—it should be excluded from the class of damages falling within the purview of the article. The extent of such depreciation is, of

(1) 14 App. Cas. 153.

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course, a question of fact, and as such a question for the arbitrators.

This view is confirmed—it receives indeed the strongest confirmation from the proviso in the second paragraph of art. 421, authorizing the Commissioners to take into consideration the increased value of the immovable still remaining in the possession of the owner resulting from the expropriation, and setting the same off against the "inconvenience, loss or damages resulting from expropriation." Expropriation here is evidently not used in the sense merely of translation of title,—indeed it seems to include not only the process of expropriation as above mentioned (the process of taking for a stated municipal purpose) but apparently the execution of that purpose as well.

The appellant municipality invokes as against this view the law laid down by Lord Sumner in delivering the judgment of the Judicial Committee in *Holditch's Case* (1). Before discussing the effect of that judgment I think it is convenient to consider a little the question how far some of the principles and specific rules laid down by the courts in England in the application of statutes relating to compulsory purchase of land are pertinent to questions arising under art. 421.

At the outset it may be noted that there is an important distinction to be drawn between the particular rules deducible from such decisions resting upon special provisions of the English statutes and the reasoning upon which great judges like Lord Cairns, Lord Watson and Lord Macnaghten have proceeded in applying general principles of compensation to particular circumstances. Whether or not specific rules are binding must depend upon the provisions of the statute to be construed; but the reasoning by which these great judges have governed themselves in the application of general principles to particular cases, can hardly fail to afford some measure of guidance in parallel cases where cognate principles come into operation.

Many years ago the Dominion courts, the courts of Ontario and the courts of Quebec began to treat the specific

(1) [1916] 1 A.C. 536.

rules laid down with reference to the construction and effect of statutory provisions such as the proviso to section 16 of the Railway Clauses Act, 1845, and sections 49 and 63 of the Lands Clauses Act, 1845, as applicable to the construction and application of Canadian statutes dealing with the subject of expropriation. This practice rather widely prevailed, but I shall limit myself to a reference to the decisions upon two statutes, viz., the Dominion Railway Act and the Dominion Expropriation Act; and to the two propositions established in *Hammersmith and City Ry. Co.* v. *Brand* (1) and *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2), respectively, viz., 1st: that "injurious affection" caused to land no part of which is taken for the purpose of a railway arising from the mere use of the railway as distinguished from the construction of the work does not give rise to a claim for compensation under the Railway Clauses Act, 1845, and 2nd: that where land is taken, a claim for compensation may arise under secs. 49 and 63 of the Lands Clauses Act, 1845, in respect of "injurious affection" of the part not taken by reason not only of the construction, but by reason also of the anticipated user of the authorized works as well.

These two propositions were long ago held to govern the application of the compensation clauses of the Dominion Railway Act notwithstanding the fact that there were obvious differences in language between those clauses and the clauses of the English statutes out of which the rules developed. In *Holditch's Case* (3) Lord Sumner refers to this course of decision and observes that the differences in language between the compensation clauses of the Dominion Act and the proviso to sec. 16 of the Railway Clauses Act of 1845 are of no importance. Lord Dunedin, as I have pointed out, in 1914 in *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (4) treated it as settled that generally speaking the principles governing the right of compensation under the Dominion Railway Act were the same as those which were established in England under the Lands Clauses Consolidation Act.

(1) [1868] L.R. 4 H.L. 171.
(2) [1868] L.R. 3 Ex. 306.
(3) [1916] 1 A.C. 536, at p. 544.
(4) [1914] A.C. 569.

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As regards the effect of the compensation clauses of the Dominion Railway Act then, the authority of the English decisions affirmed by these judgments of the Privy Council, rests upon a solid foundation, a virtual similarity between the two systems of legislation and a settled course of decision by the courts of this country under which the English decisions were given effect to as pertinent and binding.

The other statute to which I shall refer is the Expropriation Act, c. 143, R.S.C. That statute assumes a right to compensation for lands taken and for lands "injuriously affected by the construction" of public works (secs. 22 and 26) and provides a procedure for assessing such compensation. There is nothing in this statute authorizing compensation for "injurious affection" arising from use as distinguished from construction. There is nothing, in other words, in the statute itself explicitly dealing with the case covered by secs. 49 and 63 of the Lands Clauses Act, 1845, of "injurious affection" of an owner's land by reason of construction and user of a public work upon lands formerly held therewith and severed therefrom. Nevertheless in the case of the *Sisters of Charity of Rockingham* v. *The King* (1), Lord Parmoor, delivering the judgment of the Judicial Committee, applied the decisions in England under sections 49 and 63 of the Lands Clauses Act, 1845, and in particular the decisions in *Cowper-Essex's Case* (2) and in the *Stockport Case* (3), in order to determine the right of an owner to compensation in respect of injurious affection arising from the running of a railway upon a part of the land of the owner which had been severed from the rest. In that case it had been explicitly stated by the learned judge of the Exchequer Court in delivering judgment and it had been assumed in all the judgments delivered in this court that the English decisions might properly be resorted to for determining the application of the Expropriation Act, and this was founded upon the circumstance mentioned by the learned judge of the Exchequer Court and emphasized by Lord Parmoor, that in a series of cases extending over a number

(1) [1922] 2 A.C. 315. (2) 14 App. Cas. 153.
(3) 33 L.J. (Q.B.) 251.

of years the decisions in England had been treated as binding upon the courts in applying the Act.

As regards these two statutes then, the Dominion Railway Act and the Dominion Expropriation Act, the law is settled; but, of course, it does not follow that the decisions upon the two English statutes mentioned can be treated as providing a code of rules governing the application of every expropriation statute passed by a legislature in this country. In England they would not be regarded as controlling section 308 of the Public Health Act and in *Fletcher* v. *Birkenhead Corporation* (1) the Court of Appeal declined to follow the decision in *Brand's Case* (2) as governing the construction of sections 6 and 17 of the Waterworks Clauses Act of 1847. In *City of Toronto* v. *Brown* (3), I had occasion to examine the whole subject for the purpose of passing upon a contention that section 437 of the Ontario Municipal Act, requiring municipal councils to make "due compensation" to the owners of land taken or "injuriously affected by the exercise of the powers" of a council, was limited in its application by reference to the rule laid down as above mentioned in *Brand's Case* (2); and the decision of this court was that the plain language of the Ontario statute giving a right of compensation for the injurious consequences of the exercise of the powers of the municipality could not be restricted in its operation by a reference to a rule derived by the House of Lords from the proviso to section 16 of the Railway Clauses Act, 1845.

Coming now to article 421; it is limited, of course, in its application to cases in which property is taken, but I can find nothing in the article which requires us in applying it to enter upon such considerations as necessarily arise or must be taken into account in applying sections 49 and 63 of the Lands Clauses Act of 1845. There is nothing here limiting damages arising from expropriation to such matters as might properly be described as "injurious affection" of other lands, still less to the "injurious affection" of lands from which the lands taken are severed or with which the lands taken have been held, and there is no

(1) [1907] 1 K.B. 205. (2) L.R. 4 H.L. 171.
(3) [1917] 55 Can. S.C.R. 153.

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course of decision such as that affecting the construction of the Expropriation Act or of the Railway Act. I think it is important that one should be cautious in attempting to express an opinion not necessary to the decision in the case before one, as to the scope of such general expressions as are to be found in this article, and I refrain from doing so, but it follows, I think, from the circumstances just mentioned that the rule pronounced by the Judicial Committee in *Holditch's Case* (1) is not a rule which the courts are bound to apply in passing upon a claim to compensation under article 421.

On the other hand, I am bound to say that if one were entitled to govern oneself by *Holditch's Case* (1), *Cowper-Essex's Case* (2) and the case of the *Sisters of Charity* (3), there appears to be abundant evidence of the existence in relation to Montreal Park of that unity of possession and control, conducing to the advantage or protection of the property as one holding, which was held to exist in *Cowper-Essex's Case* (2), and to be absent in *Holditch's Case* (1).

The appeal should be dismissed with costs.

ANGLIN J.—Are the respondents, from whom five lots forming part of a residential building subdivision in the city of Montreal have been expropriated by the appellant municipality for the construction of a sewage tank, entitled to compensation for consequent depreciation in the value of their adjacent lands, which also form part of such building subdivision? This question is the subject of the main appeal.

Are the respondents entitled to recover from the municipality their outlay for counsel fees, witness fees, and other costs incurred in maintaining their claim to compensation before the Board of Commissioners—a right accorded them by the Superior Court but denied them by the Court of King's Bench? This question is raised by a cross-appeal.

The allowance of $896.66 made to the respondents by the commissioners for the actual value of each of the five lots expropriated is not contested.

(1) [1916] 1 A.C. 536. (2) 14 App. Cas. 153.
(3) [1922] 2 A.C. 315.

In disposing of the controversy as to the right of the respondents to compensation for depreciation in the value of their adjacent property the courts below have treated the English decisions on the Lands and Railways Clauses Consolidation Acts of 1845 (notably the *Cowper-Essex Case* (1)), and on the Dominion Railway Act, to which the principle of those decisions has been held to apply (*Holditch* v. *Canadian Northern Ry.* (2); *Sisters of Charity of Rockingham* v. *The King* (3)), as governing authorities on the construction of the relevant provisions of the charter of the city of Montreal.

If the principles of those English decisions should be applied, in my opinion upon the facts in evidence there was sufficient connection between the lots taken and other lots in the building subdivision still owned and controlled by the respondents to bring this case within the authority of the *Cowper-Essex Case* (1), and the very recent *Sisters of Charity of Rockingham Case* (3), and to render inapplicable the decision in the *Holditch Case* (2).

> The lands taken (were) so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

The respondents

> retained such control over the development and use alike of the parcels sold and the parcels unsold as made a real and prejudicial difference between (their) ability to deal with what remained to (them) after the compulsory taking of land and (their) ability to deal as a whole with both it and the land taken before such compulsory taking.

See also *Toronto Suburban Railway Co.* v. *Everson* (4)

The freedom of the five lots after their expropriation from the restrictions, which it was the policy of the owners to impose upon all lots purchased in the building subdivision, necessarily affects detrimentally the value of some, if not all, other lots in the subdivision. The public use to which it is proposed to put the lands so taken, and upon which the statutory authorization for such taking depends is calculated to cause further depreciation, which, I agree, is matter that the commissioners must take into account in determining the compensation to be allowed. To that

(1) 14 App. Cas. 153.
(2) [1916] 1 A.C. 536.
(3) [1922] 2 A.C. 315, at p. 322.
(4) [1916] 54 Can. S.C.R., 395.

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extent the views expressed in the *Cowper-Essex Case* (1) as to what should be included in compensation for injurious affection, especially by Lord Macnaghten, at p. 177, are in point, if such compensation is recoverable under the provisions of the Montreal City Charter.

But, with great respect, I am of the opinion that the English decisions relied upon afford little assistance in determining the rights of expropriated landowners under that charter to compensation in respect of injury to adjacent property held by them. The right to expropriate lands "required for any municipal purposes whatsoever" is conferred on the city of Montreal by paragraph 1 of article 421 of its charter (62 V., c. 58). The right to compensation or indemnity for such expropriation is given by article 407 C.C.:

> No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid.

The right to indemnity for expropriation is assumed by the City Charter, which, by the 3rd paragraph of article 421 (a "special law" within article 1589 C.C.), prescribes the rule or measure by which such indemnity is to be ascertained—what it is to include—the manner or method of the expropriation being likewise prescribed by other articles of section XX of the charter. Paragraph 3 of article 421 reads as follows:

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

The language of that enactment differs widely from that of the statutory provisions dealt with in the English cases. We find nothing in article 421 at all resembling the phrase, "lands injuriously affected by the execution of the works" (section 68 of the Lands Clauses Act, 1845), or the phrase "injuriously affected by the construction thereof" i.e., of the railway (section 6, Railways Clauses Act, 1845), which form the basis of the English decisions that injury to the claimant's property (apart from any particular use to

(1) 14 App. Cas. 153.

which it may be put or any personal inconvenience suffered by the owner) must be shewn. *Ricket* v. *Metropolitan Railway Co.* (1). Here, in addition to "the actual value" of the property taken, paragraph 3 of article 421 provides that the compensation shall include "damages resulting from the expropriation."

Again we find in article 421 of the Montreal Charter neither such words as "lands held therewith," i.e., with the lands taken (section 49 of the Lands Clauses Consolidation Act, 1845) nor language such as that contained in section 63 of that Act—

> the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner.

In the English Lands and Railway Clauses Consolidation Acts lands taken and lands injuriously affected form the subjects of separate provisions; in the Montreal charter the value of the property expropriated and "damages resulting from the expropriation" are covered by the same sentence—*uno flatu*. By the Montreal charter one of the city recorders becomes *ex-officio* president of the board; the city council nominates two of its assessors as additional members; and, although their names are to be suggested by the landowners, the city alone is empowered to apply for the appointment by the Superior Court of the two other members required to constitute the board (article 429). Under the English Acts the landowners may take all the steps necessary to obtain compensation. But a more radical difference, I think, exists in regard to the basis of the right to compensation for what is known in English law as injurious affection. Whatever may be the case in regard to the right of the owner under the English common law to be paid for land taken from him for a public purpose by due authority of law (*Attorney General* v. *De Keyser's Royal Hotel* (2); *Commissioner of Public Works* v. *Logan* (3); *Western Counties Ry. Co.* v. *Windsor & Annapolis Ry. Co.* (4)), the right, where it exists, to additional compensation for injurious affection of other land held with that

(1) [1867] L.R. 2 H.L. 175.
(2) [1920] A.C. 508.
(3) [1903] A.C. 355, at p. 363.
(4) (1882) App. Cas. 178, at p. 189.

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taken, like the more restricted right of a proprietor whose property has been injured by a public undertaking but from whom nothing has been taken, is in England purely statutory.

If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, although the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by statute. *East Fremantle* v. *Annois* (1).

Article 407 of the Quebec Civil Code is a textual production of article 545 of the Code Napoleon (which embodied and somewhat enlarged the principle of the French constitution of 1791), and expresses a fundamental principle of the common law of France (Merlin Rep. vbo. Retrait d'utilité publique), which "*pourrait même être considéré comme un principe de droit public,*" (Baudry-Lacantinerie (3 ed.) Des Biens no. 214).

That law prevailed in Lower Canada before the enactment of the Civil Code, *Mayor of Montreal* v. *Drummond* (2). Under article 407 C.C., as under article 595 C.N., the "just indemnity" to which an expropriated owner is entitled must cover not merely the intrinsic value of the portion of that owner's property actually taken but also that of advantages attached to its possession of which the expropriation will deprive him (S.36.1.12; S.72.2.25) and especially any diminution in value of the rest of the property not taken. S.36.2.127; S.75.1.428 and n.1.; S.77.1.277. Although these decisions deal more particularly with the laws of 1833 and 1841, they merely apply to them a principle well recognized, "La jurisprudence et la doctrine sont fixées dans ce sens," S.77.1.277, n.3; Picard, Expropriation, L'indemnité, pp. 292-3, 299.

"Juste," c'est-à-dire suffisante pour compenser le prejudice subi par l'exproprié; autrement, l'expropriation sera une spoliation. Baudry-Lacantinerie, ibid.

It would therefore seem to be unnecessary in Quebec to look in a statute authorizing expropriation for a special provision for compensation for injurious affection of land

(1) [1902] A.C. 213, at p. 217. (2) [1876] 1 App. Cas. 384, at p. 403.

held with that taken. Art. 407 C.C. carries that right unless it is excluded by the special law (Art. 1589 C.C.). There is no similar statutory provision of universal application in English law.

But quite apart from this important difference the whole scheme and arrangement of the indemnity provisions of the English Lands and Railways Clauses Act of 1845 on the one hand and those of Art. 421 (3), etc., of the Montreal charter on the other, are so different and the terms in which they are respectively couched are so unlike that it would be quite unsafe to treat decisions on the former as governing the construction of the latter.

In *North Shore Ry. Co.* v. *Pion* (1), in dealing with the Quebec Railway Act of 1880, a statute much more nearly *in pari materia* with the English Lands Clauses and Railway Clauses Consolidation Acts than is the Montreal City Charter, their Lordships of the Judicial Committee said:—

> The provisions and structure of that Act are too widely different from those of the English Lands Clauses and Railway Clauses Consolidation Acts to enable their Lordships to derive aid from the cases which have been decided upon those English Acts. In the English Acts special and separate provision is made for lands not taken, but injuriously affected, and the procedure for obtaining compensation, applicable both to lands taken and to lands injuriously affected, is defined so as to enable the landowner, as well as the company, to take, or cause to be taken, in all cases the necessary steps for that purpose. But in the Quebec Act of 1880 this is not so.

I am for these reasons, with great respect, of the opinion that in determining whether under Art. 407 C.C. and par. 3 of Art. 421 of the Montreal Charter the respondents are entitled to compensation in respect of depreciation in the value of other lots in the subdivision owned by them due to the expropriation of the five lots taken by the appellants for a sewage tank we cannot look for guidance to the English cases so much discussed at bar and relied upon in the courts below. We have to construe the words "damages resulting from the expropriation" in the setting in which they occur in Art. 421, and having regard to the scope and purpose of that legislation and the general law of the province of Quebec as to compensation or indemnity in cases of expropriation.

(1) (1889) 14 App. Cas. 612, at p. 624.

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In *Cité de Montréal* v. *Robillard* (1), the court of Queen's Bench held that "damages resulting from the expropriation" are confined to damages sustained by the owner whose lands are taken. I see no reason to question the soundness of that decision. The terms of Art. 429

—compensation to be paid to the proprietor whose building or land is to be expropriated—

seem to confirm this view, which also appears to have been held by the Judicial Committee in *Mayor of Montreal* v. *Drummond* (2). On the other hand the damages to be compensated for must "result from the expropriation." They do not extend to injurious affection "by the exercise of the (other) powers" conferred by the statute. (Compare ss. 49 and 63 of the Lands Clauses Consolidation Act, 1845, and ss. 6 and 16 of the Railways Consolidation Act, 1845.) In *Robillard's Case* (1), however, although the Court of Queen's Bench expressed the further view (p. 303) that the damage to be compensated for must be

such as is directly connected with the land expropriated,

it added that "other damage caused by the expropriation," while restricted to that sustained by the party expropriated, is not limited to the land taken and its actual value but includes damages caused to his remaining land as, in their opinion (p. 304), Art. 421 of the Montreal Charter,

is a similar provision to that embodied in the statutes for railway expropriation here, under which we held in *Wood* v. *A. & N.W. Ry. Co.* (3), that a party expropriated was entitled not only to the value of his land taken but to damage caused to his remaining lands by the operation of the train service.

Without conceding the similarity of paragraph 3 of Art. 421 of the Montreal Charter to the compensation provisions of the Railway Act construed in the *Wood Case* (1), and without expressing any view on the question whether the scope of the words "and damages resulting from the expropriation" is or is not exhausted thereby, under the circumstances here in evidence, those words in my opinion certainly cover such depreciation in value as the taking

(2) [1896] Q.R. 5 Q.B. 292. (2) 1 App. Cas. 384, at p. 405.
(3) [1893] Q.R. 2 Q.B. 335.

of the five lots for a sewage tank has caused to other lots comprised in the same subdivision still held by the respondents after the expropriation. That depreciation was "damage caused by the expropriation," and is "directly connected with the land expropriated." The view that this is the proper construction of par. 3 of Art. 421 is strengthened by its concluding provision that

> the Commissioners may take into consideration the increased value of the immoveable from which is to be detached the portion to be expropriated, and offset the same by the inconvenience, loss or damage resulting from the expropriation.

If an increase in the value of adjacent immovables due to the expropriation is to be taken account of, it would seem only reasonable that depreciation in the value of the same immovables likewise caused should form part of the loss or damages against which such increase in value may be offset.

Nor is it necessary in my opinion that the restrictive covenants taken by the respondents from purchasers should have the effect of subjecting the respective lots sold to a servitude in favour of the rest of the property comprised in the subdivision. If such a servitude were created and some of the lots already sold had been taken by the appellants the respondents might have had a claim for "the actual value of the * * * servitude expropriated." What they are claiming for is "damages resulting from the expropriation" to their remaining property. No question of servitude is involved. The sole matter to be determined is whether depreciation in the value of such adjacent land caused by the expropriation is damage resulting therefrom within the purview of paragraph 3 of article 421. Under the circumstances in evidence I think it is.

Nor is the fact, pressed at bar, that the maintenance of the proposed sewage tank is likely to be only temporary now material, if substantial injury has been caused by taking part of the respondents' land for it. While that fact may affect the *quantum* of, it cannot entirely defeat the right to, compensation. *Lingké* v. *Mayor, etc., of Christ-Church* (1).

(1) [1912] 3 K.B. 595.

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In estimating the compensation it must of course be assumed that all proper precautions will be taken to prevent the use and operation of the tank becoming a nuisance to the neighbourhood. While any omission of due care resulting in injury would probably be actionable, it cannot afford a ground for statutory compensation since it would be an abuse of the statutory power and without its protection.

In determining how far, under the Montreal Charter, the purposes for which the municipality is expropriating should be taken into account in estimating "the damage resulting from the expropriation," I prefer to adopt the reasoning of Lord Macnaghten in the *Cowper-Essex Case* (1), already referred to, and the line of decisions in Belgium mentioned in Picard on Expropriation, L'indemnité (vol. 1, pp. 293-8), rather than the narrower ideas expressed in such works as De Lalleau on Expropriation (vol. 1, no. 302), though the latter are no doubt founded on French jurisprudence. Crépon, Code annoté de l'Expropriation, p. 253, nos. 164, *bis.*, *et seq.*—s.v. nos. 143 and 152.

For the reasons stated by Martin and Rivard JJ. in the Court of King's Bench, I am satisfied that the right to recover counsel fees, witness fees, etc., asserted by the respondents has been expressly taken away by article 436 of the City Charter, as enacted by 4 Edward VII, c. 49.

Both the appeal and the cross-appeal should be dismissed with costs.

BRODEUR J.—La première question qui nous est soumise est de savoir si les arbitres auraient dû indemniser la compagnie McAnulty pour les dommages résultant de ce qu'elle appelle le morcellement de sa propriété.

La cité de Montréal prétend qu'il n'y a pas de morcellement de propriété par l'expropriation, qu'elle n'est tenue de payer que pour les cinq lots expropriés et que les autres lots pour lesquels l'expropriée réclame une indemnité ne font pas partie de ces cinq lots, qu'ils en ont été effectivement détachés par un cadastre de subdivision qui avait été fait par l'expropriée plusieurs années auparavant.

(1) 14 App. Cas. 153.

La compagnie McAnulty prétend, au contraire, que tous ces lots ne forment qu'une seule exploitation qui donne lieu au cas d'expropriation de quelques-uns d'entr'eux à l'indemnité résultant du morcellement.

La preuve constate que tous ces lots de terre formaient originairement une ferme en culture, que la compagnie McAnulty s'en est portée acquéreur en 1911, qu'elle a payé une partie du prix de vente comptant, que la balance du montant d'achat est restée hypothéquée sur tout l'immeuble, que la propriété a été subdivisée par la compagnie McAnulty en plus de trois mille lots à bâtir que ont été placés en vente sur le marché sous le nom de "Montreal Park," et que l'on dispose de ces lots par promesses de vente qui contiennent des restrictions quant à la manière dont ils devront être construits et exploités.

Les commissaires chargés de fixer l'indemnité ont décidé de ne pas accorder de dommages ou d'indemnité pour les autres lots que les cinq qui avaient été expropriés.

Il me paraît bien évident que l'expropriation a causé des dommages sérieux et appréciables aux autres lots. La construction de cette fosse Imhoff qui a motivé l'expropriation est destinée à traiter les égouts et déprécie nécessairement la valeur des terrains avoisinants.

L'article 407 du Code Civil énonce le principe général que nul ne peut être contraint de céder sa propriété pour cause d'utilité publique à moins qu'il ne soit justement indemnisé.

Que doit comprendre l'indemnité?

La valeur du terrain exproprié et les dommages accessoires résultent directement de l'expropriation; et l'on range généralement dans cette dernière catégorie la dépréciation provement du morcellement de la propriété; l'article 421 de la charte de la Cité de Montréal, sous laquelle les arbitres procédaient, énonce le même principe en disant que l'indemnité doit comprendre la valeur réelle de l'immeuble ou partie d'immeuble exproprié "et les dommages résultant de l'expropriation."

Sommes-nous en présence d'un immeuble exproprié ou *de partie* d'un immeuble exproprié? En d'autres termes, ces terrains du "Montreal Park" forment-ils une seule exploitation? S'ils ne forment qu'une seule exploitation,

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alors l'expropriation des cinq lots en question constituerait un morcellement (severance).

Il est bien vrai que la subdivision des terrains et leur cadastrage peut former en soi un morcellement de la propriété et lui enlever dans certain cas le caractère d'exploitation unique. C'est ce qui avait été dit dans la cause de *Canadian Northern Ry.* v. *Holditch* (1). Mais dans cette cause de Holditch la subdivision avait eu lieu sans aucune réserve, le propriétaire de ces différents lots avait donné à chacun d'eux une existence distincte et séparée qui leur avait fait perdre le caractère de seule et même exploitation. Aussi le Conseil Privé (2), appelé à examiner notre décision, disait par la bouche de Lord Sumner, en discutant les faits de cette cause de Holditch:

> They (the lots) were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. *They were sold out and out. No restrictive covenants were taken. There was no building scheme, other than the lay-out shown on the registered plan,* and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership) and elected once for all to treat this multitude of lots as a commodity to trade in.

A la page 543, Lord Sumner continue en parlant des terrains Holditch:—

> There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

Sous quelques rapports, les faits de la cause de Holditch (2) ressemblent à ceux de la présente cause. Dans les deux cas, il y a achat de terrains pour opérations spéculatives et subdivision des lots; mais les dissemblances se manifestent quand, dans le cas Holditch, les terrains sont vendus sans conditions, et qu'il n'y a pas de plan d'ensemble pour la construction des bâtisses. Dans le cas de la propriété McAnulty, les terrains sont vendus avec des restrictions, les bâtiments doivent avoir une certaine uniformité, et le tout constitue une étendue de terre connue sous le nom de *Montréal Park.*

(1) 50 Can. S.C.R. 265. (2) [1916] 1 App. Cas. 542.

Il me semble alors que la décision Holditch ne peut pas être avantageusement invoquée par la cité de Montréal. Les faits que ont été prouvés dans la cause de *Cowper-Essex* v. *Acton Local Board* (1) me paraissent plus conforme à ceux que nous constatons dans la présentte cause.

Dans cette cause de *Cowper-Essex* (1), le propriétaire conservait sur l'amélioration et l'usage des parties vendues et non vendues un contrôle tel, qu'il éprouvait, comme disait Lord Summer

a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of the land and his ability to deal as a whole with both it and the land taken before such compulsory taking.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

La somme réclamée par la compagnie McAnulty parait à première vue très élevée; mais il ne faut pas oublier que les Commissaires ont le droit, en fixant l'indemnité, de prendre en considération la plus-value donnée au terrain par l'ouvrage projeté (art. 421 Charte). Je présume que cette fosse Imhoff pour la construction de laquelle on a pris certains lots facilitera l'égout de tous les lots pour lesquels on réclame des dommages.

Une autre question a été soulevée par un contre-appel, c'est de savoir si la compagnie McAnulty a droit d'être indemnisée pour ses dépenses de procureurs et de témoins.

Cette question avait été décidée en 1892 dans un sens favorable à l'indemnitaire dans une cause de *Sentenne* v. *Cité de Montréal* (2). Mais en 1899 la legislature a déclaré que la cité de Montréal n'était pas tenue de payer aucun frais de témoins, de sténographe ou d'avocats dans les procédures en expropriation. Cette disposition de la loi est tellement formelle qu'il n'y a pas lieu d'appliquer la décision Sentenne.

Ce contre-appel est donc mal fondé et doit être renvoyé avec dépens.

MIGNAULT J.—Two questions are involved under the appeal and the cross-appeal in this case.

1. Were the expropriation commissioners justified in

(1) 14 App. 153.
(2) [1892] Q.R. 2 Q.B. 297.

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refusing compensation for depreciation of the respondent's lots not taken because these lots are distinct and separate from the expropriated lots and because, in the opinion of the commissioners, the depreciation would not result from the expropriation, but from the establishment and operation of an Imhoff tank on the expropriated lots?

2. Were the commissioners justified in refusing to comprise in the compensation counsel fees and the charges of the expert witnesses produced by the expropriated party?

These two questions are questions of law and the parties might have avoided the considerable expense of printing the voluminous testimony before the commissioners by agreeing on the statement of facts contained in the judgments and which they do not dispute. This is a remark that could be repeated in many cases where points of law alone are involved and where the parties could notably reduce the cost of the proceedings by sensibly agreeing on the essential facts.

I will now examine these two questions, the first being the subject of the appeal, the second of the cross-appeal.

First question. The right of the respondent to damages for depreciation of its lots which were not taken, turns on the proper construction of the expropriation provisions of the Montreal City Charter.

In the two courts below it was apparently considered that this question involved a choice between the decisions of the House of Lords and of the Judicial Committee respectively in *Cowper-Essex* v. *Local Board for Acton* (1), and *Holditch v. Canadian Northern Ontario Railway Co.* (2). I do not mean, when I use the word "choice," that it was thought that these decisions were in conflict, but merely that they applied to different circumstances. In the former case, as well as in the recent case of *The Sisters of Charity of Rockingham* v. *The King* (3), the expropriated party, a portion of whose land was taken, was held to be entitled to compensation for the depreciation of the residue, not taken, of his land due to the anticipated legal use of works which might be constructed upon the lands taken. I may perhaps be permitted to add that the judgment in

(1) 14 App. Cas. 153. (2) [1916] 1 A.C. 536.
(3) [1922] 2 A.C. 315.

the *Sisters' Case* (1) contains a very useful and comprehensive statement of the English case law in matters of compensation. In the *Holditch Case* (2) compensation was refused for injurious affection by noise, smoke or vibration to lands separate and disjoined from those taken.

With respect I think that the expropriation provisions of the Montreal City Charter sufficiently differ from the enactments considered in the three cases above mentioned to leave us free to place a construction on these provisions uncontrolled, I do not say not aided, by the English decisions on The Land Clauses Consolidation Act, 1845, The Railway Clauses Consolidation Act, 1845, as well as by decisions of the Judicial Committee in compensation cases arising under the Railway Act of Canada.

The expropriation provisions under which the appellant took the respondent's lands are contained in sections 421 and following of the Montreal City Charter, as enacted by 3 Geo. V, ch. 54, section 20. Section 421 allows the city to expropriate lands for any municipal purpose, and paragraph 3 is very explicit as to the indemnity to which the owner is entitled:

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

Two elements therefore make up this "indemnity."

1. The actual value of the immovable expropriated, and there is no dispute as to this value;

2. The damages resulting from the expropriation.

"Damages resulting from the expropriation" is a very wide and comprehensive term and would include damages from severance or from injurious affection. It can no doubt be considered that the law-makers of the province of Quebec, when enacting expropriation provisions, have in mind the cardinal principle of Quebec property law, Art. 407 C.C., that

> no one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.

(1) [1922] 2 A.C. 315. (2) [1916] 1 A.C. 536.

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But, standing by itself, paragraph 3 of section 421 amply suffices to determine any question with regard to the respondent's right to compensation, which as stated comprises, besides the actual value of the immovable, the damages resulting from the expropriation.

The facts here, according to the judgment of the learned trial judge, are that in 1911 the respondent bought a block of land, 347 arpents in superficies, which it laid out as a residential building subdivision containing about 15 streets and over 3,300 lots, which was treated as one holding. For the benefit of this subdivision the respondent, in contracts of sale or agreements to purchase lots, imposed conditions prohibiting uses of the lots which might deteriorate adjoining parts of the property, and restricting, with the exception of one street, the buildings to be erected thereon to residential buildings constructed at least 10 feet from the front of the lots. Whether these restrictions did or did not constitute real servitudes appears to me immaterial, for they undoubtedly gave the respondent a control over the whole subdivision even after the alienation of some of the lots. During 1912, 1913 and 1914, about a third of the lots were disposed of subject to these restrictions. In February, 1916, the city of Montreal gave public notice of the expropriation of five of these lots required for the construction of an Imhoff tank, which is a sewage filtration plant. The learned trial judge found that the fact alone that the purpose of the expropriation was for the construction and operation of a sewage plant injuriously affected the remaining lots, diminished their value and made their sale more difficult, if not impossible, and specially as regards the lots in the immediate vicinity of the expropriated property.

With this finding of fact there can be no difficulty in coming to the conclusion that this depreciation of the remaining lots is a "damage resulting from the expropriation" and should have been considered by the commissioners. I therefore agree with the judgment of the two courts setting aside the award.

Second question.—Whatever might have been the right of an expropriated party to claim as damages resulting from the expropriation, counsel fees and the cost of expert

witnesses, the Quebec legislature has expressly enacted by section 436 of the Montreal City Charter, as amended by 4 Edward VII, ch. 49, sec. 21, that

> the city is not bound to pay the fees of counsel or witnesses or any incidental costs or disbursements, other than those hereinafter mentioned, for proceedings before the commissioners or before the courts, either for the appointment of commissioners or the homologation of their report or for the withdrawal on behalf of the person indemnified of the sums of money deposited in the prothonotary's office.
>
> The commissioners, appointed by the court and by law shall be entitled to fees as follows:
>
> For appraising vacant immovable property, hearing witnesses, and making award: for each immovable.....$10 00
> For appraising immoveable property, containing buildings, hearing witnesses, and making award: for each immoveable.... 15 00
> For appraising tenants' claims: for each award..... 10 00

This enactment is somewhat obscure on account chiefly of its defective punctuation. The original section 436, as contained in 62 Vict., ch. 58, clearly stated that no fee for witnesses, stenographers, advocates or counsel for any proceedings before the commissioners should be payable by the city. In the substituted section the legislature was dealing with both the non-liability of the city for fees of counsel and witnesses, and with the right of the commissioners to charge certain fees, and, saving the expressly mentioned costs, it imposes no liability on the city to pay for fees of counsel or witnesses. I have no hesitation whatever in adopting on this point the reasoning of the learned judges of the court of appeal.

For these reasons I would dismiss the appeal and the cross-appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jarry, Damphousse, Butler & St. Pierre.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

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*Nov. 7, 8.
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*Feb. 6.

THE CITY OF OTTAWA.....APPELLANT;

AND

SIR HENRY K. EGAN.....RESPONDENT.

(FOUR APPEALS)

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

Assessment and taxes—Assessment on income—Industrial company—Distribution of funds—Assessment for current year—Consideration of previous year's income—Assessment Act, R.S.O. [1914] c. 195, s. 11 (2).

Section 11 of the Ontario Assessment Act provides for taxes on income and by subsection 2 "where such income is not a salary or other fixed amount capable of being estimated for the current year the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st day of December then last past." In 1921 the shareholders of an industrial company were assessed in respect of moneys received from the company in 1920. On appeal it was established that no similar amounts were paid them in 1921 and the Appellate Division deducted said amount from the assessable income for that year.

Held, that the income to be taxed is that of the current year; that the income of the preceding year is only a basis from which to estimate the former when subsection 2 applies; and that the income to be assessed for 1921 was properly reduced.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment of the Ontario Railway and Municipal Board in favour of the appellant.

The question for decision and the statutory provision giving rise to it are stated in the above head-note.

Frank B. Proctor for the appellant.

Tilley K.C. and *Wentworth Greene K.C.* for the respondents.

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be dismissed with costs. I concur generally with the reasons stated by Sir Wm. Meredith, the Chief Justice of Ontario, when delivering the unanimous judgment of the First Divisional Court in favour of the respondents.

I am also in full accord with the reasons for judgment of my brothers Anglin and Mignault and do not, therefore, deem it necessary or desirable to repeat these reasons.

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

IDINGTON J.—The appellant seeks herein to reverse four judgments of the Appellate Division of the Supreme Court of Ontario, reversing the judgments of the Ontario Railway and Municipal Board, which had reversed the judgments of the late County Judge of Carleton, who had allowed the appeals, respectively taken, by each of the respondents, or those whom they respectively represented, against their respective assessments under the Ontario Assessment Act, by those acting on behalf of appellant.

Each of these appeals depends on the same essentially relevant facts and law, and hence are consolidated for the purposes of this appeal.

The respondents, or those they respectively represent, are pretended to be assessed in respect of income derivable from rights held by each; or those they respectively represent, as shareholders in a company incorporated as The Hawkesbury Lumber Company, by 52 Vict., c. 98, with a nominal capital of $200,000.

The power to assess is given by section 11 of the Assessment Act, c. 195 of R.S.C. [1914], which reads as follows:—

11. (1) Subject to the exemptions provided for in sections 5 and 10:—

(*a*) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

(*b*) Every person although liable to business assessment under section 10 shall also be assessed in respect of any income not derived from the business in respect of which he is assessable under that section, and

(*c*) Every person liable to business assessment under clause (*f*) of subsection 1 of section 10 shall also be assessed in respect of the income derived by him from his business, profession or calling, to the extent to which such income exceeds the amount of such business assessment.

(2) Where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past. 4 Edw. VII, c. 23, s. 11.

Income is defined by section 2, subsection (*e*) of said Act, as follows:—

(*e*) "Income" shall mean the annual profit or gain or gratuity whether ascertained and capable of computation as being wages, salary, or other fixed amount or unascertained as being fees or emoluments, or as being profit from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest

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upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.

The dominant member of this definition is that in the words "*the annual profit or gain or gratuity*" derivable from either that ascertained and capable of computation or unascertained from various specified sources which may not be so.

The appellant's commissioner of assessment having discovered that in December, 1920, the said Hawkesbury Lumber Company had made a distribution amongst its shareholders out of some surplus assets accumulated over so long a period as fifteen years, or more, prior to the end of the year 1916, and called it a dividend, came to the conclusion, somewhat hastily, I respectfully submit, that it must be considered assessable income of that year, 1920, and acted accordingly, and directed the several parties receiving part thereof to be assessed in the assessment roll of 1921, prepared as the basis of taxation for 1922.

I cannot understand how that which clearly was no part of "the annual profit or gain" in the year 1920, can be taken as the measure of what was to determine the assessment for 1921 in default of other means of determining same.

The word "dividend" used in the latter part of the definition of income is clearly restricted to dividends or profits received from money at interest, or other form of such like character, and in no sense intended as a repetition of that found as the expression relative to manufacturing industries such as this lumbering industry or its like.

And when one turns to the charter of the Hawkesbury Lumber Company which in express terms includes all the powers given by the Companies' Clauses Act (save and except section 18 and anything else inconsistent with said charter) as then in force and so recently enacted, and considers all so invoked, it seems, if possible, more obvious that dividends such as it was empowered thereby to declare might well include capital no longer needed as well as profits.

The dividend now in question might well have been of that character; especially so when we find that special provision was made for the private business concerns of several

of those promoting the company's incorporation becoming the property of the company.

It might well be that the assets so acquired might turn out in the course of time to far exceed in value the modest capital stock of the company and produce more capital than needed and hence the basis of distribution by way of dividends such as the directors were given power to declare.

The rise in value of timber lands, held only by virtue of mere licence, may also have largely contributed to the value of the company's assets and have become a subject of distribution by way of dividend by the year 1916, or any of the fifteen preceding years. Such increase of value is not part of what is taxable as income.

In such an elastic and comprehensive charter as this company had there was ample room for the actual capitalization of even more profits as contended for by counsel for respondent.

But inasmuch as that may not have been declared in a formal way I may be permitted to suggest that the foregoing reasons I have assigned founded on the history of said company by virtue of its charter and all implied therein presents in a more cogent light the insuperable difficulty of maintaining appellant's pretensions herein.

All I am concerned with is that in any way one can look at the meaning of the word "dividend" relied upon by appellant, it does not justify the assumption that the dividend in December, 1920, was part of the income of the respondent for that year, and thus a basis within the meaning of subsection 11, subsection (2) above quoted from the Assessment Act.

There has been, at least ever since A.D. 1853, an income tax in force in Upper Canada later known as Ontario. It was included for many years under the term "personal property" as defined in the several Acts in the earlier years of said period.

And when, as of necessity, the income of the previous year had to be taken as basis it was generally referred to as that for the past year, and in one of the Acts seemed to refer to it as fixed by the assessment of the past year.

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It was not until 1904 that income was defined as it is now, as above quoted. I suspect that before and even since the assessment of income under said Act when a previous year had to be used as a basis the actual fact was got from the previous year's assessment roll.

And I respectfully submit that due insistence on the part of municipal officers would have brought forward the actual facts and an honest basis for assessment of respondents, or those they respectively represent, based on the previous year, quite within the limits of subsection 2 of section 11, instead of the adoption of a dividend which was the accumulation of fifteen years previous to a period three or four years anterior to the year now in question.

If, however, I am mistaken in my suggestion and the parties concerned should in face of such insistence as open to appellant's officers have taken the ground that they were not bound to submit to such taxation until the money had been got, then they might have been within their legal rights. And if a shareholder in an industrial concern is not liable until paid the part that is paid in and for the last year previous to the assessment is all that in any court should be acted upon.

It is a clear and express principle of law applicable to the construction of taxing statutes that express language in same is indispensable.

I would refer to the language of Lord Cairns in *Cox* v. *Rabbits* (1), where he said that

a taxing Act must be construed strictly; you must find fixed words to impose the tax, and if words are not found which impose the tax it is not to be imposed.

I think the application of this language of Lord Cairns, which expresses that which is undoubted law, to the facts presented by this appeal, should dispose of this appeal, and observance of which should have averted this appeal from the Appellate Division.

Can distribution of capital or bequests or heirship inheritance which have come in during the year be taxed as income?

It is not that received but that earned or gained by industry that alone seems to be taxable, if those items are maintainable.

(1) [1870] 3 App. Cas. 473 at p. 478.

There were many other objections submitted in argument and others again which occur to me as cogent in the way of appellant, which I have left aside lest the foregoing reasoning, presenting what seems to me insuperable, might be confused therewith and thereby be impaired.

The reference to English decisions on very differently framed Acts, as a glance at the Imperial Act of 1918 shews, is rather far fetched.

I hold the appeal should be dismissed with costs throughout.

DUFF J.—The principle of income assessment and taxation clearly expressed in the legislation which comes under consideration on this appeal is that it is the income for the current year which is assessable. That is impliedly declared in section 11, subsection 2, expressly declared in section 19 (*b*) as well as in the form of return prescribed under the authority of section 18, subsection 1 (*a*). In certain circumstances (where the income is not a "fixed amount" and where it is not "capable of being estimated for the current year") the income of the preceding year is made to furnish the standard or evidence for fixing the minimum income for the current year, but it is only as evidence (conclusive it is true up to a certain point) that the income of the preceding year becomes relevant to the question of assessment. Mr. Proctor's principal contention, which he presented with both force and candour, was that, according to the scheme of the legislation, incomes are divided into two classes, one class being incomes of "fixed amount" of which salaries and wages are to be taken as the type, while the other embraces all other descriptions of income. As regards the first class, the amount being "fixed" at the critical time, according to Mr. Proctor's suggestion, no difficulty could arise, but as regards all other descriptions of income the assessable amount is determined by the income of the previous year. The scheme of the legislation, as Mr. Proctor thus conceives it, is no doubt a more practicable and workable scheme than that which in my view the legislation does in fact embody, but there are fatal objections to that contention. In the first place the language of the sections already mentioned is too plain

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to admit of doubt that the income of the preceding year is, as I have already said, to be treated only as evidence for the purpose of fixing the minimum amount of the assessment; and in the next place this view of the legislation is quite incompatible with the language of section 19 (*b*) which contains not a word about salary or wages and directs a reference to the income of the previous year when the income for the current year cannot be estimated. Section 19 (*b*) was enacted as an amendment and must be taken, I think, to govern the construction of section 11, subsection 2.

The fundamental principle of the statute being that it is the income of the current year that is to be assessed and to be estimated, I concur with the view of the Chief Justice of Ontario that it is not an unreasonable implication that the assessing authority in determining the assessable amount in any given case is bound to proceed upon the facts known to it at the time the question comes up for determination.

The Ontario Municipal Board was therefore bound in giving judgment on the municipality's appeal to take into account the fact then known that no income had been received in respect of the shares in question in the year 1921.

This is of course conclusive of the appeal. I express no opinion upon the other questions argued.

ANGLIN J.—Having regard to the definition of "income" in section 2 (*e*) of the Assessment Act, to the provisions of sections 11 and 13, according to which the assessment roll in respect to income was directed to be prepared (s. 22 (3), col. 20), and to the declaration required from an income taxpayer (section 19*a*) and the note in the form (no. 2) of return prescribed by section 18, I agree with the unanimous opinion of the Divisional Court, as stated by the learned Chief Justice of Ontario, that the assessment roll in question made in 1921 was an assessment roll for that calendar year and that the taxable income to be included in it was the income of that year.

It may have been legitimate for the assessor when preparing the roll for 1921 to have included in the assessable income of the several respondents in respect of prospective

dividends from their holdings in the Hawkesbury Lumber Company amounts equal to the sums received by them from that source during the year 1920, if such latter sums should be regarded as income. Although the respondents, who had knowledge on the subject not available to the assessor, had made returns of income for 1921 which shewed no income to be received from the Hawkesbury Lumber Company, the assessor may have been within his right in declining to accept these returns (s. 20 (1)) and in applying the provisions of s. 11 (2) when preparing the roll. He did not, necessarily, then know that the respondents would not receive any income from the Hawkesbury Lumber Company during the entire year 1921. But, as is pointed out by the Chief Justice of Ontario, the object of the rehearings of assessment appeals provided for by the statute by the Judge of the County Court, the Ontario Railway and Municipal Board and the Divisional Court, before each of which " the whole question of the assessment " may be re-opened, is that

> the accurate amount for which the assessment should be made * * * may be placed upon the roll by such Judge, Board or Court (s. 82).

As the learned Chief Justice says:

> When the appeal was before the Ontario Railway and Municipal Board the year 1921 had expired, it was demonstrable and was demonstrated that the income for which it is sought to assess the appellants was not received in 1921, and in my view it was the province of each tribunal to which an appeal has been made, to apply the test provided by section 11 (2), and when the appeal was before the Board, and as it is now before us, not only was the income of 1921 not incapable of being estimated but it was actually and definitely ascertained.

I also respectfully agree that it is

> open to an appellant at every stage until the final tribunal of appeal (the Divisional Court) is reached, and indeed before it, to show what the amount for which he is to be assessed is.

Assuming, therefore, in the appellant's favour, but without so deciding, that the moneys received by the respondents in 1920 from the Hawkesbury Lumber Company were " income " within the purview of the Assessment Act, they were income for 1920, not for the current year 1921, in and for which the roll in question was prepared. It having been conclusively shewn before the Ontario Railway and Municipal Board (which heard the appeal on the 23rd of January, 1922), that the respondents had in fact derived

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no income from that source during the year 1921, I agree that the assessment roll was properly "corrected" by the Divisional Court and that "the accurate amounts" of the assessable incomes of the respondents were properly inserted therein in lieu of the supposititious amounts which had been fixed by the assessor acting under s. 11 (2).

It may be that the omission from the Assessment Act of some provision for a special assessment in any year of income received after the roll for that year had been completed, similar to that made by (s. 9 (2)) for the case of transfer of exempted land, was purely accidental. But it is no part of the duty of a court to supply such deficiencies in legislation. What is sometimes called an equitable construction is not admissible in a taxing statute. In order to justify taxation upon it the subject of assessment must be brought clearly within the provisions of the Act. *Partington* v. *Attorney General* (1); *Tennant* v. *Smith* (2); *Attorney General* v. *Milne* (3).

I would for these reasons dismiss this appeal with costs.

BRODEUR J.—The respondents are shareholders in the Hawkesbury Lumber Company. This company had a capitalization of $200,000. It was very successful and had accumulated large surpluses which, after paying some dividends, were appropriated to capital purposes. It was found however by the Dominion taxing officer that if the profits earned previously were not paid out to the shareholder before the end of 1920 he would have to make a special levy on these profits. Then the shareholders of the company decided to make, in December, 1920, the distribution suggested by this taxing officer. Such a distribution was called in the resolution of the company a "dividend."

In the year 1921 the shareholders, respondents in this appeal, made their return to the municipal taxing officer and did not include therein any reference to the large "dividend" which they had received in the previous year.

The municipal assessor claims that such an amount should have been included in that return and that the respondents should be assessed accordingly.

(1) L.R. 4 H.L. 100 at p. 122. (2) [1892] A.C. 150 at p. 154.
(3) [1914] A.C. 765 at p. 771.

The respondents, on the other hand, contend that they cannot be assessed in 1921 for that alleged dividend received in 1920, and their contention was maintained by the Appellate Division.

The Assessment Act provides that every person not liable to business assessment shall be assessed in respect of his income; and the income is defined by the Act as meaning the annual profit or gain and includes the dividends or profits received (section 2, paragraph (*e*) and section 11, paragraph (*a*)).

It is also provided in subsection 2 of section 11 that when the income

> is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

It is pretty evident under these different provisions of the law that what should be assessed would be the income of the current year. In the present case the assessment which is at issue is the assessment for the year 1921. The taxpayer, in making his return, and the assessor, in making his assessment roll, should insert therein the amount of the income which could be estimated.

If, however, the amount cannot be estimated then the income of the taxpayer for the previous year can be used as a basis for the fixing of the income.

The whole question is whether the amount of the income could be estimated or not.

It seems to me very clear that the large amount received in the year 1920 as a "dividend" from the Hawkesbury Lumber Company could not be estimated as being likely to be received during the year 1921. Nobody could suggest such a thing possible that the shareholders of this company were to receive in 1921 the same amount as was received by them the year previous. On the other hand, their income could easily be ascertained or estimated, and then there was no occasion to apply the provision of subsection 2 of section 11.

For these reasons, the appeal fails and should be dismissed with costs.

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MIGNAULT J.—There are four appeals here from the Appellate Divisional Court of Ontario, the question being as to the validity of the assessment, under *The Assessment Act* (Ontario), of the four respondents for income for the year 1921, and against which assessment the respondents appealed.

On the 22nd December, 1920, each of the four respondents received a large sum of money from The Hawkesbury Lumber Co., being a dividend of 875 per cent which, by resolution adopted at an extraordinary general meeting of the shareholders of the company, held on the 15th December, 1920, was declared payable to the shareholders of record on that day out of an accumulated cash surplus in the hands of the company. In the return made to the appellant for purposes of assessment for 1921 the respondents, who had duly paid the tax on their assessed income for 1920, made no mention of this sum which was received by them in 1920 and not in 1921; but the assessing authorities of the city of Ottawa nevertheless included it in the income tax assessment for 1921. The respondents unsuccessfully appealed to the Court of Revision, but succeeded in their appeal to the County Court, before the late Judge Gunn, where the amount thus added to the assessment was struck out. The city took an appeal to the Ontario Railway and Municipal Board which decided in its favour, this judgment however being reversed by the Appellate Divisional Court. The city of Ottawa now appeals to this court.

Income assessment under The Assessment Act is for the current calendar year, whereas the Dominion income tax is levied on the income received during the preceding year. No little of the difficulties of this case come from the very arduous problem which the legislature endeavoured to solve when it decided to levy the tax on income not already received but estimated for the year current at the time of the assessment.

As defined by section 2, subparagraph (*e*), "income" is the annual profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial

or financial or other business or calling directly or indirectly received by the person subject to the tax, and it includes dividends or profits directly or indirectly received from stocks or from any other investment.

Subsection 2 of section 11 states that where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

Section 19*a* provides that in cities having a population of not less than 100,000 (which would comprise Ottawa), every person in receipt of an income liable to assessment shall within the time fixed by by-law of the council forward to the assessment commissioner a statutory declaration showing his total income from all sources during the current year and in ascertaining such income subsection 2 of section 11 shall apply. The respondents duly forwarded this declaration within the time prescribed by a by-law of the council.

The form of statutory declaration authorized by the Act contains a note which is to the same effect as subsection 2 of section 11, and it is on this form that the respondents' declarations were prepared.

Assuming for the moment, but not deciding, that the amount received by the respondents in December, 1920, could properly be described as "income," the appellants' main contentions are based on this subsection. It must be observed however that it is only when the assessed's income is not a salary or other fixed amount "capable of being estimated for the current year," that his income is taken to be not less than the amount of his income during the previous calendar year. Inasmuch as the taxation is imposed upon an income to be received during the year of assessment, and which must be estimated before it is actually received, if this income can be estimated subsection 2 does not apply. And it does not follow that an income cannot be "estimated" because it consists in whole or in part of dividends paid periodically year after year, for these dividends may well be of a fixed amount which

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is paid at regular intervals, although, of course, on account of unforeseen events, they may vary or even fail to be paid. When the respondents made their declarations for 1920, these declarations no doubt contained an estimate of dividents to be received from stocks as do their returns for 1921. The 1920 declarations could not estimate extraordinary receipts like the dividend of 875 per cent on the Hawkesbury Lumber Company's stock declared in December. The declarations for 1921 could however estimate the respondents' incomes to be received during that year, and no criticism is made by the appellant as to this estimate, the claim being that, under subsection 2 of section 11, the declaration should have included, as income for 1921, a sum which admittedly was received in 1920 and was not again received in 1921. The sufficiency of the 1921 declarations is now questioned and not the sufficiency of the declarations made for 1920, and so far as any income really received in 1921 is concerned the declarations for 1921 are not attacked.

It is not claimed that the respondents acted otherwise than in perfect good faith, or that the dividend of 875 per cent was declared in December, 1920, with the view to enable the respondents to escape municipal taxation thereon. The Hawkesbury Lumber Company had consulted the commissioner of taxation under the Dominion income tax law, and was informed by him that if dividends were declared and paid out of surplus before the 31st December, 1920, such dividends would be considered to be non-taxable in the hands of the shareholders. No inference can be drawn from this that an attempt was made to evade taxation under the provincial Act. But the appellant objects that if this dividend cannot be included in the respondents' incomes for 1921, the respondents will escape taxation on the large amount which they received late in December, 1920. And in its factum it says:—

> The dividends could not have been charged to income tax upon the assessment rolls prepared in 1920, for the reason that certain of these rolls were finally revised prior to the date upon which the dividend was declared. Others were completed shortly afterwards. The rolls had been completed by the assessor and had been turned over by him prior to the 30th day of September, 1920.
>
> The assessor had no knowledge which would have enabled him to enter these amounts upon the assessment rolls under preparation in 1920.

In no way would he foresee that a dividend of 875 per cent would be declared towards the end of December, 1920, long after his assessment rolls had gone before the court of revision.

It is not suggested that the respondents could have foreseen this dividend, when they made their statutory declarations in 1920, but really the criticism of the appellant points to a *casus omissus* in The Assessment Act, a case which neither the legislature nor these parties had foreseen, and it is impossible for the court to add to this taxation law in order to provide for it. And I also think that subsection 2 of section 11 cannot be extended to cover it.

The Assessment Act did not provide for the preparation of a supplementary roll to include income actually received after the preparation of the regular roll but not included therein. Nor did it require a supplementary declaration from persons receiving unforeseen income after the preparation of the roll. I have said that it is a very arduous problem to devise a complete scheme of taxation on income to be received during the year of assessment, and this case shews how difficult the problem really is. The legislature may well provide for such a contingency, but in my opinion it has not yet done so. I refer of course to the statute as it stood at the time of these proceedings.

I may complete what I have to say on this branch of the case by referring to section 118 which provides for the remission or reduction of taxes by the court of revision on the petition of a person who has *inter alia* been overcharged by reason of a gross and manifest error in the roll, or who has been assessed for income but has not received such income. It does not go any further and does not authorize the making of a supplementary roll in a case like the one under consideration.

In my opinion therefore, the appellant's contention based on subsection 2 of section 11 is unfounded. This subsection can be applied to the case of persons having a fluctuating income which cannot be estimated in advance and to my mind this is its object and scope.

In view of what I have said it is unnecessary to determine whether the dividends received by the respondents are properly described as "income" as defined by The Assessment Act.

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There is the further ground that under sections 82 and 83 of The Assessment Act, on an appeal upon any ground against an assessment, the County Court Judge or the Ontario Railway and Municipal Board or a divisional court may re-open the whole question of the assessment so that omissions from, or errors in, the roll may be corrected, and may determine the accurate amount for which the assessment should be made. The Appellate Court has exercised this power and I respectfully concur in the reasons given by the learned Chief Justice of Ontario for exercising it.

In my opinion therefore the appeals fail and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Frank B. Proctor.*

Solicitors for the respondent: *Greene, Hill & Hill.*

RIORDON COMPANY, LIMITED (PETITIONER) ..... APPELLANT;

AND

JOHN W. DANFORTH COMPANY (RESPONDENT) ..... RESPONDENT.

*1923
Mar. 9, 10.
April 3.

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

Practice and procedure—Stay of proceedings—Debtor—Extension of credit by unsecured creditors—Approval by Bankruptcy Judge—Privileged claim—Action to enforce—Right of judge to grant stay—C.C. Art. 2013 et seq.—"The Bankruptcy Act," as amended by (D) 11-12 Geo. V, c. 17, s. 2 (g.g.), 6, 7, 9, 10, 11, 13 (15), 13a, 42, 45, 46, 51, 52.

The appellant company, being financially embarrassed, but before any assignment made, submitted to its unsecured creditors a proposal for an extension of credit of one year, pursuant to section 13 of the Bankruptcy Act. Such proposal was accepted by the majority of the unsecured creditors and duly approved by a judge in bankruptcy according to the provisions of the Act. The respondent, having a claim against the appellant for work done and materials supplied, caused to be registered a privilege, under articles 2013 *et seq.* C.C., upon the property on which work had been performed and, within the delay mentioned in the code, brought action to realize its security. The appellant then petitioned the court in bankruptcy for a stay of proceedings in such action until the expiry of the extension of credit.

Held that the judge in bankruptcy had no jurisdiction under the provisions of the Bankruptcy Act to grant such stay.

Per Duff, Anglin and Brodeur JJ.—The court in bankruptcy had no inherent power to stay action.

Held, also, that the respondent company was a "secured creditor" within the meaning of section 2, subsection gg. of the Bankruptcy Act.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec, reversing the judgment of the court in bankruptcy, Maclennan J. and dismissing the petition made by the appellant for an order staying an action instituted by the respondent against the appellant.

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

Lafleur K.C. and *Montgomery K.C.* for the appellant. The judge in bankruptcy was competent to stay the action of the respondent, as the Bankruptcy Act does not entirely

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

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oust the jurisdiction of the court to restrain proceedings by a secured creditor, when such court is of the opinion that the interests of the creditors generally, secured and unsecured, would be seriously prejudiced by the continuance of the proceedings.

The respondent was not a "secured creditor" within the meaning of the relevant sections of the Bankruptcy Act.

Geoffrion K.C. and *De Witt K.C.* for the respondent.

IDINGTON J.—The respondent having a claim against the appellant for work done and materials supplied in the erection of a mill owned by it, registered a lien or privilege in respect thereof under article 2013 and subsequent articles of the Civil Code of Quebec.

The appellant became insolvent in 1921 and before any receiving order or assignment under the Bankruptcy Act, or its amendments, had been made, applied under said Act and some of said amendments to its creditors for an extension of time to pay its debts and was, on the 1st December, 1921, granted same for a year, and after the said extension was granted the respondent instituted an action to enforce its said lien or privilege and realize the security thereby afforded it. That action was on the 2nd February, 1922, specifically ordered by a learned judge of the Superior Court to be stayed.

The question raised in this appeal is whether or not the respondent is, by virtue of said lien or privilege, a secured creditor within the meaning of the relevant section of said Bankruptcy Act and its amendments.

The learned judge who granted the order, thus staying respondent's action, recognized that secured creditors were expressly excepted from the operation of any such extension of credit but by a process of reasoning which seeks to distinguish between such a security as respondent enjoys under the code and that of other secured creditors, satisfied himself that the latter could be protected whilst the other should not be.

The said learned judge then founds his right to stay upon section 7, section 13, subsection 15, and subsection 13*a* (2).

The Court of King's Bench reversed said judgment and set aside said stay with costs.

The notes of judgment by Mr. Justice Greenshields set forth in such complete and satisfactory manner the various aspects of the relevant law bearing upon the questions raised, that I need not repeat same here for I agree in all the essential features thereof as did the majority of his colleagues.

I may, however, remark here concisely that, of the sections specifically relied upon by the learned judge granting the stay, section 7 must be read in connection with section 6; that subsections 15 and 13 cannot justifiably support the order, and that section 13*a* makes any such order as grants an extension of time subject to the rights of secured creditors to realize upon or otherwise deal with their securities.

In short, in my view, I respectfully submit that the only ground which can, at all plausibly, be presented (and that only at first blush) in support of the said staying order, is the distinction which the learned judge makes between the classes of securities business men had long been accustomed to refer to as such and those furnished by the respective statutes of the several provinces in favour of those doing work or supplying material for the purpose of improving the value of the debtor's property.

Why in reason and common sense those doing so should be excluded from the benefits given other classes of securities passes my understanding. They contract with the supposed owner of land on the faith of the legislation which aims at giving them a lien thereon, to the extent by which they thereby add to its value. And surely they are quite as worthy and in need of protection as a mortgagee or other creditor of that kind. All they get back in way of security is that which they gave on faith of being secured to the extent in value which the debtor got. They may have given much more but only get secured to the extent by which the debtor is enriched and his unsecured creditors suffer nothing of which they have a right to complain.

But this need not be elaborated for I submit that the express language of section 2, subsection (*gg*) of the Bankruptcy Act, which reads as follows:

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"Secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor

seems to answer the distinction made and all implied therein.

Clearly it is for the class of unsecured creditors, who are all on the same footing and by this legislation are given an opportunity of coercing a small minority of that class, and no other, to do what the majority may deem advisable in the interest of the entire class.

The scope of such legislation and its obvious purpose is what ought to be looked at and govern us, instead of ignoring all that by following methods akin to splitting hairs and guessing at the possible meaning of certain words and thereby doing a palpable injustice.

Why should those who chose to deal blindly, without security, be entitled to use the property of others to recover something for themselves?

And, above all, why should they be permitted to impair and possibly destroy that property of others?

That given as security is *pro tanto* the property of others than the debtor or his unsecured creditors.

I think this appeal should be dismissed with costs.

DUFF J.—In the fall of 1921 the appellant company became financially embarrassed; and on the 11th October of the same year the company requested Mr. Scott, an authorized trustee in bankruptcy, to call a meeting of its creditors to enable it to submit a proposal for an extension of credit, the proposal being that credit should be extended up to the 19th of November, 1922.

There was accordingly on the 17th of November, 1921, a meeting of the unsecured creditors of the appellant sufficient in number and as to the amount of their claims to satisfy the conditions of section 13 of the Bankruptcy Act, which accepted the proposal. On the 5th December, 1921, approval was given by a judgment of the Judge in Bankruptcy to this proposal.

It was before the year 1921 that the respondent company entered into its contract with the appellant company out of which the respondent company's claim arises. By

that contract the respondent company undertook to construct works of a permanent nature on property belonging to the appellant company in the province of Quebec. Prior to the proceedings above mentioned the appellant under acticle 2013 (*f*) C.C. caused to be registered a statement by which it claimed a privilege upon the property in respect of the sum of one hundred thousand dollars, the contract price. Due notice of this claim having been given, an action was commenced within the period prescribed by the code against the appellant company, praying a condemnation in respect of the personal obligation of the company and a declaration of the validity of its privilege as registered and of its right to be paid by preference the amount of its judgment out of the sale of the property. The respondent company having disputed the appellant company's claim by its pleadings, the action was set down for trial on the 9th of February, 1922.

On the 31st January, 1922, the appellant company petitioned the court in bankruptcy asking for a stay of proceedings in this action until the 19th November, 1922; on the 2nd February of the same year the Judge in Bankruptcy granted the stay.

On appeal this order was set aside and the appellant company by leave given under the Bankruptcy Act now appeals to this court. There are two questions. The first of these in their natural order is whether the respondent company is a secured creditor within the meaning of the Bankruptcy Act. This is contested by the appellant company. It is not denied however that the respondent company would be entitled in liquidation proceedings to a preference out of the property of the company over and above creditors possessing no such security as that which the respondent company possesses, the argument presented on behalf of the appellant company being that the respondent company, while entitled to priority over the general body of creditors possessing neither security nor privilege in the distribution of the proceeds of liquidation, is not within the scope of the provisions of the Act giving special rights and a special status to creditors described as "secured" creditors but that its right is strictly limited to the right of preferential payment conceded. I may say at

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once that I am unable to accept this view for a number of reasons.

First of all the rights of the appellant company under article 2013 C.C. and the subparagraphs of that article are rights which appear clearly enough to constitute a security within the ordinary meaning of the word. It is true that for the purpose of realizing this security the respondent company must first obtain judgment against the appellant company in respect of the appellant company's personal obligation to pay, but having done that it is entitled to bring the property subject to the privilege to sale and to rank upon the proceeds of the sale in priority over other claimants to the extent, at all events, to which the value of the property has been enhanced by the execution of the works giving rise to the obligation. Such rights, I repeat, seem to me to constitute a security and a creditor possessing such rights is, I think, in the ordinary meaning of the words a secured creditor. Then if we look at the definition of secured creditor, which is to be found in s. 2, s.s. (*gg*), we find that "secured creditor" is defined as meaning a person holding any of a number of things, among which is a privilege on or against the property of the debtor or any part thereof as "security for" his debt. I concur with the view expressed by Mr. Justice Greenshields in the court below that "hypothec" and "privilege" have been brought within the scope of the definition for the purpose of including therein securities characteristic of the law of the province of Quebec; and *prima facie* at all events it seems to me that privilege in this definition must include every privilege given by the law of Quebec which is of such a character that it can properly be said to be held "as security for" a debt.

There seems to me to be great force also in Mr. Geoffrion's contention that there is no provision in the Act if the holder of such a privilege be not a "secured creditor" for the recognition of the security. Section 51 seems to provide for the distribution of the property of the bankrupt among his creditors *pari passu*, due provision having been made pursuant to the provisions of the Act for secured creditors.

I have not failed to consider and weigh the arguments presented by Mr. Lafleur and Mr. Montgomery based upon the suggestion that a privilege of this character cannot be given effect to in a practical way under the provisions of the Act relating to secured creditors. One must admit that difficulties are likely to arise, but precisely the same difficulties would arise in dealing with a claim under the Mechanics Lien Act in force in the various provinces by which the holder of a mechanic's lien is entitled to priority over a prior mortgagee in respect of the *plus value* arising from the work or the materials supplied upon which the lien is founded. My conclusion is that on this point the appellants fail.

The next question is whether, assuming the respondent company to be a secured creditor within the meaning of the Act in respect of the privilege mentioned, the Judge in Bankruptcy had jurisdiction to make the order which he did make granting a stay of proceedings. The jurisdiction, if it existed, must have arisen from the express provision of s.s. (1) of sec. 13*a* or from the inherent powers of the Bankruptcy Court. As to s.s. (1) of s. 13*a*, that subsection appears very clearly (whatever may be said with regard to s. 7) to limit the express authority to grant a stay to the period during which the creditors are considering the proposal "made or to be made." I must say it seems impossible to escape this construction of s.s. (1). At the expiration of that period, that is to say after an order has been made approving the proposal and the acceptance of it, then a stay automatically takes place except in the case of proceedings by secured creditors to assert their rights. Assuming there may be grounds for doubt as to the construction of s. 7, we are not concerned with that section, and I cannot think that any real doubt can exist that the jurisdiction given by s.s. (1) of s. 13*a* is limited in the manner I have stated.

The only remaining point is whether the jurisdiction to make the order can properly be ascribed to the inherent powers of the Bankruptcy Court. I think Mr. Geoffrion's contention on that point is sound, namely, that the Bankruptcy Judge was not professing to exercise any inherent power of the Court of Bankruptcy to control its proceed-

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ings but was professing to act under the powers explicitly conferred upon him by the statute, but there is another objection, and although it may be strictly unnecessary to deal with the point, I think it is better to do so. In my opinion the jurisdiction must be taken to be defined by s.s. (1) of s. 13*a* in respect of the subject matter with which that subsection deals and consequently the Court of Bankruptcy possesses no authority under the circumstances in which the subsection comes into play to grant a stay of proceedings which is not compatible with the exercise by secured creditors of their rights "to realize or otherwise deal with their securities."

The appeal should be dismissed with costs.

ANGLIN J.—In this case no receiving order has been pronounced nor has any assignment been made or petition in bankruptcy presented. What has occurred is that the appellant company, desiring to make a proposal to its creditors for an extension of time for payment of its debts, had a meeting of such creditors convened by an authorized trustee; the proposal submitted was accepted by the prescribed majority of the creditors; and on the report of the authorized trustee, the extension so agreed to was approved by the Court in Bankruptcy. All this was done under the authority of s. 13 of the Bankruptcy Act.

The respondent is admittedly a privileged creditor under the provisions of articles 2013 C.C. *et seq.*, and is proceeding by action to realize its security. Invoking as the authority for doing so ss. 7, 13 (15) and 13*a* (2), Mr. Justice Maclennan, sitting as Judge in Bankruptcy, on the application of the appellant made an order staying that action. The Court of King's Bench (Greenshields, Flynn, Tellier and Bernier JJ., Guerin J., dissenting), reversed that order, and from its judgment the present appeal is brought by leave under s. 74 (3) granted by my brother Duff.

The staying of proceedings by creditors for the purpose of facilitating, or aiding to make effective, an extension proposed or approved is dealt with specifically by section 13*a* enacted in 1921 (c. 17, s. 14). I am accordingly of the opinion that, notwithstanding the provisions of ss. 15 of

s. 13, s. 7 cannot be invoked to support the order made by the learned Judge in Bankruptcy. Subsection (1) of s. 7 applies only "after the presentation of a bankruptcy petition," and s.s. (2) only "on the making of a receiving order."

Subsection (1) of s. 13*a*, as the side note indicates, deals only with the staying of proceedings

pending consideration of proposal of a composition, extension or scheme of arrangement.

It provides for the case of intended efforts to effect an extension being imperilled and for a stay until action is taken by the court on the trustee's report. The learned Judge in Bankruptcy evidently realized the inapplicability of this subsection, as he invokes only subsection (2), which applies "on the making * * * of an order approving a proposal of a composition, extension or scheme of arrangement." But ss. (2) does not provide for any action by the Bankruptcy Court. By it such proceedings as fall within its scope are automatically stayed upon the order approving of an extension being made. Moreover, the operation of the subsection is expressly declared to be "subject to the rights of secured creditors to realize or otherwise deal with their securities."

By statutory definition, "a person holding * * * a lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due from the debtor" is a "secured creditor." The respondent is such a person. I am quite unable to appreciate the grounds on which it sought to restrict the term "secured creditor" thus defined to a person holding physical possession of the property which forms his security, or some estate in it, such as the mortgagee under the English system enjoys. The privileged creditor under the law of Quebec occupies much the same position as the lien-holder in the English law. Both are alike covered by the definition. On this aspect of the case I concur in the views expressed by Mr. Justice Greenshields. The respondent, in my opinion, is a "secured creditor" within the meaning of that term in ss. (2) of s. 13*a* of the Bankruptcy Act. On that ground, and also because it does not contemplate a stay by action

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of the court, that subsection does not support the order of the learned Judge in Bankruptcy.

But it is said the court must have inherent discretionary jurisdiction to stay this action. No doubt the Superior Court in which the action was brought has such a discretionary power under some circumstances, but I would question the existence of such inherent power in the Judge in Bankruptcy over the proceedings in any other court, or in the court of which he is a member which for this purpose may be regarded as another court, even if the explicit provisions of the Bankruptcy Act dealing with the subject of staying proceedings do not imply its exclusion. Moreover, no such inherent discretionary jurisdiction was exercised. If it exists for any purpose I am not satisfied that it would justify the making of the order which the appellant seeks against the respondent, who is merely exercising his legal right to realize on his security and is in nowise abusing the process of the court in seeking to enforce that right. The extension was sought on the footing that it should "not bind or affect secured creditors," and the order of approval expressly provides that the extension

is approved subject to the rights of secured creditors to deal with their securities according to law.

I am for these reasons of the opinion that the judgment appealed from was right and should be maintained.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J.—The question here is whether the court can stay an action by a creditor of an insolvent debtor who has obtained an extension of time under section 13 and 13a of The Bankruptcy Act, when such creditor asserts a privilege or lien against the whole or part of the debtor's property.

The respondent had taken an action against the appellant claiming $100,720.50, and alleging that it was entitled to a builder's privilege on the appellant's mill at Temiskaming, Que., for, we were informed, plumbing work and supplies. The appellant had obtained, under sections 13 and 13a of the Bankruptcy Act, an extension of time from its creditors and on its application the Superior Court sitting in bankruptcy (Maclennan J.) stayed the respond-

ent's action. This judgment was reversed by the Court of King's Bench, Mr. Justice Guerin dissenting, and the appellant now appeals with special leave to this court.

The question submitted is a most important one, and if the judgment appealed from is right the respondent's action could not be stayed even if a receiving order or an authorized assignment had been made, the provisions of the Act as to the staying of such an action being practically to the same effect in all these cases.

In reversing the judgment of the Superior Court, the Court of King's Bench refused to follow a previous decision of its own court, differently composed, in a case of *La Compagnie du Boulevard Pie IX* v. *Damphousse* (1). Perhaps I may be permitted to say with great respect that the inconvenience of a court thus disregarding its own judgment in a previous case is too obvious for discussion. However, the *Damphousse Case* (1) is not binding on us and the effect of our judgment, if it be followed as it should be, will be to put an end to any confusion or uncertainty which may arise.

The respondent claims to be a " secured creditor " under subsection *gg* of section 2 of the Act which is as follows:—

(*gg*) " secured creditor " means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor, or any part thereof, as security for a debt due or accruing due to him from the debtor.

The respondent contends that this definition is wide enough to include such a claim as it asserts on the appellant's mill for work done thereon. It has undoubtedly a privilege under Quebec law, but this privilege is only on the increased value given to the property by reason of the work done or materials supplied, to be established after a judicial sale of the property and a relative valuation of the property and the work done (Arts. 2013, 2013b C.C.). To give effect to this privilege the property will have to be sold.

Before dealing with the statutory definition of the term " secured creditor," it will be useful to consider several other provisions of the Act.

To rank against the estate of an insolvent debtor claims must be proved, hence the term " provable debts " which

(1) 67 D.L.R. 385.

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is found in several sections of the Act. The mode of proving debts is described in section 45, and in section 46 there are elaborate provisions as to the proof of debts and valuation of securities by secured creditors. Briefly, the secured creditor may realize his security and prove for the balance due him, or he may surrender his security and prove for his whole debt, or he may in a statutory declaration place a value on his security, and the trustee then can redeem the security at its assessed value or require that the property comprised in the security be sold. The creditor may require the trustee to elect whether he will redeem the security or require it to be realized, failing which the equity of redemption or any other interest in the property comprised in the security vests in the creditor and his debt is reduced by the amount at which the security was valued. When the secured creditor does not comply with section 46, he is excluded from all share in any dividend.

Section 51 deals with the priority of claims on the estate, the general order being: 1, the fees and expenses of the trustee; 2, the costs of the execution creditor, including sheriff's fees and disbursements; 3, wages, salaries, commissions or compensation of clerks, servants, travelling salesmen, labourers or workmen. Debts proved in bankruptcy or under any assignment are paid *pari passu*. Section 52 states that the right of the landlord to distrain or realize his rent shall cease after the receiving order or assignment, but the landlord has the right to be paid by preference an amount not exceeding the value of the distrainable assets and not exceeding three months' rent. I may add that, for the purpose of voting at meetings of creditors, a secured creditor, unless he surrenders his security, must state in his proof the particulars of his security, its date and its value, and can vote only in respect of the balance due him. He is not entitled to vote until he has proved his claim and valued his security (section 42).

We now come to sections 6 and 7, dealing with the effect of a receiving order, which are important in connection with the question at issue.

Section 6, subsection 1, states that on the making of a receiving order the trustee is constituted receiver of the property of the debtor, and thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect of a debt provable in bankruptcy has any remedy against the property and person of the debtor in respect of the debt, or shall commence any action or other legal proceeding without leave of the court. It adds this proviso:—

But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Section 7 enacts that the court may, after presentation of a bankruptcy petition against a debtor, order that any action, execution or other proceeding against the person or property of the debtor, pending in any court other than the court having jurisdiction in bankruptcy, shall stand stayed until the last mentioned court shall otherwise order; and the court in which any such proceedings are pending may likewise, on proof that a bankruptcy petition has been presented against the debtor, stay such proceedings until the first mentioned court shall otherwise order.

Subsection 2 of section 7 is as follows:—

(2) On the making of a receiving order, every such action, execution or other proceeding for the recovery of a debt provable in bankruptcy shall, subject to the provisions of the next preceding section as to the rights of secured creditors, stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

Sections 9 and 10 deal with the authorized assignment, the latter section stating that its effect is to vest in the trustee, subject to the rights of secured creditors, all the property of the assignor at the time of the assignment.

Section 11 contains general provisions relating to receiving orders and authorized assignments and directs (subsection 1) that they shall take precedence over,

(*a*) all attachments of debts by way of garnishment, unless the debt has been actually paid over; and

(*b*) all other attachments, executions or other process against property, except such thereof as having been completely executed by payment to the execution or other creditor, and except also the rights of a secured creditor under section six of this Act.

(This last exception was added by the 1921 amendment.)

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I may note briefly that subsection 3 of section 11 directs the sheriff or other officer of the court having seized property of the debtor under execution, attachment or other process, upon receiving a copy of an assignment or receiving order, to forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment of his fees and charges and the costs of the execution creditor. And subsection 10 states that after its registration the receiving order or the assignment shall have precedence over all certificates of judgment, judgments operating as hypothecs, executions and attachments against land, within the registration office or district or county, subject to a lien for the costs of registration and sheriff's fees.

Section 13 deals with compositions, extensions of time and schemes of arrangement of the insolvent debtor's affairs, which when approved by the court are binding on all the creditors. Section 13a is important in view of this controversy, but is very unskilfully drafted. I will cite it in full:—

13*a*. (1) The court, at any time after a debtor has required an authorized trustee to convene a meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement, may, on the *ex parte* application of the trustee and his affidavit disclosing the circumstances and stating his belief that the success of the intended efforts to bring into effect a composition, extension of time for payment, or scheme of arrangement of the debtor's affairs and obligations will be imperilled unless, pending consideration by the creditors of the proposal made or to be made the existing conditions as to litigation of claims against the debtor is preserved, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last-mentioned court, upon or before report made of the result of the dealings between the debtor and his creditors, shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on like application and proof, stay such proceedings until the court having jurisdiction in bankruptcy shall otherwise order.

(2) On the making of an authorized assignment or an order approving a proposal of a composition, extension or scheme of arrangement every such action, execution or other proceeding for the recovery of a debt provable in authorized assignment or composition, extension or scheme of arrangement, proceedings under this Act shall, subject to the rights of secured creditors to realize or otherwise deal with their securities stand stayed unless and until the court shall, on such terms as it may think just, otherwise order.

The reservation in subsection 2 of section 13a is practically in the same terms, as to the right or power of secured creditors to realize or otherwise deal with their securities, as the proviso of section 6, subsection 1.

Coming back now to the definition of "secured creditor" in section 2, subsection *gg*, it is certainly wide enough to comprise a builder who, under articles 2013 and 2013f C.C., has acquired, and has taken an action to enforce, a privilege on the immovable on which he performed work. The taking of such an action within six months is necessary for the preservation of the privilege.

The respondent being therefore a "secured creditor," can his action be stayed?

The general scheme of the Bankruptcy Act appears to be that secured creditors are considered as creditors of the insolvent debtor, for all purposes such as proving claims, voting at meetings of creditors and receiving dividends, only after deducting the value of their security. They may keep their security and remain entirely outside the bankruptcy proceedings. Under section 46 they may surrender their security and prove their debt for the whole, or realize it and prove for the balance, if any, of their debt; they have the further option of valuing their security which the trustee may redeem at its valuation or require it to be offered for sale, and the secured creditors rank only for the balance. Where they have done none of these things they are excluded from all share in any dividend. The case of the landlord is a special one and is dealt with in section 52.

While there may no doubt be difficulties caused by some provisions of the Act such as the offering for sale, under section 46, of a privilege like that asserted by the respondent, I think that it follows, from what I have described as the general scheme of the Act, that the secured creditor (I do not refer to the landlord) should not be impeded in his attempt to realize his security. Our Act appears even more emphatic in this respect than the English Act, for while the proviso of section 6 copies verbatim subsection 2 of section 7 of the latter Act, subsection 2 of section 7 of the Canadian Act is not found in section 9 of the English Act, and sections 13 and 13a of our Act are

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not in the English Bankruptcy Act, nor in the English Deeds of Arrangement Act, 1914.

It may be that by asserting certain general privileges under the Quebec law, which apply to the whole of the personal or real property of the debtor (arts. 1993, 1994, 2009 C.C.), creditors may cause some embarrassment in the administration of the Bankruptcy law, but these privileges are generally for small amounts and could be redeemed by the trustee. And, if necessary, Parliament can provide for the difficulty by an amendment of the Act.

I would therefore not disturb the judgment appealed from and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lafleur, Macdougall, Macfarlane & Barclay.*

Solicitors for the respondent: *De Witt & Howard.*

THE W. MALCOLM MACKAY COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE BRITISH AMERICA ASSURANCE COMPANY (DEFENDANT) .... RESPONDENT.

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*Mar. 6, 7.
*Apr. 3.

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

Insurance, fire—Lumber—Statutory conditions—Variation—condition or description—Inspection of lumber—Knowledge of insurer—Estoppel.

A policy insuring lumber against loss or damage by fire contained the following clause: "Warranted by the insured that a clear space of 300 feet shall be maintained between the property hereby insured and any standing wood, brush or forest and any sawmill or other special hazard."

Held, that this clause was not merely descriptive of the property but was a condition of the contract of insurance and void as not being in the form required for an addition to, or variation of, the statutory conditions contained in the Fire Insurance Policies Act of New Brunswick (3 Geo. V, ch. 26.) *Curtis's & Harvey* v. *North British and Mercantile Ins. Co.* ([1921] 1 A.C. 303), and *Guimond* v. *Fidelity-Phenix* (47 Can. S.C.R. 216) dist.

Prior to the issue of the policy an expert in that class of insurance in the insurer's employ examined the lumber and the locality in which it was piled and reported to the insurer that none of it was within 300 feet of standing wood, brush or forest. On the trial of the action on the policy the jury found that some of it was within that distance at the time of the inspection but none was so placed afterwards.

Held, that the policy was issued and accepted in the belief that the inspection truly represented the fact and the insurer was estopped from maintaining the contrary.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the judgment on the trial in favour of the defendants.

Two questions for decision were presented on the appeal. The first was whether the clause in the policy set out in the head-note was a condition or merely descriptive of the property. The other depended on the following facts.

No written application for the policy was presented. The insured applied to the head agents in St. John, who sent one Heine, considered an expert, to view the property. Heine reported to his employer that he had paced the dis-

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

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tance between the lumber to be insured and the nearest woods and found it to be more than 300 feet; that some brush between the lumber and the woods had been burnt over and was not dangerous; and recommended the risk to the company. On the trial of the action the jury found that when Heine saw it the lumber was less than 300 feet from the brush and none had been placed within that distance after the inspection.

The Appeal Division held that the clause respecting the position of the lumber was not a condition and that the insurer could rely on the jury's findings as to such position. The second question was, therefore: Was the defendant estopped from claiming that there was a breach of the warranty?

Baxter K.C. and *F. R. Taylor K.C.* for the appellant. The clause warranting the continuance of the position of the lumber is a condition and void for want of proper form. See *Wanless* v. *Lancashire Ins. Co.* (1). The *Curtis's & Harvey Co.* v. *North British and Mercantile Ins. Co.* (2) is clearly distinguishable.

The defendant company is affected with the knowledge and bound by the acts of its agent Heine. *City of London Fire Ins. Co.* v. *Smith* (3). We rely on the rule laid down in *Carr* v. *London and North Western Ry. Co.* (4).

Teed K.C. for the respondent. The warranty clause is not a condition but a description of the nature of the risk. See *Great Northern Co.* v. *Alliance Ins. Co.* (5).

As to estoppel see *Guimond* v. *Fidelity Phœnix Ins. Co.* (6), *Lockharts* v. *Bernard Rosen & Co.* (7).

IDINGTON J.—The appellant brought this action against the respondent upon two policies of insurance dated 11th April, 1921, and on lumber piled at Burton, Sunbury County, New Brunswick.

The E. C. Atkinson Lumber Company having cut said lumber off lands owned by its said co-appellant which

(1) [1896] 23 Ont. App. R. 224.
(2) [1921] 1 A.C. 303.
(3) 15 Can. S.C.R. 69.
(4) [1875] L.R. 10 C.P. 307 at p. 317.
(5) 25 Ont. App. R. 393.
(6) 41 N.B. Rep. 145; 47 Can. S.C.R. 216, at p. 229.
(7) [1922] 1 Ch. 433.

had also made advances to said operator the loss, if any, was made payable to said company so advancing.

The Atkinson Company carried on its business at Fredericton, N.B., and applied to an insurance agent there for the needed insurance but he was not able to fix the rate or rates of premium at the place where the lumber was piled; he, therefore, turned the business over to the general agents of the respondent at St. John, N.B. They in turn sent R. W. Heine, a regular salaried man engaged to see after their outside work, to inspect the risk and fix the premium to be paid. He did so and upon his report the respondent through its said general agents determined the whole business, issued the policies and were paid the rates so fixed.

The lumber having been consumed by fire in the following July the respondent on notice and inspection by someone else, set up as a pretext for non-payment, that in and by a term of each of the said policies the assured had warranted a clear space of 300 feet between the property so insured and any standing wood, brush or forest, etc.

The appellant, therefore, brought this action which was tried with a jury to whom were submitted several questions answered by them.

The learned trial judge thereupon directed a judgment to be entered dismissing said action. From that judgment an appeal was taken to the Appeal Division for New Brunswick and that court dismissed the said appeal.

Of the several questions raised herein, the most important, in a general sense, is that which must turn upon the determination of whether or not the warranty above referred to was in law a condition which is required by the New Brunswick Fire Insurance Policies Act, 3 Geo. V, c. 26, to conform therewith. By section 3 thereof conditions set forth in the first schedule to the Act are made part of every contract of fire insurance, and required to be printed on every such policy with the heading "Statutory Conditions" and no stipulation to the contrary, or providing for any variation, addition or omission, shall be binding on the assured, unless evidenced in the manner prescribed in this Act in that behalf.

That is followed by section 4, reading as follows:—

4. If the insurer desires to vary the said conditions or to omit any of them, or to add new conditions, there shall be added on the instrument

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of contract containing the printed statutory conditions, words to the effect set out in the second schedule, printed in conspicuous type, and in ink of a different colour, and with the heading, "Variations in Conditions"; and section 5, reading as follows:—

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured; and no questions shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid; provided, it shall be optional with the insurers to pay or allow claims which are void under the third, the fifth, or ninth statutory conditions, in case the said insurers think fit to waive the objections mentioned in the said conditions.

The warranty in question seems to have varied in one of the policies by reason of something which transpired between their date of 11th April, 1921, and the 1st June, 1921.

There was no stress laid in argument by either side on that circumstance.

I therefore assume that the form of the condition now in question reads as it seems from the beginning to have read in policy no. 33704, and is as follows:—

Warranted by the assured that a continuous clear space of 300 feet shall hereafter be maintained between the property hereby insured and any standing wood, brush or forest and any saw-mill or other special hazard.

which raises the next question argued as to its being a condition within the meaning of the said above quoted sections of the Act, and applies to both policies though the word "hereafter" does not appear in the amended form of the other policy.

The Appeal Division below held that the said warranty was merely descriptive of the risk or, as it is put by the judgment of Mr. Justice Barry, speaking for that court, "to speak more accurately descriptive of the location of the risk" and hence not a condition within the meaning of the above quoted sections of the Act requiring such condition to be set forth in accordance therewith.

There is no pretence that if it is to be treated as such a condition that said requirements were complied with.

In the argument before us the case of *The London Assurance Co.* v. *The Great Northern Transit Co.* (1), was relied

(1) [1899] 29 Can. S.C.R. 577.

upon by respondent's counsel as maintaining the ground taken below as to the warranty being merely descriptive of the risk.

I cannot see much resemblance between what was involved in that case and is in this.

That decision, of course, in a case exactly like what was presented therein, must bind us, but, I submit, is not to be extended to, or cover, what in fact seems to be a condition within the meaning of the sections now in question; nor are we bound by the mere dicta assigned as reasons, or beyond the exact point decided.

In that case judicial opinion seems to have been much divided in the Ontario courts. The learned trial judge (the late Mr. Justice Armour) seems to have held in favour of the plaintiff, and the Court of Appeal seems to have been equally divided.

Of those in said Court of Appeal holding with the insurance company's contention, the late Chief Justice Burton spoke as follows:—

> But it is said that the clause "whilst running on the inland lakes rivers and canals during the season of navigation," if of any force in limiting or restricting the general nature of the insurance, is of force only as a condition in respect of the user of the vessel, and is not binding, not having been indorsed upon the policy in compliance with the provisions of the Ontario Insurance Act, as being a variation of, or an addition to, the statutory conditions. I am unable to agree in that contention. I could well understand that if this had been an insurance on this vessel or on a house generally, and the insurers had afterwards relied on a condition to the effect that if the house should be unoccupied or vacant for a certain number of days the risk should cease, that being a variation of the statutory conditions could not be resorted to unless the requirements of the statute had been complied with. But that is not this case; the policy describes and defines accurately and distinctly the precise risk they are willing to undertake, and the locality and user or occupation of the vessel form part of the definition of this risk; it is not the insurance of the vessel generally for a certain time, but it is for the insurance of her so long as she remains in a certain locality, and so long as during the summer she was in actual service and during the winter was tied up in a place of safety. The existence of these things formed part of the risk and was a condition precedent to the risk attaching or any liability on the part of the insurers.

The distinction that the learned judge so made applies here, I submit, and in effect presents us with a view of the case in hand as being almost identical in principle with what we have to deal with.

I adopt that as distinguishing that case from this.

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Moreover there are a number of the statutory conditions such as appear in the 10th and 11th numbers thereof, which, to my mind, are very illuminative of the principles governing the action of the legislature in imposing these conditions as part of every fire insurance contract.

From these I submit we must be guided as to the nature of the conditions which are to fall within the variations or additions or omissions which an insurance company is imperatively required to set forth as prescribed and in default are to be held null and void.

Clearly it is the measure of the hazard which is involved that must determine whether or not anything touching that can be by the insurer imposed unless by adopting the prescribed mode of doing so.

Curiously enough the respondent by the adoption of its third variation in conditions, which reads as follows

> 3. If any building herein described be or become vacant or unoccupied, and so remain for the space of thirty consecutive days, or being a manufactory, shall cease to be operated for that length of time, this policy shall be void, unless notice of such vacancy or non-occupation has been given to the insurer, and such vacancy or non-occupation has been consented to in writing by the insurer,

seems to have observed that principle.

I cannot, in principle, distinguish between the increase of hazard involved in these changes in mode of use or condition and thus provided for, and that provided for by the warranty in question herein. Nor can I do so as between either and any of the tenth and eleventh of the statutory conditions.

If respondent succeed in imposing such a warranty as in question herein without observing the statutory requirements for validating it, I submit it will have gone a long way towards repealing what has proved to be a most excellent piece of Ontario legislation which was the work of a highly qualified commission intended and destined to put the insurance business on a higher level of honest dealing than it had been some years previously to its adoption by the Ontario legislature where it originated.

Indeed, I am forcibly reminded, by the respondent's contention herein of the undesirable conditions of the fire insurance business and its prolific source of litigation in that province for many years prior to said enactment.

Turning to the continuation of the story of how this insurance here in question was brought about, the Mr. Heine, who inspected and reported as above related, in his evidence tells us that on that occasion he had not trusted to memory of what respondent required in such cases, but read from a book he had with him and measured accordingly by pacing from where part of the lumber to be insured was piled to the nearest trees or bushes, and found they were three hundred feet from the lumber then piled by appellant, the E. C. Atkinson Lumber Company.

The jury, however, on the evidence of other witnesses, found that of the lumber so piled some was within three hundred feet of standing wood, brush or forest.

The jury also found that none of it was so placed within three hundred feet of any standing wood, brush or forest after the said inspection by Heine, upon which, and his report thereof, the rate of insurance was fixed and the policies were issued accordingly to appellants.

No application in writing was made by the appellants or either of them.

They acted in paying the rates demanded upon such basis as was solely fixed by respondent or its general agents, and accepted the policies proffered in accordance therewith and pursuant thereto.

The explanation of the difference between Heine's finding and that of other witnesses would seem to be that the alleged wood or forest had in a previous year been overrun by fire and so burnt over that for at least the distance he paced, what remained after said fire could no longer be properly considered as a fire hazard within said warranty.

No one seems to impute dishonesty to Heine. At best he would, from respondent's point of view, seem to have made an error of judgment. It is, I submit, easy to conceive how different minds under such circumstances might arrive at a different judgment as to where the line ought to be drawn in such a case.

These facts supply additional strength to the argument in favour of the appellant's contention that the warranty in question should be held to be a condition within the meaning of the said section above cited of the statute

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requiring it to be set forth as a variation, addition or omission, in the manner prescribed and, default that having been done, treated as null.

Neither the case above cited nor the case of *Curtis's & Harvey, Limited,* v. *North British & Mercantile Ins. Co.* (1), when closely examined, seems to me to help any one in this case. The facts there in question are entirely different from those here in question.

I am so decidedly of the opinion, upon all the foregoing considerations, that this appeal should be allowed that I do not feel disposed to enter elaborately into the other grounds referred to in the course of the argument.

The case of *Guimond* v. *Fidelity-Phenix Ins. Co.* (2), so much relied upon below and cited here, does not seem to me worthy of much consideration herein. It was decided before the New Brunswick Legislature had passed the Act above referred to and as I thought, in course of taking part in deciding it, raised only one point necessary for consideration and that did not suggest any possibility of making its decision turn upon any such considerations as are arguable herein.

The appellants' counsel in argument stoutly contended that the policies sued upon were not only as usual liable to the application of the doctrine of *contra proferentem* but also under the peculiar circumstances above related so directly the product of its own efforts to induce through its agents the appellants to accept same, that the respondent is estopped from setting up the final determination of fact which in truth had nothing to do with the fire or the cause thereof and at best was a mere technical defence of which it in the last analysis was the sole creator.

The case of *Carr* v. *London & South Western Ry. Co.* (3) is relied upon by appellants' counsel as presenting, by Brett J., a correct statement of the doctrine of estoppel in the following quotation:—

> And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

(1) [1921] 1 A.C. 303. (2) 47 Can. S.C.R. 216.
(3) L.R. 10 C.P. 307, at p. 317.

And as to the misdescription they rely upon *In re Universal Non-Tariff Fire Ins. Co.* (1), which I am inclined to think is with numerous other cases cited in line therewith as to the relation of the party in question acting and causing the error being so far an agent of the company as to bind it under the peculiar circumstances and at all events estop it from setting up such error.

I incline to think the appellants are entitled to succeed on one or other of those aspects of the case as well as the chief ground above dealt with as against the pretensions of respondent.

I would allow the appeal with costs throughout and direct judgment to be entered for the amount of damages assessed at $5,361.71 as of the date of the trial with costs.

DUFF J.—Ss. 4 and 5 of the Fire Insurance Policies Act, New Brunswick (3 Geo. V, ch. 26), are in the following words:—

4. If the insurer desires to vary the said conditions or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions, words to the effect set out in the second schedule, printed in conspicuous type, and in ink of a different colour, and with the heading, "Variations in Conditions."

5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured.

The policies sued upon contain a clause requiring the maintenance of a space of 300 feet between the lumber insured and any standing wood, brush or forest. In policy no. 33704 the clause is as follows:—

Warranted by the assured that a clear space of 300 feet shall be maintained between the property hereby insured and any standing wood, brush or forest and any saw-mill or other special hazard.

In policy no. 33705 the word "hereafter" is found between "shall" and "be". In other respects the two clauses do not materially differ.

It does not seem to admit of a doubt that if this clause is a "condition" within the meaning of ss. 4 and 5, then the insertion of it is an attempt to add a "new" condition or to vary a statutory condition within the meaning of that section and consequently not "binding upon the assured" and not "valid", because it is not set out in the manner prescribed by the statute.

(1) [1875] L.R. 19 Eq. 485.

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It is convenient first to discuss the effect of the clause. The property insured is described as "lumber, piled and lying along the line of the Canadian National Railway at Burton, Sunbury County, New Brunswick." The description embraces, I think, any lumber of the insured company so situated, and the clause in question cannot, I think, be read as importing merely a qualification of this description. I think it is a warranty against the presence of any of the lumber of the insured company within the prohibited space.

The warranty literally read seems to come into operation concurrently with the conclusion of the contract. There is an obvious difference between a warranty as to the existence of a state of facts, upon the faith of which a contract is concluded, and a warranty that such a state of facts shall exist from and after the conclusion of the contract. Here the meaning is that from the moment the contract is concluded the "clear space of 300 feet" shall be maintained. Such a clause introduced by the word "warranted," is in the nature of a condition precedent of the company's liability, as has been decided in numerous cases. (*Newcastle Fire Ins. Co.* v. *Macmorran* (1); *Barnard* v. *Faber* (2); *Ellinger* v. *Mutual Life Ins. Co.* (3); *Camors* v. *Union Marine Ins. Co.* (4)).

The warranty is therefore strictly a condition falling, *prima facie,* within the provisions of ss. 4 and 5 of the statute as being either an attempt to vary one of the statutory conditions or an attempt to add a "new" condition.

The circumstances of the case are clearly distinguishable from those of the case of Curtis & Harvey, which Their Lordships of the Judicial Committee had before them in 1921. (*Curtis's & Harvey, Limited* v. *North British & Mercantile Ins. Co.* (5)). That was a case which arose out of a claim made under a policy of insurance which, on the face of it, was an insurance against fire, but which contained two clauses dealing with the subject of the perils insured against. One was clause 11, a statutory condition, providing that the company should not be liable for explosions of any kind unless fire should ensue, and then for loss or dam-

(1) 3 Dow 255, at page 262.
(2) [1893] 1 Q.B. 340.
(3) [1905] 1 K.B. 31.
(4) 81 Am. St. R. 128.
(5) [1921] 1 A.C. 303.

age by fire only; and the other a clause in these words: "Warranted free of claim for loss or damage caused by explosion of any of the materials used on the premises." The Supreme Court of Canada had in *Hobbs* v. *Guardian Fire and Life Ins. Co.* (1) held that clause 11 did apply to explosions resulting from fire; in other words that, notwithstanding clause 11, the policy was a policy of insurance against loss caused by fire, including loss resulting from explosions due to fire. Their Lordships held that the warranty clause had, according to its terms, the effect of excluding explosions from the perils insured against, and Lord Dunedin, in delivering the judgment of Their Lordships at page 312, said that

> any other stipulation or covenant which may define or limit the risk can also receive effect in so far as it does not contradict the statutory conditions, which are paramount.

It must be remembered that Their Lordships were dealing with a clause defining and limiting the risk in the sense of limiting the perils insured against. One of the so-called conditions of the policy dealt with this same subject, and in so far as the clause was a variation of the condition (that is in so far as it dealt with explosions resulting from fire) the statute applied. In so far as it was not a variation of the condition but an independent stipulation defining and limiting the risk in that sense (that is in so far as it related to explosions not arising from fire) it was treated by Their Lordships as valid, obviously because it was not a "condition" to which the statute applied.

The clause now before us does not define or limit the risk in the view I take of it either as being merely a description of the property insured or in the sense of defining or limiting the perils insured against, as in the case of Curtis & Harvey. Strictly limiting its legal effect to the scope of its terms, it is not, in my judgment, other than a "condition" within the meaning of the statute.

The respondent company argues, however, that the warranty, and especially by force of the word "maintained" implies the affirmation of an existing state of facts corresponding to the state of facts warranted. It is clear enough, of course, that strict and literal compliance with the warranty would in a practical sense be impossible unless the

(1) 12 Can. S.C.R. 631.

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state of facts which the policy warrants shall be maintained was in existence at the moment the policy came into force. But it does not follow at all, I think, that an affirmation of the existence of this state of facts as the basis of the contract is included within the scope of the warranty as defined by the terms in which it is expressed. To the argument that it is implied, there are, I think, two answers: First, if I am right in my conclusion that the condition imported by the warranty as expressed is inoperative by force of the provisions of the statute, then I do not think that you can consistently with the statute imply from it a condition or a term not expressed even though such an implication might be found there if the clause were truly a part of the contract.

In the next place, as I have already intimated, assuming the warranty by its express terms involved an affirmation as to the existing state of facts, it would still be something more than a description of the property and would import a condition precedent of the company's liability—a "condition" to which the statute would apply.

There is another point. The policy on the contention raised by the respondent company, which succeeded in the courts below (as to the effect of the words "standing wood, brush or forest") was sterile from the commencement. The respondent company, through Heine, their agent, had full knowledge of the actual facts, and the acceptance of the construction of the words mentioned now advanced by them necessarily involves the proposition that they received a premium for and delivered a policy to the insured which, constructively at all events, they knew to be inoperative. It is impossible, I think, to ascribe to the parties an intention to deliver and to accept an inoperative policy, and I think it is a very arguable proposition that the case can be brought within the principle laid down in *"The Moorcock"* (1); *Hamlyn* v. *Wood* (2); and by Lord Watson in *Dahl* v. *Nelson* (3). Certainly if the matter had been mentioned it is impossible to suppose the parties subscribing to a contract which in the existing

(1) [1889] 14 P.D. 64, at page 68. (2) [1891] 2 Q.B. 488 at page 491.
(3) 6 App. Cas. 38, at page 59.

state of facts which the parties contemplated as continuing to exist could impose no liability on the company, and I think, as I say, it could be argued with a great deal of force that a term should be implied by which the words mentioned should be read as excluding anything found within 300 feet of the lumber as situated at the time of Heine's inspection. Moreover, the respondent company —being as to this matter *spondentes peritiam artis*—were fully aware, through Heine, that the Atkinson company believed, as a consequence of Heine's conduct, the facts as they existed to constitute a sufficient compliance with the warranty as understood by the respondent company. It is open to question, I think, whether the respondent company is at liberty now to put forward another construction of the warranty with the effect of obliterating the only consideration which the insured company was receiving for the premium it paid.

The appeal should be allowed.

ANGLIN J.—The plaintiffs sue upon two policies to recover insurance for a quantity of lumber destroyed by fire. The sole defence to the claim is non-fulfilment of the following term of the policies:—

> Warranted by the assured that a continuous clear space of 300 feet shall (hereafter) be maintained between the lumber hereby insured and any standing wood, brush or forest or any saw-mill or other special hazard.

This clause is found in a typewritten slip attached to each of the two policies. so placed that it is separated from the description of the property insured and of its location by intervening provisions. The word "hereafter" is omitted from one of the clauses. There is no suggestion of proximity to a saw-mill or special hazard other than standing wood, brush or forest.

The action was tried with a jury, which found that at the time of the fire and at the date of an inspection by one Heine, a salaried representative of the general agents of the defendant company, made immediately before the risk was taken, the lumber or some of it was within 300 feet of standing wood, brush or forest and that none of it had been so placed after the agent's inspection. These findings of fact are accepted.

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The material circumstances of the application for the insurance and of the inspection of the risk by Heine are stated by Mr. Justice Barry, who delivered the decision of the Appeal Division of the Supreme Court of New Brunswick confirming the judgment of the trial judge (Chandler J.), dismissing the action. The appellants have expressly accepted that statement of fact as accurate, and the respondent does not seriously challenge it. Its correctness should, I think, be assumed.

It is quite clear that when Heine visited Burton Station to inspect the risk he had abundant opportunity of ascertaining the precise surroundings of the lumber then piled and that he was fully satisfied that every part of it was more than 300 feet from the nearest standing wood, brush or forest. He so reported to the respondent company by letter, and highly recommended the risk. There is no suggestion of collusion between Heine and the assured or of any lack of good faith on the part of either. If the finding of the jury is right, as must now be assumed, Heine simply made a mistake, probably in his appreciation of a bush hazard. The insurer in issuing and the insured in accepting the policies both proceeded on the assumption that the surroundings of the lumber at that time were in fact as they appeared to, and were reported by, Heine, whose business it was to inspect proposed risks for the purpose of passing upon their desirability for, and fixing the rates to be charged for them by, the companies represented by his employers as general agents.

For the appellants it is contended that the clauses invoked against them are indirect attempts to add a condition to the terms of the policies and, as such, ineffectual for non-compliance with the requirement as to form prescribed for variations of, or additions to, the statutory conditions by the New Brunswick Insurance Act (3 Geo. V, c. 26); for the respondent it is urged that the clauses in question are descriptive or limitative of the risk assumed and not within the purview of the statutory provisions dealing with variations of, or additions to, statutory conditions. If so, urge the appellants, the respondent is estopped by what took place in regard to, and consequent upon, the inspec-

tion by Heine from relying upon the facts found by the jury as a defence.

I find difficulty in regarding a provision warranting that a certain state of affairs, impliedly existing, "shall be maintained" as merely descriptive. The word "warranty" followed by the verb in the future tense seems inapt to express description of a risk presently assumed. While the present existence of the conditions to be maintained is no doubt implied, in the sense that unless they exist the warranty is incapable of literal fulfilment, there is no contractual guarantee of their present existence. It therefore seems more in accord with the language used to treat the warranty as affecting only the state of affairs to be maintained during the future continuance of the risk. So viewed it seems to me to be not descriptive, but in reality to import a condition that the assured shall so keep the insured lumber that no part of it will in the future and during the continuance of the risk, be within 300 feet of any standing wood, brush or forest.

On the other hand if, notwithstanding the use of the future tense, the clause is *in se* susceptible of a construction importing a guarantee of the present existence of the state of affairs warranted, as well as its continuance during the term of the policies, I should regard it as so equivocal that resort can properly be had to evidence of the circumstances under which the policies were issued to aid in determining the sense in which it should be taken to have been intended. To these circumstances I have already sufficiently adverted. Of the existing situs of the lumber and its surroundings the insurance company must be deemed, as between it and the insured, to have had, through Heine, full notice. *Bawden* v. *London, Edinburgh and Glasgow Ins Co.* (1); *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.* (2). Heine, representing the general agents, was satisfied from his inspection that, if the conditions existing when the policies issued should be maintained, the warranty would be fulfilled. The application for the insurance proceeded on that footing. No guarantee as to the present existence of such condition was therefore required, and the insured had no reason to expect that it would be asked.

(1) [1892] 2 Q.B. 534. (2) [1907] 23 Times L.R. 521.

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Only a warranty against altering existing conditions so as to impinge upon the 300 feet clear space would be looked for. The bringing into the Burton Station piling ground of other lumber then piled elsewhere was immediately contemplated. Hence the importance of stipulating that the existing satisfactory state of affairs should not be prejudicially affected by the placing of such additional lumber when brought in—that the " clear space of 300 feet shall be maintained." That, and that alone, would, under the circumstances, appear to have been what might reasonably be expected to be made the subject of warranty by the insured against the proximity of such hazard. Giving due weight to the rule, *contra proferentem,* I am not at all certain that its scope should not be so restricted.

But the language used covers not only undue proximity owing to changes to be made in, or additions to, the piles of lumber, which the jury has clearly negatived, but also the maintaining of such undue proximity if it should already exist. In whichever way it is read, however, the clause in question involves a stipulation that the risk shall not attach if the warranty is not fulfilled, and it is in my opinion either a variation of statutory condition No. 3 or a new condition added to the statutory conditions, and in either view falls within the provision prescribing that it must be placed under a stated heading and in ink of a colour different from that in which the body of the policy is printed—conditions admittedly not complied with.

The case is distinguishable from *Curtis's & Harvey (Canada) Limited* v. *North British & Mercantile Ins. Co.* (1), in that we have here a clause by which it is intended to impose a condition upon the risk attaching or continuing, whereas the clause under consideration in the *Curtis's & Harvey Case* (1) qualified and restricted, not the circumstances in which the risk should attach or continue, but the peril insured against. The latter clause, in so far as it was not in conflict therewith, was held not to be in the nature of a variation or addition to the statuory conditions, but " another stipulation or covenant which defined or limited the risk " (the word " risk " being obviously used here in the sense of " peril "), insured against.

(1) [1921] 1 A.C. 303.

On the other hand if I should be wrong in regarding the clauses under consideration as attempts to vary or add to the statutory conditions—if, as the respondent contends, they should be deemed merely descriptive of the risk assumed—I am satisfied that, in view of the inspection made by Heine, of his report, on the faith of which both parties acted, and of the fact that the clauses relied upon were prepared by the company itself, for it, after loss, to dispute the existence, at the time the policies were issued, of the facts necessary to meet the requirements of those clauses, is inequitable and should not be tolerated by the court. The insured in accepting the policies with the warranty against proximity of bush hazard relied, as they were entitled to do (*Joel* v. *Law Union and Crown Ins. Co.*) (1), upon the skill and judgment of Heine as to what constituted "standing wood, brush or forest" within the meaning of the warranty clause, which he says he explained and interpreted to Atkinson (representing the insured) at the time of the inspection. He had been sent by the respondents' general agents to make the inspection for the very purpose of ascertaining to what hazard from the insurer's point of view the lumber was exposed. As put by Ritchie C.J., in *Hastings Mutual Fire Ins. Co.* v. *Shannon* (2),

> who but the company is to be responsible for his (Heine's) not making a more accurate examination?—

I would add—or for any lack of skill on his part in failing to recognize a bush hazard which he must have seen, if it in fact existed, as the jury has found. Ritchie C.J. further said in the *Shannon Case* (2), at page 408:—

> So long ago as 1815 Lord Eldon, in the House of Lords, recognized that while it is a first principle of the law of insurance that, in the case of warranty, the thing must be exactly as it is represented to be, it would be an effectual answer, even in the case of a warranty, that the insured were misled by the insurers or their agents. *Newcastle Fire Ins. Co.* v. *Macmoran* (3).

See also *Quinlan* v. *Union Fire Ins. Co.* (4); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (5); *Mahomed* v. *Anchor Fire and Marine Ins. Co.* (6); *In re Universal*

(1) [1908] 2 K.B. 863, 891.
(2) 2 Can. S.C.R. 394, at p. 407.
(3) 3 Dow 255.
(4) [1883] 8 Ont. App. R. 376.
(5) [1910] 44 Can. S.C.R. 40.
(6) [1913] 48 Can. S.C.R. 546.

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Non-Tariff Fire Ins. Co. (1); *Benson* v. *Ottawa Agricultural Ins. Co.* (2)

In *Guimond* v. *Fidelity-Phœnix Ins. Co.* (3), there was no inspection of the risk by any one on behalf of the insurers. The existence or non-existence of the thing warranted not to exist—a railway passing within 200 feet of the insured lumber—was in no wise a matter of opinion or a subject as to which reliance would be placed on inspection by an expert. There was no room for the suggestion that the insured had been misled by any person acting for the insurers.

I would for these reasons, with respect, allow this appeal and direct that judgment be entered for the plaintiffs (appellants) for the amount of their claim with costs throughout.

BRODEUR J.—I would allow this appeal on the ground that the insurance company knew through its agent Heine the exact location of the lumber insured.

The three hundred feet clause stipulated in the policy had been the subject of a special investigation on the part of the agent. An application had been made for insurance to the general New Brunswick agents of the respondent company. They sent up this man Heine to examine the locus and he was of opinion that there was no risk from small brush which had been burned about a year before, and he so advised the company before the policy was issued. All the facts and circumstances surrounding the risk were well known to the company, and it fixed the premium according to the view expressed by Heine. Whether or not there was a brush risk, the insurance company was willing to insure, as in fact was done with regard to some other lumber for the benefit of the appellant company which was in a brush risk. All the difference was in the percentage of premium asked for. After having had the ground thoroughly examined by the representative and after having had a report from the latter that in the case in question there was no brush risk and after having then charged a premium of $2\frac{1}{2}$ per cent instead of 5 per

(1) L.R. 19 Eq. 485, 495. (2) 42 U.C.Q.B. 282.
(3) 47 Can. S.C.R. 216.

cent, can this insurance company be permitted now to claim that it is not liable if a loss subsequently occurs?

The courts below have relied on the case of *Guimond* v. *Fidelity-Phœnix Ins. Co.* (1). When this latter case was decided, there was no statute in New Brunswick providing for statutory conditions while now there is such a statute which might oblige us to construe differently certain provisions of the policy now under consideration. We came to the conclusion in the *Guimond Case* (1) that the persons to whom the insured applied for insurance were not the agents of the insurer. In this case, there is not the least doubt that Heine was the representative and agent of the insurer.

The following cases are authority for the proposition that in the present case the insurance company should be declared liable. *National Benefit Life Assur. Co.* v. *McCoy* (2); *Kline Brothers* v. *Dominion Fire Ins. Co.* (3); In re *Universal Non-Tariff Fire Ins. Co.* (4). I may also refer to Halsbury, vol. 17, age 534, where it is said:—

> If the agent of the insurance office takes upon himself the responsibility of surveying and describing the property, any misdescription by him of the property cannot be imputed to the assured and if the property is consequently misdescribed in the policy the instrument, if necessary, may be rectified.

In view of my conclusion on the above point, it is not necessary for me to consider whether the 300 feet clause was a condition to the terms of the policy in issue and whether the statutory conditions of the Fire Policies Act of New Brunswick should apply.

The appeal should be allowed with costs throughout and judgment should be rendered for the plaintiff for the amount of the loss which was fixed by agreement at the sum of $5,361.71.

MIGNAULT J.—I think that what has been termed the warranty clause is a condition of the policies and not a description of the risk insured against. Being a condition, it is governed by the New Brunswick Fire Insurance Policies Act (3 Geo. V, ch. 26). Section 4 of the statute

(1) 47 Can. S.C.R. 216.
(2) [1918] 57 Can. S.C.R. 29, at p. 34.
(3) [1912] 47 Can. S.C.R. 252.
(4) L.R. 19 Eq. 485.

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contains an imperative rule, which must be observed by the insurer who desires to vary the statutory conditions, or to omit any of them, or to add new conditions, and requires that such conditions be printed in conspicuous type, and in ink of a different colour and with the heading "Variations in Conditions." The sanction of this rule is that, unless the condition is distinctly indicated as above mentioned, or to the like effect, it is not valid and binding on the assured. The insurer here did not comply with this rule. My learned colleagues have to my mind successfully distinguished this case from the *Curtis's & Harvey Case* (1), and I need not repeat what they have said. On this point the judgment appealed from cannot be sustained.

The respondent's agent, Heine, having inspected this risk, measured the distance between the lumber and the nearest bush, and reported that there was a clear space of 300 feet between the lumber and any standing wood, brush or forest, and the so-called warranty clause having been inserted in the policies on Heine's representations, I would think that the respondent should not now be allowed to dispute liability on the ground that the facts so represented were not true. No change in the situation of the lumber was made by the appellant who throughout acted in good faith, relying on Heine's representations. There is, therefore, much more here than mere knowledge by the insured of the situation of the property, and this distinguishes this case from *Guimond* v. *Fidelity-Phœnix Ins. Co.* (2).

The first ground of appeal, however, suffices to dispose of the case in favour of the appellant.

I would allow the appeal with costs and give judgment to the appellant for the amount of the verdict with interest and costs throughout.

Appeal allowed with costs.

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

Solicitors for the respondent: *Teed & Teed.*

(1) [1921] 1 A.C. 303.

(2) 47 Can. S.C.R. 216.

THE CITY OF MONTREAL (DEFENDANT) .APPELLANT;

AND

T. LESAGE (PLAINTIFF) .....RESPONDENT.

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*Feb. 19.
*April 3.

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

Municipal corporation—Negligence—Water pipes—Damages to property—Onus—Art. 1054 C.C.

Upon an action brought by the owner of an immovable for damages caused by flooding due to the bursting of water pipes, a municipal corporation is liable under article 1054 C.C., unless it establishes that it was "unable by reasonable means to prevent the act (le fait) which caused the damage." *Quebec R.L.H. & P. Co.* v. *Vandry* ([1920] A.C. 662) and *The City of Montreal* v. *Watt & Scott* ([1922] 2 A.C. 555) followed; and in order to bring itself within the exculpatory clause of article 1054 C.C., it is not sufficient for the appellant to prove that the cause of the bursting is unknown.

Judgment of the Court of King's Bench (Q.R. 33 K.B. 458) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court, Lafontaine J. and maintaining the respondent's action.

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

Chs. Laurendeau K.C. and *G. St. Pierre K.C.* for the appellant. The appellant, to be relieved from liability, was not obliged to prove fortuitous event, *vis major* or fault of the respondent, but it was sufficient to prove that it had acted with reasonable care and had adopted reasonable means to prevent the accident. The cause of the accident cannot be explained; all possible causes were examined and discussed by expert witnesses who testified that the accident is not attributable to any of them.

Paul Rainville K.C. for the respondent. Under article 1054 C.C., the appellant is responsible for the damages caused to the respondent by a thing which was under its care and control.

IDINGTON J.—The respondent sued the appellant for damages to his buildings on the corner of Cadieux and De-

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

(1) [1922] Q.R. 33 K.B. 458.

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Montigny streets in said city, on the 25th April, 1919, by reason of the water pipes used by appellant on DeMontigny street in front of respondent's said building having burst and through the rupture so produced poured millions of gallons of water upon said buildings or the ground adjacent to the foundation thereof.

The learned trial judge maintained the respondent's claim and assessed the damages at $3,000.

The Court of King's Bench unanimously upheld the said judgment. Each of the five members thereof who heard said appeal gave written reasons in support of their said judgment founding the action upon the obligations resting upon appellant by virtue of Art. 1054 of the Civil Code.

The appellant's counsel admitted in answer to a question I put to him that he did not deny that the burden of rebutting a presumption created by the relevant law and fact against the appellant rested upon it.

I fail to see how that can be held to have been discharged by the evidence upon which he relied.

I do not propose going into a detailed account thereof and of the evidence adduced by the respondent.

I have considered same and the arguments adduced by counsel on each side resting respectively upon that class of evidence given on behalf of their respective clients.

If as the witnesses for appellant pretend that they cannot account for the repeated bursting of parts of said pipe and we are asked to allow this appeal because the appellant's employees cannot find anything to account for such bursting, I respectfully submit that they have not duly investigated the possible causes.

One of these witnesses admitted there had been water pipes in the city which lasted for forty years without bursting. No attempt was made to compare such enduring water pipes with those in question and to learn how it came about that the one set lasted so well and so long without bursting and this later structure had a dozen ruptures within ten years.

Is it conceivable that such a state of things is to continue and owners of property to suffer loss at such a rate

because appellant's employees will not listen to what others say and are blind to what experience demonstrates?

Such a case as appellant sets up does not present anything upon which we should say that it had discharged the burden cast upon it by law.

Nor do I find any error in the law as presented by the several judges below.

The question of damages, concurrently agreed upon by both courts, is one with which we should not interfere in such a case.

I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—I concur with Mr. Justice Brodeur.

ANGLIN J.—The impression left on my mind by a study of the somewhat voluminous record in this case cannot be better expressed than in the sentence in which the lamented Chief Justice Lamothe stated his conclusion:

> La preuve, telle que faite, ne nous permet pas de dire que le fait déterminant des dommages, *causa causans*, n'aurait pu être empêché.

Having regard to the history of the conduit—twelve breaks, many of them serious, within ten years in the other two sections—I am not so clearly convinced that the defendants were unable by any reasonable means to prevent the act (*le fait*) which caused the damage to the plaintiff's property (*City of Montreal* v. *Watt & Scott* (1)), that I would feel justified in reversing the judgment of the Superior Court unanimously affirmed by the Court of King's Bench, notwithstanding the fact that a majority of the learned judges of the latter court appear to have proceeded on a view of the effect of the judgment of the Judicial Committee in *Quebec Ry. L.H. & P. Co.* v. *Vandry* (2), which must, in the light of the "addition" made to it in the later judgment in *City of Montreal* v. *Watt and Scott* (1), now be deemed somewhat exaggerated.

While proof of fault *dans locum injuriae* is certainly lacking, the burden thrown on the defendants by the Vandry decision (2) of bringing themselves within the exculpatory clause of article 1054 C.C., even as tempered by the "addition" made by their Lordships in the *Watt and Scott*

(1) [1922] 2 A.C. 555. (2) [1920] A.C. 662.

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Case (1), remains so onerous that I am not satisfied it has been discharged. That burden is, of course, enormously increased where, as here, the cause of the accident is unknown.

It would require a very strong case indeed to justify interference with the assessment of the plaintiff's damages, unanimously confirmed by the Court of King's Bench. Such a case has not been made out.

The appeal in my opinion fails.

BRODEUR J.—L'article 1054 du Code Civil, après avoir énoncé le principe qu'une personne est responsable du dommage causé par la faute de ceux dont elle a le contrôle, ajoute qu'elle est aussi responsable du dommage causé " par les choses qu'elle a sous sa garde."

L'article énumère ensuite quels sont ceux qui sont sous contrôle au sens de cet article, et ajoute:

La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage.

Le dommage causé par une chose n'a pas donné lieu d'abord dans notre jurisprudence à l'application du principe que celui qui en avait la garde pouvait écarter la responsabilité en prouvant qu'il n'avait pu empêcher le fait qui avait causé ce dommage. Mais la théorie du risque professionnel, qui a été favorisé par certains auteurs, et surtout par Saleilles, à la fin du siècle dernier et au commencement de celui-ci, a donné lieu à une certaine indécision dans la jurisprudence française et dans la nôtre. Cette cour, dans cette célèbre cause de *Shawinigan Carbide Co.* v. *Doucet* (1), a été également divisée sur la question de savoir s'il y avait présomption de faute contre le propriétaire dans le cas où le dommage était causé par sa chose. Cette opinion de la cour suprême a été savamment examinée dans la Revue Trimestrielle du Droit Civil, Vol. 10 (1911), page 23.

En 1915, cette question de la responsibilité fut discutée devant nous dans cette célèbre cause de *Vandry* v. *Quebec Ry. L.H. & P. Co.* (2), et là encore nous voyons une grande divergence d'opinion.

(1) [1909] 42 Can. S.C.R. 281. (2) [1915] 53 Can. S.C.R. 72.

En 1918, la même question a été soulevée de nouveau devant nous dans une cause de *Norcross* v. *Gohier* (1), et nous avons décidé que le dommage causé par une chose crée contre le propriétaire une présomption de faute qu'il est tenu de repousser.

En 1920, le Conseil Privé a tranché cette question *d'onus probandi* en décidant dans la cause ci-dessus mentionné de *Vandry* v. *Quebec Ry. L.H. & P. Co.* (2),

that a person capable of discerning right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage.

Et dans une cause encore plus récente, décidée par le conseil privé, savoir celle de *City of Montreal* v. *Watt & Scott* (3), le conseil privé a maintenu le principe qu'il avait énoncé dans la cause de Vandry (2), en y ajoutant cependant ceci:—

In their Lordships' views "unable to prevent the damage complained of" means: "unable by reasonable means." It does not denote an absolute inability.

Je n'ai pas besoin de faire une revue de la jurisprudence et de la doctrine en France sur cette question de la responsabilité de la chose et sur *l'onus probandi*; mais nous constatons qu'il y eut là aussi pendant un grand nombre d'années une grande incertitude. Dalloz, 1897.1.433; Le centenaire du code civil p. 33; Dalloz, 1900.2.289; Dalloz, 1904.2.257; Dalloz, 1905.2.417; Dalloz, 1906.2.249; Dalloz, 1908.1.217; Dalloz, 1909.1.73 (note de Planiol); Dalloz, 1910.1.17 (note de Desmain); Dalloz, 1913.1.427; Dalloz, 1914.1.303; Laurent, vol. 20, no. 475; Planiol, vol. 2, no. 930; Saleilles, Revue de Jurisprudence, 1911; Colin & Capitant, vol. 2, p. 291.

Le principe est maintenant parfaitement bien établi tant dans notre jurisprudence que dans la jurisprudence française que le dommage causé par le fait des choses qu'on a sous sa garde établit une présomption de faute.

Il s'agit maintenant de savoir quelle preuve est exigée pour faire disparaître cette présomption de faute.

D'abord, quelle est la faute dont le débiteur doit être tenu responsable? La doctrine enseigne que la faute la

(1) [1918] 56 Can. S.C.R. 415. (2) [1920] A.C. 662.
(3) [1922] 2 A.C. 555.

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plus légère suffirait pour faire rejeter l'excuse d'impossibilité énoncée. La loi ne peut balancer entre celui qui a commis une faute même légère et celui qui a souffert sans en avoir commis aucune. Quiconque suivant la doctrine a causé ou occasionné du dommage doit le réparer. Toullier, vol. 11 no. 264; Laurent, vol. 20, no. 475.

On enseigne généralement en France que l'excuse d'impossibilité peut s'appliquer dans le cas où il y a eu cas fortuit, force majeure, ou faute de la victime.

Le Conseil Privé, dans la cause de *La Cité de Montréal* v. *Watt & Scott* (1), après avoir déclaré que le débiteur, pour s'exonérer, doit montrer d'une manière raisonnable qu'il n'a pu empêcher le fait qui a causé le dommage, ajoute que le cas fortuit et la force majeure pourraient en conséquence produire cette exonération.

Je considère que si le débiteur n'apporte pas une preuve formelle et décisive, s'il se contente de prouver qu'il ne connaît pas la cause de l'accident, il ne détruit pas la présomption de faute édictée contre lui.

Dans le cas actuel, la cité de Montréal a tenté de prouver qu'elle ne connaissait pas la cause de l'accident. Mais en même temps il est démontré que les conduites d'eau qui se sont brisées et qui ont causé les dommages n'étaient pas placées assez profondément dans la terre et qu'elles étaient soumises à l'action de la gelée, pour partie du moins, la partie supérieure étant en contact avec la terre gelée pendant que la partie inférieure reposait sur une couche plus chaude. Il pouvait se produire alors une différence de dilatation qui a pu affaiblir la conduite et occasionner la rupture. Cela est d'autant plus possible que plusieurs ruptures ont eu lieu dans ces dernières années et qu'elles se sont toutes produites, à l'exception d'une, à l'époque où la terre gelait ou dégelait.

De plus, on n'a pas suivi les devis. Ces devis avaient été faits avec beaucoup de soin par les officiers techniques de la cité de Montréal. Pourquoi ne pas avoir pourvu alors à ce que ces spécifications soient en tous points observées?

Maintenant plusieurs accidents semblables se sont produits et je ne vois pas que la cité ait pris des mesures éner-

(1) [1922] 2 A.C. 555.

giques pour tâcher de prévenir ces accidents dans l'avenir.

Il paraît également que des conduites avec un diamètre aussi considérable que celui dont on s'est servi offrent une source de dangers plus considérables.

Pour ces raisons, je considère que la cité de Montréal n'a pas établi qu'elle n'a pas pu empêcher le fait qui a engagé sa responsabilité. En conséquence le jugement qui l'a condamnée doit être maintenu et l'appel doit être renvoyé avec dépens.

MIGNAULT J.—The Court of King's Bench in deciding this case followed the decision of the Privy Council in *Quebec Railway, Light, Heat & Power Co.* v. *Vandry* (1), the majority of the learned judges being of the opinion that under that decision, where damage is caused by a thing under the care of the defendant, the latter cannot claim the benefit of the exculpatory paragraph of Art. 1054 of the Quebec Civil Code unless he shews that the act (*le fait*) which caused the damage amounted to a *cas fortuit* or *force majeure*. Since the judgment of the Court of King's Bench was rendered, their Lordships of the Judicial Committee in *City of Montreal* v. *Watt & Scott, Limited* (2), explained the meaning of their decision in the *Vandry Case* (1), and said at p. 563:—

> The only addition to the views expressed in Vandry's Case (1), which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" means "unable by reasonable means." It does not denote an absolute inability. If, therefore, the storm in question could be described as a *cas fortuit* or *force majeure*, and if the appellants had shewn that they had constructed the sewer of a size sufficient to meet all reasonable expectations there would, in their Lordships' view, have been a case where the exculpatory paragraph would have applied.

While the reference to the storm there in question might appear to give some support to the opinion expressed in the court below that the defendant cannot claim the benefit of the exculpatory paragraph of article 1054 C.C. unless he shews that the act which caused the damage can be described as a *cas fortuit* or *force majeure*, it seems to me that the language of their Lordships should not be so construed. For were the defendant constrained to go the length of proving that the accident which caused the dam-

(1) [1920] A.C. 662. (2) [1922] 2 A.C. 555.

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age was a *cas fortuit* or the result of *force majeure,* he would be obliged to establish " an absolute inability " to prevent the damage complained of, and their Lordships are very careful to state that " unable to prevent the damage " does not denote such an inability, but means " unable by reasonable means," which of course excludes the idea of irresistible force as a necessary element of exculpation. It follows that I cannot agree with the view expressed by the majority of the learned judges of the Court of King's Bench that the defendant here was obliged to shew that the damage was caused by a *cas fortuit* or resulted from *force majeure.*

Nevertheless the question remains whether the city of Montreal has established that it could not, by reasonable means, prevent the bursting of the pipe which caused the damage complained of. It is certainly no defence to say that the cause of the bursting is unknown.

Under all the circumstances it can reasonably be inferred that there was a flaw in the pipe which burst, for of course the bursting was not without a cause. This pipe formed part of a water distribution system carrying the water by means of a thirty-inch main pipe which extended some 18,000 feet from Aqueduct street to DeLorimier avenue. It was manufactured by the Canada Iron Corporation, Limited, of Three Rivers, in 1910 and was laid down in that year. This distribution system had three distinct sections however, manufactured under separate contracts, and in the section where the accident occurred this was the first case of the bursting of a pipe. There were, it is true, blow-outs in the other sections, but as they may have happened through causes that are not disclosed I do not think that they should be considered here. So we have the mere fact of this accident, without any similar occurrence in this section to indicate a weakness in the pipes.

That the appellant was at considerable pains to secure proper pipes for its water distribution system is shewn by the following " considérant " of the learned trial judge:

> Considérant que si dans la confection des conduites dont la défenderesse s'est servie, et dans le choix des matériaux employés, ainsi que dans la confection des travaux d'installation et le posage des divers tuyaux servant à conduire l'eau, dont l'un s'est brisé, la cité de Montréal paraît, suivant la preuve, avoir mis tout le soin et pris toutes les précautions que la science, l'art et l'expérience peuvent suggérer en semblable cas,

et si avant de s'en servir, les divers tuyaux dont l'ensemble forme l'une des conduites principales du système d'aqueduc de la défenderesse, ont été soumis à de sérieuses expériences qui ont demontré qu'ils pouvaient être employés avec sécurité, tout de même la défenderesse n'en a pas moins pris un risque en employant des tuyaux qui à cause de leur diamètre considérable ou pour des causes inconnues présentaient certain danger suivant la science et l'expérience.

The learned trial judge had in a preceding " considérant," placed the liability of the appellant upon article 1054 C.C., but perhaps as to this " considerant," I may say that in my opinion the mere use of a thirty-inch pipe, which was no doubt necessary to carry a sufficient supply of water in a city of the size of Montreal, does not appear to be a safe ground for a judgment condemning the city to pay damages when, as the learned trial judge finds, the civic authorities took all the precautions which science, art and experience could suggest, and when the pipes were submitted to serious tests showing that they could be used with safety. But the weakness of the appellant's case under article 1054 C.C. is that, in relation to the accident which caused the damage, its evidence, apart from proof of the precautions to which I have referred, is chiefly of a negative character, the attempt being to shew that the accident could not be explained. What was neccessary was to prove that the accident could not have been prevented by reasonable means. And to my mind, after carefully reading the appellant's evidence, one fact stands out as a possible cause of the bursting. The pipe in question was placed in a trench and was covered only by two feet four inches of earth and asphalt paving. Frost, it is shewn, extends much deeper than that, and in winter the top of the pipe was in frozen earth, while the bottom was probably below the line of frost, thus causing a tension which tended to weaken the pipes. Accidents did not take place for several years, but as time went on and the pipe was winter after winter exposed to these strains, its force of resistance was no doubt decreased. In cross-examination, Mr. Vanier, the appellant's principal expert witness, admits the possibility of an accident under these circumstances. I will quote a short passage from his testimony:

Q. Mais est-ce que, sous l'influence du froid et sous l'influence de la chaleur, lors du dégel, ce tuyau n'était pas soumis à une dilatation, à une contraction à chaque changement de saison?

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R. C'est comme tous les tuyaux d'aqueduc, c'est justement ce point-là que je touchais tout à l'heure, ces cas des différences de température à l'intérieur et à l'extérieur du tuyau, qui peuvent avoir une influence sur la fonte.

Q. Et étant donné que dans tous les tuyaux il y aurait ou peut y avoir des "cooling strains," est-ce que ce ne serait pas de nature à soumettre ces tuyaux à une tension telle que le tuyau, à un certain moment, devient trop faible pour résister à la pression de l'eau intérieure?

R. C'est possible théoriquement, c'est possible, mais ce n'est pas démontré.

It is not sufficient to say "ça n'est pas demontré," for the respondent did not have to explain the bursting, the burden being on the appellant to shew that it could not have prevented it. And here is an admitted possible cause of the accident which the appellant has not excluded by the evidence which it adduced, as the quotation from Mr. Vanier's testimony shews.

There is no doubt that article 1054 C.C. as now construed imposes a very serious responsibility on municipal corporations which in the interest of their citizens have installed public services. But this is really a question of policy for the consideration of the legislature, for the law, however rigorous it may seem, must be applied to public bodies as well as to private individuals. I therefore think that the evidence adduced by the appellant does not entitle it to claim the benefit of the exculpatory paragraph of article 1054.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jarry, Damphouse, Butler & St. Pierre.*

Solicitors for the respondent: *Rainville & Rainville.*

LONDON GUARANTEE AND ACCIDENT COMPANY (DEFENDANT).... APPELLANT;

AND

J. F. SOWARDS (PLAINTIFF)..... RESPONDENT.

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*Mar. 1.
*Apr. 3.

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

Insurance, accident—Automobile—Collision with other automobile, vehicle or object—Contact with highway—Excessive speed—Motor vehicles Act, R.S.O. [1914] c. 207; 7 Geo. V, c. 49, s. 14 (O).

An automobile was insured against loss or damage by "being in accidental collision * * * with any other automobile, vehicle or object."

Held, reversing the Judgment of the Appellate Division (52 Ont. L.R. 39) that the automobile, coming into contact with the earth by being capsized after striking a rut in the road, was not in "collision" within the meaning of that term in the policy.

Effect of speed beyond the legal rate, the car not being driven by the insured, discussed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment on the trial in favour of the defendant company.

The material facts are sufficiently indicated in the above head-note.

Grant K.C. and *Swabey* for the appellant. The word "object" in the clause describing the risk insured should be construed as something of the nature of "other automobile" and "vehicle." See Hals. Laws of England, vol. 7, page 516, par. 1038.

No authority can be found for saying that an upset results in a collision. In the United States there is authority to the contrary. *Bell* v. *American Ins. Co.* (2); *Stuht* v. *United States Fidelity and Guarantee Co.* (3).

If the car was driven at an illegal rate of speed the plaintiff cannot recover. *O'Hearn* v. *Yorkshire Ins. Co.* (4).

D. L. McCarthy K.C. and *Rigney K.C.* for the respondent referred to Berry on Automobiles (3 ed.), page 1518, Huddy (6 ed.), 1038.

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

(1) 52 Ont. L.R. 39.
(2) 181 N.W. Rep. 733; 57 Ins. L.J. 546.
(3) 154 Pac. Rep. 137.
(4) 51 Ont. L.R. 130.

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Idington J.

THE CHIEF JUSTICE.—I concur in allowing this appeal. I would restore the judgment of the trial judge dismissing the action with costs.

IDINGTON J.—The respondent as owner of an automobile having had it insured by the appellant against

being in accidental collision, during the period insured, with any other automobile, vehicle or object, excluding (1) loss or damage from fire or theft, however caused; (2) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile

brought this action thereon to recover damages for alleged losses within the meaning thereof.

The automobile in question was in charge of the respondent's son and driven by him when the accident in question took place, on the road from Odessa to Kingston early in the morning of 4th May, 1921.

He was accompanied by a single companion. They are the only witnesses having a direct personal knowledge of the accident.

The son, after telling the story of his drive, states the accident as follows:—

Q. You speak of there being a culvert?—A. Yes.

Q. Describe the culvert, please?—A. The culvert was slightly raised off the road.

Q. What is your idea of slightly?—A. Up like that.

Q. How high?—A. I suppose it would be eighteen inches, twelve or eighteen inches.

Q. Do you mean the ground or top would be eighteen inches from the level of the road?—A. Yes.

Q. Do you know how the road was approaching the culvert and just over it when you left it?—A. All I know when I went over I struck and the wheel went out of my hand.

Q. A hole?—A. The wheel went out of my hand.

Q. How do you mean?—A. The wheel hit the hole and swerved out.

Q. Is that what caused the car—continue now as minutely as you can as to what happened; you say you went over the culvert and struck a hole?—A. Yes.

Q. Then what happened?—A. The front wheel of the car left the road and went down in the ditch and I put on a little more speed to try and climb to the top of the road; I couldn't make it and she slid and went over upside down.

Q. Do I understand one wheel of the car adhered to the surface or top of the road and the other wheel was down in the ditch?—A. The front and back wheels were down in the ditch and the other two wheels were down on the road.

Q. Would that be the right wheel down in the ditch?—A. Yes, the right wheel was in the ditch and the left on the road.

Q. You told me about doing something?—A. I turned the wheel, put on a little more speed to try and climb to the level of the road.

Q. Tried to get back on the road?—A. The back wheel slewed and she turned over.

It is claimed that this incident which was followed as result of said effort at recovery by a turning over of the car to its left side and being pressed a bit further onward on that side, was a collision within the meaning of the above quoted insurance.

The learned trial judge held that this striking of the earth was not a collision within said insurance any more than, if the car had been struck by an aerolite or if someone fired a rifle ball through the tire, the car would be in a collision.

The Divisional Court of Appeal for Ontario reversed this finding and held it was a collision within the meaning of said insurance as above expressed.

We have had that question fully argued out. And less fully another I am presently about to refer to.

In this connection we have had pressed upon us as usual in such like cases, the application of the *ejusdem generis* rule.

I prefer wherever possible in regard to the application of said rule to adopt the mode of thought given expression to by the late Lord Macnaghten in the case of *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (1), as follows:—

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the sea" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

Applying that to the facts in question as above related I fail to see herein how the rough treatment even a driver gets by running into a rut on the road, which was (save rate of speed and want of care) the sole originating cause of all else that happened and is herein in question, can be

(1) 12 App. Cas. 484, at page 502.

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classed under the term collision as used in above quoted insurance.

With great respect I cannot see the necessity for elaborating further this branch of the case.

The clause read in the light of common sense should not, and I respectfully submit never was intended by the contracting parties to, indemnify an owner for damages flowing from such a cause.

The learned trial judge, besides holding that the case as presented did not fall within the meaning of the insurance clause relied upon, found as a fact that the appellant's son was, at the time in question, driving at a rate of speed which exceeded that of the twenty-five miles an hour limit allowed by the Motor Vehicles Act 9 Geo. V, c. 57, sec. 3.

Upon that ground also he rested his judgment.

A perusal of the entire evidence leads me to agree with this finding of the learned trial judge; and at all events in face of the peculiar nature of much of said evidence the finding of the learned trial judge I respectfully submit should not have been disturbed.

And thereupon I am strongly of the impression that in law an insurance company cannot legally insure the owner of an automobile against anything arising out of driving at a prohibited rate of speed.

The cases cited by the learned trial judge and others cited by counsel do not (though some of them are illuminative of the law involved) by any means finally and conclusively dispose of this question in the way I should like to see it settled.

To illustrate my way of looking at it I would refer to the case of *Webster* v. *De Tastet* (1), and the remarks in regard thereto in Pollock on Contracts, page 306, and the reason given for the decision. Yet the Merchant Shipping Act of 1854 had apparently eliminated the said reason.

Although the said case seems to have been given due weight in the case of *Cohen* v. *Kittell* (2), many years after said Act, yet under the legislation here in question that may not help.

(1) 7 T.R. 157.

(2) [1889] 22 Q.B.D. 680.

In a somewhat analogous manner we are met with the peculiar provision which has resulted from the several amendments to section 19 of the Motor Vehicles Act which, before these amendments, read as follows:—

19. The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council.

The first two lines continue the same throughout all the amendments.

What does this section mean? To whom is the owner responsible? Is he to indemnify him who has been penalized? Or him who has suffered injury? If not something like that is it to be interpreted as rendering the owner liable to be convicted? If so why is it not so expressed as plainly as in section 28 of the same Act?

The persistent observance of the same expression in the several amendments in later sessions, suggests something possibly different from the intention of imposing liability to a conviction for the like penalty imposed upon him actually committing the offence.

If the latter meaning it would not be as clear as the case of *Coppen* v. *Moore* (1), relied upon by the respondents, for the Act there in question expressly declared that the owner, subject to certain limitations, would be guilty of the offence there in question.

I incline to the opinion that whichever of the two meanings I have suggested as applicable to the responsibility of the owner under said section may be the correct one, that it would be against public policy for the appellant to attempt to insure against the risk of speed, beyond the statutory limitations, and hence void if so interpreted.

Yet as there is a decided difference arguable and in the one view possibly the result I incline to not maintainable and the distinction was not grappled with in argument, I prefer resting my opinion on the merits of this appeal upon the first ground taken alone.

Indeed there may, as happened in the Merchants Shipping Act, be some legislative amendment which has escaped my attention.

I submit that the Act now in question may well be amended so as to render the question beyond dispute.

(1) [1898] 2 K.B. 306.

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Duff J.

I would allow this appeal with costs here and in the Court of Appeal and restore the judgment of the learned trial judge.

DUFF J.—

The risk insured against is the risk of loss

> by being in accidental collision * * * with any other automobile, vehicle or object.

The respondent's automobile capsized and was damaged in consequence. The appeal turns upon the point (subject to another element in the case which I shall presently discuss) whether or not what happened falls within the words describing the risk. In other words, whether in the circumstances it can be fairly affirmed that the automobile was "in accidental collision" with an "other automobile, vehicle or object," within the meaning of the policy.

I am not disposed to agree that the word "object" can be limited in deference to *noscitur a sociis* or to the principle of *ejusdem generis* to the degree for which Mr. Grant contends. I am inclined to think that the broader idea, that of "conveyance," must be ascribed to "vehicle" in this connection, and that so read it would express everything falling within the word "automobile." In all the instances put, there is conveyance; in the case of the locomotive stone crusher, for example, there is conveyance of the mass of the locomotive. Nevertheless I am not disposed to disagree with the view of the learned trial judge that some significance must be attached to the words "automobile" and "vehicle," and that the presence of these words limits the scope of the word "object" —at least sufficiently to exclude from the class of perils insured against, impact of the body of the motor upon the earth resulting from collapse or capsize. I agree also with the learned trial judge that "collision" is not a word which anybody would be likely to use in this context to describe impact upon the earth involved in collapse or capsize. I think, moreover, that it is not a meaning which anybody receiving a policy of insurance would on reading the policy be likely, without a good deal of reflection and analysis, to ascribe to the word "collision."

I have considered carefully the judgment delivered in the Appellate Division, and while I agree that there are difficulties in drawing an abstract line between cases in respect of which good reasons might be given for bringing them within the language of the policy, and cases which ought to be excluded, I must say with the most unaffected respect that I think the cases mentioned, capsize and collapse and consequential impact upon the earth of the body of the car, very clearly fall on the other side of the line.

It appears that after the capsize of the car it came into violent contact with a boulder, and I was disposed to think on the argument that sufficient attention had not been paid to the question whether the damage to the car was in part due to this impact. The learned trial judge, however, has found, and I think not without good warrant on the evidence, that the damage was entirely due to what occurred before the collision with the boulder.

This is sufficient to dispose of the appeal, but I cannot take leave of the appeal without expressing my opinion in concurrence with the view of the Appellate Division that there is nothing in the common law and nothing in the Ontario statute relied upon which disqualifies the owner of an automobile or other vehicle or the owner of a ship from contracting for indemnity for loss arising from accidents due to the negligence (in which he is not personally implicated) of his servants or his licensees. The principle invoked by the learned trial judge under which he held the plaintiff to be disqualified, was discussed in *Weld-Blundell* v. *Stephens* (1), and the following passage from the judgment of Kennedy J. in *Burrows* v. *Rhodes* (2), was approved by Lord Wrenbury at p. 998 and adopted by him as a correct statement of the law upon the point:—

> It has, I think long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void.

I agree with the Appellate Division that the circumstances of this case do not bring it within that principle.

(1) [1920] A.C. 956.

(2) [1899] 1 Q.B. 816, at p. 828.

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Anglin J.

ANGLIN J.—The material facts of this case appear in the reports of it in the provincial courts, 52 Ont. L.R. 39; 22 Ont. W.N. 513.

In order to recover the plaintiff was obliged to establish that the damage sued for was sustained by his automobile by being in accidental collision with any (some) other automobile, vehicle or object.

The policy so limits the risk.

The insurance company was relieved of liability by the learned trial judge on three distinct grounds—that no collision had taken place; that, if there had been a "collision" it was not with an "object" within the meaning of that word in the relevant clause of the policy; that the automobile was driven at an illegal rate of speed and liability under the policy therefore did not arise.

The Appellate Divisional Court held a contrary opinion on all three grounds.

I am, with respect, unable to regard the impact of an overturned car with the highway on which it was being driven as a "being in collision" within the meaning of the clause of the policy above in part quoted. However comprehensive the meaning to be given to the word "object" it is quite certain that the coming together of the automobile and the highway, due to the upsetting of the former, was not an event which anybody would dream of describing as a "collision." That word, in my opinion, is used in the policy in the sense in which it is ordinarily employed. Injury to the car sustained by its overturning owing to some defect in the road-bed was a risk which it was not intended to cover.

But a witness, Wilson, who saw the overturned automobile after the accident, deposes that, while sliding along the roadside ditch after overturning, it had come into contact with a large stone; and it is urged that that was a collision. Assuming the fact to be established, I very much doubt whether it was a collision within the meaning of the policy. But it is unnecessary to determine that question. The learned trial judge, expressly basing his finding on the credibility of the evidence, says:—

> Practically all the damage was caused at once when the car landed on its right side, and nothing which took place subsequently was of any consequence.

The only evidence in the record on the point is to that effect. It was given by the driver of the car. It has been urged that his physical condition immediately after the accident was such that he was incapable of forming any opinion on such a matter. However that may be and however likely it may seem that some appreciable part of the injury to the car is ascribable to its violent impact with the stone, there is no evidence to that effect such as might easily have been obtained from the witness, Wilson, or from others who examined the car after the accident, if its appearance warranted such an inference. It must not be forgotten that the burden of proving that the injuries for which he claims damages were caused by his automobile "being in accidental collision" rested on the plaintiff. That burden he has not discharged. Upon the record before us I find it impossible to say that the learned trial judge was clearly wrong in finding, as the plaintiff's son deposed, that

practically all the damage was caused at once when the car landed on its right side.

It is not necessary to pass upon the effect on the plaintiff's right to recover of the illegal speed at which his car was being driven as disclosed by the evidence. I venture to suggest, however, that an explicit provision in the Motor Vehicles Act, barring the recovery by an automobile owner or driver of insurance for injury either to the car owned or driven by him or to the persons or property of others, to the causing of which the driving of the car at an illegal rate of speed while under the control of such owner or of any person in his service or with his privity had contributed, would not only be commendable on grounds of public policy, but would also be conducive to better observance of the speed laws, which are now so frequently and flagrantly violated.

I would allow the appeal with costs in this court and in the Appellate Divisional Court and restore the judgment of the learned trial judge dismissing the action.

BRODEUR J.—The plaintiff Sowards had insured his automobile with the appellant company and it was stipulated in the policy that there would be indemnity for

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damage in an "accidental collision * * * with any other automobile, vehicle or object."

On the 4th of May, 1921, this automobile struck a hole or rather a rut in the road and the machine was upset on its right side and went down in the ditch.

Was this an *accidental collision* which entitled the insured to claim indemnity?

Collision in such a policy means the act of two vehicles coming together or of the insured automobile running against or coming into violent contact with some other object. *Lepman* v. *Employers' Liability* (1). The driving of an automobile into a hole is not such a collision with an object as is contemplated by the parties to an insurance policy containing a collision clause. *Dougherty* v. *Ins. Co.* (2).

Accidental collision with the surface of the roadbed in being turned over was not and could not be contemplated by the policy. The collision with another automobile or object could not be considered as covering the case of a turning over. The upsetting and the collision present different aspects and the parties would not intend insurance against upsetting when they have provided collision insurance. *Bell* v. *American Ins. Co.* (3).

It is contended, however, by the plaintiff that when the automobile was upset, one of the wheels struck a stone which turned the automobile over to its left side. That would bring us to consider whether the collision with a stone in the highway would be covered by the policy. I would be inclined to think so, because policies of the nature of the one under consideration permit recovery for injuries occasioned by a collision with either a moving or a stationary body. *Cantwell* v. *General Accident Insurance Corp.* (4). But the trial judge, on conflicting evidence, has found that practically all the damage had been caused previously, when the car was upset for the first time. In view of this finding, it is not necessary then to decide the question whether a stone in a highway would be considered as one of the objects mentioned in the policy.

(1) 170 Ill. App. 379.
(2) 38 Pa. Co. Ct. 119.
(3) 181 N.W. Rep. 733.
(4) 205 Ill. App. 335.

I have come to the conclusion that the accident alleged by the plaintiff did not result in a collision, and it is, therefore, useless to consider the other questions raised on this appeal.

I am of the opinion that the judgment of the Appellate Division, which maintained the action of the insured, is not well founded.

The appeal should be allowed with costs throughout and the plaintiff's action should be dismissed.

MIGNAULT J.—The collision clause in the insurance policy relied on by the respondent is in the following terms:—

> In consideration of ninety-eight dollars ($98.00) premium, this policy also covers, subject to its other conditions, damage to the automobile and/or equipment herein described, in excess of twenty-five dollars ($25.00) (each accident being deemed a separate claim and said sum being deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage from fire or theft, however caused; (2) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble, and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile.

The learned trial judge found that

> practically all the damage was caused at once when the car landed on its right side and nothing which took place subsequently is of any consequence.

Mr. Justice Ferguson of the Appellate Division, with whom the other learned judges agreed, expressed the opinion that the collision was with the highway, and also that the surface of the highway was "an object" within the meaning of the policy.

Even granting that in the clause insuring the automobile against damage

> by being in accidental collision * * * with any other automobile, vehicle or object,

the words "or object" are not to be construed according to the rule *noscitur a sociis*, still I cannot bring myself to believe that what the parties meant was to treat as a collision the overturning of the car. The car was necessarily in contact with the highway all the time and if it overturned or upset, bringing its side, instead of its wheels, in contact with the roadway, that certainly was not a collision within the meaning of the policy.

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My opinion therefore is that the respondent is not entitled to recover from the appellant under the collision clause of its insurance policy the damages caused by the upsetting of the car.

I would allow the appeal with costs here and in the Appellate Division and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Clarke, Swabey & McLean.*

Solicitor for the respondent: *T. J. Rigney.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MOOSE JAW

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*Feb. 6, 7.
*Feb. 20.

R. M. JOHNSON (RESPONDENT).....APPELLANT;

AND

H. YAKE AND OTHERS (PETITIONERS).....RESPONDENTS.

Election law—Candidate—Official agent—Corrupt and illegal practices—Election expenses—Payment—Untrue return—False declaration—"Dominion Controverted Elections Act," R.S.C. [1906], c. 7, s. 51 as amended by [1921] (D.) c. 7, s. 9, and s. 56 as amended by [1921] (D.) c. 7, s. 7.—"Dominion Elections Act," [1920] (D.) s. 46, ss. 78 (3) (7), (9) and s. 79 (1) (3), (9).

The appellant, being a candidate at a federal election, appointed one McR. as his official agent. An association, organized for the purpose of financing his candidature, received moneys which were deposited in a bank account under the control of its president and secretary. Certain election expenses were paid by cheques issued by the association without the knowledge of McR. The agent, with the approval of the appellant, declared in his return that he had authorized these payments. Two accounts, one of $20 for lunches supplied to the scrutineers and another for $68 for the services of a band on the night of the election day were sent to the agent and paid by him before his return was filed, but were not included in it. The appellant, pursuant to section 79 (3) of "The Dominion Elections Act," transmitted to the returning officer a sworn declaration that to the best of his knowledge and belief the return of election expenses made by his agent was correct.

Held that the appellant and his official agent were guilty of corrupt and illegal practices within the meaning of "The Dominion Elections Act," [1920] c. 46, section 78 (3) enacting that the payment of all election expenses should be made "by" or "through" the official agent and section 79 (1), (3), (9) declaring to be a "corrupt practice" any untrue return or false declaration knowingly made by a candidate or his agent. Consequently the election is void: "The Dominion Controverted Elections Act," R.S.C. [1906], c. 7, s. 51 as amended by [1921] c, 7, s. 4 and s. 55 as amended by [1921] c. 7, s. 9.

Held, also, that on the present appeal from a judgment merely declaring the election void, it was no part of the duty of this court to decide whether or not the parties in fault were liable to the penalties and disqualifications provided by "The Dominion Elections Act."

Held, further, that upon the evidence the appellant was not entitled to the benefit of the relief clause ("The Dominion Controverted Elections Act," R.S.C. [1906], c. 7, s. 56 (a) as amended by [1921] c. 7, s. 7) which provides for cases where the corrupt act of the parties arises through inadvertence, accidental miscalculation or other similar causes.

Judgment of the Election Court ([1922] 3 W.W.R. 328) affirmed.

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

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APPEAL from the judgment of Embury and Mackenzie JJ. (1), sitting as trial judges under the provisions of the "Dominion Controverted Elections Act," R.S.C. [1906], chapter 7, in the matter of the controverted election of a member for the Electoral District of Moose Jaw in the House of Commons of Canada, rendered on the 6th of October, 1922, maintaining the respondents' petition with costs and declaring void the election of the appellant.

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

A. B. Hudson K.C. for the appellant.—The trial judges had no jurisdiction to hear and decide the petition, as they were judges of the Court of King's Bench, not of the Court of Appeal nor of the Supreme Court.—The judgment is based solely on a finding that the appellant and his official agent were guilty of a corrupt practice in making a false return of election expenses, and a petition under "The Dominion Controverted Elections Act" is not authorized in respect of such matter.—The declaration of expenses was in fact true.—The payment of accounts by the officers of the association were authorized by section 10 of "The Dominion Elections Act."—The payments made for lunches and band were not election expenses.—The evidence is not sufficiently clear against the appellant and his agent to justify a finding of a lack of good faith, and relief should have been given under the provisions of section 56 (a) of the statute of Canada [1921] c. 7, in view of the very large majority of the appellant and the fact that no money was spent for corrupt purposes.

W. N. Tilley K.C. for the respondent.—The reprisement of "The Dominion Elections Act" with regard to the payment of election expenses through the official agent is absolute.—The payment of the accounts for lunches and band should have been included in the return filed by the agent.—The declarations transmitted by the appellant and his agent were false. The appellant and his agent having been found guilty of acts amounting to "corrupt practices," the election must be declared void.

(1) [1922] 3 W.W.R. 328.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Anglin, which I have carefully read, and in which I fully concur, I am of the opinion that this appeal should be dismissed with costs.

My learned brother has covered every point raised in this appeal so fully and satisfactorily that I cannot see any good reason for repeating his reasons.

DUFF J.—The return of the appellant as member for Moose Jaw was impeached by allegations of illegal and corrupt practices within the meaning of sections 51 and 55 of "The Controverted Elections Act" under two heads. Under these heads it was alleged 1st, that the agents of the appellant were guilty of illegal practices in paying election expenses otherwise than through the official agent in violation of the prohibition enacted by section 78 subsection 3 of "The Dominion Elections Act", 2nd, that the appellant personally and his official agent were guilty of corrupt practices within the meaning of section 79 subsection 9 of the same statute in making a false return of election expenses.

I shall deal with the findings upon these charges seriatim. As to the 1st charge, the trial judge found categorically that certain payments enumerated in the report were made by agents of the appellant otherwise than "by" nor "through" the official agent within the meaning of subsection 3 of section 78 of "The Dominion Elections Act."

The funds on which the appellant was at liberty to draw for election expenses were in part in the hands of an association known as "The New National Policy Political Association"; an association organized in part at least for the purpose of financing the canvas of the Progressive Party under whose auspices the respondent was conducting his candidature. The association had a central committee in Regina and a local committee in each electoral district. The Moose Jaw local committee of which one Thomas Teare was president and one Devlin was secretary, received in due course from the central committee moneys for the purpose of defraying the expenses of the Moose Jaw election these moneys being deposited in a bank account under the control of Teare and Devlin. The offi-

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cial agent, McRitchie, had no authority in relation to this fund and none over Teare or Devlin. On the 28th of November, about a week after the official nomination day and a week before election day, there was a meeting of the local committee at Moose Jaw at which Teare and Devlin and one Salsbury were present with the appellant himself. Certain accounts were produced by Salsbury and approved by all present and cheques were accordingly drawn and signed by Teare and Devlin for the payment of them. Teare and Devlin acted without consulting the official agent and without his knowledge or authority direct or indirect. These bills were, the trial judges found, paid irregularly, that is to say otherwise than through the official agent and in violation of subsection 4 of section 78 of "The Dominion Elections Act." It is not disputed that they were paid and paid by means of cheques drawn as just mentioned by Teare and Devlin; but it is argued by Mr. Hudson that the petitioners failed to prove that the cheques were not delivered to the payees "by or through" the agency of McRitchie.

It is undeniable, I think, that where a charge is made the proof of which may entail consequences of a penal nature under "The Dominion Elections Act" or "The Controverted Elections Act," a finding in the affirmative should only ensue on the production of evidence which is conclusive. I think Mr. Hudson does not over-emphasize the point when he argues that the trial judges before finding that such a charge has been established ought to be satisfied beyond reasonable doubt.

I am unable, however, to conclude that this general principle was disregarded by the trial judges. The evidence of Teare and Devlin touching the conversations with the appellant after the election upon the subject of these bills taken together with the respondent's declaration might, I think—if the trial judges accepted, as apparently they did, the evidence of Teare and Devlin as truly relating the incidents of that conversation—not improperly be considered by them to leave no substantial question that the cheques signed by Teare and Devlin had not passed through the hands of the official agent. I think, moreover, that the circumstance that McRitchie was not called by the appel-

lant was a circumstance which they might properly regard as lending some weight in favour of this conclusion. The principle upon which the failure to call a witness may be considered to be a fact weighing in the scale against a party to litigation rests in the first place upon a presumption of that party's probable knowledge of what testimony the witness would be likely to give. I think in all the circumstances and especially having regard to the incidents placed in evidence connected with the redaction of the declaration of expenses that the trial judges did not err in acting upon the presumption that the appellant would probably know the nature of the testimony his official agent would give if he were called as a witness or in inferring that he refrained from calling him because he or his advisers did not think McRitchie's testimony would heighten the prospects of a favourable issue.

Under the second head the appellant and his official agent were charged with the corrupt practice of making false declarations respecting election expenses. The declaration of the official agent is said to be false in two particulars, (a) in alleging that certain sums were paid in liquidation of election expenses under the authority of the official agent which in fact were paid without such authority, and (b) in omitting from the statement of expenses set forth in the declaration two specified sums which should have been included therein.

To begin with (a). The declaration which was the joint production of the official agent and the appellant, acknowledges the disbursement of the sum of $1,351.05 described as a sum expended "by paying bills authorized by myself and by cash direct." The list of bills making up this aggregate almost in its entirety consists of those sums paid by the cheques signed by Teare and Devlin already referred to. The charge is that the words just quoted necessarily imply an affirmation that these bills were either incurred by the authority of McRitchie or paid by his authority; and that affirmation is alleged to be contrary to the fact and to have been known to be so both by the appellant and by McRitchie. In respect of this charge the finding of the trial judges is against the appellant.

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The official agent, it appears, had long after the payment of these bills by Teare and Devlin and after the election indorsed them with his initials with the professed object of signifying his assent to them. This was done with the knowledge of the appellant but Mr. McRitchie's approval was not communicated to either Devlin or Teare or to the payees.

Subsection 9 of section 79 comes into play, I think, when two conditions occur. There must first be a "false declaration" respecting election expenses and by that I think is meant a declaration contrary to the fact, and in the second place it must be known that the declaration is contrary to the fact. And the first question which arises at this point is, was there a false declaration—was there an affirmation conveyed by these words which was contrary to the fact? The words do seem very clearly to convey an affirmation either that the bills paid had been authorized by the official agent or that the payment of them had been authorized by him. Now I do not think that such a statement would necessarily involve an affirmation of antecedent authority. In considering for our present purpose this question whether the affirmation was or was not contrary to the fact, we must, I think, do so without regard to any of the provisions of "The Dominion Elections Act" and I agree that "authorized" does not necessarily mean antecedently "authorized." But it does nevertheless imply something at least amounting to an adoption of what was done, an adoption in the sense of making the act "authorized" the official agent's own act and the assumption of responsibility for it. It requires very little argument I think to demonstrate that the indorsement by the agent of his approval on the bills long after the business was closed, long after the bills had been not only incurred but paid and paid by people over whom the official agent had no authority and out of funds over which he had no control and without the knowledge of those who had paid them, could not without abuse of language be described as an act authorizing either the bills or the payment of them.

The words quoted then do involve an affirmation contrary to the fact. Is it shewn that the appellant knew it was contrary to the fact?

The trial judges have taken the view that this form of language was deliberately adopted by the appellant and his official agent acting in concert, with the object of making it appear that the payments had been made "by or through" the official agent in conformity with the law; and that in doing this they both intended to give a false colour to the transaction referred to and particularized in the declaration.

There is some evidence that in framing this part of the declaration the appellant consulted his solicitor and it appears from Devlin's evidence that he told Devlin that this part of the declaration received the form it did in consequence of his solicitor's advice I do not doubt that if it had appeared to the trial judges that the appellant and his agent, being desirous of honestly complying with the law, had acted in this matter in conformity with legal advice given to them as to the requirements of the law they would under this head have acquitted the appellant of the charge of bad faith.

But the question of bad faith or its opposite was in the circumstances largely a question of credibility and I am unable to discover any ground upon which the finding of the learned trial judges could properly be reversed. There is nothing to indicate that they misconstrued the statute or misapprehended the evidence or that they misdirected themselves in any way; while on the other hand there is a circumstance which in considering this branch of the case they could not very well leave out of account, and that is the circumstance that the appellant's solicitor was not called as a witness to support the suggestion that this form of the declaration was prompted by legal advice. The gravity of the charge of bad faith must have been apparent from the outset to the appellant and to his legal advisers and, valuable no doubt as the services of the solicitor at the trial would appear to them to be, the trial judges would, I think, be justified in attaching in this connection no little importance to the circumstances that the testimony of the solicitor himself was not placed before them.

The charge founded upon alleged omissions from the declaration by the candidate and the official agent respect-

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ing election expenses was held to be established by the learned trial judges who rejected the plea of the appellant that the items to which this charge relates were omitted under the belief that they were not election expenses within the meaning of the Act. One of these payments was a payment for sandwiches provided for scrutineers on election day and the other for the services of the band of the Great War Veterans' Association for performing in celebration of the appellant's victory on the night of the election. If this charge had stood alone it may be that, having regard to the facts deposed to and in view of the absence of a visible motive for putting forward a misleading statement in respect of these payments, the learned trial judges would have been disposed to consider that these omissions had occurred innocently. But the trial judges would no doubt, as they were entitled to do, examine the question in light of the existing intention to mislead they held to be established respecting the statement already discussed touching the payments by Teare and Devlin. Here again I can discover no ground upon which this court would be justified in dissenting from the finding of the primary tribunal.

As respects this charge it must further be observed that these payments were made by the official agent, that they were not included in any statement of personal expenses sent to him by the candidate as required by subsection 14 of section 78; that, in the declaration of the official agent in relation to election expenses it is virtually affirmed that no personal expenses of the candidate were paid by the agent; and it is difficult therefore to accept the appellant's explanation of these items on the ground that he considered them to be personal expenses.

I may add, however, that I can find no evidence in support of the finding that these payments were made in breach of the provisions of subsection 9 of section 78 requiring all expenses to be paid within 50 days after the day on which the candidate was declared elected.

With respect to the point raised touching the jurisdiction of the learned trial judges, I think it is sufficient to say that in my judgment, subsection 2 of section 14 of c. 25 of the statute of 1916 very clearly applies and that it is a complete answer to the objection.

Such being my views as to the findings of the primary tribunal it becomes necessary to refer to two contentions touching the legal effect of these findings advanced by Mr. Hudson. The first concerns the effect of section 51 of "The Controverted Elections Act" (as amended by 11-12 Geo. V, c. 7, sec. 4), which is in these words:—

51. If it is found by the report of the trial judges that any corrupt practice has been committed by a candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, or that any illegal practice has been committed by a candidate or by his official agent or by any other agent of the candidate with the actual knowledge and consent of the candidate, the election of such candidate, if he has been elected, shall be void.

It is argued that the corrupt practices found and reported by the trial judges both took effect with the making of the declarations of election expenses on February 15th, 1922, two months after the return of the appellant as elected (December 15th, 1921), and it is said to follow that they were not "committed * * * at an election" within the meaning of section 51 because by force of section 2 (d) the "election" must be considered to come to an end with the making of the last mentioned return. I assume the effect of the statutory provisions mentioned to be that the "election" must be considered to have terminated on the date mentioned.

It is clear, I think, that the words "at an election" are not adverbial words qualifying "committed" but that as Mr. Tilley contended the words "candidate at an election" together constitute a single substantive description of the candidate, and the condition under which section 51 becomes operative is that the corrupt practice or illegal practice shall have been committed by the candidate or agent as the case may be, as candidate or agent. The same observation applies to section 55. It is plain that the duty of making a declaration under section 79 is a duty imposed on the candidate and agent as such and that a false declaration within the meaning of subsection 9 is deemed to be a corrupt practice committed by the candidate or agent as such. Moreover the illegal practice found to have been committed by Teare and Devlin with the assent of the appellant was indubitably committed by them during election as the agents of the appellant who just as unquestion-

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ably gave his "sanction" to what they did. Subsection 11 of section 78 cannot therefore apply and the necessary consequence is that the learned trial judges rightly held the election to be void.

There is no formal declaration by the trial judges in their judgments or in their report as to the disqualification of the appellant or his official agent. Their judgment does include the determination of issues raised by charges relating to corrupt practices and illegal practices and their report to the speaker declares the appellant and the official agent to have been guilty of corrupt practices in making false declarations respecting election expenses. The effect of their judgment and report as touching the disqualification of the persons whose conduct was in question is a matter which may be decided if and when the point arises by the application of the relevant statutory law to the facts as found. Mr. Hudson raises a question as to the effect of section 87 of the Dominion Elections Act and argues that, as regards the corrupt practices reported, since the declaration of election expenses was not made until long after the election had terminated, subsection 2 of section 87 does not come into operation, as it only applies where a corrupt practice or illegal practice is reported to the speaker as having been committed "at an election"; and since (such is the contention) subsection (c) of section 87 has no application to a finding or decision given upon the trial of an election petition.

I will not say that there is not here a contention as to the construction and effect of section 87 which though technical is nevertheless legitimate and is at least susceptible of plausible statement. And it is quite clear that as regards the corrupt practices reported they did not occur "during" the "election" or "at" the "election" if these phrases are to receive an interpretation derived from section 2 subsection (d) of "The Dominion Elections Act." I express, however, no opinion whatever upon Mr. Hudson's argument. Neither the judgment of the trial judges nor the report to the speaker declares in terms that a corrupt practice was committed by the appellant or the official agent either "at" or "during" the "election," and if and when

any question arises as to the disqualification of the appellant by reason of the judgment and report he will have the benefit of the full weight (if any) which his argument may be found to possess.

In my opinion this is not a case in which any relief can be granted under section 56 (a) of "The Controverted Elections Act."

The finding of the learned judges that the payments to the Paris Cafe and the Great War Veterans Association Band were made after the expiration of 50 days after the declaration of the result of the election should be set aside but subject to that the appeal should be dismissed with costs.

ANGLIN J.—Robert Milton Johnson, returned as having been elected to the House of Commons for the electoral district of Moose Jaw at the general election held on the 6th of December, 1921, appeals from the decision of an Election Court (Embury and Mackenzie JJ.) finding that he and his official agent had both been guilty of illegal and corrupt practices and declaring his election consequently void. The grounds of appeal are:

(*a*) that the Election Court as constituted was without jurisdiction;

(*b*) that the corrupt practices found are not proper subjects of a petition under "The Controverted Elections Act";

(*c*) that the evidence does not support the findings made; and

(*d*) that the acts found, so far as the evidence supports them, are not valid grounds for avoiding the election.

(*a*) The jurisdiction vested in the Supreme Court of Saskatchewan by "The Dominion Controverted Elections Act" (R.S.C., 1906, c. 7, s. 2 (viii)), as amended by the statutes of 1915, c. 13, s. 1, is transferred to the judges of the Court of Appeal and of the Court of the King's Bench for Saskatchewan by c. 25, s. 1, s.s. 2 of the statutes of 1916. The judges who constituted the Election Court were judges of the Court of King's Bench of Saskatchewan duly nominated under s. 4 of that statute, and as such had jurisdiction to try this election petition.

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(*b*) Section 11 of "The Controverted Elections Act" of 1906 (R.S.C., c. 7) was repealed and a section to replace it enacted by c. 13, s. 4, of the statutes of 1915. Under this substituted section the unlawful or corrupt acts charged may properly form the subject of an election petition.

(*c*) The learned trial judges expressly avowed their confidence in the testimony of the two chief witnesses for the petitioners, Teare and Devlin, and quite as explicitly indicated their disbelief of that given by the appellant when in conflict with it. Upon that basis they have found and certified that the appellant was guilty of corrupt or illegal practices in authorizing the payment of certain of his election expenses otherwise than by or through his official agent in contravention of s. 78 (3) of "The Dominion Elections Act"; in causing an untrue return to be made by his official agent (importing the authorization by such agent of the payments so made) in contravention of s. 79 (1) of the said Act; in knowingly making a false declaration of the correctness of the said return in contravention of s. 79 (3) of the same statute; in causing the omission from his official agent's said return of two items of election expenses payment of which was made by him through such agent; and in knowingly making a false declaration that the total amount paid by him to his official agent was $677, whereas (including the said two items) he actually paid to his said agent the sum of $765. The learned judges also found and certified that the official agent, one Frank McRitchie, had been a party to, and was therefore likewise guilty of, the above corrupt or illegal practices.

A study of the evidence does not enable me to say that the appreciation of the credibility of the respective witnesses by the learned trial judges should not be accepted; neither does it disclose any ground which would justify a reversal of the findings of fact set out in their certificate.

Counsel for the appellant urged that one of the two items above mentioned as having been paid through the official agent and omitted from his return—$68 for the services of a band on the evening of polling day—should not properly be classed as an election expense. The statute (s. 79 (1) (a)) expressly requires that the official agent's return

shall contain detailed statements of "all payments made by the official agent." I can see no justification for omitting this item from the official agent's return of "election expenses." The evidence rather indicates that it was so omitted deliberately and because in the opinion of the candidate and some of his friends it was thought advisable to conceal it.

I am of the opinion that it is not possible upon the record before us to set aside any of the findings made by the learned trial judges except that contained in their "determination," but not in their certificate, that the Paris Café account and the Pearce Band account were paid more than fifty days after the respondent was declared elected contrary to s. 78 (9) of the statute. The evidence does not appear clearly to support that finding.

(*d*) That the findings so made justified the "determination" that the election of the appellant was void I think admits of no doubt. The acts found to have been committed are declared to be, some of them illegal practices ("Dominion Elections Act," s. 78 (4) (7)), and others corrupt practices ("Dominion Elections Act," s. 79 (9); "Controverted Elections Act," s. 2 (f). Those acts having been committed by "a candidate at an election" who has been declared elected, and also by his official agent, s. 51 of "The Controverted Elections Act," (1921, c. 7, s. 4), clearly voids the election. Parliament in its wisdom and after long experience has attached that consequence to corrupt practices and illegal acts such as the appellant and his official agent are found to have committed. We have no discretion in the matter. Our plain duty is to administer the law as we find it.

Counsel for the appellant pressed for a declaration that his client is not subject to the personal disqualification provided for by sections 39 (a) and 87 of the Elections Act. But that question is really not before us. The learned judges of the Election Court have not certified to such disqualification. They have found certain facts and have determined that upon the facts so found the appellant's election is void and they have certified these findings as required by the Controverted Elections Act, s. 68. On the present appeal from the judgment of the Election Court

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it is not part of our duty, as I understand it, and it would therefore be an impertinence, to express an opinion whether the findings so made and certified entail disqualification of the appellant. While that may follow as a consequence, it is not so held in the judgment of the Election Court. Upon the correctness of that judgment—and upon that only—are we called upon to pass.

I would for these reasons dismiss this appeal with costs.

BRODEUR J.—The first question we have to decide is whether the judges of the Court of King's Bench of Saskatchewan have jurisdiction to try Dominion election petitions.

By virtue of the provisions of "The Dominion Controverted Elections Act," as amended in 1915, the court which had jurisdiction over such election petitions was the Supreme Court of the province.

In the same year, 1915, the legislature of the province passed an Act providing for the abolition upon proclamation of its Supreme Court and for the creation, also upon proclamation, of a new court of original jurisdiction to be called the Court of King's Bench.

The proclamation provided by the provincial Act having been issued the Supreme Court, which had jurisdiction over election petitions, was abolished, and the Court of King's Bench was established.

The judges who tried this case are judges of this Court of King's Bench, and it is contended by the appellant that they had no jurisdiction.

I would have been inclined to agree with the appellant on this point if it were not for the Dominion statute passed in 1916 which declared (ch. 25, sect. 14, s.s. 2), that if under any statute of Canada jurisdiction is given to the Supreme Court of Saskatchewan this jurisdiction can be exercised by the Court of King's Bench.

This federal legislation of 1916 removes all doubts as to the question of jurisdiction. Under "The Dominion Controverted Elections Act," the judges of the Supreme Court of Saskatchewan had exclusive jurisdiction to try petitions concerning elections held for the Dominion Parliament in that province. But this jurisdiction, by virtue of the Act

of 1916, can now be exercised by the judges of the Court of King's Bench.

The most important point in this case is whether the appellant Johnson has been properly found guilty of a corrupt practice which rendered his election void.

It is alleged that he has made a false return of his election expenses.

The evidence shows that a Mr. McRitchie had been appointed by the candidate Johnson as his official agent, that on the 28th of November, 1921, between the nomination and the polling day, cheques were issued by the Moose Jaw Constituency Committee of the Progressive party for the payment of certain election expenses to the amount of $1,351.05 which had been incurred by Mr. Johnson; that the cheques were paid without the knowledge of the official agent; that the officers of the committee having discovered that they had acted illegally in not having these payments made by the official agent (as provided by sec. 78 (3), "Dominion Elections Act") notified Mr. Johnson of their mistake; and that the agent, on the advice of the candidate, declared in his return of expenses that these payments of $1,351.05 had been authorized by him.

It is in evidence also that two other bills were sent to the agent, one of $20 claimed by the Paris Café for lunches supplied to the scrutineers of Mr. Johnson, and the other of $68 for the services of a band on the night of the election, and that these two bills, though received before the return of the election expenses, were not mentioned in it.

It is contended by the appellant that these two bills were not election expenses.

These bills having been paid by the official agent, I cannot very easily follow the argument that they were not election expenses. These scrutineers, to whom lunches had been supplied, were doing some work for the benefit of the appellant's election. In fact, this item was not included because he feared that these lunches could not be considered as legitimate expenses. I would not say that they were or were not legitimate election expenses—we are not called upon to decide that—but they have been incurred in connection with the election and it was the imperative duty of the agent and of the candidate to mention them

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in the return (sect. 79 s.s. 1-3 of "The Dominion Elections Act".)

It cannot be disputed also that the services of a band on the night of an election are expenses incurred in connection with the election.

The failure of the agent and of the candidate to include in their return these two bills for the payment of which money had been supplied by the candidate himself render them guilty of corrupt practices under sect. 79, ss. 9, which says:

> If a candidate or official agent knowingly makes a false declaration respecting election expenses, he is guilty of a corrupt practice.

As to the declaration in the return that the payment of $1,351.05 made by the Progressive Committee of Moose Jaw was made with the authorization of McRitchie, I am obliged to declare that it is not a true declaration.

The return of election expenses must give to the public a full and complete disclosure of all expenses and claims made by or to a candidate in connection with the election. Parliament requires by its legislation that the public should know exactly what has been received and expended in each constituency. The return should mirror the manner in which the electoral compaign has been conducted. If illegal acts have been committed so much the worse for the candidate. Of course, errors and omissions might occur, but then the courts are authorized to be lenient and not to condemn for trivial things (1921, ch. 7, s. 7.)

In this case I would have been for my part willing to exercise my discretion in favour of the appellant if he had declared the facts as they had occurred. It was evidently a mistake which was made by the officers of the Moose Jaw Committee when they issued cheques for these bills; but they were under the impression that being an incorporated association for political purposes they could pay legitimate election expenses (article 10, "Dominion Elections Act".) They had not thought of the fact that their powers were restricted to contributions for election purposes and that expenses incurred in a constituency should be paid by the official agent (section 78, subsection 3). If the agent or candidate had reported in his statement the facts as they really occurred, then the appellant could have invoked

the application of the statute of 1921; but no, they tried to prove that these payments had been authorized by the official agent when the evidence shows that he knew of them only long after. I admit the law is very severe; but if the agents or the candidates are candid and truthful and if the election has been carried out honestly there is no fear; the courts will not condemn for trivial things omitted.

These returns of expenses must be certified under oath and the agent and the candidate should always respect the sanctity of the oath.

For these reasons the finding of the trial judges that the appellant was guilty of corrupt practices is right and their report should be confirmed with costs.

MIGNAULT J.—The election petition of the respondents complaining of the return of the appellant as a member elected to represent the electoral district of Moose Jaw, Saskatchewan, in the House of Commons of Canada, was tried before the Honourable Mr. Justice Embury and the Honourable Mr. Justice Mackenzie, two of the justices of the Court of King's Bench for the province of Saskatchewan. The question of their jurisdiction to try this petition was raised before them, but the objection was finally rejected and the trial proceeded to judgment.

The petition having been maintained the appellant now appeals to this court and again raises the question of the jurisdiction of the learned trial judges. In my opinion, whatever doubts may have been created by the language of the provincial statute under the terms of which the Court of King's Bench replaced the Supreme Court of the province, no possible question as to the jurisdiction of the learned judges to try this petition can arise in view of the unequivocal enactment of subsection 2 of section 14 of chapter 25 of the Statutes of Canada for 1916 " The Judges Act." I would therefore dismiss this objection as unfounded.

On the merits I am of opinion that the judgment is well founded and that the appeal should be dismissed. Notwithstanding Mr. Hudson's very able argument I must hold that the appellant, as found by the learned trial

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judges, made a false declaration of expenses within the meaning of the "Dominion Elections Act."

Mr. Hudson argued that the words contained in the declaration of expenses

by paying bills authorized by myself and by cash directly

were not false because the appellant's official agent, McRitchie, authorized the payment of these accounts which were paid by cheques issued directly to the payees by Teare and Devlin. McRitchie was not called at the trial, so Mr. Hudson could not go further than to contend that the declaration of expenses shows that McRitchie had authorized these payments. However, when they issued their cheques Teare and Devlin, respectively the president and secretary-treasurer of the incorporated association which furnished funds for the appellant's election expenses, did not even know McRitchie. And what the statute requires is that election expenses be paid "by and through" the official agent. The payments here were made by and through an association whose cheques were issued and made payable directly to the creditors of the accounts, and not by and through the official agent. If the words I have quoted from the declaration of expenses imply that these payments were made by and through McRitchie, they are false, and if they mean that McRitchie merely authorized the payment made with these cheques they are equally untrue, for McRitchie was not present at the meeting of the 28th November, 1921, when the payments were authorized and the cheques signed. The appellant said that McRitchie initialled the vouchers on the 28th January, the day he prepared the return of expenses, but this does not show that he authorized the payments when they were made, much less that these payments were made by or through him. It is difficult to escape the conclusion that the peculiar wording of the declaration was suggested by the desire to cover up something or to conceal the real truth. My opinion is that it was a false declaration.

Moreover the payment of two accounts, those for the band on the night of the election and for the luncheons furnished to the scrutineers in the polling stations, is not mentioned in the declaration of expenses. As a matter of fact, these accounts, which were for election expenses,

especially the account for luncheons, were paid after the preparation of the return of election expenses by the appellant and McRitchie, but before it was sworn to, and appear to have been paid with moneys furnished by the former to the latter. This payment, the trial judges say, was made more than fifty days after the day the appellant was declared elected, and they add that it was thus an illegal practice of the appellant and his official agent under subsection 9 of section 78 of "The Dominion Elections Act." The evidence is not clear as to the date when the band account and the account for luncheons were paid. As to the former account, the appellant says it was paid by cheque dated January 31st and passed through the bank on February 7th. The account for luncheons was apparently paid in money, the appellant having furnished $10 on two different occasions to his official agent for that purpose.

By knowingly making a false declaration respecting election expenses, the appellant and McRitchie were guilty of a "corrupt practice" ("Dominion Elections Act," section 79, subsection 9) and, under section 51 of "The Dominion Controverted Elections Act," the election is void. The commission of an illegal practice by the candidate or his official agent entails the same consequence. The appellant was certainly "a candidate at an election" within the meaning of section 51.

The appellant asked that he be given the benefit of section 56a of "The Dominion Controverted Elections Act" which permits the Court or the trial judges to relieve the candidate or the official agent from the consequence of an illegal practice, where the commission of the illegal practice did not arise from any want of good faith. This application was refused by the learned trial judges who in their reasons for judgment said:—

> We do not see that we can extend the benefit of this section to the respondent (now the appellant) in the present circumstances, primarily because we do not think that he has satisfied the onus cast upon him of proving his good faith.

This declaration of the learned trial judges places the appellant in a most disadvantageous position when he again before this court applies to be given the benefit of section 56a. And I cannot see my way to grant his application.

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The learned counsel of both the appellant and the respondents appeared to be of the opinion that the result of the judgment of the trial court would be the disqualification of the appellant and his official agent. Mr. Tilley for the respondents very chivalrously did not insist on this personal disqualification, being satisfied with the avoidance of the election. But if personal disqualification be the legal effect of finding the appellant and McRitchie guilty of a corrupt practice under "The Dominion Elections Act," section 39, the court would be powerless to interfere. Disqualification is not declared in terms in the judgment appealed from, and I express no opinion on the question whether it was incurred. The matter rests on the proper construction and effect of section 39.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. E. Gregory.*

Solicitor for the respondents: *J. W. Corman.*

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

F. J. EARL (PLAINTIFF) ..... RESPONDENT.

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*Feb. 7, 8.
*April 3.

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

Negligence—Railways—Accident—Level crossing—Switching operations—Breach of order of Railway Commissioners—Contributory negligence—Defence available.

In an action for damages brought by a person struck by a moving train when using a level crossing on a highway, the trial judge found that the railway company, in causing one of its switching trains to pass over the crossing, had acted in contravention of an order of the Board of Railway Commissioners; but he also found the injured person guilty of contributory negligence.

Held, Brodeur J. dissenting, that the railway company was not liable; its disregard of the board's order did not preclude its setting up as a defence the contributory negligence of the respondent, and it was not proved that the railway company's servants by the exercise of ordinary care and caution could have avoided the consequences of the respondent's negligence.

Judgment of the Appellate Division ([1922] 3 W.W.R. 406) reversed, Brodeur J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Harvey C. J. (2), and maintaining the respondent's action.

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

Maclean K.C. for the appellant. The train movement was not one impliedly prohibited by the order of the Board of Railway Commissioners. Even if the train had no right to cross the highway at the time, or if there should have been a watchman stationed on the crossing, the respondent, after knowing that the train did intend to cross, proceeded recklessly and carelessly into a dangerous place and should be held the author of his misfortune; and the judgment should have given effect to the respondent's negligence.

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

(1) [1922] 3 W.W.R. 406. (2) [1922] 3 W.W.R. 27.

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Ford K.C. for the respondent. The respondent was not guilty of contributory negligence, and the railway company acted illegally and in contravention of the order of the Board of Railway Commissioners.

The CHIEF JUSTICE.—I would allow this appeal with costs throughout concurring in the reasons therefor stated by my brothers Anglin and Mignault.

DUFF J.—The appellate company was disobeying the enactments of the order of the Railway Commission as to the hours within which shunting might be carried on in the locality where the accident occurred, and in requiring the presence of a watchman. I do not think it follows, however, that the company's cars were such an unlawful (i.e. destitute of statutory authority) obstruction of the street traffic as to constitute what should be described as in point of law a nuisance, nor do I think the rule in *Rylands* v. *Fletcher* (1) comes into play; otherwise I should have thought it necessary to consider carefully the question whether the doctrine of contributory negligence applied. I think the charge against the company must be based upon the proposition that they were improperly and in violation of the order working their railway. Section 345 of the Railway Act has not been construed as enacting that a railway company should be responsible for all damages resulting in part through the negligence of the victim and in part through such disobedience. It is settled that in those provinces in which the doctrine of contributory negligence is part of the law, as a general rule it must be applied for the purpose of determining whether an injury arising wholly or in part from a contravention by a railway company of the provisions of The Railway Act or of an order made under the authority of the Act respecting the management of its trains is actionable. *The Grand Trunk Ry. Co.* v. *McAlpine* (2); *Canadian Pacific Ry. Co.* v. *Smith* (3). This is one of those cases that sometimes cause one to turn a rather wistful eye to jurisdictions in which where injury results from the combined negligence or misconduct of the plaintiff and the defendant, the burden of the

(1) [1868] L.R. 3 H.L. 330. (2) [1913] A.C. 838.
(3) [1921] 62 Can. S.C.R. 134.

loss can be equitably distributed. But where the English doctrine of contributory negligence reigns, a tribunal assessing damages in such circumstances must find the defendant responsible for the whole of the loss or for none.

The House of Lords unanimously affirmed the view expressed by the Lord Chancellor in *Admiralty Commissioners* v. *SS. Volute* (1), that the question of contributory negligence should be dealt with somewhat broadly and upon common-sense principles, as a jury would probably deal with it. The general rule has usually been put in accordance with this sentence from the judgment of Lindley L.J., in "*The Bernina*" (2):

> I take it to be settled that an action at common law by A against B for injury directly caused to A by the want of care of A and B will not lie.

(*Dowell* v. *General Steam Navigation Co.* (3); *Walton* v. *The London, Brighton and South Coast Ry. Co.* (4); *The Bernina* (2)). As Lord Sumner said, in his judgment in *Weld-Blundell* v. *Stephens* (5):

> Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result.

The rule thus broadly stated must be supplemented, of course, by the judgment of Lord Penzance in *Radley* v. *London & North Western Ry. Co.* (6) as interpreted in *British Columbia Electric Ry. Co.* v. *Loach* (7); but I cannot help thinking that there has been a tendency to over-refinement in the application of the law which has led to a good deal of confusion and uncertainty.

With the greatest respect for the courts below, my conclusion is that this case comes within the class of cases envisaged by Lord Cairns in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery* (8). I repeat the sentence, which has many times been approved and applied, e.g., in *Grand*

(1) [1922] 1 A.C. 129, at p. 144.
(2) [1886] 12 P.D. 58, at p. 88.
(3) [1855] 5 E. & B. 195, at p. 205.
(4) [1866] H. & R. 424.
(5) [1920] A.C. 956, at p. 984.
(6) [1876] 1 App. Cas. 754.
(7) [1916] 1 A.C. 719.
(8) [1878] 3 App. Cas. 1155, at p. 1166.

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Trunk Ry. Co. v. *McAlpine* (1), and *Canadian Pacific Ry. Co.* v. *Fréchette* (2), by the Judicial Committee; and in *The Canadian Pacific Ry. Co.* v. *Smith* (3).

If a railway train, which ought to whistle when passing through a station, were to pass through without whistling and a man were, in broad daylight, without anything in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company which caused his death.

The violation of the restriction as to hours may be left out of account, obviously. As to the watchman, I doubt very much indeed if the facts would justify a finding that the presence of a watchman would probably have saved the respondent. At all events I am quite clear that the object of having a watchman is to warn people that they are in presence of a railway and that the tracks are in use, to call their attention to the risks in order to give them an opportunity of exercising that prudence which people usually display in such circumstances; and not at all to protect people by forcible means from the consequences of their own folly and recklessness in refusing to take warning and observe the usual precautions in the presence of such risks.

The respondent's miscalculation (I assume there was a miscalculation) is, I think, of no importance. His fault was in his heedless inattention to the risks of a situation which would have awakened the attention and the care of any ordinarily careful person. Miscalculation was inexcusable in the circumstances.

To distinguish this case from the hypothetical case put by Lord Cairns or from the case of *Canadian Pacific Ry. Co.* v. *Smith* (4), or, indeed, from a number of other authorities which could be named would, I think, with the greatest respect, be approaching perilously near to frittering away the substance of the doctrine which it is the duty of the court to apply; and unless the language of the rule that a plaintiff cannot recover when carelessness is in part the "direct" cause of the accident is to be interpreted with no regard whatever to the meaning of the words em-

(1) [1913] A.C. 838.

(2) [1915] A.C. 871, at pp. 879 and 888.

(3) 62 Can. S.C.R. 134.

ployed, I cannot understand an affirmation that the respondent is not within it. The case is not at all like *Slattery's Case* (1) in the view Lord Cairns took of it (as well as Lord Penzance), namely, that notwithstanding the plaintiff's want of due care and attention in the presence of a railway, the blowing of a whistle might (in the opinion of the jury) have awakened his attention to the fact that a train was approaching; nor like the *Ottawa Electric Ry. Co.* v. *Booth* (2), where the driver of one street car, meeting and passing another which was stopping to enable passengers to alight, proceeded without sounding his bell in order to give warning to passengers who most probably would be passing around the rear of the other car, oblivious of the peril arising from the fact that they were about to encounter a car moving on another track. Nor is it like *Long* v. *Toronto Ry. Co.* (3), where the driver of the car saw a pedestrian, evidently in a state of abstraction, about to pass in front of his car and negligently failed to take in due time proper measures to avoid him; nor has it any resemblance to *Loach's Case* (4).

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The defendant railway company appeals from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of Harvey C. J. awarding the plaintiff $3,850 as damages for personal injuries sustained at a level crossing in the City of Edmonton.

By an order of the Board of Railway Commissioners the defendant company was required to carry out its switching movements over the crossing in question between the hours of 1 o'clock and 2.30 o'clock p.m., and the hours of 9 o'clock p.m. and 6 o'clock a.m., and to keep a watchman on duty to protect the crossing during the periods when switching operations should be carried on. The plaintiff was injured by an engine engaged in switching operations at 6.30 o'clock p.m. on the 5th July, 1921. No watchman was on duty at the time. I am satisfied that the defend-

(1) 3 App. Cas. 1155.
(2) [1920] 63 Can. S.C.R. 444.
(3) [1914] 50 San. S.C.R. 224.
(4) [1916] 1 A.C. 719.

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ant's train which injured the plaintiff was unlawfully passing over the crossing and that liability for the injury done him would therefore be clear if contributory negligence, of which he has been found guilty, had not deprived him of the right to recover.

I cannot, however, accede to the suggestion that section 310 (1) of the Railway Act (1919, c. 68) required that a person should be stationed on the tender of the engine to warn persons crossing or about to cross the railway. That provision applies only to "any train not headed by an engine." The train in question was so headed, although the engine was moving reversely.

For the plaintiff it is urged that he was not guilty of contributory negligence; that, if he was, the defendant could nevertheless by the exercise of reasonable care have avoided the consequences of his negligence and that contributory negligence is not available as a defence to a claim for injury caused by a defendant when acting in violation of a statutory prohibition.

The learned judge found the plaintiff guilty of contributory negligence in not taking reasonable care to avoid placing himself in the way of the train which he admitted he knew was about to pass over the crossing. After a careful study of the evidence I am satisfied that this finding must stand. The learned Chief Justice, however, held that the defendant was nevertheless liable on the ground that

> a watchman standing to guard the track and warn approaching passengers, if properly performing his duties, would almost certainly have observed and warned the plaintiff in time to prevent the accident.

With very great respect I cannot accept that finding, notwithstanding the approval of it by the Appellate Division. It is, I fear, purely a conjecture that a watchman could have effected what the fireman shouting from the approaching engine failed to accomplish. The plaintiff was either so intent on guiding his bicycle or so absent-minded that he failed to heed the fireman's warning. It seems to me to be more than probable that a watchman's flagging or shouting would have been likewise unheeded.

The plaintiff's negligence continued up to the moment of the impact; so much so that at the trial he could not himself say whether the train hit him or he hit the train

It is a fair conclusion from the evidence that, after the likelihood of his putting himself in danger was or should have been apparent to employees of the defendant, they could not have avoided the consequence of his rashness and that they had not incapacitated themselves from doing so by anything they had done or omitted to do, except engaging in the illegal switching operation. This case in my opinion does not fall within the principle of the decision in *British Columbia Electric Ry. Co.* v. *Loach* (1).

The negligent running into danger of the unfortunate plaintiff, if not the sole proximate cause of his being injured, was at least a contributing cause quite as proximate and immediate as the breach of the order of the board by the defendants. Indeed I might, if necessary, require to consider carefully whether the unlawful conduct of the defendant was not merely a condition of the accident rather than a cause of it in the legal sense. The injury to the plaintiff can scarcely be attributed to the unlawful quality of the defendant's act in carrying on switching operations during prohibited hours. But see *Admiralty Commissioners* v. *SS. Volute* (2). If the unlawful switching should be regarded as a contributing cause, the accident was the result of the joint fault of the defendant and the plaintiff; without the negligence of the latter operating as a *causa causans* it could not have happened. There is therefore no cause of action. *Wakelin v. London & South Western Ry. Co.* (3) per Brett M.R.

Nor does the fact that the plaintiffs were using the highway crossing in violation of a statutory prohibition exclude the defence of contributory negligence. That question has been before the English and the Ontario courts several times and, with the possible exception of a dissenting judgment by Meredith C.J. C.P., in *Godfrey* v. *Cooper* (4), cited by Mr. Ford, judicial opinion has been uniform in this sense.

In the case referred to, Riddell J. and Middleton J., with whom Latchford J. concurred, cite with approval *Walton* v. *Vanguard Motor Bus Co.* (5), where Lord Alver-

(1) [1916] 1 A.C. 719.
(2) [1922] 1 A.C. 129, at p. 144.
(3) [1896] 1 Q.B. 189 N.
(4) [1920] 46 Ont. L.R. 565.
(5) [1908] 25 Times L.R. 14.

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stone C.J., dealing with a case in which a lamp standard unlawfully placed on a footpath had been negligently run against and damaged by the defendants, said:

The defendants were not entitled to raise the point that the lamp-post was an object they were entitled to knock down without being held liable for negligence.

In *Deyo* v. *Kingston & Pembroke Ry. Co.* (1), this question was squarely presented for decision. The defendants, in violation of a prohibitive section of the Railway Act, were using freight cars of a height which did not allow an open and clear headway of 7 feet between the top of the cars and the bottom of the lower beams of a bridge over the railway. A brakesman, who was on the top of a moving freight car contrary to a rule of the defendant company, was killed by coming in contact with this overhead bridge. An action brought by his representative failed. Osler J.A., delivering the judgment of the Court of Appeal, said:

There remains the question whether the violation of the statutory duty of the defendants under the other section was the proximate cause of the death of the deceased; or whether this must not be said to have been wholly owing to his own unfortunate neglect of the rules of the company. I feel compelled to say, that on this ground the defence has been made out and that the action must fail. Even to an action founded on the breach of a statutory duty contributory negligence may be a defence, as we constantly see in actions arising under the Workmen's Compensation Act or the Factory Act. *Groves* v. *Wimborne* (2). *A fortiori,* it must be an answer to such an action that the injury was caused by the deceased's own act or omission; that it was caused by or could not have happened but for the servant's direct disobedience of some order or rule of his employers, intended though that may have been to prevent accidents arising from the continued failure of the latter to perform their statutory duty.

In *Groves* v. *Wimborne* (2) it was held that the defence of common employment is not available to a master where breach of an absolute duty imposed on him by statute has caused injury to his servant. Vaughan-Williams L.J., in his judgment in the Court of Appeal said, at p. 419:

No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. It would be an answer for the reason that in fact the damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff.

(1) [1904] 8 Ont. L.R. 588. (2) [1898] 2 Q.B. 402.

In *Blenkinsop* v. *Ogden* (1), Kennedy J., sitting in a Divisional Court, said that

> In an action by an injured person for damages his own contributory negligence would be an answer upon the ground that the immediate and direct cause of the mischief would be his own conduct and not the occupier's neglect to fence.

Iles v. *Abercarn Welsh Flannel Co.* (2) was also a case of injury through a breach of statutory duty to fence off machinery. A Divisional Court (Mathew and A. L. Smith JJ.) dismissed an appeal by the defendants holding that there was no evidence of contributory negligence, but

> intimated that the holding of the county court judge, that the defendants, having been guilty of a breach of a statutory duty, could not set up a defence of contributory negligence by the plaintiff, was wrong.

In *Britton* v. *Great Western Cotton Co.* (3), another case of unfenced machinery, the unsuccessful defence was based on "*volenti non fit injuria.*" Channel B., in the course of his judgment, expressed his agreement with the distinction drawn between a statutory and common law liability,

> not by any means questioning the proposition, however, that in either case contributory negligence on the part of the person injured would afford a defence;

and Piggott B. said:

> It seems that even although there may be a statutory duty, imposed on the employer, the workman must still be careful of his own safety. In this case there is nothing to shew that the deceased knowingly incurred the danger, or was guilty of any want of care, and the defendants, therefore, ought to bear the consequences of their own clear neglect of duty.

In *Kelly* v. *Glebe Sugar Refining Co.* (4) Lord Adam, in delivering the unanimous judgment of the First Division of the Court of Sessions, treated contributory negligence as a defence that would have been available if established.

In *Caswell* v. *Worth* (5), a plea admitting that a shaft, in which the plaintiff was injured, was not fenced as required by the Factory Act, but alleging as contributory negligence that the plaintiff had himself set the machinery in motion contrary to an express order, was sustained on demurrer by a court consisting of Lord Campbell C.J., Coleridge, Wightman and Crompton JJ.

(1) [1898] 1 Q.B. 783.
(2) [1886] 2 Times L.R. 547.
(3) [1872] L.R. 7 Ex. 130.
(4) [1893] 30 Sc. L. Rep. 758.
(5) [1856] 5 E. & B. 849.

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The weight of American authority is to the same effect. The cases will be found noted in 29 Cyc., p. 508, under the text:

> Contributory negligence will defeat recovery, even though the negligent act consisted in the violation of a statute or ordinance, and though such violation is held to be negligence *per se*.

A very recent American decision to that effect is, *Ebling* v. *Nielsen et al* (1).

Although none of the cases I have cited is binding on this court, the weight of judicial opinion which they present cannot be disregarded. So long as we are governed by the English doctrine of contributory negligence no sound reason can in my opinion be advanced for holding that defence inadmissible where the defendant's fault consists in the violation of a statutory duty. On the other hand, the present case illustrates the harshness of the rule by which, where there is common fault contributing to cause injury to a plaintiff, he is deprived of all redress and the defendant entirely relieved, although the culpability of the former may be comparatively slight and that of the latter distinctly gross. The doctrine of the civil law that in such circumstances the damages should be divided in proportion to the degree of culpability commends itself to my judgment as much more equitable.

The appeal must in my opinion be allowed and the action dismissed. The appellant is entitled to its costs throughout, should it see fit to exact them.

BRODEUR J. (dissenting).—This is a railway accident at a level crossing at Edmonton. There are no less than six tracks crossing the street; some are main tracks and some are used for switching operations. The latter should be used according to the order of the Railway Board during the night only and during one hour of day-time. However the appellant company disregarded this order of the Railway Board and during the prohibited time was having a reversed engine with a few cars passing on the switching tracks and had no flagman and nobody on the tender to give warning. Earl, who was on a bicycle, saw the train; but having the impression that it would continue across the street in the direction in which it was proceeding when he

(1) [1920] 186 Pac. Rep. 887.

saw it, he tried to reach a track on which he did not expect that the car would pass; but he came into collision with it and was hurt.

His action is to recover damages resulting from his disability, which was estimated at 35 per cent.

The courts below maintained his action for $3,850. The railway company is appealing; and Earl asks by a cross-appeal that the damages be increased to $5,993.61.

It is pretty evident that this level crossing is a very dangerous one. It is at a place where there is a very heavy traffic and it is no wonder that the company, when it applied for a level crossing, was ordered by the Railway Board not to carry out any switching operations during the day, except for one hour and a half, and that a signal man be provided to watch the crossing.

However the company completely disregarded this order and was carrying out shunting operations at a prohibited hour without having a flagman to give warning to the public. Besides, in the evidence given by the engineer of the train, it is admitted that a man on the front of the tender would have had a better chance of warning a victim than a man in the cab.

The finding on the facts was on the whole in favour of the plaintiff and is to the effect that he did not go on the track deliberately.

But, besides that, the defendant company had no right to be on this street at this hour of the day when the accident occurred. It deliberately violated the law as laid down by the Railway Board and it should not be entitled to avail itself of the error of judgment which might have been committed by a person who had a right to be there.

For these reasons, the appeal should be dismissed with costs.

As to the cross-appeal, we do not interfere in this court with the amount of damages granted by the courts below except in very exceptional circumstances which I do not see in the present case.

The cross-appeal should be also dismissed with costs.

MIGNAULT J.—Questions involving the application of the rule of contributory negligence are of much nicety and con-

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siderable difficulty and it is not easy to frame a satisfactory formula which can be applied in the almost infinite variety of circumstances where the rule is invoked. (See the article of Lord Justice O'Connor in The Quarterly Review, vol. 38, p. 17.) If I may say so, the doctrine of the civil law, in force in the province of Quebec and also adopted in admiralty matters, is much more equitable, for where there is common fault the liability of each party is measured by his degree of culpability. This prevents the negligent defendant from entirely escaping punishment because the plaintiff, in a greater or less degree, has contributed by his negligence to the accident. However this is a matter for the consideration of the law-maker, for the courts are obliged to apply the law however harsh it may seem.

Save some statements by two or three witnesses to which apparently the learned trial judge gave no weight, there is no dispute as to the material facts. The respondent is a stenographer and book-keeper, and at half-past six of the evening of July 5, 1921, in bright daylight, was riding a bicycle north on 96th Street in the city of Edmonton, approaching the crossing of 105th Avenue, which runs east and west, while the direction of 96th Street is north and south. The centre portion only of 96th Street is paved. The tracks of the appellant's railway cross 96th Street on the level almost at its intersection with 105th Avenue and thence proceed in a northeasterly direction. To the west of 96th Street and at a distance of about one hundred yards are the freight sheds of the appellant. As the respondent approached the crossing, he saw a train of ten loaded freight cars headed by an engine placed reversely, that is to say tender in front, moving in an easterly direction from the freight sheds towards the crossing of 96th Street, and he says he assumed that it would cross the latter street and intended to wait until it had passed. He had all the more reason for waiting because he saw another train approaching the crossing from the east. He had been riding along the paved strip, but as he came near the crossing a motor car in front of him stopped at the tracks, and then backed a few feet, and the respondent left the paved strip and crossed diagonally and in a northeasterly direction over a somewhat muddy portion of the street, for it had been

raining, no doubt intending to go on to the sidewalk and wait there. This brought him to the right and to the east of the motor car, which had its top up and may have obstructed his view of the freight train approaching from the west, the more so as the diagonal direction he was following towards the sidewalk possibly caused him to turn his back to the train. The muddy condition of the roadway he was thus crossing diagonally must have absorbed all his attention, for when he reached the sidewalk he was on the railway track and was struck while still on his bicycle by the tender of the engine and very seriously injured. The train that struck him was shunting and moving at about five miles an hour, the engine's bell constantly ringing. It was stopped within about forty feet.

An important point to be considered is that under an order of the Board of Railway Commissioners of June, 1914, the appellant was authorized to construct, maintain and operate ladder tracks across Kinistine Avenue (now 96th Street), but switching movements were authorized only between the hours of 1 and 2.30 p.m. and between 9 p.m. and 6 a.m. and a watchman was ordered to be provided, at the expense of the appellant, to protect the crossing during the periods that switching operations were being carried on. There was no watchman at the crossing when the accident happened and the shunting itself was at an unauthorized and impliedly prohibited time.

The learned trial judge, speaking of the respondent's conduct, said:—

> I can see no explanation of his conduct consistent with reasonable care and I think he was guilty of negligence in riding on to the track blindly in this way knowing as he did that a train was approaching the crossing.

Notwithstanding this finding of contributory negligence on the part of the respondent, the learned trial judge nevertheless condemned the appellant on the ground that it should have had a watchman at the crossing, who, had he been there, might have warned the respondent of his danger. This reason, with deference, appears to me unsatisfactory, for the watchman, to be of any use, would have had to be stationed between the tracks to stop traffic on both

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sides of the crossing, and therefore at some distance from the point where the respondent was struck. It further seems entirely a matter of conjecture whether a warning from a watchman so placed would have prevented the respondent from going on to the track, for the fireman of the approaching engine, when not further away than the watchman would have been, loudly shouted to him to stop and the warning was unheard or unheeded by the respondent.

In the appellate court, Mr. Justice Stuart was of opinion that while the reasons of the learned trial judge were quite sufficient, they were not nearly as strong as they might have been. In his opinion, the appellant's train was crossing the highway illegally, and in so crossing struck the respondent who had the right to be there, and he felt great reluctance under these circumstances in going very far with any doctrine of contributory negligence. Mr. Justice Beck and Mr. Justice Clark adopted the reasons of the trial judge.

A point urged by the respondent is that the appellant should have placed a man on the foremost part of the tender to warn persons on the highway. This turns on the proper construction of section 310 of The Railway Act of 1919, and inasmuch as the train was headed by an engine, although the engine was moving tender first, I do not think the section applies. Any possible warning that could have been given by a man so placed was in fact shouted to the respondent by the fireman of the engine, but to no effect.

As the failure to have a watchman at the crossing or a man on the foremost part of the tender does not afford a satisfactory basis for the judgment rendered against the appellant, there only remains the question whether, assuming the appellant violated a statutory prohibition in carrying on shunting operations at an unauthorized hour, it can escape liability by reason of the contributory negligence of the respondent. In other words, is the contributory negligence of the plaintiff a valid defence where the injury was caused by the defendant in the course of the performance of an illegal act?

I do not think the defence of contributory negligence is excluded in a case like this one. It is true that proof of the

breach of a statutory prohibition or of a statutory duty relieves the plaintiff from the necessity of alleging or proving negligence. But it is not enough to find that the defendant was negligent, for, if the plaintiff was himself guilty of negligence which caused the accident or which contributed thereto, he cannot recover damages from the defendant, unless, in the language of Lord Atkinson in *Grand Trunk Railway Co.* v. *McAlpine* (1),

it be shewn that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequences of the plaintiff's negligence.

There only remains the question whether the appellant's servants by the exercise of ordinary care and caution could have avoided the consequences of the respondent's negligence?

The fireman of the engine was riding on the south side or on that side which gave him a view of anything approaching the track from the south. He says he was looking to the east, that is to say in the direction the train was moving.

As I have stated, the respondent passed to the right of the motor car which had stopped on the paved portion of the street and which was between him and the train, his attention apparently being entirely directed towards the muddy road he was crossing in his effort to reach the sidewalk. I will quote from the fireman's testimony with whose evidence, as well as with that of the engineer, the learned trial judge stated he was particularly impressed:—

Q. If you can tell me, as near as possible, whereabouts was your cab when you first saw the plaintiff?—A. Pretty nearly the west side of the crossing.

Q. And where was the plaintiff when you first saw him?—A. He came from around that first automobile. There were two automobiles; one was on the paved road a little way back from the track, and the other one was on the side, that is the west side of the street, but he came from this first one and tried to make across the tracks.

Q. He was going north?—A. He was going north.

Q. And east of the far auto?—A. Yes.

Q. And you first saw him when?—A. He was pretty close to the track.

Q. About how far from the track?—A. About ten feet.

Q. What did you do?—A. Well, my impression was he seemed to hesitate. I thought he was going to wait until the train went by and when I saw that he wasn't, he was going on the track, and then headed straight

(1) [1913] A.C. 838, at pp. 845, 846.

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down the track between the rails, his bicycle was wobbling around, he seemed to me like he was nervous, and as soon as I saw that I hollered.

Q. How far was he from the track when you hollered?—A. He must have been about five feet. I knew he was going to head right on to the track, and I hollered and tried to attract his attention.

Q. How loudly did you holler?—A. Just about as loud as I could leaning out of the window and hollering.

Q. And did you do anything about notifying the engineer?—A. Yes, sir, I turned to the engineer and told him to hold her.

Q. And did he hold her? Yes, and applied the emergency brake and reversed the engine.

Q. And where did the engine stop?—A. The engine moved to just over the east side of the crossing, the tender just over the east side of the crossing.

I think the fireman was entitled to assume, when he first saw the respondent, that the latter would not attempt to cross the track which would have been an act of madness with the train so close. But when he realized that the respondent was not going to wait, he shouted out to him, and the engineer says the shout could be heard a block. Did this shout come too late to permit the respondent to stop his bicycle, or should the fireman have shouted a second or two sooner, for it was a matter of seconds? The respondent's act, in riding blindly on to the track, knowing that a train was approaching the crossing, had created a situation of great danger, and when the fireman realized the danger he shouted to respondent. The latter may have been then so close to the track that he could not stop, or he may have been unnerved by the sudden realization of the danger, at all events he became the victim of the situation his negligence had created. Even if the fireman did not do everything that could have been done in this emergency—and it is easier to criticise after the event than to take the proper course during an emergency—still the respondent's own act was the cause of his misfortune. I think the language of Lord Birkenhead in the recent case of *Admiralty Commissioners* v. *SS. Volute* (1), a marine collision case and therefore one for contribution, may very properly be cited here as descriptive of the situation created by the respondent's negligence:

I think that the question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be

(1) [1922] 1 A.C. 129, at p. 144.

drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

Unfortunately for the respondent, this is not a case of contribution, and his negligence disentitled him to succeed in his action against the appellant. It is with regret that I come to this conclusion, but after the most serious and anxious consideration I can see no help for it.

With great respect therefore I differ from the judgments below and would allow the appeal and dismiss the respondent's action with costs throughout.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Short, Cross, Maclean & McBride.*

Solicitors for the respondent: *Howatt & Howatt.*

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*Feb. 23.
*April 3.

THE GOVERNOR AND COMPANY OF GENTLEMEN ADVENTURERS OF ENGLAND (DEFENDANT) ..... APPELLANT;

AND

W. VAILLANCOURT (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Master and servant—Assault by employee—Liability of employer—Arts. 1053, 1054 C.C.

The appellant company, known as the Hudson's Bay Company, maintained a trading post in the far northern part of the province of Quebec. The post was in charge of one Wilson as manager, with two other employees of the appellant under his control, the respondent as general helper and his mother as housekeeper, all three living together. One morning, at 6.30, Wilson came out of his room half naked and drunk, to inquire about some noise heard in the upper part of the building. The respondent, coming down, saw Wilson and, knowing his mother was near, told him to kindly go back to his room and get dressed. A few minutes later, the respondent being in the kitchen, Wilson went there and shot at him, injuring his leg so severely that it had to be amputated.

Held, Duff and Anglin JJ. dissenting, that the appellant company was liable under article 1054 C.C., as the damages were caused by Wilson "in the performance of the work for which (he) was employed."

Per Idington and Brodeur JJ.—Upon the evidence, the appellant company is also responsible under article 1053 C.C.

Judgment of the Court of King's Bench (Q.R. 34 K.B. 207) affirmed, Duff and Anglin JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Superior Court, Sir F. Lemieux C. J., (2), and maintaining the respondent's action for $13,000.

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

Lafleur K.C. and *Holden K.C.* for the appellant. The act of Wilson was not done in the performance of the work for which he was employed (article 1054 C.C.); the wrong done was merely a wicked act; the master is not responsible even if that act had been done while the servant who did the act was occupied in work for his master. The respondent's injury was not caused by any act, imprud-

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

(1) [1922] Q.R. 34 K.B. 207. (2) [1922] Q.R. 60, S.C. 457.

ence, neglect or want of skill on the part of the appellant, under article 1053 C.C.—*Central Vermont Ry. Co.* v. *Bain* (1); *Curley* v. *Latreille* (2); *Halparin* v. *Bulling* (3); *Sheehan* v. *Bank of Ottawa* (4); *Roth* v. *Canadian Pacific Ry. Co.* (5); *Fiol* v. *Lombard* (6).

Alleyn Taschereau K.C. for the respondent. The appellant company is liable under articles 1053 and 1054 C.C.

IDINGTON J.—I agree entirely with the appreciation of Mr. Justice Guerin, presiding in the court appealed from, of the learned trial judge's opinion judgment in regard to the facts and the relevant law.

The like view of the law and facts has been taken by four out of five of those who heard the case in appeal. I concur with the majority. I cannot see anything useful to be served by repeating any of said arguments.

I may be permitted, however, to ask if a local trader had come into the appellant's shop and, in course of dealing with the agent Wilson when drunk, had been shot down by him because they disagreed as to prices, could it be held that the appellant would not be liable? I, of course, do not include in this illustration the consequences of an accepted challenge to go outside and fight it out.

I cannot distinguish such a case as I put from the mode of discipline the drunken agent in charge of the premises and all therein, including respondent, sought to apply to his subordinate.

I would dismiss this appeal with costs.

DUFF J. (dissenting).—The first question we have to consider turns upon the effect of a clause of Article 1054 of the Civil Code, which is in the following words:—

Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers, dans l'exécution des fonctions auxquelles ces derniers sont employés.	Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

(1) [1918] Q.R. 28 K.B. 45, at p. 47.
(2) [1920] 60 Can. S.C.R. 131.
(3) [1914] 50 Can. S.C.R. 471, at p. 474.
(4) [1921] Q.R. 59 S.C. 555, at p. 559.
(5) [1905] 4 Can. Ry. Cas. 238.
(6) Journal du Palais, 1875, p. 210.

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There does not appear to be any necessary inconsistency between the French text and the English text. They are to be read together, and (if interpretation be necessary) each as explanatory of the other. *City of Montreal* v. *Watt & Scott Ltd.* (1). I doubt myself if exposition could make the meaning of the language used in either text plainer than it is. *Le fait dommageable* must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions,* then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must, I think, always be in substance a question of fact, and although in cases lying near the border line decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

I am emphasizing this because in cases arising under these paragraphs, as in other cases under Article 1054 C.C., counsel are accustomed to fortify their arguments by copious references to decisions of the French courts, many of which appear to be of little value either as illustrations of the application of the text or otherwise. In France the doctrine has been widely accepted and has more than once been affirmed by the highest tribunal that the employer is responsible for acts done by his employee *à l'occasion* of his service. It cannot be insisted upon too strongly that an act done by an employee *à l'occasion* of his service may or may not be one for which the employer is responsible under Article 1054 C.C., depending in every case upon the answer to the question: "Was the act done in the execution of the employee's service or in the performance of the work for which he was employed?" An illustration of cases requiring an affirmative answer is one decided in 1847, Dalloz 4. 423, in which a builder's workman, smoking while at work, set fire to a building. Precisely the same

(1) [1922] 2 A.C. 555, at p. 562.

case, that is to say the same in all its essential elements, was decided in the opposite sense in *Williams* v. *Jones* (1). But in *Williams* v. *Jones* (1) Blackburn J., dissented on the ground that in the circumstances the act of smoking by the employee while engaged in the duties of his employment, the circumstances being such that by smoking when so engaged the property where he was working was exposed to the risk of fire, constituted negligence in the performance of his duties. Blackburn J.'s difference with his colleagues "was as to the proper inference as from the facts" and his is the view which in a similar case would probably now be accepted. *Jefferson* v. *Derbyshire* (2). On the other hand, if the act of the servant causing the injury complained of is an act having no relation to the duties of his employment as, for example, where two servants momentarily discontinue their work to engage in some sort of a frolic, then, although it might not improperly be said that the injurious act is something done *à l'occasion* of their employment, it would appear to be an abuse of language to describe it as done *dans l'exécution des fonctions* or in the performance of the work for which they were employed.

Such cases are no doubt near the line, and the nearer the line one gets the greater the room of course for difference of opinion as to the application of the words of the text. But in substance the solution of the point involves nothing more than an accurate appreciation of the facts in their relation to the rule. There seems to be an increasing tendency in France (see Planiol, Revue Critique de Legislation, vol. 38, pp. 298, 301) to refer the paragraph under discussion as well as the opening paragraph of Article 1384 C.N. to a doctrine of social responsibility, according to which the risk of injury arising from the prosecution of an enterprise, whether through the negligence of servants or caused by things employed in the enterprise, should fall upon the *entrepreneur* or proprietor because he enjoys the profits arising from it. I do not think considerations derived from this mode of reasoning can legitimately be applied in controlling the interpretation or the application of the text now under consideration.

(1) 3 H. & C., 256.
(2) [1921] 2 Q.B. 281, at p. 290.

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With great respect for those from whom I have the misfortune to differ in opinion as to the result of this appeal, I cannot persuade myself that the circumstances in this case bring it anywhere near the boundary line which limits the application of the text. It is quite true that where a general authority is confided to a manager to be exercised in a rather remote region with which communication is somewhat infrequent, and resources are placed at his disposal such as those of which Wilson had command, considerable latitude may be permissible in the interpretation of the authority vested in him. But making full allowance for this, I can find no fact pointing to the existence of an authority vested in Wilson to exercise discipline over his subordinates by the administration of corporal punishment. There is no trace of such authority, either absolute or conditional. Treating, therefore, Wilson's expressions while engaged in beating the respondent, as serious evidence of the existence of a belief that he was invested with authority to do what he was doing in the name of the company and in the company's interest, the existence of such a belief is wholly irrelevant in the absence of some fact to show that it was founded on some action of the company naturally calculated to give rise to it.

But in truth the evidence makes it abundantly clear, as it seems to me, that Wilson's act was the act of a man crazed by drink, prompted merely by drunken frenzy—an act which, I repeat, with the greatest possible respect, cannot in my judgment be brought within the rule of the text under the most liberal interpretation possible.

Mr. Lafleur did not dispute that a case might conceivably be made out under Article 1053 C.C. if it could be shewn that the appellant company in selecting Wilson or in supervising his activities had failed to exercise due care with regard to the safety of the subordinates placed under his control. It is not necessary, in the view I take of this case, to attempt to indicate what ought to be regarded as a test of due care in this connection. It is sufficient to say that in order to establish a case under this head it would be necessary to produce some fact either actually known to the company or which the company ought to have known at least suggesting that by the employment of Wil-

son the personal safety of his fellow employees, subject to his orders, might be exposed to some extraordinary risk. I think the evidence does not disclose any such fact.

The appeal, in my opinion, should be allowed and the action dismissed.

ANGLIN J. (dissenting).—It is quite unnecessary to repeat the facts of this case already detailed in the very carefully prepared judgment of the learned Chief Justice of the Superior Court (1), the judgments delivered in the Court of King's Bench (2), and the opinions prepared by other members of this court.

With very great respect for the learned judges who hold the contrary view, I am of the opinion that this appeal should be allowed and the action dismissed.

It is sought to hold the defendant company responsible either under Article 1054 C.C. or under Article 1053 C.C.

In so far as the claim rests on the relationship of master and servant existing between the defendant company and Wilson, who shot the plaintiff, the liability imposed by the last paragraph of Article 1054 C.C. is, I think, as exclusive as it is, within the limits which it prescribes, absolute. Massé et Verge sur Zachariae, par. 628 (2); 20 Laurent, no. 583; 31 Dem. 611-2; Sourdat, Resp. 4 éd.t.12, no. 888). That liability arises from fault of the servant causing damage quite independently of any fault on the part of the master. In dealing with this aspect of the case we must therefore put aside as irrelevant and immaterial alleged lack of care in the choice of the servant or in the exercise of control or supervision of his activities. Those considerations have to do only with fault of the master and, while they might import liability under Article 1053 C.C., they are entirely foreign to the case so far as it rests on Article 1054 C.C. The only qualification or condition which the law attaches to the vicarious responsibility of the master is that the damages for which it is sought to hold him liable shall have been caused by the servant "in the performance of the work for which he is employed." But the fulfilment of that condition is *de rigueur,* this vicarious responsibility being *de droit étroit.* (Dem. no.

(1) Q.R. 60 S.C. 457.
(2) Q.R. 34 K.B. 207.

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617). In determining whether there is liability under Article 1054 C.C., I agree with Mr. Justice Tellier:—

Il faut répondre oui, si ces dommages ont été causés dans l'exécution des fonctions auxquelles le dit Wilson était employé; dans le cas contraire, il faut répondre non.

But I cannot assent to the view of that learned judge, shared by the other members of the Court of King's Bench (except Mr. Justice Howard) and by the learned Chief Justice of the Superior Court, that the damage for which the plaintiff claims was caused by Wilson "*dans l'exécution des fonctions auxquelles il était employé.*" I had occasion to consider carefully the scope and import of that much-discussed phrase (S. 92.1.569, n. 1 & 2) in *Curley* v. *Latreille*, (1) and I have had no reason to change the views there expressed.

I fully agree that the duties of Wilson at Weymontachingue included the upkeep and management of the residence and the control of the plaintiff as a servant, as well as the conduct of the defendant company's business. His authority over the plaintiff would probably have warranted reprimand and possibly dismissal for insubordination or insolence.

There can be no doubt also that although the particular act which causes damage may be unauthorized or even a distinctly forbidden or criminal act, if it be done in the performance of the work for which the servant is employed it will render the master liable for resultant injury. But when he took his gun and went to the kitchen and shot the plaintiff, Wilson was not performing any work or discharging any function within the scope of his employment as post-manager. He was not doing anything appertaining to the work for which he was employed. Under no circumstances could a sane man believe that his duty or his authority would extend to the doing of such a purely wanton act. And it is by the view which a reasonable man should take that what is included in the work or functions for which a servant is employed and the scope of the authority which his duties carry must be determined, and not by any crazy notion that may enter the servant's mind if mentally deranged or crazed with drink.

(1) 60 Can. S.C.R. 131.

The reasonable inference from the circumstances in evidence in my opinion is that Wilson was actuated by resentment for what, in his drunken frenzy, he imagined to be an insult at the hands of the plaintiff. Temporarily insane though he was, the belief that he conceived that when he shot the plaintiff he was engaged in discharging his duty to the company or in exercising any authority given him for the management of the household or the control of the servants, if material, is, in my opinion, not warranted. Wholly disconnected with any work for which he was employed by the defendant company, not committed by him "*comme tel en sa qualité de préposé,*" Wilson's act was not merely *un abus de son autorité,* it was something wholly *en dehors de ses fonctions. Fiol* v *Lombard* (1); *Central Vermont Ry. Co.* v. *Bain* (2); *Antoine* v. *Goudal* (3); Mignault, Droit Civil, p. 337; 31 Dem. no. 617; 20 Laurent no. 582; 11 Toullier no. 282.

As to liability under Article 1053 C.C., the evidence does not satisfy me that a case of actionable fault on the part of Youngman (whom I regard as the *alter ego* of the defendant company) either in the selection or in the supervision of Wilson as post manager has been shown, or that causative connection between any such alleged fault and the shooting of the plaintiff was sufficiently direct to entail liability of the company. Youngman seems to have taken reasonable care in the selection of Wilson and I am not satisfied that a case of negligence in his supervision has been made out. The fact that although the plaintiff and his mother, who now denounce Wilson's conduct and habits so vigorously, lived for two years and a half with him at the company's post, yet made no complaint to Youngman or to the company about him, I regard as most significant. But though Youngman should be found to have been somewhat remiss in his supervision, I am not satisfied that it can be said that an attempt by Wilson to commit murder was a consequence which he should have anticipated might ensue as the result of leaving the latter in control of the post. *In lege causa proxima, non remota, spectatur.*

(1) S. 1875.2.36. (2) Q.R. 28 K.B. 45, at p. 47.
(3) S. 1904.2.298.

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BRODEUR J.—Je ne pourrais mieux faire que de concourir dans l'opinion si admirable de l'honorable juge-en-chef Lemieux (1). Il a exprimé dans une forme impeccable les faits qui ont donné lieu à la réclamation du demandeur Vaillancourt et les principes de droit qu'il a invoqués à l'appui de son jugement sont absolument inattaquables. Ils sont en tout conformes à ce que nous enseignent la doctrine et la jurisprudence françaises.

Ce jugement a été confirmé par la cour d'appel.

La question qui se présente est de savoir si la compagnie défenderesse est responsable des blessures infligées par son préposé Wilson au demandeur Vaillancourt.

Je suis d'opinion que la compagnie a engagé sa responsabilité

1. par la faute et l'imprudence qu'elle a commises en mettant ce nommé Wilson en charge du poste de Weymontachingue (art. 1053 C.C.)

2. par le fait que ce dommage aurait été causé par son mandataire dans l'exercice de ses fonctions (art. 1054 C.C. et art. 1731 C.C.)

D'abord la compagnie est-elle en faute et a-t-elle engagé sa responsabilité sous les dispositions de l'article 1053 C.C.?

Sur ce point il n'est pas nécessaire que je discute la preuve. Il s'agit, après tout, d'une question de fait. Et comme les cours inférieures ont toutes deux déclaré que la faute de la compagnie était prouvée, je ne crois pas qu'il soit utile d'ajouter quoi que ce soit à ce qui a été si bien dit par l'honorable juge-en-chef Lemieux en Cour Supérieure. Il a eu l'avantage de voir et d'entendre les témoins, et il est évident qu'il n'a pas été favorablement impressionné par les témoignages de la défense sur ce point.

Je suis également d'opinion que la compagnie a engagé sa responsabilité parce que le dommage dont se plaint Vaillancourt a été causé par Wilson, le préposé de la défenderesse, dans l'exercice de ses fonctions.

Quelles étaient les fonctions de Wilson?

La compagnie de la Baie d'Hudson avait originairement des pouvoirs bien étendus dans les régions du nord pour y faire le commerce des pelleteries. Elle y exercait des fonc-

(1) Q.R. 60 S.C. 457.

tions judiciaires et administratives et même législatives (Encyclopedia Britannica, vo. Hudson's Bay Company). Elle jouissait naturellement d'un très grand prestige auprès des tribus indiennes de ces régions. Lorsqu'en 1869, elle a abandonné une partie de ses privilèges au gouvernement du Canada, elle a cependant stipulé la conservation de ses postes. Elle possède dans les régions du nord de Québec un de ces postes, appélé Weymontachingue, qui était sous la gérance du nommé Wilson qui en avait le suprême commandement et qui avait sous son contrôle le demandeur Vaillancourt comme homme de peine, et sa mère, comme cuisinière.

Ce contrôle qu'il avait sur Vaillancourt et sa mère était de tous les instants. Il vivait sous le même toit qu'eux, dans une maison appartenant à la compagnie. Un matin. Vaillancourt, après avoir soigné les animaux du poste, était allé à sa chambre, qui était à l'étage supérieur du poste, pour s'habiller plus chaudement et aller travailler ensuite dans la forêt quand il s'entendit interpeller par Wilson. Il descendit alors et constata que Wilson était en boisson et presque complètement nu. Mû par des notions élémentaires de vertu et de décence, Vaillancourt lui mit tranquillement la main sur l'épaule et lui conseilla d'aller s'habiller. Wilson, croyant évidemment que ces conseils de son subalterne constituaient un mépris de son autorité et de son prestige, prend un fusil qui se trouvait à sa portée et tire sur Vaillancourt à bout portant et le blesse gravement à la jambe. De peine et de misère, Vaillancourt a pu se traîner dehors sur son autre jambe et aller se coucher sur l'herbe. Sa mère et les sauvages qui étaient dans le voisinage se sont portés à son secours. Cela n'a pas empêché Wilson de le frapper à coups de canne et de dire alors:

Les officiers de la Baie d'Hudson ont le droit de tuer, et puis ils sont protégés.

Voilà comment Wilson voulait affirmer son prestige et celui de la compagnie en présence des pauvres sauvages et de ceux qui l'entouraient.

Ces paroles de Wilson démontrent bien qu'en tentant de tuer Vaillancourt il faisait un acte qu'il croyait nécessaire pour la paix et la tranquillité de ces régions. C'était évidemment pour lui un acte d'autorité devenu désirable

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pour le prestige de la compagnie qu'il représentait. Il s'est évidemment mépris sur le caractère de ses fonctions en ayant recours à la force brutale pour réprimer tout abus qui aurait pu se produire. S'il y avait quelque doute au sujet de l'importance qu'il attachait à ses fonctions et sur la manière dont elles devaient être remplies, on pourrait référer à cet incident dévoilé par la preuve où un commerçant aurait tenté un jour d'acheter des pelleteries de la tribu sauvage qu'il y avait là et de faire concurrence par là même à la compagnie de la baie d'Hudson. Wilson le chassa de là en essayant de décharger son fusil sur lui. Dans une autre occasion, il aurait fait feu sur un jeune sauvage. Ces circonstances démontrent évidemment que Wilson se croyait obligé dans l'intérêt de la compagnie qu'il représentait d'user d'armes à feu pour affirmer son autorité.

C'est ce que les cours inférieures ont trouvé comme question de fait. Devons-nous rejeter cette décision? Je ne le crois pas.

Nous n'avons qu'à consulter la doctrine et la jurisprudence françaises pour nous convaincre qu'au point de vue légal la conduite de Wilson a engagé la responsabilité de la compagnie.

Voici, par exemple, ce que disent Massé et Verge sur Zachariae qui sont cités dans la Bibiothèque du Code Civil de DeLorimier sous l'article 1054 C.C.:—

> En principe (disent-ils) la responsabilité des maîtres et des commettants à l'égard du dommage causé par les domestiques ou préposés n'est pas limitée au cas où les actes dommageables rentraient dans les termes du mandat ou de la fonction: pour que le maître ou le commettant soient responsables, il suffit que les actes dommageables du domestique ou du préposé *se rattachent à l'objet de leur mandat et qu'ils aient lieu à l'occasion de son exécution* * * * La responsabilité des maîtres et commettants est tellement étendue qu'elle s'applique *même aux délits et aux crimes commis par les domestiques ou préposés dans l'exercice de leurs fonctions, délits ou crimes* pour lesquels ils n'auraient pu recevoir aucun mandat.

Cette responsabilité est évidemment bien étendue, mais elle vient de cette considération que les maîtres ou les commettants ont à se reprocher d'avoir donné leur confiance à des hommes méchants, maladroits ou imprudents.

Pothier nous enseigne (Obligations, no. 121) que les maîtres sont responsables des délits de leurs serviteurs

même dans le cas où il n'aurait pas été en leur pouvoir d'empêcher le délit * * * ce qui a été établi pour rendre les maîtres attentifs à ne se servir que de bons domestiques.

Voilà où nos codificateurs se sont inspirés pour écrire l'article 1054 C.C.

Les termes de l'article 1054 C.C. sont généraux et la responsabilité du maître qu'ils édictent ne souffre d'exception que dans le cas où le fait reproché ne se rattache pas au contrat de louage de services. Le préposé qui accomplit mal les instructions de son maître ou qui accompagne l'accomplissement de son mandat d'agissements inutiles ou étrangers donne lieu à la responsabilité civile de son maître. La loi veut que le maître subisse la conséquence du choix et de l'emploi d'un préposé incapable et coupable.

Les expressions que nous retrouvons dans l'article 1054 "dans les fonctions auxquelles ils sont employés" ne signifient pas que les faits à raison desquels les maîtres et commetants peuvent être déclarés civilement responsables doivent constituer l'exercice même des fonctions des domestiques ou des préposés. La condition exigée par la loi se rencontre lorsque les faits dommageables ont été accomplis soit dans l'exercice de ces fonctions, soit même à l'occasion de cet exercice et alors même que le dommage résulte d'un abus des dites fonctions. Beaudry Lacantinerie, vol. 4 Obligations, no. 2914; Dalloz, 1908.1.351; Demolombe, vol. 31, no. 641; Laurent, vol. 20, no. 506; Revue Trimestrielle, 1917, p. 134; Revue Trimestrielle, 1906, p. 673.

Si c'est au cours de son travail, dans l'établissement même du patron que l'acte dommageable est commis par le préposé, peu importe qu'il y ait non pas exercice normal mais abusif des fonctions.

Dans le cas où un ouvrier interrompt son travail et joue avec un de ses compagnons en se servant d'une canne-fusil lui appartenant et blesse ce compagnon, la chambre criminelle de la Cour de Cassation a vu là un cas d'application de l'article 1384 du Code Napoléon correspondant à notre article 1054 C.C. (Dalloz 1919.1.8.)

Cette solution est absolument analogue à celle donnée sous la loi des accidents du travail par la chambre civile où l'on a considéré comme survenu à l'occasion du travail

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tout accident arrivé au temps et au lieu du travail. Sirey, 1912.1.323; Sirey, 1912.1.335; Sirey, 1913.1.313.

L'appelante a cité à l'appui de ses prétentions une cause de *Fiol c. Lombard* jugée en 1875 et rapportée dans le Journal du Palais, p. 210.

Je ne crois pas que cette décision puisse s'appliquer aux faits de la présente cause. Le tribunal, dans cette cause de Fiol, a trouvé comme question de fait que le fait dommageable ne s'était pas produit dans les fonctions auxquelles leurs domestiques étaient employés. L'accident serait survenu à la suite de dissentiments entre eux. Il n'y avait pas, comme dans la présente cause, le fait que le préposé a cru nécessaire d'avoir recours à la force brutale pour accomplir les fonctions qui lui avaient été confiées.

D'ailleurs cette décision de Fiol a été rendue en 1875 et elle a été virtuellement ignorée dans les décisions plus récentes que j'ai citées plus haut.

Pour toutes ces raisons, l'appel doit être renvoyé avec dépens.

MIGNAULT J.—Dans cette cause très difficile on a invoqué à la fois l'article 1053 et l'article 1054 du code civil pour rendre l'appelante responsable de l'acte de son préposé Wilson, qui en état d'ivresse, a blessé l'intimé d'un coup de fusil nécessitant l'amputation de sa jambe.

La portée de l'article 1053 C.C. est très générale. La faute la plus légère engage la responsabilité de toute personne capable de discerner le bien du mal, mais à une condition essentielle cependant, c'est que cette faute ait causé le dommage dont on se plaint. Si cette relation directe entre la faute et le dommage manque, l'article 1053 C.C. est sans application possible. Cet article me paraît donc hors de cause ici car la faute qui a occasionné le dommage n'est pas la faute de l'appelante, mais celle de son préposé Wilson.

Sauf en ce qui concerne le dommage causé par une chose dont répond celui qui a cette chose sous sa garde, l'article 1054 C.C. s'occupe des cas où on est responsable de la faute d'autrui, comme le sont les maîtres et commettants du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés. Comme l'énonciation d'une règle générale, et abstraction

faite de quelques lois particulières qui peuvent étendre cette responsabilité, je suis d'avis que l'article 1054 C.C. pose les seuls cas où l'on soit civilement responsable de la faute d'autrui. C'est donc le seul article qui puisse s'appliquer dans l'espèce.

Dans *Curley* v. *Latreille* (1), après avoir rapporté certaines solutions de la jurisprudence française et fait observer que la responsabilité de la faute d'autrui est de droit strict, je me suis exprimé comme suit sur la portée de l'article 1054 C.C., avec le plein concours de mon honorable collègue, M. le juge Anglin:—

> Etant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Quebec le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés,* ou, pour citer la version anglaise de l'article 1054 C.C. "*in the performance of the work for which they are employed.*" Ceci me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exercice des fonctions ou seulement à leur occasion, mais, s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte. L'abus des fonctions, si le fait incriminé s'est produit dans l'exécution de ces fonctions, entre au contraire dans ce texte et entraîne la responsabilité du maître.

Je suis encore du même avis, et il ne me semble pas inutile de le dire encore à raison de certaines solutions de la jurisprudence française qu'on a invoquées pour donner à l'article 1054 C.C., quant à la responsabilité des maîtres et commettants, une interprétation extensive qu'il ne comporte pas dans mon opinion. Il faut bien reconnaître que la jurisprudence française a pris depuis quelques années une orientation qui l'écarte de plus en plus de la doctrine traditionnelle. Elle admet de nouvelles théories en matière de responsabilité civile, comme l'abus du droit, l'enrichissement sans cause et la responsabilité des irresponsables, enfants en bas âge et insensés (Planiol t.2, no. 878). On peut même dire qu'elle tend à faire abstraction de la faute et à la remplacer par la conception du risque. Mais n'oublions pas que nous avons un code dont le texte doit nous servir de règle, et que si les opinions des auteurs et

(1) 60 Can. S.C.R. 131, at p. 175.

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les décisions de la jurisprudence française ne peuvent se concilier avec ce texte, c'est le texte et non pas ces opinions et ces décisions que nous devons suivre. Je ne serais certainement pas partisan d'une interprétation de notre code qui en ferait prévaloir la lettre sur l'esprit, mais quand le texte est clair et sans équivoque on n'a pas besoin de chercher ailleurs.

Les faits de la cause peuvent être relatés brièvement. Wilson, depuis 1916, était gérant du poste de traite de l'appelante à Weymonttachingue et l'intimé y était employé comme homme de peine. Le matin du 11 octobre 1920, vers 6 h. 15, l'intimé qui occupait une chambre au deuxième étage, descendit pour soigner le cheval et les volailles, et remonta ensuite à sa chambre. Wilson était au premier étage et, entendant du bruit en haut, il demanda qui était là. L'intimé répondit que c'était lui et ensuite descendit l'escalier. En passant devant la chambre de Wilson, il rencontra celui-ci vêtu seulement d'une chemise et visiblement sous l'influence de la boisson. Wilson lui dit: "Je suis saoûl encore ce matin." L'intimé lui posa la main sur l'épaule en lui disant: "M. Wilson, si vous êtes saoûl, entrez dans votre chambre et mettez vos vêtements; il n'est pas convenable de sortir comme vous êtes." L'intimé se rendit alors à la cuisine et chaussait ses bottes de travail, lorsque Wilson est arrivé avec une carabine et a tiré presqu'à bout portant sur l'intimé qu'il atteignit à la jambe. L'intimé s'enfuit au dehors où Wilson le rejoignit et le frappa plusieurs fois avec une canne, lui disant que les officiers de la compagnie de la Baie d'Hudson avaient le droit de tuer et qu'ils étaient protégés. Comme résultat de cet assaut, l'intimé eut la jambe cassée et on dut plus tard la lui amputer. Il tient l'appelante civilement responsable du délit de Wilson.

Wilson, je l'ai dit, était gérant du poste et était chargé d'y faire pour l'appelante la traite des pelleteries avec les chasseurs et trappeurs qui étaient surtout des sauvages. Il y tenait également un magasin général où les sauvages et les chasseurs achetaient les provisions et autres marchandises dont ils avaient besoin. Le personnel du poste se composait de l'intimé, homme de peine, et de sa mère,

servante, nommés par Wilson mais payés par l'appelante, tous les deux soumis à l'autorité de Wilson.

Il s'agit de déterminer dans ces circonstances si Wilson était dans l'exécution de ses fonctions quand il a blessé l'intimé. Il est évident que Wilson ne conduisait pas alors le commerce que lui avait confié l'appelante, et de ce chef le délit commis par lui était entièrement en dehors de ses fonctions comme gérant de ce commerce. Mais en rapport avec cette gérance il avait, je l'ai dit, autorité sur l'intimé et sa mère, également employés de l'appelante, qui étaient tenus d'obéir à ses ordres légitimes. Et la question est de savoir s'il exerçait cette autorité, tout en l'exerçant mal, lorsqu'il a blessé l'intimé. L'honorable juge Tellier, en cour d'appel, pose la question de responsabilité uniquement sous l'article 1054 C.C., et il dit, parlant de Wilson:—

> S'il traitait bien les clients au comptoir, et le demandeur à sa résidence, il remplissait convenablement ses fonctions; s'il les maltraitait, il manquait à ses devoirs, il abusait de son autorité. Dans un cas comme dans l'autre, il était dans l'exercice de ses fonctions.

Il ne me paraît pas douteux que le maître ne peut se soustraire à sa responsabilité pour les actes de son préposé sous prétexte que le préposé s'est rendu coupable d'un crime pour lequel aucun mandat ne lui avait été donné, s'il est constaté que ce crime a été commis dans l'exercice des fonctions du préposé. Il s'agit ici, en effet, de la responsabilité découlant des délits comme des quasi-délits des préposés. Cela ne souffre aucun doute en doctrine et en jurisprudence. Comp. Pothier, Obligations no. 121, et la note sous Paris, 15 mai 1851, Dalloz, 1852.2.241.

Mais il est également certain que le maître n'est pas responsable du délit ou crime dont son préposé s'est rendu coupable en dehors de ses fonctions. Il y un assez grand nombre de décisions dans ce sens. Voy. Cassation, 5 juin 1861; Dalloz, 1861.1.439; Cassation, 3 mars 1884; Sirey, 1885.1.21; Paris, 19 mai 1874; Dalloz, 1874.2.214; Douai, 14 février 1894; Sirey, 1894.1.161; Douai, 24 février 1902 et 12 janvier 1903; Sirey, 1904.2.298.

Dans ces espèces, on ne trouve pas la particularité que présente la cause qui nous est soumise, c'est-à-dire la subordination entre la victime et le préposé qui a commis le

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délit, le maître commun ayant placé cette victime sous les ordres de ce préposé. Le poste confié à Wilson se trouvait dans un endroit désert, et Wilson avait le contrôle du personnel du poste un peu comme le capitaine d'un navire a le contrôle de l'équipage. Or il ne manque pas d'arrêts où on a condamné l'armateur à raison de mauvais traitements infligés aux matelots par les officiers du navire dans l'exercice de leurs fonctions.

Ainsi on a rendu le propriétaire d'un navire responsable du délit de coups et blessures commis sur la personne d'un matelot par le maître d'équipage dans l'exercice de ses fonctions (Sirey, 1864.2.99); ou d'un crime dont le capitaine s'était rendu coupable au préjudice d'un des hommes de l'équipage (Fuzier-Herman, vo. *Armateur*, no. 109) ou encore des suites des punitions illégales et des mauvais traitements infligés ou des blessures occasionnées à un mousse ou à tout autre homme de l'équipage par un officier du bord dans l'exercice de ses fonctions. (idem, ib. no. 110.)

Si Wilson maltraitait le personnel du poste qui était soumis à ses ordres, il est indiscutable qu'il abusait de l'autorité que l'appelante lui avait confiée à l'égard de ce personnel, et cet abus donnerait lieu à la responsabilité décrétée par l'article 1054 C.C. Jusqu'ici il n'y a pas de difficulté car l'abus de la fonction, bien que ce soit un abus du mandat que le préposé tient de son commettant, engage cependant la responsibilité de ce dernier.

Il est assez difficile d'expliquer l'assaut brutal et meurtrier commis par Wilson sur la personne de l'intimé, à moins d'y avoir un abus d'autorité. La preuve constate que jusqu'au jour de l'assaut les rapports entre Wilson et l'intimé étaient excellents et qu'il n'y a jamais eu de querelle entre eux. Wilson ne pouvait donc avoir un motif de vengeance particulière à satisfaire contre l'intimé. Cependant ce matin-là Wilson était ivre et l'intimé, son homme de peine, s'était permis de lui faire la remarque que j'ai rapportée plus haut. Wilson voulait-il le punir du manque de respect que comportait cette remarque et surtout du fait qu'il lui avait mis la main sur l'épaule pour le faire rentrer dans sa chambre et s'habiller? En l'absence de tout autre explica-

tion possible, on peut bien le croire. Mais il est évident que dans ce cas il y a eu abus de l'autorité qu'avait Wilson sur l'intimé, car alors qu'il pouvait réprimer l'injure ou le manque de respect par des rémontrances ou autres moyens raisonnables, il ne pouvait se porter à des voies de fait sur la personne de son serviteur. L'assaut qu'il a commis était donc un flagrant abus de son autorité.

Si je croyais qu'il n'y avait eu dans l'espèce qu'une querelle ou une vengeance particulière à raison de dissentiments antérieurs entre ces deux hommes, j'hésiterais beaucoup à dire que Wilson agissait dans l'exercice de ses fonctions comme chef du personnel du poste de traite quand il a assailli l'intimé. Mais cet élément, ou cette explication de la conduite de Wilson, manque absolument. Il ne reste que l'explication que Wilson a voulu punir un manque de respect de son serviteur à son égard, et alors il exerçait, mais il exerçait abusivement, l'autorité qu'il tenait de l'appelante sur son serviteur. L'état d'esprit de Wilson, surtout ivre comme il était, peut n'être pas un indice bien sûr pour déterminer s'il exerçait ses fonctions de maître de l'intimé, mais l'ivresse ne peut certainement excuser les mauvais traitements qu'un maître inflige à son serviteur, et dans toutes les circonstances de la cause, même en ne tenant pas compte de ce que Wilson, dans son état d'ivresse, a pu s'imaginer, l'acte lui-même, tout déraisonnable et criminel qu'il était, à défaut d'autre explication possible, était un acte d'autorité, et les paroles de Wilson que l'intimé rapporte le démontrent.

Après une longue et sérieuse étude de la cause, je suis donc d'avis que Wilson a abusé de son autorité sur l'intimé et partant que l'article 1054 C.C., s'applique. Je crois que cette conclusion est conforme à la justice, et j'aurais beaucoup regretté d'avoir à dire, dans les circonstances que l'intimé n'a d'autre remède qu'un recours illusoire contre un gérant insolvable. Il a fidèlement servi l'appelante et son préposé Wilson, et la brutalité de ce dernier, dans l'exercice de l'autorité que l'appelante lui avait confiée, a rendu l'intimé infirme pour la vie. D'ailleurs l'appelante n'a pas été sans avertissements quant au caractère dangereux de Wilson, comme le démontra le témoignage du

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nommé Potts. Elle devait choisir ses gérants avec soin et les surveiller efficacement, et c'est à raison de ce devoir du maître que l'article 1054 C.C. le rend responsable du dommage causé par ses préposés dans l'exercice de leurs fonctions, sans qu'il puisse se disculper en prétendant qu'il ne pouvait empêcher le fait qui a causé le dommage. Cette responsabilité, dit Pothier (Obligations No. 121), a été établie

pour rendre les maîtres attentifs à ne se servir que de bons domestiques.

Le résultat de ce procès ne peut donc manquer de produire de bons effets.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitor for the respondent: *Alleyn Taschereau.*

FIDELE MONDOR AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM A. WILLITS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1923
*Feb. 12.
*May 1.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contract—Pulpwood—Agreement by employer for re-sale—Knowledge of contractor—Measure of damages—Monies retained until completion.

W. entered into a contract to supply a paper company with 3,000 to 5,000 cords of pulpwood at eight dollars per cord with permission to continue cutting on the same terms up to a specific date. W. had previously made a contract with M. who agreed to deliver 4,000 cords to be cut on the limits of the Paper Co. at six dollars. M. was informed of the first-mentioned contract though not of all its terms. At the end of the season M. was more than 1,400 cords short of the quantity he agreed to deliver.

Held affirming the judgment of the Court of Appeal (32 Man. R. 383) that as no default by W. was proved he is entitled to recover from M. damages for non-performance by the latter of his contract to deliver 4,000 cords and the measure of those damages is the profit he would have made under his contract with the paper company.

Held also, Brodeur J. dissenting, that W. can recover the drawback from the price of the wood actually delivered withheld by the paper company because of failure to deliver the whole 3,000 cords contracted for.

APPEAL from a decision of the Court of Appeal for Manitoba (1), reversing the judgment at the trial in favour of the plaintiffs.

The material facts are stated in the above head-note.

Holland for the appellants.

Hudson K.C. for the respondents.

THE CHIEF JUSTICE.—At the close of the argument in this case I entertained a great deal of doubt and have since then given the judgments below and the evidence much consideration. I am unable to reach the conclusion that the judgments appealed from are so clearly wrong that the appeal should be allowed. Although I still entertain some doubts, I would concur in dismissing the appeal with costs.

DUFF J.—The appeal should be dismissed. I concur with the judgment of Mr. Justice Cameron and have very little indeed to add to it.

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

(1) 32 Man. R. 383.

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It is made clear, I think, to a demonstration that the appellants realized that they were taking a subcontract from the respondent to " cut, haul and deliver " pulpwood from the timber concessions of the Dryden Paper Mill which the respondents as principal contractors had already contracted to, or were about to contract to " cut, haul and deliver " for the Dryden Paper Mill. The Court of Appeal rightly took the view that in these circumstances the appellants must have realized that failure on their part to perform their subcontract would probably involve the respondents in consequential disadvantages by way of penalties or liability to pay damages for breach of their contract as well as occasioning loss of profits whatever the amount of them might be which they would naturally expect to arise from the performance of their contract. It seems rather naive to appeal to a court of justice to act upon the assumption that the appellants believed the respondents to have undertaken responsibility towards the Dryden Paper Mill in respect of the cut of this pulpwood gratuitously with no expectation of making a profit.

The responsibility of the appellants for the damages claimed seems to follow very clearly. If authority be needed it will be found in *Cory* v. *Thames Iron Works Co.* (1).

ANGLIN J.—The appellants failed to satisfy me that they had made out a case entitling them to damages from the defendants for breach of an undertaking to furnish assistance in carrying out their contract. The clause on which they relied is far from being definite; the construction of the word " otherwise " in it is by no means certain; whether it covered the procuring of men for the lumber camps I regard as at least debatable. But, if it did, the evidence of refusal or neglect by the defendants to render such assistance as could reasonably be expected from them is not at all convincing. The appeal on this branch of the case in my opinion cannot succeed.

The question raised as to the measure of damages on the counterclaim requires more consideration. Two items of damage have been allowed, $2 per cord profit lost to

(1) [1868] L.R. 3 Q.B. 181.

defendants on 1,405.6 cords of pulpwood which the plaintiffs failed to deliver at C.P.R. Spur Mile 24.4 for the Dryden Paper Company, Limited, as contracted for, and twenty cents per cord on 2,594.4 cords of pulpwood so delivered by the plaintiffs. For pulpwood—not less than 3,000 cords and up to 5,000—to be delivered to the Dryden Paper Company, Limited, at the spur, the defendants were entitled under their contract with it to receive $8 per cord, and they were to pay to the plaintiffs for pulpwood so delivered by them as subcontractors $6 per cord, the latter having agreed to take out and deliver at C.P.R. Spur Mile 24.4 for the Dryden Paper Company on the defendants' account 4,000 cords. Each of the contracts contained a provision in these terms:

> Payment will be made on the 15th of each month for all wood thus received before the first of the month. Ten per cent of the value of the wood received will be retained by the parties of the first part until this contract has been completed.

Twenty cents per cord was the difference in the drawbacks under these stipulations in the respective contracts.

The case appears to have been treated in the Manitoba courts as one of breach of contract for the sale and delivery of goods. With great respect, the contracts were rather for work and labour to be performed. The limits from which, and from which only, the pulpwood was to be cut belonged to the Dryden Paper Company. That company was providing for the cutting of pulpwood—its property—on its own limits, and for the transfer of it, when cut, to cars on which it would be taken to its mills. The defendants having contracted to perform these services employed the plaintiffs to do the work for them.

The evidence leaves no room for doubt that the plaintiffs knew that they were subcontractors for the defendants and that the defendants would make a profit on the work they undertook to do. It is also, I think, a fair inference that they were aware that, except in regard to the price to be paid, the defendants' contract with the Dryden Company was in terms similar to those in their own subcontract, including the provision for drawback. Contracts and subcontracts in terms identical, except as to price, are such a common feature of the timber-cutting industry in Canada

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that it is reasonable to infer that knowledge of the fact that they were subcontractors carried to the plaintiffs the information that, except as to price, the terms of the defendants' contract with the Dryden Paper Company were the same as the terms which they had accepted.

On that basis the plaintiffs are, in my opinion, liable to the defendants for whatever loss they, as reasonable men, should have expected the latter would sustain as a result of their failure to cut and deliver a substantial part of the 4,000 cords of pulpwood for which they had contracted. The loss of profit of $2 per cord on 1,405 cords not delivered, clearly was of that character. In that respect, while the case is one of breach of contract for services to be rendered, I agree that the measure of damages is similar to that for breach of contract for the sale and delivery of goods not procurable in the market (*Borries* v. *Hutchinson* (1)), where a resale had been communicated to the original vendor when he made his contract.

Elbinger Actien-Gesellchaft v. *Armstrong* (2), and *Grébert-Borgnis* v. *Nugent* (3), cited by Mr. Justice Cameron, seem to shew that knowledge by the plaintiffs of the existence of the principal contract with the defendants, though its precise provisions as to price and drawback had not been communicated, would suffice to support the claim for damages based on loss of profits and of drawback which could not be recovered. As in the case of goods not procurable in the market, the respondents could earn the money payable under their contract with the Paper Company only by delivering the very pulpwood they had contracted to cut and deliver. They could not require the Dryden Paper Company to take any other pulpwood in substitution therefor; neither was that company obliged upon non-delivery to go into the market for other pulpwood in order to mitigate any damages for which the defendants might be liable to it. Its only obligation was to accept and pay for the delivery of its own pulpwood cut on its own limits.

The plaintiffs, however, contest their liability to compensate the defendants for the drawback withheld from

(1) [1865] 18 C.B. N.S. 445.
(2) [1874] L.R. 9 Q.B. 473.
(3) [1885] 15 Q.B.D. 85.

them by the Dryden Paper Company asserting that, under the terms of its contract with the defendants, that company is not entitled to keep such retention money. They contend that this money was held by the Paper Company merely as a guarantee fund to protect it against damages by reason of the non-fulfilment of the defendants' contract, and that only to the extent to which such damages can be established is it entitled to withhold payment of that fund from the defendants. No evidence of damages sustained by the Dryden Paper Company having been given, the plaintiffs maintain that, for aught that is shewn to the contrary, the defendants could recover the whole sum retained and that they (the plaintiffs) are therefore not chargeable with any part of it.

I respectfully agree with the view taken by the majority of the learned judges of the Manitoba Court of Appeal that on a proper construction of the clause of the contract between the Dryden Paper Company and the defendants, which has been quoted above, payment of the ten per cent withheld could be enforced by the latter only on the complete performance of its contract to deliver at least 3,000 cords of pulpwood. The contract does not provide merely for retention money to serve as a fund to be drawn upon either to complete the contractors' work left unfinished, or to compensate for damages occasioned by their default. Completion of the contract is, I think, made a condition precedent to any right on the part of the contractors to receive the ten per cent retained. The contractors must fulfil that condition before they are entitled to any part of that sum. The contract in effect was that, if at least 3,000 cords of pulpwood should be delivered, the price payable to the defendants should be $8.00 per cord; if only part of that quantity should be delivered, the price should be $7.20 per cord. Such was the bargain the parties chose to make, and it was competent for them to make it. I see nothing in the contract to warrant treating the eighty cents a cord withheld as merely a guarantee fund against possible loss to the Dryden Company—nothing to entitle the defendants to payment of any part of the money so retained until the condition under which the Dryden Company had agreed to

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pay it, viz., completion of delivery to it of 3,000 cords of pulpwood—had been fulfilled.

The defendants have voluntarily given the plaintiffs credit for the ten per cent drawback likewise retained by them under the corresponding provision of their contract with the plaintiffs. We are not called upon to express an opinion upon the question whether they were obliged to do so.

The appeal, in my opinion, fails.

BRODEUR J.—This case turns mostly upon the amount of damages to which the respondents would be entitled.

The facts having a bearing on the issue are the following:—

In the fall of 1920, the respondent Willits entered into negotiations with the Dryden Paper Company and he offered to cut, during the ensuing winter 2,000 to 4,000 cords of pulpwood on the timber limits of the company, at a price of $8 per cord. The company would not at first accept his offer unless he would make it 4,000 cords. But Willets having declared that he did not feel in a position to cut such a large quantity his offer was accepted and it was agreed that a formal contract would be prepared and signed.

On the 23rd of December, the contract was signed and by it Willits agreed specifically to cut and deliver 3,000 cords before the end of the logging season, with a proviso that he could deliver a larger quantity. It was stipulated that the payment would be made each month for the quantity then delivered and that 10 per cent should be retained by the company until completion of the contract.

At the same time Willits was negotiating with the appellants, Mondor et al., and induced them to enter into an independent contract with him to cut and deliver 4,000 cords of the same pulpwood, at $6 per cord, on the Dryden Paper limits. The appellants were made aware that Willits had a contract with the Dryden Company to cut pulpwood, but they were not informed as to its quantity, its price and its conditions.

Mondor and his associates went to work and did their best to carry out their contract and they cut 2,594 cords

in spite of the fact, as found by the trial judge, that the snow in the forest, while of sufficient depth, was soft and wet, that their workmen could not be induced to remain long at their unpleasant task, that they had to work under adverse conditions, and that they did all they could to carry out the contract in full.

The appellants having sued Willits for a balance of $3,119.40 claimed to be due under their contract with him, the defendant Willits made a counter claim in damages for $2,811.20, representing a profit of $2 per cord on the cords not delivered, and for $518.80 representing the loss of the sum retained by the Dryden Company, being the 10 per cent above mentioned.

The counter claim was dismissed in the Superior Court but it was maintained in the Court of Appeal. Mr. Justice Prendergast dissented in the Court of Appeal as to the damages for retention money paid by Willits. I am disposed to agree with him.

Some other questions were discussed by the appellants which of course we have to consider.

It is contended first by the appellants that the respondents were bound to assist the appellants in the securing of men, and they rely in that respect on the clause of the contract which stipulated that

> every possible assistance will be given to the parties of the second part (Mondor, Coutur and Leonard) in locating roads, procuring and removing cars and otherwise to enable them to carry out the terms of this agreement.

It seems to me that the clause would not justify such a construction, though Willits in his evidence states that he was willing to assist the appellants in the procuring of axemen. But there is no doubt that Willits was bound to assist in the location of roads, and he has not proved that he has done anything to carry out this obligation. This work of locating the roads seems to have been done exclusively by the appellants. This failure on the part of the respondents to fulfil their obligation of giving assistance must have, however, a bearing on the amount of the damages claimed from the appellants for their own breach.

A question has been raised also by the appellants as to the quantity of pulpwood that Willits was bound to deliver to the Dryden Company. The quantity contracted for by

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Willits was 3,000 cords with an option to increase it. But in that regard I am led to inquire how it is that on the 23rd December Willits wanted to take a firm contract with the Dryden Company for 3,000 cords only, when ten days before he was inducing Mondor and his associates to deliver 4,000 cords. He had a great deal of experience with those contracts and he must have felt that a contract of four thousand cords could not be fulfilled during the time specified and that is the reason why he would not oblige himself to deliver that quantity to the Dryden Company, though he bound others less experienced.

This circumstance also should not be forgotten when we come to assess the damages for breach.

The measure of damages, as laid down in the leading case of *Hadley* v. *Baxendale* (1), should be such as may fairly and reasonably be considered either as arising naturally, according to the usual course of things, from a breach of contract or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.

When Willits made his contract with Mondor et al., he should have disclosed to them (if he wanted to have the right to claim all the damages which he now claims) the whole nature and the extent of his own contract with the Dryden Company.

The fact that the appellants, Mondor et al, knew of the existence of the Dryden contract is not sufficient to withdraw the case from the application of the rule laid down in *Hadley* v. *Baxendale* (1). This special circumstance of a main contract with the Dryden Company is a fact of course which should be considered in assessing the damages, but it does not alter the rule that the damages which the party ought to receive in respect of the breach should be such as may be fairly and reasonably considered or may reasonably be supposed to have been in the contemplation of both parties at the time they made their contract.

We have no right to assume in assessing the damages that a profit as large as two dollars per cord was in the contemplation of both parties. It looks to me pretty

(1) 9 Ex. 341.

evident that Mondor et al would not have made this contract if they had been apprised by Willits of the price he was going to receive. We should then consider what would be a reasonable assessment of damages in these circumstances.

The court below has given the full profits which Willits would have made not only on 3,000 cords but on 4,000 cords; and besides they have granted the damages which the Dryden Company claimed from Willits.

I hesitate a great deal in confirming the part of this judgment concerning the profits Willits was to make, because he should have disclosed his exorbitant profit.

Halsbury, vol. 10, page 315, no. 581, says:

> If a buyer or consignee has at the date of the contract entered into a subcontract, its terms, so far as they affect the principal contract, are special circumstances of which notice must be given in order that damages may be recovered in respect thereof. In order to fix the seller or carrier who has delayed or refused delivery with liability for damages incurred by the buyer or consignee by reason of his inability to fulfil the subsidiary contract, it is not enough that it is made known that the goods are intended for resale, neither, on the other hand, is it necessary that the terms of the subcontract should be completely disclosed. Liability is incurred in respect of so much of the terms of the subcontract as is communicated.

I cannot concur however in the judgment below concerning the damages which Willits had to pay to the Dryden Company for retention money, and I rely in that respect on *Borries* v. *Hutchinson* (1) decided in 1865, which presents facts almost similar to this case. The defendant Hutchison had contracted to sell to Borries a commodity not ordinarily procurable on the market. At the time of entering into the contract Hutchison was aware that Borries was purchasing this commodity for a foreign correspondent. Later on he learned that the goods were designed for St. Petersburg and had been sold at an advanced price. The goods were not delivered at the time stipulated to the St. Petersburg merchant. It was conceded that Borries was entitled to recover the profit which he would have made on the transaction and that he could also recover the excess of freight and insurance resulting from a rise in the freight rates between the time of the contract and the time of the delivery; but the court held that

(1) 18 C.B.N.S. 445.

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the original vendor was not chargeable with the damages that Borries had paid to his purchaser, these damages being too remote.

Applying the principle of the decision to the present case, I say that it may be conceded, though with a great deal of doubt, that Willits is entitled to his loss of profit of $2 per cord but that he could not be entitled to recover the damages which he paid to the Dryden Paper Co.

I am fortified in this conclusion by the fact that Willits himself was to help in the locating of the roads and that he has done nothing to fulfil this obligation and also by the fact that he induced the appellants to contract for 4,000 cords of wood when he knew himself that they were unable to cut as much and when he would not himself contract with the Dryden Company for such a quantity.

The damages to which the respondents are entitled on their counterclaim are $2,811.20 being $2 per cord on the quantity not delivered. They have already in their hands a sum of $1,556.64 of retention money. The latter should be deducted from the $2,811.20.

The appeal should be allowed with costs and the judgment on the counter claim should be reduced to $1,254.56.

MIGNAULT J.—Had the appellants fulfilled their contract with the respondents to cut, haul and deliver 4,000 cords of pulpwood at $6 per cord, the respondent—who had contracted to cut, haul and deliver at least 3,000 cords, and had received permission to increase this amount to 5,000 cords, as found by the trial judge and the Court of Appeal, for the Dryden Paper Company, Limited, at $8 per cord—would have made a profit of $2 per cord, or in all $8,000. The appellants cut and delivered only 2,594.4 cords, leaving a deficiency of 1,405.6 cords. They sue the respondents for the April and last deliveries, to wit 532 cords (comprised in the 2,594.4 cords) at $6 per cord, deducting however 10 per cent (or sixty cents per cord) under the following clause of their contract.

Payments will be made on the 15th of each month for all wood thus received before the first of the month. Ten per cent of the value of the wood received will be retained by the parties of the first part (the respondents) until this contract has been completed.

The respondents admit that this amount is due, but by their counterclaim demand $3,330 for loss of profits and other damages. Their contract with the Dryden company had an identical clause as to the retention of ten per cent (or eighty cents per cord) from payments until completion of the contract, and the amount of their counterclaim is calculated as follows:—

Loss of profits on the deficiency of 1405.6 cords.....	$2,811 20
Loss of 20 cents per cord, being the difference between 80 cents retained by the Dryden Co. and 60 cents retained by the respondents, on the quantity delivered, 2594.4 cords....	518 80
Total	$3,330 00

The counterclaim alone is in question on this appeal.

I will test the respondents' claim against the appellants by another mode of calculation.

Total profit had the appellants' contract been fulfilled		$8,000 00
Cr.		
Received from the Dryden Company on the portion of the price representing the respondents' profit of $2 per cord, after deduction of 80 cents per cord, on the quantity delivered, 2,594.4 cords, to wit: $1.20 per cord.....	$3,113 28	
Retained from the appellants and also deducted by the latter in their claim for the 532 cords unpaid, 60 cents per cord, on 2,594.4 cords.....	1,556 64	4,669 92
Net loss of profits.....		$3,330 08

There is a difference of eight cents between this net loss of profits and the respondents' figures, which is explained by the fact that the respondents neglected the decimal 4 in calculating the 20 cents per cord on the quantity delivered, 2,594.4 cords.

The learned trial judge stated that a settlement in full was made between the respondents and the Dryden Company on the basis of the retention by the latter of the 80 cents per cord deducted by it under the clause of its con-

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tract to which I have referred. Not having completed their contract I cannot see how the respondents could have recovered this retention money from the Dryden Company and I look on it as a loss occasioned by the breach of the appellants' contract. The appellants knew that the respondents had a contract for this wood with the Dryden Company and the retention clause is not an unusual clause in contracts of this kind.

I cannot appreciate for what reason Mr. Justice Prendergast, at the end of his dissenting judgment, stated that the respondents were allowed on their counterclaim $1,237.44 in addition to the $3,330 granted to them. In their factum, the appellants state that this is an error of the learned judge, and that the figure intended is $1,556.64 instead of $1,237.44, being the 60 cents per cord retained from the appellant on their contract price. The calculation I have made shews that this full amount is credited to the appellants and the $3,330.08 is the net balance.

In my opinion the contention of the appellants under the clause obliging the respondents to render them assistance is unfounded. This was the opinion of all the judges of the Court of Appeal.

The respondents occupy the rather fortunate position of middlemen who get their full profit on a contract the execution of which they had passed on to the appellants, while the latter were charged with the entire risk and must bear the whole loss incurred by reason of the non-fulfilment of this contract. The liability of the respondents towards the Dryden Company would have been fully discharged had the appellants delivered to the company 3,000 cords, the minimum quantity which the appellants contracted to cut for the latter, and then the only claim of the respondents would have been for loss of profits on 1,000 cords, which they had the privilege of cutting for the company, but which they had not bound themselves to deliver. The misfortune of the appellants is that they fell materially short of the minimum quantity which the Dryden Company was entitled to demand from the respondents, thus

giving the former the right to keep the retention money. And for this reason there is no escape from the conclusion that the respondents' counterclaim is well founded.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bonnar, Hollands & Philp.*
Solicitor for the respondents: *William Manahan.*

1923
*Feb. 13.
*May 1.

GEORGE H. CROSBY (DEFENDANT).....APPELLANT;

AND

CHARLES O. PRESCOTT, EXECUTOR AND ADMINISTRATOR OF MARY LOUISE CROSBY AND GEORGE A. CAMPBELL (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Right of action—Foreign administration—Promissory notes—Situs—Action in Manitoba—Ancillary probate—Private international law.

C., domiciled in Massachusetts, died there leaving among the assets of her estate promissory notes payable to her order but not indorsed. The maker lived in Manitoba. The Probate Court of Massachusetts appointed P. administrator of C's. estate.

Held, affirming the judgment of the Court of Appeal (32 Man. R. 108) that the situs of the notes was in Massachusetts they being transferable by acts done solely there, and the administrator or his transferee alone could sue on them.

Held also, that the administrator could maintain an action against the maker in the Manitoba courts without taking out ancillary administration in that province.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial (2) in favour of the defendant.

The facts of the case are sufficiently stated in the headnote. The only question for decision on the appeal is whether or not the administrator with the will annexed, appointed by a Probate Court in Massachusetts, must take out administration in Manitoba also to enable him to sue the maker there of promissory notes in his possession as administrator.

The trial judge held that the action could not be maintained but his judgment was reversed by the Court of Appeal.

Hudson K.C. for the appellants. The foreign administrator cannot maintain this action. Williams on Executors (11 ed.) 264; *Enohin* v. *Wiley* (3).

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

(1) 32 Man. R. 108; 68 D.L.R. 250.

(2) [1921] 3 W.W.R. 746.

(3) 10 H.L. Cas. 1.

Simple contract debts are assets where the debtor is found. A promissory note is merely evidence of title and does not change the character of the debt. *Attorney General* v. *Bouwens* (1); *Commissioner of Stamps* v. *Hope* (2).

Browns v. *Browns* (3) relied on by the Court of Appeal is distinguishable. The debtor in that case resided in the foreign state at the time of the creditor's death.

Hollands for the respondents.

THE CHIEF JUSTICE.—I do not consider it useful for me to add anything to what has already been said by the learned Chief Justice of Manitoba and by the late Mr. Justice Cameron in whose reasons for the judgment of the Appellate Court I concur. Ancillary administration from the Surrogate Court of Manitoba was, under the circumstances, unnecessary to enable the plaintiff to maintain his action.

I would dismiss the appeal with costs.

DUFF J.—The action which has given rise to this appeal was brought upon three promissory notes made by the appellant, payable to the order of Marie Louise Crosby. The appellant, at the time the notes were given, resided in Manitoba, and the payee in Massachusetts. Mrs. Crosby died in 1918 in Massachusetts, and the respondent, Prescott, became in due course, by a grant of letters of administration with will annexed in Massachusetts, administrator there of her estate. As in my opinion the claim of the administrator is the only one requiring consideration, I shall make no reference to the circumstances upon which the alternative claim of the respondent Campbell is based. The promissory notes sued upon, being then past due and unpaid, came into the possession of the respondent Prescott as such administrator in the ordinary course of administration in Massachusetts. No grant of letters of administration, ancillary or otherwise, was ever received by the respondent from Manitoba.

The appellant contends that in the absence of such a grant the respondent has no status to maintain an action

(1) 4 M. & W. 171. (2) [1891] A.C. 476.
(3) 15 Alta. L.R. 77.

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in Manitoba upon debts due by a person residing therein to the testator. The point is an important one, and it is impossible, I think, to say that there is any actual decision which concludes the matter. I have come to the conclusion, however, that the facts of the case bring it within the principle upon which the Court of Appeal based its judgment. It is, of course, a perfectly well settled doctrine of English law that simple contract obligations due to the deceased by a debtor residing in England are deemed for the purposes of administration and collection to have a situs within the jurisdiction where the debtor resides, and consequently no action can be maintained in England to enforce such obligations against a debtor residing there by a foreign administrator who is not clothed with authority to administer the assets of the deceased in England by an English grant. *Commissioner of Stamps* v. *Hope* (1). The old form of declaration in debt was *debit et debinet* (2 Saund. 117b.); and the presumption was not an unnatural one that the assets to satisfy the debt would be found in the jurisdiction where the debtor had his domicile.

The Court of Appeal in Manitoba has held, rightly as I think, that there is an exception to this rule in the case of negotiable instruments; and that, as regards these, if they are reduced into possession by a foreign administrator within the territory from which he has received his grant and where they were at the time of the death of the creditor, it is competent to him to enforce them by action in the English courts, even in the absence of an English grant. This exception is said to be based upon the circumstance that the debt evidenced by such an instrument being transferable by delivery, is capable of being reduced into possession by means of acquiring possession of the instrument itself, and that such an instrument having been reduced into possession by the administrator in the lawful execution of his authority as such in the jurisdiction from which he derived his grant, his title to the debt due upon it is as good as his title to corporeal chattels reduced into possession in similar circumstances.

It is not open to doubt that a debt due to a deceased foreign creditor by an English debtor may be subject to

(1) [1891] A.C. 476.

be reduced into possession by the administrator of the foreign creditor within the foreign jurisdiction in such a way as to entitle him to enforce it in England without an English grant. Mr. Westlake gives an example of such a debt having been so reduced into possession by the recovery of judgment for it in a foreign jurisdiction, and the authorities referred to by him on page 127, *Vanquelin* v. *Bouard* (1); *Re Macnichol* (2); support his proposition that in such a case the judgment creditor may enforce his judgment by action in England without obtaining an English grant. It is beyond question also that the debts due upon negotiable instruments held in England at the time of his death by a creditor dying abroad are English assets in respect of which probate duty is payable; *Attorney General* v. *Bouwens* (3); *Winans* v. *Attorney General* (4); and this on the ground that such instruments are of a chattel nature capable of being transferred in England and "sold for money" in England. In like manner the foreign administrator may transfer and give a good title to the debt due by an English debtor upon a negotiable instrument coming into his hands as such administrator, and the transferee could, of course, maintain an action upon the debt so transferred to him. I think Story's proposition (Conflict of Laws, par. 517) follows from this, viz., that a foreign administrator who reduces such a negotiable security into possession is entitled to sue the debtor upon it in any other jurisdiction where he may be found, without obtaining a grant from that jurisdiction. Mr. Westlake sums up the matter in a passage at page 126, Private International Law, which in my opinion states the true rule. It is in the following words:—

> 96. But to the rule in par. 95*a* the debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

(1) [1863] 15 C.B.N.S. 341.
(2) [1874] L.R. 19 Eq. 81.
(3) 4 M. & W., 171.
(4) [1910] A.C. 27.

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There are two points, however, raised by Mr. Hudson in his argument, which require special consideration. The first is based upon the fact that the promissory notes sued upon, being payable to the order of the testator, were not indorsed by the respondent, and consequently they never were in a state in which they were transferable by delivery alone. Therefore it is said that the administration never acquired a title to these negotiable instruments which enabled him to sue in any character other than that of administrator of the testator's estate, and that this character he does not bear outside the jurisdiction from which he received his grant.

The passage in Story no doubt contemplates instruments transferable by delivery; that is to say, instruments payable to bearer or instruments which, if payable to order, have been indorsed by the payee; and no case has been referred to, I think, in which the foreign administrator was suing in his own name upon a non-indorsed instrument payable to his testator's order.

In principle, however, the right of the foreign administrator to sue appears to depend upon the fact that the instrument has been reduced into possession, and through it the debt due under it. The debt due under a promissory note payable to the testator's order is sufficiently reduced into the administrator's possession for the relevant purpose if the administrator, within the jurisdiction from which he receives his grant, gets possession of it and indorses it in blank, for the reason that his power of disposition of the debt by delivery of the instrument is as complete as if it were a movable chattel. Can it then be said that the administrator, having the note in his possession and having power by the manual act of putting his name on the back of it to put it into a state for immediate transfer by delivery, has not by the fact itself of acquiring such control, sufficiently taken possession of the instrument, and with it the debt, within the meaning of the rule? His power over the instrument and over the debt is complete and this, I think, does constitute such possession. To hold otherwise would appear to involve the introduction of a distinction based upon form and technicality rather than upon principle or substance.

The other point requiring notice is that the promissory notes now in question having been overdue at the testator's death are not within the rule enunciated by Story and Mr. Westlake. It is true that overdue promissory notes are not instruments fully negotiable in the sense in which notes still current are; that is to say, they are not part of the currency of the country to which title may be acquired by a *bona fide* taker for value from a person who has no title. Nevertheless such instruments, though overdue, are transferable by delivery, and such delivery has the effect of transferring not only the document, but the debt as well, and in that respect the resemblance to corporeal movables is complete; and accordingly I think the circumstance of their being overdue does not take them out of the rule.

The appeal should be dismissed with costs.

ANGLIN J.—The plaintiff, Prescott, though described as an executor and administrator of the estate of Mary Louise Crosby (he is in fact administrator cum test. annex.), in reality brings this action in his own right and personal capacity as the holder of the notes sued upon. His title to them was perfected under the law of Massachusetts and the letters of administration granted him by the Probate Court of the county of Middlesex in that State, where the testatrix resided and the notes were at the time of her death. In my opinion he did not require ancillary administration from the Manitoba Surrogate Court having jurisdiction where the defendant resided in order to maintain this action. I cannot usefully add to the reasons for so holding assigned by the Chief Justice of Manitoba and the late Mr. Justice Cameron.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The action of the respondent Prescott is on three promissory notes dated and signed by the appellant at Elkhorn, Manitoba, and payable to the order of Miss Mary Louise Crosby, a resident of the state of Massachusetts. Two of these notes, for $2,700 and $686.44, respectively, indicate no place of payment; the third, for $289, was made payable at Westford, Mass. Mary Louise Crosby died in Massachusetts not having indorsed the

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notes, and left a will bequeathing her entire estate to her sisters, Annie (Mrs. Campbell) and Lavinia (Mrs. Wightman). These two sisters however predeceased Miss Crosby, the former leaving a will devising a house and contents to her two sisters and bequeathing all her money to her sons, George Campbell and Llewellyn Campbell. The latter died in Saskatchewan and left a will which gave a legacy of $1,000 to a Mrs. Labossière, and the rest of his estate to his brother George Campbell. Miss Crosby had confided these notes to the respondent Prescott for safekeeping, in Westford, Massachusetts, where she lived with Prescott and his mother as their housekeeper, and after her death Prescott was named, by the Massachusetts court, administrator with will annexed of her estate. In this action the respondent Prescott described himself as executor and administrator of the estate of Mary Louise Crosby. George Campbell was joined as plaintiff and alleged that an equitable assignment of the notes had been made to him, and also claimed that under his mother's and his brother's wills he was entitled thereto. The notes had merely been sent to him unindorsed and I will dispose at once of his contention that an equitable assignment of the notes was made to him by saying that in my opinion it is not borne out by the facts. Nor do I think he can assert his claim, if he has one, to Miss Crosby's estate in this action. The action must therefore be dealt with on the basis that Prescott is the only competent plaintiff.

The question raised by the plea of the appellant, who has always resided in Manitoba, is whether the Massachusetts administrator can take this action against him without obtaining letters of administration in Manitoba.

Perhaps the point would be better stated thus:—

Was the situs of these notes in Massachusetts at Miss Crosby's death, and if so, could the Massachusetts administrator, on the strength of his nomination as such by the local court, sue the appellant on the notes without being appointed administrator in Manitoba?

Was the situs of these notes in Massachusetts at the time of Miss Crosby's death?

The question of the situation of property usually does not admit of much discussion. If the property consists of

real estate or corporeal movables, it has a local situation which is apparent to any one. And if under certain statutes, by reason of the language used, a fictional situation is given to property notwithstanding its real situation, it is obvious that these fictions cannot be extended to any case other than the one provided for. There is no necessity to refer here to the maxim *mobilia sequuntur personam,* which is by no means of general application, except to observe that the deceased was domiciled where these notes were locally situate when she died.

But there is a real difficulty when the property consists of debts or generally of *choses in action.* As to this species of property, the general rule is that it must be held to be situate where resides the debtor or other person against whom the claim exists. (Dicey, Conflict of Laws, 3rd ed., p. 342.) In other words, simple contract debts (which expression excludes debts created by deed or judgment debts) have no local situation other than the residence of the debtor where the assets to satisfy them would probably be. *Rex* v. *Lovitt* (1).

Does this rule apply to negotiable instruments such as bills of exchange, promissory notes, etc., which are locally situate at the place where the deceased resided at his death? In *Attorney General* v. *Bouwens* (2), which has been since recognized as a leading authority and on which reliance was placed by both the majority and the minority judges in the court below, it was held that the English probate duty was payable in respect of bonds of foreign governments, of which a testator dying in England was the holder at the time of his death, and which had come to the hands of his executor in England, such bonds being marketable securities within the kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of the kingdom in order to render the transfer of them valid.

In this case, the bonds or securities had been issued respectively by the Russian, the Danish and the Dutch Governments, dividends on the two former being paid by an agent in London, and on the latter in Amsterdam. Lord

(1) [1912] A.C. 212, at p. 218.

(2) 4 M. & W. 172.

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Abinger, speaking for the court, distinguished the case from two prior decisions, *Attorney General* v. *Dimond* (1), and *Attorney General* v. *Hope* (2), dealing with French *rentes* and American stock, which could only be transferred in France and the United States, respectively.

The question in the *Bouwens Case* (3) was whether the defendant was liable for probate duty in respect of these securities, and it thus involved the question of the situs of the securities. This situs was to be determined according to the practice, so far as it has not been changed, of the ecclesiastical tribunals which formerly had jurisdiction in these matters, and Lord Abinger, after citing the rules that had been thus laid down, said (page 192):—

> These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate.

Further Lord Abinger said (pages 192, 193):—

> Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform *here* would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration (for even if there were a foreign administration, it is an established rule that an administration is necessary in the country where the suit is instituted (Story on Conflict of Laws, 421): and that these letters of administration must be stamped with a duty according to the saleable value of the bills, the case of *Hunt* v. *Stevens* (4), is an express authority.

The importance of this decision is that it considers as situate (and therefore subject to probate duty) within England, foreign securities capable of being transferred or

(1) 1 C. & J. 356.
(2) 1 C.M. & R. 530.
(3) 4 M. & W. 172.
(4) 3 Taunt. 113.

sold in England, without it being necessary to do any act out of the kingdom to render the transfer valid. And the converse of the case supposed by Lord Abinger—a testator dying in England possessed of foreign securities capable of being sold and transferred there—is equally a case where the English probate duty would be payable, for it is the precise case passed upon by the Exchequer of Pleas in the *Bouwens Case* (1). See also *Winans* v. *The Attorney General* (2).

I may refer again to Dicey, at page 344, who states as follows the effect of the *Bouwens Case* (1).

> When bonds, again, or other securities, e.g., bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.

The following species of property have been held to be subject to probate duty in England, because they were considered to be situate there:—

Certificates of shares in a foreign company made out in the name of the shareholder, having indorsed thereon a form of transfer and power of attorney in blank, *Stern* v. *The Queen* (3); it would appear that on some of these certificates the form of transfer had been signed by the person named as owner of the shares, and in others it had not:—

Certificates of shares in foreign railway companies, *Goods of Agnese* (4):—

Shares of mining companies in South Africa, when there was in London a duplicate register where the shares could be transferred. *In re Clark, McKecknie* v. *Clark* (5).

Returning to the *Bouwens Case* (1) each of the parties here rely on it as an authority which supports his contentions. I think it may be taken to establish that inasmuch as notes such as Miss Crosby possessed in Massachusetts were marketable securities there and could be sold and transferred without it being necessary to do any act outside

(1) 4 M. & W. 172.
(2) [1910] A.C. 27.
(3) [1896] 1 Q.B. 211.
(4) [1900] 1 P. 60.
(5) [1904] 1 Ch. 294.

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of Massachusetts to render the transfer valid, these notes are to be held situate in Massachusetts, although the monies thereunder were payable by a person domiciled elsewhere. At least one of the notes was payable in Massachusetts.

The only difficulty is that these notes had not been indorsed by Miss Crosby. But this difficulty is apparent only, for the respondent as administrator could indorse these notes in blank and then transfer them by delivery. He could also sue on the notes himself without indorsing them. As far as any act was required in order to sell or transfer these notes, such act could be performed in Massachusetts.

I think, therefore, that the situs of these notes, which are negotiable securities, was, under the authorities I have referred to, in Massachusetts at Miss Crosby's death.

This point being determined, it is difficult to appreciate why letters of administration should be taken out in Manitoba in respect of personal property situate in Massachusetts and in the possession there of the Massachusetts administrator.

Indeed it appears clear that the court in Manitoba would not have jurisdiction to make a grant of administration when no property of the deceased is situate in that province. *Tucker, in Goods of* (1), and Williams on Executors, 11th ed. vol. 1, p. 340. See also Manitoba *Surrogate Court Act* (R.S.M. ch. 47, sec. 19). And on the question whether in such a case the foreign administrator can sue before the courts of the country where the debtor is domiciled, in recovery of debts situate in the country where the deceased was domiciled, I may refer to Westlake, *Private International Law,* 5th ed., at page 132, who says that debts due on negotiable securities are an exception to the rule governing simple contract debts, because they can be sufficiently reduced into possession by means of the paper which represents them. And he adds, basing his opinion on *Attorney General* v. *Bouwens* (2):

(1) 3 Sw. & Tr. 585.

(2) 4 M. & W. 172.

They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

Westlake further refers to Story, *Conflict of Laws*, 8th ed., par. 517, page 736, who supports his view in these terms:—

The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name; and he need not take out letters of administration in the state where the debtor resides, in order to maintain a suit against him. And for a like reason it would seem that negotiable paper of the deceased, payable to order, actually held and indorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such indorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country as the legal indorsee, and allowed to sue thereon accordingly, in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situate in such foreign country.

I think these authorities shew that no grant of letters of administration in the state or country where the debtor is sued is necessary, when the foreign administrator became legal owner and holder of negotiable securities by virtue of his appointment as administrator of the deceased's estate in the state or country where the deceased was domiciled, and when the negotiable securities were in the deceased's possession at his death. It does not seem to me to matter whether notes or bills to order had or had not been indorsed by the deceased, for if they had not, the administrator could indorse them, and inasmuch as he himself sues on them indorsation is unnecessary. The respondent here describes himself as "executor and administrator of the estate of Mary Louise Crosby." He was not executor, but only administrator with will annexed. I regard, however, these words as being merely descriptive and not as precluding the contention that the respondent is the legal owner and holder of the notes.

I may add that I am generally in accord with the opinions expressed by Chief Justice Perdue and the late Mr. Jus-

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tice Cameron in this case. See also the judgment of Chief Justice Harvey of Alberta in *Browns* v. *Browns* (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Bonnar, Hollands & Philp.*

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(1) 15 Alta. L.R. 77.

W. H. LAMER ET AL (PLAINTIFFS).....APPELLANTS; 1923

AND *Feb. 19, 20.
*May 1.

T. BEAUDOIN (DEFENDANT).....RESPONDENT.

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

Contract—Sale—Maple sugar—Warranty as to quality—Delivery—Payment by sight draft attached to bill of lading—Part of shipment not of quality specified—Right to recover price of sale—Articles 1048, 1063, 1473, 1492, 1526 C.C.

On the 27th May, 1920, the appellants agreed to buy from the respondent "30,000 pounds of pure maple sugar * * * guaranteed free of burnt and soft sugar * * * to be packed in good clean bags." On the 8th of June, the appellants ordered and received a shipment of 10,066 pounds and paid for it by accepting a sight draft attached to the bill of lading. Fifty-four pounds having been found below the guaranteed quality, the respondent on being notified reimbursed a sum representing their value. On the 31st of July, the appellants sent another order for 10,000 pounds and paid for them in like manner without having had the opportunity to inspect the goods. On the 16th August, they transferred the sugar to their warehouse in Montreal and then began to empty the bags. Out of the first 24 bags, the appellants found that between 30 and 40 per cent of the shipment were not of the quality guaranteed and complained to the respondent. The latter arrived in Montreal on the 20th of August, did not agree with appellants' finding and offered to replace any small quantity of sugar which according to him might be burnt or soft. The parties not being able to effect a settlement, the appellants on the 23rd of August took an action to resiliate the whole contract and to be reimbursed the amount of the draft paid for the second shipment, not having then received a letter sent on the same day by the respondent, in which he offered to replace any part found unsatisfactory in the 70 bags left unemptied. The respondent, with his defence, made a tender of $80 representing the value of the sugar which was not, according to him, of standard quality.

Held, Idington J. dissenting, that the appellants had the right to reject the second shipment of sugar and to recover the price paid for it.

Per Duff and Brodeur JJ.—As the words "guaranteed free of burnt and soft sugar" are words describing the sugar sold, the goods contracted for have not been delivered. (Articles 1063, 1473 C.C.)

Per Mignault J.—Since these words constitute a warranty of quality relief must be given to the appellants under article 1526 C.C., as the defect in the goods was latent for the appellants who were obliged to make payment before it could be discerned by inspection. Duff and Brodeur JJ. *contra.*

Per Anglin J.—Whether the words "guaranteed free of burnt and soft sugar" should be regarded as words of description or as a warranty of quality, the appellants are entitled to recover the price paid for the second shipment.

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

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Per Anglin and Mignault JJ.—Relief under article 1526 C.C. is not confined to cases of legal warranty, but it extends to breaches of conventional warranty.

Per Duff and Brodeur JJ.—The appellants' action can also be maintained under the provisions of article 1048 C.C., as they paid the price of sale believing themselves by error to be debtors.

Per Idington J. dissenting—The appellants' action was premature as, the time of delivery having been extended by mutual agreement, the respondent under the circumstances of this case had the right to have an opportunity of replacing the goods not up to the standard in the same method adopted on the first shipment.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court and dismissing the appellants' action.

Monty K.C. for the appellants.

Dorais K.C. and *Beaudoin* for the respondent.

IDINGTON J. (dissenting)—The appellants and respondent entered into the following contract:—

Montreal, May 27, 1920.

I, T. Beaudoin, of Broughton Station, Quebec, party of the first part, hereby sell and agree to deliver to Canada Produce Company, 171 St. Paul Street, East, Montreal, Quebec, party of the second part, thirty thousand pounds (30,000 lbs.) of pure maple sugar, made during the year 1920, and guaranteed free of burnt and soft sugar, sugar to be packed in good clean bags, about 100 lbs. to be placed in each bag. Delivery to be made by the seller within ten days (10) from this date. Seller to place the sugar on board car free of expense to the buyer. Buyer to pay the seller twenty-six cents (26c.) per pound f.o.b. car, bags free, and it is further understood that the buyer will have a representative on the ground at the time the car is loaded and will pay cash or accepted check on completion of loading of goods on car.

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CANADA PRODUCE COMPANY,
Per W. H. Lamer.

The market price was thereafter in a falling condition for said class of goods.

Instead of calling for delivery thereof within the ten days from said date the appellants waited until reminded of their obligation by respondent and, nearly a month later, requested the latter to send a shipment of almost a third of the quantity named, and he did so.

Upon that occasion the respondent called the appellants' attention to the condition of the contract requiring them to have a representative present at the shipment and their reply was that they would not, but trusted to the integrity

of the respondent to see that the quality of the goods was all right.

The required shipment was made by respondent accordingly and he made a draft for the price therefor which was duly honoured.

But on the inspection at Montreal the appellants rejected and set aside for respondent a small quantity, as not up to the mark, in regard to quality and notified the respondent thereof, and sent him the rejected parcel for which he, later on, sent in return the amount of the price therefor and the expenses.

A continued reminder from time to time by the respondent as to the need of arranging for shipment of the balance induced the appellants to send an order for shipment of about another third of the whole quantity bought but not until the 31st of July, 1920.

On this occasion both parties seemed to assume that the same method would be observed as on the previous occasion and no representative was sent by appellants to inspect at the point of shipment.

The respondent therefore on getting the order therefor shipped according to the order and drew at sight on appellant for the price thereof, and they accepted and paid the draft and proceeded to unload the goods which were packed in bags. They emptied then twenty-four of the ninety-four bags in the consignment into barrels in which they intended shipping same to a customer in the United States and then, pretending that the goods were not up to the required standard, phoned respondent of their complaint.

He came to Montreal and, on the 20th of August, 1920, discussed the matter with appellants but they could not agree.

The respondent then proposed that they follow out the same course of dealing as on the previous occasion and set aside such part as found below the standard, and he would make good any such deficiency.

The appellants would not assent to continue said mode of dealing unless the respondent would also agree to abandon the balance of the contract, which he declined to do.

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He returned home and wrote fully and clearly his proposition apparently to put beyond doubt or dispute that he was acting in accord with the method adopted on the first shipment as a substitution for the inspection at place of shipment as provided in the contract.

The appellants were apparently so determined to get rid of the contract that they instituted this action, on the 23rd of August, 1920, to annul the whole contract and to be reimbursed the amount of the draft they had paid for the second shipment.

The learned trial judge refused to annul the contract but allowed a recovery for the amount of the said draft.

On appeal by respondent therefrom the Court of King's Bench unanimously reversed said judgment with costs.

I agree so entirely in the main with the reasons of the several learned judges writing same that I do not require to set them forth afresh herein, but desire in addition thereto, to express as clearly as I can a few considerations arising out of the foregoing facts.

The time for delivery had clearly been so extended, by mutual agreement, evidenced by the conduct of the parties, that even if by mistake some of the goods were not up to the standard, that did not entitle the appellants to act in the abrupt manner they did in bringing this action as if all right to rectify said mistake, if any, had ended.

I respectfully submit that the utmost they would be entitled to, under such circumstances, would be either to follow out the method adopted on the first shipment and, by mutual courtesy, assented to, of rejecting and setting aside all these goods not up to the standard, notifying the vendor thereof, and accepting those up to the required standard, and giving a reasonable time for due rectification thereof.

Or they might, if that method is not to be accepted as a complete substitution of the provision in the contract, insist upon being notified at once of the time when a shipment would be made and be ready to inspect at the place of shipment as provided therein.

The evidence shews the respondent had at his place of business where that would have taken place, if insisted upon, an ample supply of such goods of the required

quality, so as to meet effectually the most rigid inspection if that course had been adopted.

I am not to be understood as implying that such was the proper course to have been adopted but it clearly was the only thing open to appellants if they cannot be held as having assented in a binding manner to the course of dealing pursued on the first shipment.

In my opinion that substituted mode of dealing had become binding upon both parties by their course of conduct and was that which should have been followed as the respondent proposed.

It is idle to argue as done herein, that the respondent would only abide by such rejection as he approved of.

There is no foundation for it in fact, unless the insinuation of one of the appellants in his evidence.

The proper thing to have done was to follow that course as part of the bargain thus mutually amended and then, if respondent set up any such pretension on the rejected goods being set aside, the true position in regard to the facts would have been disclosed. And if unjustifiable rejections made or dispute anent same have risen, that issue of fact could have been tried out.

Just a word or two as to the actual quality of the goods. I am quite satisfied that there was no thirty or forty per cent of inferior quality. How did respondent, on the resale of the goods, after he had bought them in at the auction directed by the court, manage in such a depressed market to get twenty-two cents a pound for goods sold in a high market at only twenty-six cents a pound?

The fact is that the examination by all the alleged experts was of the most casual character of less than half. And all seem to have taken no. 1 sugar as the test whereas the contract does not specify any such standard but merely made in 1920, free from burnt and soft sugar. One if not two of them never saw a single one of the twenty-four bags passed into barrels before the appellants found any to reject, and the presumption that they were up to the mark is strengthened. How can appellants pretend to reject them?

The appellants argue the case as if the bargain was made to fit a special client of theirs, or a special market. It is

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nothing of that sort, but the open market in Montreal, or in Beauce, that has to be considered. I think the former where the contract was made.

Coming to that phase of the matter there is only about four hundred dollars involved herein if the results had been looked at, as in the last analysis they may have to be.

And thus costs, many times that, have to be squandered in wretched litigation, purely begotten of an attempt by appellants unfairly trying to get rid of a contract instead of to get justice done.

I think the judgment appealed from is right and that this appeal should be dismissed with costs.

DUFF J.—I concur with my brother Brodeur.

ANGLIN J.—The material facts in this case are fully stated in the opinion of my brother Mignault.

I agree with him that having regard to the acts and conduct of the parties the August delivery of 10,061 pounds of maple sugar may be treated as a separate and distinct transaction. I understand that my brother Brodeur is of the same opinion.

The sugar was sold as

pure maple sugar * * * guaranteed free of burnt and soft sugar.

The evidence is that the shipment did not answer that description. It contained from thirty to forty per cent of soft or burnt sugar hopelessly mixed in with the remaining sixty to seventy per cent of sugar of the quality contracted for.

The plaintiffs paid for the whole shipment $2,679.84 by accepting a sight draft attached to the bill of lading before they had an opportunity to inspect the goods. Although inspection at the place of shipment (Broughton Station) had been originally contemplated, I agree that this term of the contract had been varied and inspection at the plaintiffs' warehouse in Montreal, necessarily after payment, substituted by tacit consent of the parties, acceptance of the sugar as fulfilling the requirements of the contract being postponed until after such inspection.

That the plaintiffs had the right to reject this shipment and to demand recoupment of the money paid for it, with respect, I think admits of no doubt. If the words "guar-

anteed free of burnt and soft sugar " are regarded as words of description, as my brother Brodeur seems to think they should be, the goods contracted for have not been delivered. If, on the other hand, as my brother Mignault seems to think the more correct view, those words should be regarded as a warranty of quality, I see no good reason why relief under article 1526 C.C. or relief analogous thereto should not be given. It is true that that article is found under the heading " Warranty against latent defects." But the defect in the goods was latent for the purchasers when they were obliged to make payment. It could be discerned only on inspection. Appreciation of its full extent required the opening and examination of many bags—24 out of 94 were in fact emptied and examined before the purchasers became fully convinced of the impracticability of handling the sugar in their business. The defect was not apparent and was not something which the buyers might have known for themselves (article 1523 C.C.) when they were obliged to make payment. Although the term " latent " is usually applied to defects not discoverable by ordinary inspection, where, as here, opportunity for inspection and the consequent right of rejection are postponed until after payment, I would place the buyers in the same position for the purpose of the remedy afforded by article 1526 C.C. as if the defects discovered on inspection made in due season had been latent defects in the ordinary sense. They were in fact not discernible by any inspection which the purchasers could have made before payment. I do not assent to the view that relief under article 1526 C.C. is confined to cases of legal warranty. It extends in my opinion likewise to breaches of conventional warranties.

But whether viewed as a case of non-delivery of goods contracted for, or as one of breach of warranty rendering the goods unfit for the use for which they were intended or so diminishing their usefulness that the buyers would not have bought them if they had known their quality, the right to return the goods and recover the price paid for them is the same.

For the reasons indicated by my brothers Brodeur and Mignault, I agree that the measure of relief that should

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now be accorded to the plaintiffs must be restricted to the recovery of the $2,679.74 paid the defendant for the August shipment.

BRODEUR J.—Le défendeur Beaudoin aurait le 27 mai 1920 vendu aux appelants 30,000 livres de sucre d'érable pur "guaranteed free of burnt and soft sugar". Ce sucre devait être livré franco à bord dans dix jours à la gare de Broughton, et les acheteurs devaient y avoir un représentant pour en recevoir livraison et y faire le paiement.

Le 8 juin les acheteurs ont demandé à Beaudoin de leur envoyer à Montréal 10,000 livres de sucre seulement. Ce dernier s'est rendu à leur demande; et comme ils n'avaient personne à la gare à Broughton pour recevoir ces dix mille livres de sucre et pour les payer, il fit sur eux une traite à vue qu'il attacha au connaissement.

Les marchandises furent reçues et acceptées et la traite payée.

A plusieurs reprises après ce premier envoi, Beaudoin, le vendeur, demanda aux appelants, ses acheteurs, de prendre livraison de la balance de sucre mentionné au contrat; mais ils n'étaient évidemment pas anxieux de prendre livraison. La preuve établit qu'un fléchissement dans le prix s'était produit; et alors il n'est pas étonnant que ces acheteurs ne fussent pas empressés de prendre livraison d'une marchandise qui ne pourrait pas être revendue avec le profit qu'ils espéraient. Cependant le 16 août les appelants demandaient livraison de dix mille livres. Beaudoin s'est encore rendu à leur demande; et comme ses acheteurs n'avaient pas de représentant à la gare de chargement, il tira une traite sur eux pour la quantité livrée, soit $2,615.86, qu'il attacha au connaissement. Les acheteurs ne pouvaient donc pas prendre possession du sucre sans payer cette traite et ils firent le paiement de la somme réclamée.

Mais, après l'avoir transporté dans leur magasin et après l'avoir examiné, ils trouvèrent que le sucre n'était pas conforme au contrat, qu'il y en avait du brûle et du mou. Alors ils avertirent immédiatement l'acheteur qui se rendit à Montréal pour discuter cette question avec eux. Il y eut alors des négociations qui ne produisirent aucun résultat. De fait, les acheteurs auraient été prêts à garder tout le

sucre ni mou ni brûlé si le vendeur voulait les libérer de l'obligation de prendre livraison des 10,000 livres qui restaient sur le contrat. Mais on parut incapable de s'entendre même sur la quantité qui n'était pas conforme au contrat.

Alors les acheteurs, Lamer et al., ont institué peu de jours après la présente action pour se faire rembourser de la somme de $2,615.86 et des frais de transport qu'ils avaient payés; et ils ont demandé, en outre, l'annulation du contrat du 27 mai 1920.

Beaudoin a reconnu qu'il y avait une petite quantité de sucre de la valeur de $30.00 qui n'était pas conforme au contrat, et il a déposé en cour cette somme. Il maintient que le reste de son sucre est conforme à la qualité stipulée au contrat et il offre aussi par son plaidoyer de remplacer le mauvais sucre par une marchandise de bonne qualité.

Le point principal qui paraît avoir fait l'objet de l'enquête a été de savoir si la marchandise livrée était de la qualité stipulée au contrat.

La preuve a constaté qu'il y avait de 30 à 40% de mauvais sucre et que le bon était mélangé avec le mauvais.

La Cour Supérieure a condamné le défendeur à rembourser la somme payée, mais il n'est nullement question dans le jugement de la demande en résiliation du contrat du 27 mai 1920. Dans le résumé des plaidoiries fait par le juge il n'en est pas fait mention, et le dispositif du jugement ne contient qu'une condamnation de payer la somme réclamée. Dans l'un des considérants le juge a cependant déclaré que l'action était bien fondée. Voilà tout ce qu'il y a qui pourrait porter sur cette demande résolutoire.

La Cour du Banc du Roi a renversé le jugement de la Cour Supérieure et a maintenu le plaidoyer et a renvoyé l'action.

La véritable question à décider, suivant moi, est de savoir si ce sucre est conforme au contrat.

La Cour Supérieure, après avoir entendu les témoins sur une preuve contradictoire, a trouvé que ce sucre était dans une très forte proportion, soit 30 à 40%, inférieur à la qualité convenue. Ce point n'est pas formellement

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confirmé dans le jugement de la Cour du Banc du Roi; mais les honorables juges qui ont écrit pour conclure au maintien de l'appel reconnaissent que la marchandise n'était pas toute de la qualité stipulée au contrat.

On paraît se baser en appel sur les négociations qui ont eu lieu entre les parties après l'arrivée des marchandises à Montréal et on donne même dans l'un des considérants un résumé des offres qui ont été faites de part et d'autres. On peut difficilement baser un jugement sur des propositions qui n'ont pas pris la forme d'une convention entre les parties, et nous avons alors à examiner les droits des parties suivant la convention qui avait été faite entre eux le 27 mai 1920.

Par cette convention le défendeur Beaudoin devait livrer du sucre dur et non brûlé. A-t-il rempli son obligation? Evidemment non. Alors a-t-il le droit de garder l'argent que les demandeurs ont été obligés de lui payer pour prendre possession des marchandises, et ce avant de pouvoir les examiner? Certainement non. Il offre par son plaidoyer de rembourser $30.00 pour le mauvais sucre. Ces offres sont certainement insuffisantes lorsque la preuve constate qu'une quantité de 30 à 40%, soit une valeur de plus de mille dollars, n'est pas de la qualité stipulée.

La Cour du Banc du Roi aurait dû, même si ses prémisses étaient fondées, donner au moins jugement aux demandeurs pour ces $1,000.00 et plus. Le défendeur Beaudoin n'avait pas le droit de garder cette somme qui représentait une marchandise absolument inférieure à la qualité stipulée. Mais les acheteurs ne pouvaient pas être tenus de garder les 60 ou 70% de bonnes marchandises parce qu'elles étaient toutes mêlées avec les mauvaises et que le triage devenait une opération dispendieuse et difficile.

Dans les circonstances, les offres faites par le défendeur sont insuffisantes et doivent être rejetées. Il aurait dû simplement rembourser à ses vendeurs la somme qu'il avait eue illégalement d'eux et reprendre tout son sucre.

Mais malheureusement pour lui il n'a pas pris cette position. Il a préféré suivre les demandeurs sur le terrain où ils avaient placé le litige. Il a voulu établir que le sucre était de la qualité voulue. Et comme il n'a pas pu

réussir à démontrer que cette prétention était bien fondée, son plaidoyer devrait être renvoyé.

On a invoqué en Cour du Banc du Roi et devant cette cour les articles 1517, 1526 et 1530 C.C. comme déterminant le droit que les parties pouvaient invoquer. Je ne crois pas, pour ma part, que ces articles s'appliquent au présent litige, vu qu'ils ont trait à la garantie contre l'éviction et contre les défauts cachés, et il n'y a pas d'éviction ici, et les défauts dont on se plaint ne sont pas cachés. Fuzier Herman, vo. Vices Redhibitoires, n° 1; Pothier, Vente n° 202; Merlin, Répertoire, vo. Réhibitoire, p. 287. *Lachute Shuttle Co.* v. *Frothingham & Workman, Ltd.* (1).

On s'est demandé si le vendeur qui a livré une marchandise inférieure au contrat pouvait valablement offrir de la remplacer. Il n'est pas nécessaire de décider ce point dans la présente cause; mais on peut consulter sur cette question Guillouard, *Vente,* n° 41.

Le défendeur avait vendu du sucre d'érable dur et non brûlé. Il était obligé en vertu des articles 1063, 1473 et 1492 CC. de délivrer à ses acheteurs l'article qu'il avait vendu. Il a été décidé en France que:

> La délivrance de la chose vendue doit avoir pour objet la chose même qui a été vendue, le vendeur ne peut substituer à ce qui a fait la matière du contrat une autre chose qui lui ressemble. Cette obligation de la part du vendeur s'entend des choses de quantité telles que denrées ou marchandises, et l'acquéreur a le droit de refuser la livraison si la *qualité* des choses livrées ou des conditions d'exécution ne sont pas conformes à la convention.

Beaudoin a livré un autre article que celui vendu et a forcé l'acheteur cependant de payer avant de pouvoir l'examiner. Alors le paiement a été fait sans cause; et, comme dit Pothier, *Vente,* n° 186:

> L'acheteur ne s'étant obligé de payer et n'ayant effectivement payé ce prix qu'en conséquence de ce que le vendeur promettait de lui faire avoir la chose vendue, le vendeur n'ayant pas accompli sa promesse la cause pour laquelle l'acheteur a payé le prix ne subsiste plus.

Le contrat sans considération, dit l'article 989 C.C., est sans effet.

Ou encore, on peut dire que le paiement a été fait par les acheteurs dans la conviction que les marchandises livrées étaient conformes au contrat. Il y a eu erreur de leur part à ce sujet. Alors on pourrait également invo-

(1) [1912] Q.R. 22 K.B. 1.

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quer l'article 1048 C.C. qui donne droit de répétition à celui qui paie une dette s'en croyant erronément débiteur.

Les demandeurs avaient-ils le droit de demander la résiliation du contrat du 27 mai 1920; et s'ils avaient ce droit, est-ce qu'ils peuvent maintenant le réclamer devant cette cour, quand en Cour Supérieure il ne leur a pas été formellement accordé et qu'ils n'ont pas fait appel de ce jugement.

Il me paraît certain que la Cour Supérieure n'a pas jugé à propos d'accorder cette partie de la demande. La résolution d'un contrat ne peut se faire que par un jugement du tribunal. Il est de jurisprudence, ainsi que l'a jugé la Cour de Revision dans la cause de *Kaine* v. *Michaud,* (1) que les termes suivants de l'article 1065 C.C. " dans les cas qui le permettent " indiquent que la résolution ne sera prononcée que dans certaines circonstances et pour des motifs qui paraîtront justes et raisonnables aux tribunaux.

La même cour, dans une cause de *Marleau* v. *Shapiro,* (2) a décidé que l'on doit exercer ce droit de résolution avec une extrême prudence. En supposant donc que les demandeurs auraient eu le droit de demander la résolution de tout le contrat du 27 mai 1920, ce qui dans les circonstances particulières de cette cause n'aurait pas dû être accordé, je suis d'opinion que les demandeurs ont virtuellement abandonné cette partie de leur demande en acceptant le jugement qui a été rendu par la Cour Supérieure.

Pour ces raisons la vente du 27 mai 1920 ne devrait pas être résolue, mais l'appel devrait être maintenu avec dépens de cette cour et de la Cour du Banc du Roi, et les demandeurs devraient avoir jugement pour $2,679.74.

MIGNAULT J.—Le 27 mai 1920 les parties ont fait le contrat suivant:

Montreal, May 27, 1920.

I, T. Beaudoin, of Broughton Station, Quebec, party of the first part, hereby sell and agree to deliver to Canada Produce Company, 171 St. Paul Street, East, Montreal, Quebec, party of the second part, thirty thousand pounds (30,000 lbs.) of pure maple sugar, made during the year 1920, and guaranteed free of burnt and soft sugar, sugar to be packed in good clean bags, about 100 lbs. to be placed in each bag. Delivery to be made by the seller within ten days (10) from this date. Seller to place

(1) [1920] Q.R. 58 S.C. 531. (2) [1920] Q.R. 59 S.C. 359.

the sugar on board car free of expense to the buyer. Buyer to pay the seller twenty-six cents (26c.) per pound f.o.b. car, bags free, and it is further understood that the buyer will have a representative on the ground at the time the car is loaded and will pay cash or accepted check on completion of loading of goods on car.

T. BEAUDOIN,
CANADA PRODUCE COMPANY,
Per W. H. Lamer.

Les agissements des parties ont apporté quelques modifications à ce contrat. La livraison du sucre n'a pas été faite dans les dix jours, et l'intimé alla à Montréal au commencement de juin s'enquérir pourquoi les appellants ne se mettaient pas en mesure d'en prendre délivrance, et on lui répondit qu'il recevrait sous peu un ordre d'expédition. Effectivement les appelants lui téléphonèrent d'envoyer le tiers du sucre et l'intimé leur en envoya 10,066 livres le 8 juin avec une traite à vue que les appelants payèrent. Il se trouva que 54 livres sur les 10,066 ne répondaient pas à la garantie, et l'intimé en ayant été averti remboursa aux appelants le prix du sucre rejeté, $14.04. Lors de cette expédition, les appelants ne se firent pas représenter au lieu du chargement comme il avait été convenu et l'intimé envoya sa traite à Montréal avec le connaissement. La non-présence d'un représentant des acheteurs au lieu du chargement, le paiement à Montréal à l'arrivée des marchandises, et la livraison des 30,000 livres par parties au lieu de la faire en une fois, sont des modifications que le vendeur et les acheteurs, d'un accord au moins tacite, paraissent avoir faites au contrat.

Les instructions des appelants pour l'envoi du restant du sucre se firent attendre. L'intimé leur écrivit le 7 juillet, les pressant de prendre livraison du sucre, et ceux-ci, en réponse, promirent de lui envoyer une commande sous peu, ce qu'ils ne firent que le 31 juillet, et cette fois encore ils ne demandèrent que 10,000 livres. Ce sucre, 10,061 livres, fut expédié le 8 août avec un traite à vue, et encore une fois les appelants ne se firent pas représenter au chargement. Ce fut un malheur pour l'intimé de n'avoir pas insisté sur cette stipulation du contrat, car alors la qualité du sucre aurait été contrôlée au moment qu'on le chargeait sur les wagons, tout le sucre aurait été payé après que ce chargement eût été complété, et les difficultés qui sont

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survenues auraient été évitées. Mais à ce changement des conventions l'intimé ne fit dans le temps aucune objection.

A l'arrivée du chargement à Montréal les appellants payèrent la traite qui l'accompagnait, soit $2,615.86, prirent livraison du sucre le 16 août et le transportèrent à leur entrepôt. Le sucre devait être envoyé par eux à des clients des Etats-Unis auxquels ils l'avaient vendu, et les appelants commencèrent à vider les sacs et à charger le sucre dans des barils. C'est alors qu'ils trouvèrent, mêlée au sucre de qualité acceptable, une forte proportion de sucre mou ou brûlé. Ils ont ainsi vidé vingt-quatre sacs, et voyant que le bon sucre était mélangé avec le mauvais dans les sacs qu'ils avaient vidés, ils s'en sont plaints immédiatement à l'intimé par téléphone. Celui-ci promit de venir à Montréal examiner le sucre et n'y arriva que le 20 août. Les parties ne s'entendirent pas sur la quantité de sucre brûlé ou mou, l'intimé prétendant que cette quantité était peu considérable, les appelants qu'elle équivalait à 35 à 40 pour cent du total. Il y eut propositions et contre-propositions; les appelants voulaient faire annuler le reste du contrat; l'intimé consentait à remplacer le sucre qu'il estimerait être défectueux, et encore à l'enquête il disait que c'était peu de chose. Bref on ne s'entendit pas. Le 23 août les appelants prirent cette action, et le même jour l'intimé leur écrivit de mettre de côté le sucre inférieur, promettant de le remplacer par du bon. L'honorable juge Guerin a trouvé que les appelants ont agi avec trop de précipitation en prenant leur action du 23 août, mais, comme cette action était rédhibitoire, il eût probablement été périlleux de trop attendre.

C'est sur cette prétention de l'intimé qu'il avait le droit de remplacer le sucre défectueux que le débat s'est engagé devant les tribunaux. Les appelants concluaient à l'annulation de tout le contrat, ce qui était impossible, car une partie du contrat avait été exécutée d'un commun accord, et il restait encore près de 10,000 livres à expédier. Les prétentions des parties sont donc en présence et il faut trancher le débat entre elles. J'ajoute qu'en admettant que les appelants ont trop demandé en concluant à l'annulation du contrat entier, rien n'empêche, s'ils ont de sérieux

motifs de se plaindre du deuxième envoi, de leur accorder une partie seulement des conclusions de leur action.

Le juge de première instance a trouvé qu'il y avait dans ce sucre, au dire d'experts compétents et désintéressés, de trente à quarante pour cent de sucre mou ou brûlé. J'accepte cette constatation de fait qui paraît également avoir eu l'assentiment de l'honorable juge Guerin en cour du Banc du Roi.

Il ne reste qu'à appliquer à l'espèce les principes du droit. Les parties ayant consenti à faire des livraisons distinctes et séparées de ce qui d'après le contrat devait être livré en bloc, je crois qu'on peut, dans la décision de cette cause, envisager la deuxième expédition du sucre, en tout 10,061 livres, comme si elle eût été une vente distincte. Vu ce consentement des parties, cette deuxième expédition est certainement une chose indépendante du premier envoi qui a été accepté et de l'envoi qui restait à faire. Voy. Baudry-Lacantinerie, Vente, n° 440, dernier alinéa et renvois. Voy. aussi Sirey, 1870. 1. 265, et la note où il est dit que chaque livraison de marchandises vendues au poids, au compte ou à la mesure constitue en quelque sorte une vente distincte, et que l'acheteur doit pouvoir demander la résiliation de l'une sans demander celle de l'autre.

Cela étant, comme il y a eu violation de la garantie stipulée au contrat, l'appelant peut invoquer l'article 1526 C.C. qui dit:

> L'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et se faire rendre une partie du prix suivant évaluation.

N'oublions pas que nous sommes en présence ici d'une garantie conventionnelle. Il n'est pas seulement question de la description de la chose vendue, mais de la garantie que le sucre vendu serait exempt de sucre mou ou brûlé. La présence de sucre mou ou brûlé dans la proportion considérable que constate la preuve est un vice rédhibitoire, et les acheteurs, en vertu de l'article 1526 C.C., qui s'applique à la garantie conventionnelle comme à la garantie légale, avaient le choix ou bien de rendre le sucre qui leur avait été expédié par ce deuxième envoi, et de se faire restituer le prix qu'ils avaient payé, ou bien de le garder

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et de se faire rendre une partie du prix suivant évaluation. Ils ont choisi le premier parti, et ont exercé l'action rédhibitoire au lieu de l'action *quanti minoris*. C'était leur droit, et il ne reste qu'à appliquer l'article 1526 C.C. dans la mesure qu'il peut être appliqué dans l'espèce.

Le vendeur pouvait-il empêcher cette action en offrant de remplacer le sucre défectueux? A plusieurs reprises, j'ai demandé aux avocats de l'intimé de me citer des autorités reconnaissant ce droit au vendeur. Ils n'ont pu le faire. Dans mon opinion, le vendeur n'a pas ce droit qui, s'il pouvait être réclamé, rendrait le plus souvent l'article 1526 C.C. sans application possible. Du reste, l'existence du vice rédhibitoire donne à l'acheteur le droit de rejeter la marchandise et de se faire restituer le prix, et il n'aurait pas ce droit si le vendeur pouvait, sans le consentement de l'acheteur, remplacer la marchandise affectée de ce vice. Je ne crois pas qu'on puisse invoquer à l'encontre de cette solution les articles 1517 et 1518 C.C. que l'honorable juge Guerin cite. Ces articles, du reste, s'appliquent à la garantie contre l'éviction et non à la garantie contre les vices de la chose vendue. Le code traite séparément de ces deux garanties.

J'accepte sans réserve les considérants suivants du jugement de la cour du Banc du Roi.

> Considérant que ce premier envoi étant accepté et payé, le contrat en son entier ne pouvait plus être annulé;
>
> Considérant que quant au premier envoi de 10,066 livres, les parties se sont fait justice à elles-mêmes, et que quant aux 10,000 livres qui n'ont pas encore été livrées, cette cour n'a aucun ordre à donner, et qu'il ne s'agit que de décider quant aux 10,000 livres comprises dans le deuxième envoi.

Il est clair que tout le contrat ne peut être annulé et qu'on ne peut en rien affecter les droits et obligations des parties quant au sucre qui restait à livrer pour compléter le contrat.

Mais il n'en reste pas moins vrai qu'on peut, dans les circonstances, envisager le deuxième envoi séparément, et c'est bien ce que la cour du Banc du Roi paraît avoir fait elle-même.

Avec beaucoup de respect, il me semble que la conclusion qui découlait logiquement des considérants dans leur ensemble du jugement *a quo*, c'est que les acheteurs avaient

le droit de rejeter le deuxième envoi et de se faire remettre le prix qu'ils avaient payé.

C'est tout ce que je leur accorderais. Je ne rétablirais pas le premier jugement tel que rendu, car il peut prêter à l'interprétation qu'il annule implicitement le contrat, car il déclare l'action des appelants bien fondée. Je donnerais jugement aux appelants contre l'intimé pour $2,679.74, chiffre accordé par le premier juge, avec intérêt à compter de la demande en justice, déclarant que le deuxième envoi du sucre n'était pas conforme à la garantie conventionnelle qui avait été donnée aux appelants et que ceux-ci étaient bien fondés à le refuser. Je réserverais aux parties tous les droits que comporte le contrat, surtout pour le sucre qui restait à livrer pour compléter la quantité vendue.

Pendant l'instance, le sucre a été vendu sous l'autorité de la cour et on nous informe que le prix est consigné en cour. L'intimé en payant le montant du jugement de cette cour aura le droit de retirer cette somme.

Je maintiendrais donc l'appel avec les dépens de toutes les cours en faveur des appelants contre l'intimé.

Appeal allowed with costs.

Solicitors for the appellants: *Monty, Durauleau, Ross & Angers.*

Solicitor for the respondent: *R. Beaudoin.*

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*Feb. 21, 22.
*April 11.

LUDGER LAROCHE AND UXOR (PLAINTIFFS) ..... } APPELLANTS;

AND

THE WAYAGAMACK PULP AND PAPER CO., LTD. (DEFENDANT)..... } RESPONDENT.

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

Workmen's Compensation Act—Claim by ascendant—"Principal support" Interpretation—Art. 1053 et seq. C.C.—R.S.Q. (1909), s. 7323, as amended by 8 Geo. V, c. 71, s. 3 and 9 Geo. V, c. 69, s. 1.

Section 7323, R.S.Q. (1909) "Workmen's Compensation Act," as amended by 9 Geo. V, c. 69, s. 1, provides that "when the accident causes death, the compensation (mentioned in the section) shall be payable * * * (*c*) to ascendants of whom the deceased was the principal support (*principal soutien*) at the time of the accident."

Held that, in order to determine whether the victim was in fact the principal support of the ascendant, the personal earnings or other income of the latter must be taken into consideration. It must be found that more than fifty per cent of the total subsistence of the ascendant came from the victim. It is not sufficient for the ascendant merely to show that the contribution made by the victim to the ascendant's support exceeded that received from other members of the family.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, province of Quebec (1) reversing the judgment of the Superior Court, district of Three Rivers and dismissing the appellant's action.

The appellants brought action under the Workmen's Compensation Act on account of the death of their unmarried son by reason of and in the course of his work for the respondent.

A. Chase-Casgrain K.C. and *Robichon* for the appellants.

De Witt K.C. for the respondent.

IDINGTON J.—The appellants sued respondent claiming that, under the provisions of the article 7321 and subsequent articles of the Revised Statutes of Quebec as amended especially in respect of article 7323, first by 8 Geo. V, cap. 71, sec. 3, and then by 9 Geo. V, cap. 69, sec. 1, they were entitled to recover damages from respondent in whose services one of their sons had accidentally met his death.

The learned trial judge allowed the claim holding that as said deceased son had been at the time of his death con-

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

(1) [1923] Q.R. 34 K.B. 461.

tributing more substantially than any of his numerous brothers and sisters to the support of the appellants, his and their father and mother, living upon a farm upon which they had brought up a large family, they were entitled to recover on the basis furnished by the Act for the case of loss of their principal support.

The Court of King's Bench reversed this judgment holding that as the evidence did not demonstrate that the contributions by deceased to the support of the appellants, his father and mother, were more than they derived from the said farm, it could not be said that his annual contributions were, in the language of the said amendment, their "principal support."

The whole difficulty turns upon the peculiar language of the said amendments, and others, which result in the article reading as follows:—

When the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident, and shall in no case, except in the case mentioned in article 7325, be less than fifteen hundred dollars ($1,500) or more than three thousand dollars ($3,000.)

There shall further be paid a sum of not more than fifty dollars ($50) for medical and funeral expenses.

The compensation shall be payable as follows:—

(*a*) To the surviving consort not divorced nor separated from bed and board at the time of his death, provided the accident took place after the marriage;

(*b*) To the legitimate children, or to the illegitimate children acknowledged before the accident, to assist them to provide for themselves until they reach the full age of sixteen years, *or more if they are invalids;*

(*c*) To ascendants to whom the deceased was the *principal support* at the time of the accident.

The article as it first stood used the words "only support" and by the last amendment substituted therefor the words "principal support."

I think the construction of the Court of King's Bench is correct. Indeed I am quite unable to follow the over refinement which produces the result of ignoring entirely the support which the resources of the father or mother, or both, may produce so long as the deceased has contributed more than any others of their family.

To follow out such a construction logically, there could be nothing recovered in the case of death of a son who contributed equally with others of the family, or less than any other surviving member.

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Idington J.

Such and many other peculiar results might flow from our reversal of the judgment appealed from.

Nor do I think this a case for a new trial.

I respectfully submit an amendment by the legislature seems possibly desirable.

I would dismiss the appeal but, in view of the conflicting decisions preceding this litigation relevant to the correct interpretation and construction of such a peculiar Act, without costs of this appeal here.

DUFF J.—The question is whether the condition that the deceased shall have been (within the meaning of article 7232 (*c*) as amended by 9 Geo. V, cap. 69, s. 1) the "principal support" of the appellants at the time of the accident, has been fulfilled. The only question of law involved is the question whether in passing upon the right of the appellants to claim compensation under paragraph (*c*) as amended one is entitled to exclude from consideration all measure of support due to the exertions of the appellants themselves.

This question should in my opinion be answered in the negative. An answer in the affirmative would necessarily, as it seems to me, rest upon some modification of the language which the legislature has selected to express its meaning.

The appeal should be dismissed without costs.

ANGLIN J.—I entirely agree with the construction placed by Mr. Justice Rivard, speaking for the Court of King's Bench, on the words "principal support" (*principal soutien*) in clause (*c*) of article 3 of the Workmen's Compensation Act as amended (9 George V, c. 69). With great respect for the learned judges who have expressed a contrary view, I can find no justification for excluding the personal earnings or other income of the ascendant when considering what constitutes his support. Where his subsistence and that of his dependents is chiefly derived from that source it cannot, in my opinion, properly be said that assistance from a descendant, though substantial and in excess of any other contribution from an outside source, forms his "principal support." In order to bring a case

within clause (*c*), other requirements being met, more than fifty per cent, of the subsistence of the claimant must have come from the deceased workman.

Counsel for the appellant urged that the evidence warrants such a finding of fact, or, if not, that a new trial should be granted to permit of further proof on that issue, inasmuch as counsel at the trial, relying on the decision of the Court of Review in *Lake Megantic Pulp Company* v. *Martin* (1), since confirmed on appeal, proceeded on the assumption that he was obliged only to show that the contribution made by the deceased workman to the plaintiff's support exceeded what he received from any other outside source. A very recent decision of the Court of King's Bench (Greenshields, Allard and Letourneau JJ.) in *Fraser-Brace Shipyard Limited* v. *Mercier,* not yet reported, fully supports that view.

The evidence sufficiently establishes the value of the contribution made by the deceased towards the support of his parents. In my opinion, however, it also makes it reasonably certain that that contribution fell considerably short of fifty per cent of the total cost of their subsistence. I am accordingly of the opinion that a new trial should not be granted.

Having regard to the marked conflict of judicial opinion in Quebec and to the fact that we are overruling the most recent pronouncement of the Court of King's Bench on the meaning of "principal support" in the *Fraser-Brace Case* above noted, we shall, I think, be justified, notwithstanding our general rule to the contrary, in relieving the appellant from payment of the respondent's costs of this appeal.

BRODEUR J.—Il se présente dans cette cause une question qui a donné lieu à beaucoup de divergence d'opinion dans la jurisprudence. Il s'agit de savoir la portée des mots "principal soutien" que nous trouvons dans la loi des accidents du travail, à l'article 7323 tel qu'amendé des Statuts Refondus de Québec.

Nous avons à décider si le père et la mère qui ont des moyens personnels et qui en retirent la plus grande partie de leur subsistance ont droit à une indemnité si leur fils

(1) [1921] Q.R. 50 S.C. 281.

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qui les aidait tout particulièrement est victime d'un accident qui a causé sa mort.

Les appelants soutiennent l'affirmative et citent au soutien de leur opinion: *Lake Megantic Pulp Co.* v. *Martel* (1); *Fraser-Brace Shipyards* v. *Mercier,* jugée en décembre dernier par la Cour du Banc du Roi.

L'intimée soutient la négative et nous réfère aux causes suivantes: *Lamontagne* v. *Quebec Railway Co.* (2); *Thomson* v. *Kearney* (3); *Price Bros.* v. *St. Louis* (4); *Montreal Public Service Corporation* v. *Picard* (5).

Il est assez important de noter que la cour de Banc du Roi, à quelques semaines de distance, ait rendu des décisions absolument contraires. Il est vrai qu'elle était différement constituée; mais tout de même cette divergence d'opinion constitue pour le justiciable un état d'incertitude peu enviable.

Ainsi dans la présente cause la cour du Banc du Roi siégeant à Québec et composée des honorables juges Martin, Dorion et Rivard décidait que l'on devait prendre en considération les ressources des ascendants pour déterminer si leur fils qui était décédé était leur principal soutien.

Dans la cause de *Fraser-Brace Shipyards* v. *Mercier* la même cour du Banc du Roi siégeant à Montréal et composée des honorables juges Greenshields, Allard et Létourneau décidait absolument le contraire quelques semaines plus tard.

Ces décisions absolument contradictoires devront nécessairement inciter tous ceux qui s'intéressent à la bonne administration de la justice, à étudier les remèdes qui doivent être apportés pour prévenir la répétition d'un tel état de choses.

Il est bon tout d'abord de remarquer que cette loi des accidents du travail est considérée dans les statuts refondus comme étant une matière en rapport avec le code civil; et on y indique formellement dans l'en-tête qu'elle a trait aux "dommages à la personne" qui se retrouvent dans les articles 1053 et suivants du code.

(1) Q.R. 60 S.C. 281.
(2) [1914] 50 Can. S.C.R. 423.
(3) [1915] Q.R. 25 K.B. 220.
(4) [1917] Q.R. 27 K.B. 174.
(5) [1917] Q.R. 27 K.B. 188.

Il est par conséquent désirable, en étudiant cette loi des accidents du travail, de ne pas perdre cela de vue.

Ces articles 1053 et suivants du code civil énoncent généralement que toute personne est responsable du dommage causé par sa faute, et à l'article 1056 on donne au père et à la mère un droit d'action en dommages contre celui qui aurait causé le décès de leur fils.

Pour réussir dans leur réclamation, le père et la mère devaient prouver la faute de celui qu'ils poursuivaient, et le tribunal leur accordait les dommages que le décès de la victime leur causait.

Mais cette faute était d'ordinaire bien difficile à établir et dans bien de cas le dommage causé n'était pas réparé, vu l'impossibilité où se trouvaient les demandeurs de prouver la faute ou la négligence du défendeur. Par contre si la faute était prouvée, le défendeur était condamné à payer des dommages très élevés.

Alors, après de longues et patientes recherches et après la nomination de commissions d'études, il a été décidé de créer ce que j'appellerai le risque professionnel en adoptant, en 1909, la loi des accidents du travail qui se trouve maintenant aux articles 7321 et suivants des statuts refondus. La responsabilité était créée dans certains cas sans que la victime fût obligée de prouver négligence. Mais, par contre, l'indemnité était fixée à l'avance suivant le salaire gagné. C'était un compromis bien désirable pour tous.

Dans cette loi, on a décrété que la femme et les enfants auraient droit à une indemnité dans le cas où le mari ou le père mourrait à la suite de l'accident et on les a désignés à peu près dans les mêmes termes que ceux portés dans l'article 1056 du code civil. Mais pour les ascendants on a agi un peu différemment. L'article 1056 les désignait généralement. Ainsi l'article disait:—

> Dans les cas où la partie contre qui le délit ou le quasi-délit a été commis décède en conséquence sans avoir obtenu indemnité ou satisfaction, son conjoint, ses *père, mère,* et enfants * * * ont droit de poursuivre celui qui en est l'auteur ou ses représentants pour les dommages-intérêts résultant de tel décès.

D'après les dispositions de cet article il avait d'abord été décidé que le conjoint, le père, la mère et les enfants avaient

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le droit d'obtenir une certaine somme d'argent par voie de consolation et de soulagement (*solatium*) *Labelle* v. *Cité de Montréal* (1); mais cette opinion fut plus tard renversée par la cour suprême; *Canadian Pacific Railway Co.* v. *Robinson* (2); *Jeannotte* v. *Couillard* (3). Les dommages que pouvaient alors réclamer le père et la mère devaient représenter la perte morale ou matérielle qu'ils éprouvaient par la mort de leur fils. *Tellier* v. *Cité de St. Henri* (4).

Tel était l'état de la jurisprudence lorsque la législature est intervenue et a adopté la loi des accidents du travail, et elle a décrété que le père et la mère ne pourraient réclamer en vertu de cette loi que lorsque le défunt était leur unique soutien.

En 1919, évidemment par suite des jugements qui avaient été rendus en 1917 dans les causes de *Montreal Public Service Corporation* v. *Picard* (2) et de *Price Brothers* v. *St. Louis* (6), la législature de Québec a remplacé les mots " unique soutien " par " principal soutien."

La législature n'a pas voulu maintenir la responsabilité générale qui existait en vertu de l'article 1056 du code; mais elle a simplement déclaré que les ascendants auraient droit à une indemnité dans le cas où leur fils serait leur principal soutien. S'il n'était pas leur principal soutien, alors les ascendants retombaient sous les dispositions de la loi commune qui leur permettaient de réclamer s'il y avait eu négligence de la part des défendeurs et s'ils avaient éprouvé des dommages. *Lamontagne* v. *Québec Railway* (7).

Cette différence dans le texte entre les dispositions du code civil et la loi des accidents du travail au sujet de la réclamation du père et de la mère démontre d'une manière bien claire l'intention du législateur. Il ne voulait donner évidemment un droit d'action au père et à la mère que dans le cas où leur fils serait leur unique ou leur principal soutien. Si toutefois le fils ne réunissait pas cette qualité, si les parents avaient des ressources en dehors du support que

(1) 7 M.L.R. 468.
(2) [1887] 14 Can. S.C.R. 105.
(3) [1894] Q.R. 3 Q.B. 461.
(4) [1901] 7 Rev. de Jur. 108.
(5) Q.R. 27 K.B. 188.
(6) Q.R. 27 K.B. 174.
(7) 50 Can. S.C.R. 423.

pouvait leur donner leur fils, je considère que dans ce cas le législateur a décrété que les ascendants n'avaient pas le droit d'action sous la loi des accidents du travail.

M. Robichon, dans son excellent plaidoyer, a insisté beaucoup sur le fait que cette interprétation allait priver les ascendants de tout recours s'ils se trouvaient dans le besoin.

C'est là une erreur. Les ascendants ont toujours leur recours en vertu de la loi commune, c'est à dire que s'ils peuvent établir la faute de la défenderesse et s'ils peuvent établir en même temps, comme ils l'ont fait d'ailleurs, que la perte de leur fils représente pour eux des dommages assez considérables, ils ne sont pas jetés sur le pavé, mais leur droit d'action en vertu de l'article 1056 n'a pas été aboli mais subsiste encore.

Pour ces raisons, je suis d'opinion que, les ressources personnelles que possédait l'ascendant étant suffisamment élevées pour constituer son principal revenu, il n'a pas droit de prendre une action sous la loi des accidents du travail.

L'appel doit être renvoyé, mais vu les décisions différentes en cour du Banc du Roi et vu qu'il était dans l'intérêt public de faire déterminer définitivement par cette cour l'interprétation de cette loi, je ne pourrai considérer l'appelant comme un plaideur téméraire et je ne le condamnerais pas aux frais.

MIGNAULT J.—Sous la loi des accidents du travail de Québec (art. 7321 et suiv. S.R.Q.) lorsque l'accident cause la mort de la victime, l'indemnité est payable aux personnes suivantes (art. 7323):

(*a*) au conjoint survivant, non divorcé ni séparé de corps au moment du décès, pourvu que l'accident ait eu lieu après le marriage.

(*b*) Aux enfants légitimes ou aux enfants naturels reconnus avant l'accident, de manière à aider à pourvoir à leurs besoins jusqu'à l'âge de seize ans révolus ou plus s'ils sont invalides.

(*c*) Aux ascendants dont le défunt était le principal soutien au moment de l'accident.

Il s'agit d'interpréter le paragraphe (*c*) qui, avant 1919, donnait une part d'indemnité aux ascendants dont le défunt était l'unique soutien. L'amendement de 1919 (9 Geo. V, ch. 69) remplaça l'expression "*l'unique*" par les mots "*le principal*" améliorant ainsi la condition de l'ascendant qui,

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avant 1919, n'avait droit à partager dans l'indemnité que lorsqu'il avait perdu, dans le défunt, son unique soutien.

La question d'interprétation des mots " le principal soutien," qui pour la première fois se pose devant cette cour, a divisé jusqu'ici les juges de la province de Québec. Le jugement de la cour supérieure dans cette cause a adopté l'interprétation de la cour de revision, dans *Lake Megantic Pulp Co. Ltd.* v. *Martel* (1), dont l'arrêt a été confirmé par la cour du Banc du Roi où siégeaient les honorables juges Guerin, Allard et Howard, ce dernier dissident. Et la même cour du Banc du Roi (Greenshields, Allard et Létourneau JJ.) a tout récemment interprété dans le même sens l'expression " le principal soutien " dans la cause de *Fraser-Brace Shipyards Ltd.* v. *Mercier,* non encore rapportée. Cela n'a pas empêché la cour du Banc du Roi, composée cette fois des honorables juges Martin, Dorion et Rivard, d'adopter la solution contraire dans la cause qui nous est maintenant déférée. Cette contrariété de jugements et surtout la circonstance assez extraordinaire qu'une même cour en arrive à des décisions diamétralement opposées démontrent bien l'importance de cette question d'interprétation et la nécessité qu'il y a de mettre un terme aux incertitudes de la jurisprudence par une décision qui ne donnera lieu à aucune équivoque. Et pour que notre jugement ait ce caractère décisif, j'ajoute qu'après une sérieuse étude de la question je concours pleinement dans le jugement que l'honorable juge Rivard a prononcé au nom de la cour d'appel dans la présente cause.

Si j'ajoute quelques observations à ce que je viens de dire c'est parce que je trouve, dans les jugements des honorables juges qui ont siégé dans la cause de *Fraser-Brace Shipyards* v. *Mercier,* et dont copie a été produite devant nous lors de l'audition de cette cause, une expression concise du raisonnement sur lequel s'appuie l'interprétation de l'article 7323 que je me trouve obligé de rejeter.

Ainsi l'honorable juge Greenshields dit:—

There were other descendants who contributed to respondents' support. The proof establishes that the deceased was able and did, as a matter of fact, contribute himself to supply the existing need of respondent. As is stated in the proof, he acted as the father of the family. Apart

(1) Q.R. 60 S.C. 281.

entirely from his monetary contributions, he aided in many ways of equal, if not greater, importance. Of all those who might be called upon to contribute to the support of respondent, he was the principal or chief. For that reason I have no hesitation in holding that he was respondent's principal support, within the meaning of the statute.

I wish to make my holding upon the point as clear as possible. In interpreting the meaning of the words "principal support" under the Act, we have not to make a comparison between the earnings of the ascendant claiming and the contribution made, in his lifetime, by a deceased. When it is established that the ascendant claiming is in need, the determination as to who is the 'principal support" must be made among those who are supporting or supplying that need, and in doing so the ascendant claiming is excluded from the number.

At the risk of repetition, I again say that if there are several who aid in supplying the need of an ascendant, the one who is best able to and does supply the greatest part or affords the greatest aid is, within the true construction of the statute, the "principal support."

L'honorable juge Allard se contente de renvoyer pour ses motifs à son jugement dans *Lake Megantic Pulp Co., Ltd.* v. *Martel* (1).

De son côté, l'honorable juge Létourneau exprime son opinion avec une grande précision dans le passage suivant:

Quand une fois il est admis qu'un ascendant est dans le besoin, et que, dans ce besoin, il est effectivement aidé par son fils, il faut dire que ce fils est un *soutien*; il sera le *principal*, si, de plusieurs qui aident alors, il est celui qui contribue le plus. En parlant de ces soutiens qui peuvent ainsi et à dégrés différents aider un ascendant, la loi n'a pu vouloir, sous ce titre, comprendre l'ascendant lui-même. Cette disposition de la loi suppose deux parties et la relation qui doit s'établir entre ces deux parties; l'ascendant pour recevoir, parce qu'il *ascendant;* les descendants pour être considérés comme les soutiens, et l'un deux, le "principal soutien."

Interpréter la loi comme le suggère l'appelante équivaudrait à dire que le "principal soutien" est celui qui fournit à l'ascendant la majeure partie de ses *ressources*.. Je ne puis croire que si le législateur eût ainsi voulu éveiller l'idée *de la chose*, au lieu de l'idée de quelqu'un qui devait la fournir, il n'eût pas trouvé une expression autre que celle qu'il a employée. Les mots "principal soutien" désignent quelqu'un plutôt que quelque chose, et sûrement, dans tous les cas, plutôt ceux qui donnent que ceux qui reçoivent.

Avec beaucoup de déférence, il m'est impossible d'adopter l'interprétation des honorables juges dont je viens de citer l'opinion. On remarquera que des trois catégories de personnes qu'énumère l'article 7323, le droit des deux premières, le conjoint survivant et les enfants de moins de seize ans ou invalides, est absolu, tandis que le droit des ascendants est conditionnel. Avant l'amendement de cet article la condition était que le défunt eût été *l'unique sou-*

(1) Q.R. 60 S.C. 281.

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tien de l'ascendant, ce qui supposait que l'ascendant dépendait entièrement des secours qu'il recevait du défunt. Depuis l'amendement, il suffit, et c'est la condition du droit de l'ascendant à une part de l'indemnité, que le défunt ait été le *principal* soutien de l'ascendant. Les honorable juges qui ont décidé la cause de *Fraser-Brace Shipyards, Ltd.* v. *Mercier* supposent que plusieurs personnes, y compris le défunt, ont contribué au soutien de l'ascendant et que la contribution du défunt était plus forte que celle des autres. Si telle était la pensée du législateur, comment appliquerait-on l'article 7323 au cas où l'ascendant n'aurait eu qu'un seul descendant ou contributaire ou un seul soutien? Car alors aucun concours de contributaires n'aurait existé et on ne pourrait dire, si on n'envisageait que celui qui apportait des secours à l'ascendant, que le défunt était son principal soutien. Mais si le législateur, comme je le crois, a égard aux moyens de subsistance de l'ascendant—et il est naturel de s'occuper de ces moyens ou de la chose, pour employer l'expression de l'honorable juge Létourneau, afin que l'ascendant ne soit pas laissé dans le dénûment—le défunt aura été le principal soutien de l'ascendant s'il lui avait fourni la majeure partie de ses moyens de subsistance. Avec cette interprétation on peut dire que la pensée du législateur porte tant sur la chose que sur les personnes qui fournissent cette chose, et notre article s'applique que l'ascendant ait eu un seul ou plusieurs soutiens. Dire donc que le défunt était le principal soutien de l'ascendant c'est dire que celui-ci était principalement soutenu par le défunt. Pour cette raison, il me paraît impossible de faire abstraction des ressources de l'ascendant, et toute la question est de savoir si le défunt fournissait à l'ascendant la principale partie de ces ressources, et si oui, il en aura été le principal soutien.

Je crois donc que la décision dans *Fraser-Brace Shipyards* v. *Mercier* n'a pas donné aux mots "le principal soutien" leur véritable sens. Pour la même raison, tant sur le fait que le droit, je suis d'avis que le jugement dont est appel est bien fondé.

Je renverrais l'appel, mais vu l'incertitude qui a régné sur cette question d'interprétation, je ne voudrais pas punir

l'appelant d'avoir porté cette cause devant nous, ce qui d'ailleurs était d'intérêt général pour mettre un terme à un conflit de jurisprudence. Je n'accorderais donc aucuns frais à l'intimé contre l'appelant devant cette cour.

Appeal dismissed without costs.

Solicitors for the appellants: *Robichon & Methot.*

Solicitors for the respondent: *De Witt & Howard.*

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*Feb. 15.
*May 1.

ROBERT HOOD AND OTHERS (PLAINTIFFS) . APPELLANTS;

AND

A. C. CALDWELL AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Action—Laches—Acquiescence—Company—Purchase from promoters—Consideration—Payment for services—Resolution of directors.

An action was brought by individual shareholders against a joint stock company and its president for recission of an agreement to purchase the assets of the business formerly carried on by the president (promoter), worth some $1,500, for 500 shares of the common stock (par value $50,000) of which 200 were to be held in trust and given to purchasers of the preferred; also to have struck from the minutes a resolution of the board of directors providing payments to the president for future services as manager and a return of the money received by him pursuant to said resolution.

Held, affirming the judgment of the Appellate Division (50 Ont. L.R. 387) Duff and Brodeur JJ. dissenting as to the first-mentioned cause of action, that whether or not the proceedings of the company are open to attack no fraud was proved and the plaintiffs are debarred, by laches and acquiescence in all that was done for several years, from maintaining the action.

Per Duff J.—It is clear that the 500 shares were alloted to the vendors of the assets at a discount and the allotment was *ultra vires*. The agreement should, therefore, be set aside.

Per Anglin J.—The appellants, suing as individuals, cannot have such allotment set aside. *Fullerton* v. *Crawford* (50 Can. S.C.R. 1314) referred to.

Held also, Anglin and Mignault JJ. dissenting, that the respondents should not be given the costs of this appeal or of any proceedings below.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the defendants.

The material facts are stated in the head-note.

Woods K.C. and *Counsell K.C.* for the appellants. Acquiescence is not a bar to shareholders not fully aware of the matters complained of; *Denman* v. *Clover Bar Coal Co.* (2) at pages 326 and 329; nor in delay prior to discovery of fraud. *Farrel* v. *Manchester* (3).

McClemont for the respondents.

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

(1) 50 Ont. L.R. 387. (2) 48 Can. S.C.R. 318.
(3) 40 Can. S.C.R. 339.

THE CHIEF JUSTICE.—On the ground solely that the plaintiffs in this case had by their laches and acquiescence debarred themselves from the relief prayed for in this action, as found by the trial judge and confirmed by a majority of the Court of Appeal, I am of the opinion that this appeal should be dismissed, but without costs of appeal here, or in the trial court, or in the Divisional Court of Appeal, as on the merits apart from the acquiescence I would have allowed the appeal. In his judgment the trial judge stated that in his opinion the action was not one in which costs should be allowed.

DUFF J. (dissenting).—I concur in the view of Mr. Justice Ferguson that the agreement of the 8th March, 1912, by which the company professed to purchase the good will and assets of the Caldwell Company for five hundred fully paid-up shares, was *ultra vires*. I concur in his view that under the Ontario Act it is beyond the power of a company to allot fully paid-up shares at a discount. This, of course, does not necessarily mean that shares must be paid for to the amount of their nominal value in actual cash. It was long ago settled that shares might validly be paid for in "meal or malt," and where there is a real agreement by which the company agrees to accept in exchange for shares property which is treated as having a value equivalent to the amount of the shares, and where this agreement is made in circumstances in which the transaction itself is presumptive evidence of the value of the consideration, then the court will not inquire into that value, and the transaction is unimpeachable on the ground solely that the consideration appears to be inadequate.

But it does not follow that in no case will the court set aside an agreement on the ground that it is a virtual attempt to sell its shares at a discount. If it is established by the circumstances that the agreement is a mere sham—a mere façade to hide the real object of the donee of the shares and of the persons representing the company to do an *ultra vires* act, namely, to allot shares as fully paid-up which have not been paid for at all, or only paid for in part—then the court will treat the transaction in law as being

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what it is in fact. In *In re Wragge* (1) Vaughan Williams L.J. points out that in such circumstances the court will not limit itself to the question whether or not there is "no consideration whatever," but with regard either to the whole of the consideration or to any part of it will give effect to its conclusion that the whole or the part is a sham; that in respect to the whole or part "the transaction is a colourable one." As Lord Watson said, in *Ooregum* v. *Roper* (2):

> The court would doubtless refuse effect to a colourable transaction entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount.

The judgment of Lindley L.J. in *In re Wragge* (1) at pages 830-2, is to the same effect.

Now the case under consideration was one of those cases which have often been before the courts, such, for example, as *Erlanger* v. *New Sombrero* (3), in which promoters who own property get up a company to take the property and allot qualifying shares to themselves and nominees who are entirely under their control and appoint a board of directors entirely under their control, and then go through the form of an agreement between themselves and the company, taking the share capital of the company in consideration of the transfer of the property. In the economic sense, such a transaction is not a sale. It is not a transaction having any significance whatever as to the value of the property transferred. The price is fixed by the fiat of the vendors, and therefore the considerations which have led the courts to hold that where there is a real sale entered into between promoters and persons acting independently of them for the company, the price paid in shares is presumptive evidence of the value of the property which, in the absence of fraud or some kind of unfair dealing, the courts will not go behind, have no sort of application whatever. If in such circumstances it is made plain that the so-called consideration is merely nominal or patently derisory, I think the court should not be slow to draw the proper conclusion and to press that conclusion to its logical result.

(1) [1897] 1 Ch. 796 at 814. (2) [1892] A.C. 125, at page 136.
(3) 3 App. Cas. 1218, at page 1286.

I will not review the facts which have been fully reviewed in the judgments below, but I have no hesitation in concluding that the agreement had to use Lord Watson's language,

> the obvious result of enabling the company to issue its shares at a discount;

and moreover that it was entered into for that purpose and that it comes within the class of " colourable transactions " to which the court ought not to give effect.

What, then, should be the result? The agreement is one to which effect should not be given, and I agree with Ferguson J., that in the circumstances the allotment must be set aside, subject, however, to this qualification; the persons who acquired these shares subsequently, whether by purchase from Caldwell and Nicholson or as bonus shares, may have acquired them in such circumstances that the company, on the principle of *Burkinshaw* v. *Nicolls* (1); *Parberry's Case* (2); *Bloomenthal* v. *Ford* (3); is estopped from denying that the shares were fully paid-up and consequently that the allotment was lawful.

The next question which arises concerns the moneys received by Caldwell under his agreement of the 4th May, 1915. The general principle of law is that directors being trustees of their powers for the shareholders are incapacitated from retaining as against the company any profit arising from a contract made between themselves and the body of directors of which they are members, unless the company knows and assents. *Imperial Mercantile Credit Association* v. *Coleman* (4); *James* v. *Eve* (5), *Gluckstein* v. *Barnes* (6); *Boston Deep Sea Fishing Company* v. *Ansell* (7); *Fullerton* v. *Crawford* (8). The only provision of the Ontario Companies Act which appear in any way to affect this principle is section 92, which provides that no by-law for the payment of the president or any director shall be valid or acted upon unless passed at a general meeting or, if passed by the directors, until the same has been confirmed at a general meeting. This provision is negatively

(1) 2 App. Cas. 1004.
(2) [1896] 1 Ch. 100.
(3) [1897] A.C. 156.
(4) [1871] 6 Ch. App. 558, at page 566.
(5) L.R. 6 H.L. 335, at page 348.
(6) [1900] A.C. 240.
(7) 39 Ch. D. 339.
(8) [1919] 59 Can. S.C.R. 314. at page 330.

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expressed, but it no doubt implies authority in the shareholders and directors to pass a by-law having the object and effect indicated, provided the prescribed procedure is followed. It may be open to question, I think, whether or not this enactment does authorize such a by-law as by-law 15, which extends to profits made by any director in connection with any contracts made between him and the company. Assuming the arrangements of the 4th May, 1915, to come within section 92, then my conclusion is that the conditions of that section have not been fulfilled. By-law 15 professes to delegate to the directors the duty of exercising the authority reposed in the shareholders by section 92. I mean that by-law 15 does not in itself authorize the payment of the president or any director. It is not a "by-law for" such payment. In passing it the shareholders cannot be held either to have passed such a by-law or to have confirmed such a by-law; they have merely professed to delegate to the directors the authority to act in a certain way.

On the other hand if the arrangement falls outside of section 92, the question arises whether this by-law constitutes a sufficient assent by the company to the retention by a director of profits received from a contract made between himself and the company through the agency of the directors alone. That is a point which would, I think, require a somewhat careful examination of the provisions of the Ontario Companies Act respecting the authority of shareholders in ordinary general meetings; and without suggesting that the by-law was not competently enacted at the meeting of the 8th April, 1912, I prefer to express no opinion upon the point, in the absence of any argument upon it.

It is unnecessary to say more as to the validity of the arrangement of the 4th of May, 1915, because I am convinced that the view which was taken by the learned trial judge and by the majority of the judges of the Court of Appeal that there was, in fact, such acquiescence in the arrangement made by the directors with Caldwell as to amount to an assent by the company to that arrangement, is a view which has so much support in the evidence that

it would be quite out of the question for this court to decline to act upon it.

An observation is necessary upon the head-note in *Fullerton* v. *Crawford* (1). It is made to appear thereby that the court held that the payment to Doran in respect of commission was a lawful payment, and it is made also to appear that this court affirmed certain Ontario decisions as concerns section 92 of the Ontario Companies Act. In point of fact, of the three members of the court who expressed an opinion as to the legality of the payment to Doran, two, the Chief Justice and myself, held it to be wrongful and recoverable back. Two members of the court, Mr. Justice Idington and Mr. Justice Brodeur, held that Crawford was disentitled by his conduct to impeach the validity of the arrangement with Doran and expressed no opinion upon the point aforementioned, upon which the head-note represents the court as giving a decision.

ANGLIN J.—Two distinct claims are made in this action, first, the setting aside of an agreement whereby the defendants Caldwell and Nicholson (The Caldwell Orchard Company) sold their business to their co-defendant, The Wentworth Orchard Company, of which they were promoters, for the entire common stock of that company, having a par value of $50,000, and secondly, the repayment by the defendant Caldwell to the Wentworth Orchard Company of $18,700, paid to him as compensation for services as its manager.

On both branches of the case the learned trial judge found the plaintiffs debarred from relief by laches and acquiescence, and in that conclusion, affirmed by a majority of the learned Appellate judges, I agree, and would consequently dismiss this appeal with costs.

As to the claim for repayment by Caldwell, the trial judge, in my opinion, properly found that the resolution providing for his remuneration as manager was passed by the directors. I agree with the learned Chief Justice of Ontario, and Magee and Ferguson JJ.A. that the by-law of the 8th April, 1912, confirmed by the shareholders, was a sufficient compliance with section 92 of the Ontario Com-

(1) 59 Can. S.C.R. 314.

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panies' Act, if indeed that provision applies to services not rendered *qua* president or director and usually performed by a salaried employee. I had occasion to discuss this aspect of the matter in *Fullerton* v. *Crawford* (1). I also agree that a repetition of the directors' resolution in each subsequent year was not necessary. The company would appear to have had in the increased volume of its business and the maintenance of its profit-earning character, at least a fair return for this expenditure. There is no suggestion of fraud or impropriety connected with it. This branch of the appeal, in my opinion, fails.

I am disposed to agree with most of what has been said by Mr. Justice Hodgins and Mr. Justice Ferguson in criticising the inadequacy of the consideration for the allotment to the defendants Caldwell and Nicholson of the 500 shares of common stock received by them. But whether or not the company or its creditors may be entitled to some other relief in respect of the allotment of this $50,000 of stock, rescission in this action of the agreement under which Caldwell and Nicholson acquired that stock is, I think, not possible. There is no suggestion that the business taken over should be restored to its vendors. On the contrary, the plaintiffs, who are at present a minority of the shareholders of the company, seek to have Caldwell's and Nicholson's holdings wiped out so that as holders of the preference stock thus left in a majority they may themselves control the company and the business which it acquired from Caldwell and Nicholson. They offer to relinquish a small amount of common stock received by them from Caldwell and Nicholson as a bonus on the acquisition of their preference shares, but they make no offer to repay dividends received on that stock. They sue as individual shareholders. They do not claim on behalf of the company or of all its shareholders other than the two individual defendants.

The appeal on this branch, in my opinion, also fails.

BRODEUR J. (dissenting).—The present action is instituted by the shareholders of a company for the purpose of setting aside the purchase of the business of Caldwell &

(1) 59 Can. S.C.R. 314, at pages 346-7.

Nicholson, and for the repayment by Caldwell of $18,700 given to him as manager without the sanction of the shareholders. It was dismissed by the courts below.

It is pretty evident to me that Caldwell & Nicholson conceived the idea of forming a joint stock company to take over a dying business which had no value, to keep the control of this company without putting in money and to induce some inexperienced people to subscribe stock in that enterprise. It is a fraudulent venture which was *ultra vires*.

Caldwell and Nicholson, who were in control of the new company, voted to themselves 50,000 of common stock for the price of a few barrels and ladders which had practically no value.

I entirely agree with the view expressed by Mr. Justice Ferguson in the dissenting opinion which he gave in the Appellate Division, and I could not add anything to what he said. For the reasons he gave, I would allow this appeal with costs of this court and of the courts below.

MIGNAULT J.—For the reasons stated by the learned Chief Justice of Ontario, in which I express my respectful concurrence, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bruce & Counsell.*
Solicitors for the respondents: *McClemont & Dynes.*

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*Feb. 22, 23.
*May 1.

THE CORPORATION OF THE CITY OF THREE RIVERS (DEFENDANT)... } APPELLANT;

AND

THE SUN TRUST COMPANY, LIMITED (PLAINTIFF) ..... } RESPONDENT.

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

Suretyship—Bond issue—Acceleration clause—Default by principal debtor —Liability of guarantor—Art. 1092, 1935 CC.

The city appellant, authorized by by-law to guarantee and indorse a bond issue of $100,000 to be put out by the Three Rivers Shipyards, Limited, entered into a trust deed in favour of the respondent as trustee for the bondholders. The bonds were made redeemable and payable in annual instalments on the 1st September from 1919 to 1927, the first to be $12,000 and the others $11,000 each, bearing interest payable semi-annually. They were so described in the by-law. By clause 8 of the trust deed, it was stipulated that the total amount of the bond issue then remaining unpaid and interest thereon would become immediately exigible, at the option of the trustee, upon default by the Three Rivers Shipyards Company to pay the bonds or the interest coupons at their respective dates of maturity ("à leurs échéances respectives"). Such default also gave the right to the trustee, under clause 9, to enter into possession of the properties, rights, revenues and franchises of the company and it was further stipulated that the city might prevent the operation of that clause by itself paying the bonds or interest coupons due. By clause 18, which contained the terms of the guarantee given by the city, upon failure by the company to perform the conditions, charges and obligations imposed on it by the trust deed, the city obliged itself to pay the bonds and the interest coupons at their respective dates of maturity ("à leurs échéances respectives"). Clause 19 also created in favour of the city a hypothec upon the lands and a charge upon the movables of the company for the total amount of the debenture issue, which were made exigible upon default of payment of interest. The first instalment of $12,000 and the interest due on the 1st of March, 1920, was paid by the Three Rivers Shipyards, Limited, but the company made default in the instalment of $11,000 due on the 1st of September, 1920, and also in the interest then due on the unredeemed bonds. The respondent then sued the city for the whole amount of the unredeemed bonds and the interest due.

Held, Anglin and Mignault JJ. dissenting, that the respondent, in view of the default of the Three Rivers Shipyards, Limited, had the right to claim from the city immediate payment of the whole capital amount outstanding of the bond issue, with the interest then due, as the acceleration clause 8, stipulated against the company as principal debtor, was binding also on the city, its surety.

Per Anglin and Mignault JJ. dissenting.—The obligation of the city was merely to pay the bonds and interest coupons at their respective dates of maturity ("à leurs échéances respectives").

Judgment of the Court of King's Bench (Q.R. 34 K.B. 351) affirmed, Anglin and Mignault JJ. dissenting.

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

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, district of Three Rivers, Duplessis J. and maintaining the respondent's action.

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

Lafleur K.C. for the appellant.—Under article 1935 C.C., suretyship is not presumed; it must be expressed and cannot be extended beyond the limits within which it is contracted. The extent of the guarantee given by the city is clearly set forth in the terms of clause 18 of the trust deed taken in conjunction with the terms of the by-law.

The words "respective due dates" can only be applied to each date in so far as the city is concerned. This interpretation is made still clearer by the terms of clause 9 of the trust deed.

Fortin K.C. and *Perron K.C.* for the respondent.—The city appellant is bound toward the respondent in exactly the same manner as the Three Rivers Shipyards, Limited.

The appellant is more than a surety or guarantor, it is an indorser.

The meaning of the words "à leurs échéances respectives" is when the bonds become due and exigible for any cause whatsoever.

IDINGTON J.—For the several reasons assigned by the learned trial judge and respectively assigned by the majority of the learned judges in the Court of King's Bench in support of the judgment herein appealed from I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—I have reached the same conclusion as the Court of King's Bench. The obligation under article 18 is

à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux (détenteurs des obligations) et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

Articles 8 and 19 set forth some of the most important of these conditions, article 8 being the ordinary accelera-

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tion clause making the principal exigible on non-payment of interest; and article 19 among other things creates in favour of the municipality a hypotheque upon the lands and a charge upon the movables of the debtor for the total amount of the debenture issue ($100,000), which is also made exigible upon such default.

The natural reading of the words "à leurs échéances respectives" construed in the light of these cognate provisions seems to me to be that which the court below has given them. It is upon failure of the debtor to fulfil the conditions of the agreement, that the municipality guarantees payment of principal and interest at "leurs échéances respectives"; and on the default which happened, which brought the guarantee into operation, the principal by the terms of article 8 was not only to become due, and did become due to the creditor, but under article 19 the payment of it was to become and did become enforceable at the instance of the guarantor. The instrument provides for acceleration not only in favour of the creditor, but in favour of the guarantor also.

Consider the effect of the construction advanced by the appellants. The guarantor may, on default in respect of interest, enforce his hypothec for the principal in the usual way by obtaining judgment and proceeding to execution while under that construction he all the while is under no personal obligation to pay until the date of maturity named in the debentures. It seems a more convincing reading of the instrument to regard the right of the surety under the conditions making the municipality's hypothec enforceable upon default in respect of interest as the natural correlative of its responsibility for payment of the principal in accordance with the terms of article 8.

The appeal should be dismissed with costs.

ANGLIN J. (dissenting).—Although the weight of modern French opinion may be to the contrary (vide 13 Baudry-Lacantinerie, 1040; 2 Planiol, 2339), on the authority of Pothier (Obligations, nos. 371 and 404) I shall assume that, unless relieved by the terms of the contractual provision evidencing its character and extent (clause 18), the obligation of the appellant would be, upon default of the

principal debtor, to meet whatever liability it had undertaken, including that of payment in full before maturity, consequent upon such default. I therefore proceed at once to consider the meaning and effect of clause 18 of the contract, having in mind that, while the obligation of a surety cannot exceed, it may fall short of, and be subject to conditions less onerous than, that of the principal debtor. Article 1933 C.C.

Under clause 18 the liability of the surety arises only upon the principal debtor making default in carrying out the terms of its contract. Clause 8 of the contract upon such default occurring renders the whole debt then remaining unpaid and interest thereon immediately exigible from the principal debtor, if the trustee should deem it advisable to demand it. Yet, although the debt should thus become payable by the principal debtor in one sum and immediately, the consequent liability undertaken by the surety is expressed in clause 18 as follows:

à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

In other words, although the principal debtor (*inter alia*) on his making default in payment, is penalized by losing the privilege of deferring payment of the bonds and interest coupons until their respective dates of maturity (the term), the surety contracts that on such default occurring it will make payment of the bonds and interest coupons, not at once and *en bloc,* but only at the respective dates on which they fall due (à leurs échéances respectives). I cannot reconcile this explicit provision of the contract with an obligation of the surety to pay in one sum and immediately on demand of the trustee, the whole debt, both principal and interest; nor does it seem proper to give to the phrase, "*à leurs échéances respectives,*" one meaning in clauses 8 and 9 and another and a different meaning in clause 18, especially if to do so might extend the burden of the surety "beyond the limits within which it was contracted." (Article 1935 C.C.)

The contractual acceleration clause, applying as it does to breach of any condition or obligation to which the principal debtor is subject under the terms of the trust deed, is much more onerous than the stipulation for forfeiture

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of term (acceleration) which article 1092 C.C. would import. Indeed it would seem that the obligation of the surety was explicitly restricted as it is by clause 18 to payment of the bonds and interest coupons at their respective due dates, notwithstanding the consequence of acceleration which the contract provided that default should entail upon the principal debtor, in order to make it clear that the surety should not be subject either to the forfeiture of term imposed by article 1092 C.C. or to the more onerous provision for the like forfeiture accepted by the principal debtor in clause 8 of the contract and to which, as surety *in omnem causam,* a general or indefinite guarantee might have exposed it. Pothier, Obligations, no. 404.

Nothing in the indorsement of the bonds imposes any greater obligation than that evidenced by clause 18 of the trust deed, since by the indorsement itself the trust deed is declared to be the governing instrument.

On the other hand measuring the obligation of the city by the terms of the by-law no. 335—the sole authority for its assumption—its liability is restricted to guaranteeing payment of debentures,

dont le terme de remboursement sera par séries de deux à dix ans de la date où la cité donnera cette garantie,

with interest payable semi-annually. There is nothing whatever in the by-law to authorize subjecting the city to the penalty of the acceleration clause which the plaintiffs seek to impose upon it as surety because the debtor accepted it for itself. The contract evidenced by clause 18 of the trust deed should be construed in the light of the by-law under the authority of which it was executed by the civic officials. Whatever might be said of their right to commit the city as surety to an obligation or guarantee of an indebtedness left subject to the application of article 1092 C.C., there could be no justification for their committing it to an undertaking involving the wider acceleration provision embodied in clause 8 of the trust deed. It is a reasonable inference from the terms of clause 18 that it was inserted to preclude any contention that the city was so bound. The terms of the by-law therefore afford a strong argument for giving to clause 18 the construction above indicated.

I would for these reasons allow this appeal with costs here and in the Court of King's Bench and would reduce the judgment against the defendant to a sum equal to the amount of the bonds and interest coupons which had, according to their respective dates of maturity, fallen due before this action was begun, with interest thereon up to that time. The plaintiff should have its costs down to and inclusive of judgment in the Superior Court.

BRODEUR J.—La principale question qui nous a été soumise est de savoir si la déchéance du terme qui a frappé le débiteur principal s'étend à la caution.

La compagnie " The Three Rivers Shipyards, Limited," a, en vertu d'un acte de fiducie en date du 22 septembre 1917, émis des obligations au montant de $100,000 qui étaient payables comme suit: $12,000 en 1919 et ensuite $11,000 par année jusqu'en 1927 avec intérêts.

Il était en outre stipulé à l'articlé 8 de cet acte que, si la fiduciaire, la compagnie Sun Trust, le jugeait convenable, le montant total de l'émission ou telle partie d'icelle restant alors due deviendrait exigible dans aucun des cas suivants:

(*a*) Si la compagnie ne paie pas les obligations ou les coupons d'intérêts à leurs échéances respectives.

(*b*) Si la garantie présentement donnée est diminuée pour aucune cause ou raison quelconque.

(*c*) Si aucune des conditions et obligations auxquelles la compagnie peut être tenue par les présentes ne sont pas rigoureusement remplies.

La cité de Trois-Rivières a dans le même acte, par la clause 18, cautionné dans les termes suivants:

18. Et pour assurer plus amplement le paiement des dites obligations et de leurs coupons d'intérêts, la ville déclare par les présentes garantir le paiement des obligations émises par la compagnie comme susdit jusqu'à concurrence de la somme globale de cent mille piastres ($100,000) en principal avec en plus les intérêts, la ville s'obligeant vis-à-vis du fiduciaire pour le compte et le bénéfice des détenteurs de ces obligations et de ces coupons, à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

La compagnie " The Three Rivers Shipyards, Limited," n'a pu en 1920 payer les intérêts et le capital alors dus et elle a été mise en liquidation.

La fiduciaire, la compagnie intimée The Sun Trust, poursuit la cité de Trois-Rivières pour réclamer le paiement de la somme totale qui est due en vertu des obligations. La

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cité plaide que la fiduciaire est incompétente pour exercer cette action et que la déchéance du terme que le débiteur principal a encourue ne saurait l'affecter comme caution.

Nous allons d'abord examiner ce dernier point.

Qu'est-ce qu'un cautionnement? C'est un contrat par lequel quelqu'un s'oblige pour un débiteur envers le créancier à lui payer ce que ce débiteur lui doit en accédant à son obligation.

Dans le cas actuel, la compagnie Three Rivers Shipyards s'est obligée de payer $100,000 par versements annuels de 1919 à 1927; mais il est stipulé dans l'acte que si elle fait défaut d'effectuer ces versements ou si elle diminue ses garanties, alors le créancier a droit de se faire payer en entier et le débiteur principal perd le bénéfice du terme qui a été stipulé.

La cité de Trois-Rivières cautionne les obligations du débiteur principal. Quelle est l'étendue de ce cautionnement? Pothier, qui est toujours un guide bien sûr dans l'étude de questions comme celle-ci, nous dit au n° 371 de son admirable Traité des Obligations que

si le cautionnement n'exprime rien, on y doit sous-entendre le terme ou la condition exprimées dans l'obligation principale.

Il exprime la même opinion avec encore plus de force au no. 404 du même traité quand il dit:

Lorsque les termes du cautionnement sont généraux et indéfinis, le fidéjusseur *est censé s'être obligé à toutes les obligations* du principal débiteur résultantes du contrat auquel il a accédé; il est censé l'avoir cautionné *in omnem causam.*

Voilà qui est clair et bien précis; la caution doit remplir toutes les obligations du débiteur principal *in omnem causam,* suivant les termes et les conditions du contrat originaire.

Tout le monde admet que la Three Rivers Shipyards, Limited, doit maintenant la balance de ses obligations sous les dispositions de la clause 8ème du contrat. En est-il de même de sa caution, la cité de Trois-Rivières? En principe général, il n'y a pas de doute, car la caution assume toutes les obligations du débiteur principal. Mais on dit: "La cité ne s'est pas obligée au même dégré que le débiteur principal et la déchéance du terme originairement stipulé que le débiteur principal avait acceptée ne frappe pas la caution." La caution aurait certainement pu for-

mellement déclarer que cette déchéance ne la lierait pas. Mais elle ne l'a pas fait. Les mots " échéances respectives " sur lesquels elle se base à l'appui de sa prétention couvrent non-seulement les échéances originairement stipulées, mais aussi l'échéance globale et conditionnelle qui est mentionnée dans le contrat, si le débiteur principal fait défaut dans l'exécution de ses obligation.

Pour soustraire la caution à l'accomplissement de toutes les stipulations de la convention principale, il aurait fallu une disposition plus formelle et plus explicite que celle qui est invoquée.

On a cité à ce sujet l'opinion d'auteurs modernes, comme Demolombe, Guillouard, Planiol, Duranton et Pardessus, et un jugement de la cour de Cassation, 1891-1-5, à l'appui de la thèse soutenue par l'appelante que si le débiteur principal est en faillite et qu'il soit à cause de cela déchu du bénéfice du terme, cette déchéance ne rejaillit pas sur la caution.

Mais il ne faut pas oublier que ces auteurs ont écrit sous un système de droit contenant une disposition spéciale dans le Code de Commerce qui a nécessairement influé sur leur décision. Cette opinion est d'ailleurs combattue et victorieusement suivant moi, par d'autres auteurs modernes dont les écrits font grande autorité, savoir: Aubry & Rau, tôme 4, art. 303, note 18; Laurent, vol. 17, n° 213; Huc, vol. 7, n° 289; Larombière, art. 1188.

Ne vaut-il pas mieux suivre l'opinion exprimée par Pothier et que j'ai citée plus haut? Il écrivait sous le droit coutumier. Il n'y avait pas alors dans le droit français cette disposition du Code de Commerce. Pothier était sous ce rapport dans la même position que nous sommes dans Québec.

Il est bon de remarquer aussi que ce point ne paraît n'avoir été soulevé qu'en Cour du Banc du Roi.

Pour toutes ces raisons, le jugement qui a déclaré que la cité de Trois-Rivières était obligée de payer maintenant le montant global des obligations est bien fondé.

On a aussi prétendu que la fiduciaire n'avait pas droit de poursuite. Les cours inférieures ont été unanimes sur ce point, et il n'a pas été discuté devant cette cour. Je

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vois d'ailleurs que la cause de *Porteous* v. *Reynar* (1), a formellement décidé que l'article du code qu'on a invoqué ne s'applique pas aux fiduciaires

in whom the subject of the trust has been vested in property and possession for the benefit of third parties and who have duties to perform in the protection or realization of the trust estate.

L'appel devrait être renvoyé avec dépens.

MIGNAULT J. (dissenting).—The whole question here is whether under the contract whereby the appellant guaranteed in favour of the respondent the ten-year bond issue of The Three Rivers Shipyards Limited, the respondent can, in view of the default of the latter company, claim from the appellant the immediate payment of the whole capital amount outstanding of the said bond issue? In other words, is the acceleration clause stipulated by the respondent against The Three Rivers Shipyards, Limited, in case of the default of the latter, binding on the appellant, its surety?

This acceleration clause (clause 8 of the contract) is as follows:

Nonobstant le terme accordé pour le paiement de chacune des obligations, le montant total de la dite émission de cent mille piastres ($100,000) ou telle partie d'icelle restant alors due, deviendra exigible, si le fiduciaire le juge convenable, dans aucun des cas suivants, savoir:

(*a*) Si la compagnie ne paie pas les obligations ou les coupons d'intérêts à leurs échéances respectives.

(*b*) Si la garantie présentement donnée est diminuée par aucune cause ou raison quelconque.

(*c*) Si aucune des conditions et obligations auxquelles la compagnie peut être tenue par les présentes ne sont pas rigoureusement remplies.

The default of the company to pay the bonds and interest coupons " à leurs échéances respectives " also gives the right to the trustee (respondent), under clause 9 of the contract, to enter into possession of the properties, rights, revenues and franchises of the company, after 30 days' notice to the company and to the city, and it is stipulated that the city

pourra alors éviter l'effet de cette clause en effectuant le paiement des obligations ou coupons échus.

I desire to note, before going further, that the words " à leurs échéances respectives " which are found in clauses 8 and 9, undoubtedly refer to the date of maturity mentioned

(1) [1887] 13 App. Cas. 120.

in each bond and in each interest coupon, and not to any acceleration of such date of maturity. And it is significant that the city can prevent the entry into possession of the trustee on the default of the company by paying only the overdue bonds or interest coupons.

The obligation of the city appellant to guarantee the bond issue is expressed as follows in clause 18 of the contract:

Et pour assurer plus amplement le paiement des dites obligations et de leurs coupons d'intérêts, la ville déclare par les présentes garantir le paiement des obligations émises par la compagnie comme susdit jusqu'à concurrence de la somme globale de cent mille piastres ($100,000) en principal avec en plus les intérêts, la ville s'obligeant vis-à-vis du fiduciaire pour le compte et le bénéfice des détenteurs de ces obligations et de ces coupons, à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

This obligation of the appellant is subsidiary to that of the company, arising only on the default of the latter to fulfil the conditions, charges and obligations to which it is held towards the bondholders, and is to pay the bonds and interest coupons "à leurs échéances respectives."

Here again, as in clauses 8 and 9, the words "à leurs échéances respectives" refer in my opinion to the date of maturity mentioned in each bond and in each interest coupon, and not to any accelerated maturity of the same. It is very important to note that the parties in clause 18 contemplate the default of the company referred to in clause 8, and that in that event the obligation of the city, on the contract of suretyship, is only to pay the bonds and coupons at their respective dates of maturity.

I merely mention clause 21 relied on by the respondent to show that I have not overlooked it. It declares the obligation of the city absolute towards the bondholders, notwithstanding certain conditions stipulated by it with regard to the company, but this obligation of the city is that created by clause 18 which I have cited.

On the construction of the contract, my opinion is therefore that the default of the company to pay the bonds and interest coupons at their maturity, while it renders the whole capital amount due as regards the company, only makes the city liable to pay the bonds and interest coupons as they respectively mature.

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Mignault J.

Mr. Fortin on behalf of the respondent cited Pothier, Obligations, no. 371, paragraph 2, where he says:—

Observez que si le cautionnement n'exprime rien, on y doit sous-entendre le terme ou la condition exprimée dans l'obligation principale, de même qu'il est décidé en la loi, 61 ff. eod. tit. que le lieu du paiement exprimé dans l'obligation principale, est sous-entendu dans le cautionnement.

And the contention was that if the suretyship deed be silent or even equivocal as to the term within which the surety must pay, this term must be held to be the same as that applicable to the principal debtor.

The argument would be well worthy of consideration were the contract in question silent or even equivocal as to the term of payment applicable to the surety, or in Pothier's words, *si le cautionnement n'exprimait rien.* But, on the contrary, clause 18 is very clear, and I do not see how the intention of the city to be liable for the bonds and coupons only when they respectively mature, could be better expressed.

I have referred only to the contract, for I regard the question at issue as involving merely the proper construction of the instrument signed by the parties. It is therefore useless to mention any article of the civil code, such as Art. 1092, which, according to weighty modern French authorities, and some decisions of our courts (see Beauchamp, *Code Civil Annoté,* article 1092, no. 12), does not apply to the surety. The parties here have made their own contract and determined the effect of the debtor's default on the obligation of the surety. There remains nothing to do but to give effect to their expressed intention.

I would allow the appeal with costs against the respondent here and in the appellate court. There should be judgment for the respondent against the appellant only for the bonds and coupons which had reached their respective dates of maturity when this action was taken. The appellant should pay the respondents' costs in the Superior Court, for it wrongly asked for the entire dismissal of the respondent's action.

Appeal dismissed with costs.

Solicitor for the appellant: *George Méthot.*

Solicitors for the respondent: *Perron, Taschereau, Rinfret, Vallée & Genest.*

1923
*Oct. 26.
*Nov. 27.

THE STEAMER *MAPLEHURST* (DEFENDANT) ..... } APPELLANT;

AND

GEORGE HALL COAL COMPANY OF CANADA (PLAINTIFF) ..... } RESPONDENT.

CANADA STEAMSHIP LINES, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE TUG *MARGARET HACKETT* (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Admiralty law—Collision—Vessel having barge in tow—Absence of regulation lights—Possibility of avoiding accident—Liability of both vessels.

The lake steamer *Maplehurst,* having in tow the barge *Brookdale,* both the property of the Canada Steamship Lines, Ltd., left the city of Montreal for the city of Quebec on the evening of July 15, 1920. The *Maplehurst* was not equipped for towing as she did not have the regulation towing lights required by article 3 of the "Regulations for preventing collisions." The barge *Brookdale* had the regulation red and green side lights. While the *Maplehurst* was proceeding down the channel through Lake St. Peter, a collision occurred between the *Brookdale* and the tug *Margaret Hackett* upbound with a barge in tow, both the property of the George Hall Coal Company of Canada. As a result of the collision, the tug foundered and the barge *Brookdale* sustained damages. The plaintiffs, as their respective owners, sued for damages, each imputing fault and blame to the other. The trial judge held that the officers of the *Maplehurst* had been guilty of negligence which was a direct and efficient cause of the collision; and he also found that the accident could have been avoided by the exercise of skill and promptitude on the part of those in charge of the tug *Margaret Hackett.* The owners of the *Maplehurst* were condemned to pay three-quarters of the loss suffered by the owners of the tug *Margaret Hackett* and the latter were held answerable for one-quarter of the damages sustained by the barge *Brookdale.*

Held that the *Maplehurst* had by her negligence contributed to the collision to the extent to which the trial judge found her owners answerable. Mignault J. *dubitante.*

Per Duff J.—Where the negligence of the plaintiff and the negligence of the defendant are in sequence, the question whether the collision could "have been avoided by the exercise of ordinary care and skill on the part of the defendant," depends upon the circumstances; and

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

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the conduct of the plaintiff may have been such in its bearing and effect upon the conduct of the defendant as to form a very important element in the determination of that question.

Per Anglin J.—The fault of the officers of the *Maplehurst* continued operative until the collision was, if not inevitable, only to be avoided by great skill and extraordinary alertness on the part of those in charge of the *Margaret Hackett*.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District (1), in two actions which both resulted from the same collision, Maclennan J., local judge in admiralty at Montreal, holding the steamer *Maplehurst* to blame to the extent of three-quarters and the tug *Margaret Hackett* to the extent of one-quarter.

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

Towers K.C. for the appellants. The failure of the *Maplehurst* to carry regulation towing lights (if so found upon the evidence) has not primarily led or caused or contributed to the collision. The fault of the mate of the *Margaret Hackett* was the sole effective cause of the collision, as, by the exercise of reasonable care, he could have avoided the consequences of the negligent act of the *Maplehurst*.

Holden K.C. for the respondents. If any fault was committed by those in charge of the *Margaret Hackett,* it was not the direct cause of the accident, but followed upon and was the result of the much greater fault committed by the steamer *Maplehurst*.

THE CHIEF JUSTICE.—Notwithstanding the able argument at bar of Mr. Towers K.C., for the appellant, I, after careful consideration of all the evidence in this case, have reached the firm conclusion that this appeal fails and that the judgment appealed from should be confirmed.

I have had the advantage of reading the reasons of my brother Anglin and I find that he has lucidly expressed the conclusions I myself had reached. It is unnecessary for me to repeat these reasons in which I fully concur.

I would only add that it is of the greatest importance, in my opinion, that the courts should not minimize or seek

(1) To be reported in [1923] Ex. C.R.

to excuse the necessity of vessels traversing Canada's great waterway between Montreal and the gulf strictly obeying the regulations prescribed in that behalf. In this case it appears clearly to me that the *Maplehurst* failed to comply with the regulation as to lights to be carried by a steamer with a tow in the waters in question, and that this failure was a direct and efficient cause of the collision between the *Hackett* and the *Maplehurst's* tow, the *Brookdale*. The absence of regulation lights resulted, as my brother Anglin says, in leading the *Margaret Hackett* "into a veritable trap." The latter's mate who was also steersman at the time, was no doubt also to blame in not acting with sufficient promptitude by starboarding his helm as he possibly should have done immediately he discovered that he had been misled by the *Maplehurst's* lights into the trap in which he found himself.

But I cannot think that his failure then to act with sufficient promptitude should be held to have been the sole and effective cause of the collision.

Both vessels were to blame, the *Maplehurst* chiefly, and I do not think the apportionment of the damages between them made by the trial judge should be interfered with.

IDINGTON J.—The deliberate violation of article 3 of the relevant regulations which should have governed those in charge of the *Maplehurst* and which required two lights to be used, in the way specified by any steam vessel when towing another vessel, as a means of warning others concerned, was the primary negligence leading to what ensued and is now complained of.

To my mind it was a most gross defiance of the law to put up a coal oil lamp as the mate, so to speak, of an electric light when the article required that "each of these lights shall be of the same construction and character," etc.

This defiance of the law was deliberate when ample time could be got for consideration and proper action.

It seems to me that complaint of another who had only a few minutes to rectify the mistake into which those in charge of her were led, comes with a bad grace from appellant under such circumstances.

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Idington J.

But the court below has properly dealt therewith by its distribution of the damages.

I would dismiss this appeal with costs.

DUFF J.—A question arises on this appeal which is by no means free from difficulty but on the whole I think the balance inclines in favour of the view at which the learned trial judge arrived. The facts are dealt with by the learned judge in a manner which leaves nothing to be desired. There is ample evidence to support his finding that the lights carried by the *Maplehurst* were not those prescribed by the regulations for a steamer engaged in a towage service and that these lights were misleading and calculated to throw the navigators of other craft off their guard and to lead them to govern themselves on the assumption that the *Maplehurst* had not another vessel in tow. On the other hand the learned trial judge in effect finds, with ample warrant, I think, from the evidence, that, on the assumption upon which the mate of the *Margaret Hackett* says he acted, namely, that the *Brookdale* was a vessel under sail, it was a negligent thing for him with another craft in tow to attempt to cross in front of the *Brookdale* and moreover there seems to be ample evidence to warrant the finding that at the last moment the collision could have been avoided if the mate of the *Margaret Hackett* realizing that the *Brookdale* was a tow attached to the *Maplehurst* had signalled his tow and passed the *Brookdale* starboard to starboard.

This being the state of facts the question raised by the appeal is the question whether the *Margaret Hackett* was solely to blame for the collision or whether the negligence of the *Maplehurst* in displaying misleading lights was negligence so contributing to the collision as to cast upon her a share of the loss.

The question can be put in another form, thus: Was the negligence of the *Maplehurst* in part the direct cause of the collision? The question is sometimes a very difficult one and where, as in this case, the negligence of the plaintiff and the negligence of the defendant are in sequence then the question arises whether the collision could "have been avoided by the exercise of ordinary care and skill on the part of the defendant" to quote from the judgment of

Lord Campbell in *Dowell* v. *General Steam Navigation Co.* (1) in a passage cited with approval by the Lord Chancellor in *Admiralty Commissioners* v. *SS. Volute* (2). What is "ordinary care and skill" depends, I think, upon the circumstances and the conduct of the plaintiff may have been such in its bearing and effect upon the conduct of the defendant as to form a very important element in the determination of that question. Here the learned trial judge has found that the negligence of the *Maplehurst* threw the *Margaret Hackett* off her guard and was one of the determining factors in inducing her mate to take the course he did take, perhaps the predominant factor. It is quite true that a time did arrive before the collision when the mate of the *Margaret Hackett* realized his mistake and realized that the *Brookdale* instead of being a sailing vessel was a tow attached to the *Maplehurst* and the learned trial judge has found that by exercise of proper skill at the moment the accident could have been avoided. On the other hand the officer of the *Margaret Hackett* was placed in a somewhat difficult position and his failure to act with promptitude and clearsightedness was probably due to the fact that he found himself suddenly confronted with an unexpected state of affairs involving a present obvious danger. The precise point for consideration is indicated by the judgment of the Lord Chancellor already mentioned and especially in the following passage at p. 144:—

> Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while, no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the Bywell Castle rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution.

I am not prepared to dissent from the conclusion that "in the ordinary plain common sense of this business" the *Maplehurst* did by her negligence contribute to the collision in the sense which required the learned trial judge to pronounce her to be partly to blame.

The appeal should be dismissed with costs.

(1) 5 E. & B. 195 at p. 205. (2) [1922] 1 A.C. 129 at p. 139.

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Anglin J.

ANGLIN J.—As I read the opinion of the learned trial judge, apart from any question of burden of proof, he found that it was established by the evidence that the officers of the *Maplehurst* had been guilty of negligence which was a direct and efficient cause of the collision between her tow, the *Brookdale,* and the tug *Margaret Hackett.* The negligence consisted in not carrying the towing light prescribed by article 3 of the "Regulations for preventing collisions." The mate in charge of the *Margaret Hackett* was led into a veritable trap. Nevertheless he was held blameworthy for having attempted to cross the channel between the *Maplehurst* and her tow, even on the assumption that the latter was a sailing vessel not in tow, and also because when he realized this mistake, while at a distance of about one hundred feet from the *Brookdale,* he could still have averted the collision by a proper manoeuvre. There being no cross-appeal this condemnation of the owners of the *Margaret Hackett* must stand.

The appellant contends, however, that the fault of the mate of the *Margaret Hackett* was the sole effective cause of the collision—that by the exercise of reasonable care he could have avoided the consequences of the negligent omission to exhibit a proper towing light on the *Maplehurst.*

Consideration of the evidence has convinced me that the conclusion of the learned trial judge was right—that the fault of the officers of the *Maplehurst* continued operative until the collision was, if not inevitable, only to be avoided by great skill and extraordinary alertness on the part of those in charge of the *Margaret Hackett.* For their failure to exercise the requisite skill and to act with the necessary promptitude, the owners of the *Margaret Hackett* have been held answerable for one-quarter of the damages sustained by the *Brookdale,* in addition to bearing one-quarter of their own loss. The *Maplehurst* on the other hand has been condemned to pay three-quarters of the loss suffered by the owners of the *Margaret Hackett.*

Agreeing, as I do, with the view of the learned trial judge that the officers of the *Maplehurst* were gravely to blame and the owners of the *Margaret Hackett* not having

appealed, I should be loath to interfere with the apportionment of the damages even if I regarded it as not quite satisfactory. But, with Mr. Justice Maclennan, I consider the officers of the *Maplehurst* as much more blameworthy for the collision than those in charge of the *Margaret Hackett*.

I would dismiss the appeal with costs.

BRODEUR J.—The evidence shews that the collision in question in this case is due largely, if not entirely, to the negligence of the appellants for not having a proper tow light on the mast head of the *Maplehurst*.

If such a light had been shewn, the pilot of the respondents would never have tried to cross to the north side of the channel in front of the barge in tow. The trial judge has found that the two vessels were at fault and there is no appeal on the part of the respondents against this part of the judgment which found them guilty of contributory negligence.

It has been contended before us by the appellants that the tug, in acting with reasonable care, could have avoided the accident even if the *Maplehurst* had not the proper tow light.

I am unable to agree with this contention. When the pilot of the tug *Margaret Hackett* saw the light of the boat in tow, he thought it was a sailing vessel because he never expected to find there a boat in tow, and he was certainly well advised, under the impression that he had, to go on and to cross on the north side of the channel. When he discovered that the boat was not a sailing vessel and was in tow, it was too late to avoid the collision.

For these reasons, the appeal fails and should be dismissed with costs.

MIGNAULT J.—I find myself in much doubt whether the collision in question in these two appeals was not solely caused by the imprudence of the mate, who was navigating the *Margaret Hackett* at the time of the accident, in attempting with his tow to cross between the *Maplehurst* and the latter's tow. The excuse given by the mate was that not having seen proper towing lights on the *Maplehurst*, he thought her tow was a sailing vessel, and judged

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Mignault J.

that he could get safely by, although his own towing line was 500 feet long. The learned trial judge did not hear the witnesses himself but the evidence taken before the wreck commissioner was by consent of the parties tendered as evidence in the two cases. This is unsatisfactory, and I cannot entirely escape from the suspicion that the mate of the *Margaret Hackett,* when he says he thought the *Maplehurst's* tow was a sailing vessel, was testifying as to the state of his mind at the time of the accident with the advantage of subsequent reflection. I would not suggest for a moment that he was not in perfect good faith but evidence of this character is not very reliable, for persons who have contributed to an accident are apt, often unconsciously, to offer excuses or explanations which really were not present in their minds at the time when the accident was brought about, especially where their imprudence, as here, was admittedly one of the causes of the accident. I will not, however, dissent from the judgment about to be rendered, but my concurrence therein is not without considerable doubt.

Appeal dismissed with costs.

Solicitors for the appellants: *Barnard & McKeown.*

Solicitors for the respondents: *Meredith. Holden, Hague, Shaughnessy & Heward.*

ST. PAUL LUMBER COMPANY, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

BRITISH CROWN ASSURANCE CORPORATION, LIMITED (DEFENDANT) } RESPONDENT.

1923
*Feb. 9, 12.
*May 1.

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

Insurance—Fire—Description of insured property—Warranty—Statutory conditions—Agency—Non-disclosure.

To the face of a policy of fire insurance on sawn lumber there was attached a sheet of paper typewritten in black and containing the following provision: "It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard." The policy was indorsed with the statutory conditions in compliance with "The Alberta Insurance Act." In an action on the policy,

Held, Davies C.J. dissenting, that, as against the appellant, the warranty as to the character of the surroundings of the property insured is restricted in its application to the risk from prairie fires and cannot be regarded as part of the description of that property for the general purposes of the policy.

Held also, Davies C.J. dissenting, that upon the evidence no misrepresentation by the assured, or by any one in a position to bind him, had been shewn and that he or his representative had disclosed all material facts of which they had knowledge bearing on the risk.

Judgment of the Appellate Division ([1922] 1 W.W.R. 1048) reversed, Davies C.J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Walsh J. and dismissing the appellant's action.

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

Woods K.C. for the appellant.

Savary K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—I think this appeal should be dismissed with costs. I concur in the reasons for the judgment of the Appellate Division delivered by Mr. Justice Hyndman and concurred in by Chief Justice Scott, which clearly express my own views.

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

(1) [1922] 1 W.W.R. 1048.

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Duff J.

DUFF J.—After a careful consideration of the judgments delivered in the Appellate Division I am still of the opinion that the judgment of Mr. Justice Walsh was right and that the reasons assigned by him for the conclusion at which he arrived are sound reasons.

I agree with him that the typewritten warranty relates only to "loss or damage arising from or traceable to prairie fires."

I agree that Lebel was not the agent of the appellants and that the appellant company merely took over the application made to the London & Lancashire Company and acted upon it as if it had been made to themselves through Lebel and the inspector Hahn. As to non-disclosure, I think the view of the learned trial judge is the reasonable practical view and that it would be putting the obligation of the applicants for insurance on too high a level to hold that Meunier was under a duty to disclose as a circumstance material to the risk the fact that in the river-bed below the bench on which the lumber was piled there were some willow bushes which at the time of the application were largely immersed in the waters of the river.

The appeal should, I think, be allowed and the judgment of Mr. Justice Walsh restored.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Walsh restored.

Upon the question of construction I am satisfied that as against the appellant the warranty as to the character of the surroundings of the property insured is restricted in its application to the risk from prairie fire and cannot be regarded as part of the description of that property for the general purposes of the policy. The reasons for so holding are stated by Mr. Justice Walsh.

No misrepresentation by the assured or by any one in position to bind him has been shown.

Neither was there any concealment of, or failure on the part of the assured to communicate, circumstances material to the risk such as would avoid the policy under the first statutory condition. Upon the evidence it has not been

established that Lebel acted as agent for the insured and there is nothing to warrant the suggestion that Hahn, the inspector of the London & Lancashire Ins. Co., occupied that position. The insured appears to have made full disclosure to Lebel when he applied to him orally as local agent for the London & Lancashire, from which he then sought insurance. The transfer of the appellant's oral application from that company to the respondent company, which eventually took the risk, was arranged by Mr. Hahn without any participation by the appellant,—indeed, so far as appears, without his knowledge. Any mistake made by Mr. Hahn in describing the situs of the property when arranging such transfer, does not, in my opinion, suffice to avoid the policy as against the appellant.

BRODEUR J.—This is an appeal concerning a fire insurance policy on cut timber. The insurers, after having described in the policy three lots of timber situated at different places, added the following provision which was typewritten:

It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard.

The case turns largely on the construction of this provision. The insurance company contends that it is a condition precedent and that the facts not being as warranted the policy never attached. On the other hand, the insured claims that such a clause would extend only to damage traceable to prairie fire.

The judges in the courts below are equally divided on this point. The appellate division, by a majority of one, reversed the decision of the trial judge and came to the conclusion that this clause should be considered as a description of the property insured.

This policy is issued under the statutory conditions of the province of Alberta.

The clause in question is not artistically drawn but it means, according to my mind, that the risk covers also a loss arising out of a prairie fire, but provided that in such a case the pile of lumber should be surrounded by ploughed

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Brodeur J.

ground. If there were a serious doubt as to the construction of this clause, it should be interpreted against the insurance company, since it was drafted, inserted in the policy and stipulated by the company itself.

It is contended also by the insurance company that no liability attaches because a circumstance which was material was not disclosed, such circumstance being that the lumber was situate in a clearing in the bush and exposed to bush hazard.

A great deal has been said in connection with this about some willow brush that had grown in the river on the bank of which was piled the lumber insured.

This willow brush being at some period of the year entirely covered by the waters of the river its green and moist condition for the part which emerged from the water during the balance of the year could not constitute a serious source of danger. The brush or bush to which reference is made in a correspondence and about which inquiries were made had reference to the slashings or underbrush resulting from the cutting of the timber. This had been removed and the pile of lumber was on clear ground and was not exposed to risk arising out of this heavy underbrush which might be a great source of danger.

It was suggested also that this bush would include the standing timber.

I think that the circumstances disclosed show that a bush of heavy timber could not be considered as constituting a material fact to be disclosed and that the parties fully understood that the validity of the policy would not be affected by the fact that there was in the vicinity some standing timber.

I have then come to the conclusion that the plaintiff company has a right to recover under the policy of insurance in question.

The appeal should be allowed with costs of this court and of the court below and the judgment of the trial judge restored.

MIGNAULT J.—The action of the appellant is to recover on an insurance policy issued by the respondent covering, *inter alia,*

150,000 feet of sawn lumber piled on bank of river on section 3, township 63, range 10, west of the 4th meridian, province of Alberta.

It is contested on three grounds:—

1. There was in the policy a special warranty that the several locations therein named on which lumber was piled, should be entirely surrounded by ploughed ground and in no way exposed to bush hazard, and the lumber destroyed did not conform to this warranty.

2. It was represented by the insured and his agents that the lumber would be under some kind of supervision, ploughed around and in no way exposed to bush hazard.

3. By the conditions of the policy it was the duty of the insured to disclose any circumstance material to enable the insurer to judge of the risk it undertook, and the insured did not disclose the fact that the lumber in question was entirely surrounded by bush and underbrush and was exposed to the risk of bush fire.

The first point involves the construction of the following typewritten clause contained in the policy:—

> It is understood and agreed that this insurance also covers loss or damage arising from or traceable to prairie fires, It being warranted by the assured that the several locations named herein, on which lumber is piled shall be entirely surrounded by ploughed ground and in no way exposed to bush hazard.

In my opinion, the warranty here is restricted to the insurance against loss or damage arising from or traceable to prairie fires. It is not a general warranty. I think the words "It being warranted," etc., cannot be severed from the words which precede. The punctuation shews that although the word "It" begins with a capital "I," the warranty is really a part of the whole clause. If severed, it would not form a complete sentence, while, if taken with the preceding words, the sentence is a perfect one, and the idea expressed is quite conceivable, for a strip of ploughed ground around the lumber would be a great protection in case of a prairie fire. The insurer, when stipulating a warranty applicable, as he now contends, to the whole risk, should have made it perfectly clear that it did so apply, and I would not detach the warranty clause from its context to give it a greater effect than it has when read in this context. On this point, for the fire here did not arise from a prairie fire, I am in full agreement with the learned trial judge.

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Mignault J.

On the second point, the contention is that the appellant is bound by the statement of Mr. Hahn, the inspector of the London & Lancashire Fire Insurance Co. (which company found itself unable to insure the lumber and passed on the risk to the respondent), who in his letter to Mr. Dunham, the agent for the respondent company, said that he had arranged with Mr. Lebel that

> all this lumber was to be under some kind of supervision, ploughed around, and in no way exposed to bush hazard.

This involves a question of agency, and the claim of the respondent is that Mr. Lebel was the appellant's agent for this insurance. Mr. Lebel is a solicitor and incidentally an agent of the London & Lancashire Fire Insurance Co., Mr. Hahn's company. He explains that he never acted as solicitor for the appellant. He had written to Mr. Meunier of the appellant company claiming from the latter a certain amount for a client of his, and as Meunier could not pay he then suggested to him that the lumber should be insured in order to protect his client, to which suggestion Meunier acquiesced. This certainly does not make Lebel the appellant's agent, the more so as, to Meunier's knowledge, in addition to being a solicitor he was an insurance agent. And in his letter to Mr. Hahn, with reference to the insurance of the lumber in question, Lebel merely said that it was piled on the bank of a river, on the timber limit of the owner. Without questioning the sincerity of Mr. Hahn's statement to Mr. Dunham, I do not think that the appellant is bound by its terms. The respondent could have incorporated this statement in its policy, and not having done so the appellant cannot be bound by Mr. Hahn's representations.

On the third point, I think that Mr. Meunier fairly disclosed all the circumstances connected with the risk. The lumber was on the bank of a river, this bank being some ten feet above a flat through which the river flowed, and the lumber was about fifty feet from the river, on a clearing made by the appellant. There was timber around the clearing and on the flat there were willows which, when seen after the fire, were ten or fifteen feet high. But the insurance was effected in the early spring when the water was high and the willows, much smaller then, were covered

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Mignault J.

by water. I do not think that the appellant's representatives failed to disclose any material fact of which they had knowledge bearing on the risk. On the contrary, they appear to have acted in good faith and to have described the situation of the lumber as it then was. The willows certainly grew during the summer, but even if the risk thereby became greater I do not think that the appellant can be taxed with misrepresentation or failure to disclose material facts. On this point also I am against the respondent.

With great deference therefore, I would allow the appeal and restore the judgment of the learned trial judge with costs here and in the Appellate Court.

Appeal allowed with costs.

Solicitors for the appellant: *Woods, Sherry, Collisson & Field.*

Solicitors for the respondent: *Savary, Fenerty & Chadwick.*

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*Feb. 27, 28.
*May 19.

HENRY McCLELAN AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

LEVI DOWNEY (PLAINTIFF) .....RESPONDENT.

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

Statute—Statutory powers—Commissioners of sewers—Constitution of board—Refusal to act or resignation—Rate—Majority.

In Albert County, N.B., under the Act respecting Sewers and Marsh Lands, the parish of Hopewell is divided into districts each of which may elect a commissioner, all the persons so elected to be "Commissioners of Sewers" for the parish. Section 8 of the Act provides that "if the proprietors of any district fail to elect a commissioner, the remaining commissioners shall act and shall be "the Commissioners of Sewers." By section 18 "no rate shall be made without the consent of a majority of the commissioners; but one commissioner so elected may superintend work in progress and employ workmen for that purpose." Three commissioners were elected for the parish, one of whom refused to act and another tendered his resignation which was accepted by the third. Work having been done on the marsh lands the single commissioner made a rate for payment of the cost by the several districts. In an action for moneys due in respect to such work,—

Held, reversing the judgment of the Appeal Division (45 N.B. Rep. 90), Idington and Brodeur JJ. dissenting, that the one commissioner, though constituting the board for other purposes, had no authority to make such rate as he could not be a majority of the commissioners which was necessary under section 18 to do so.

Per Anglin J. It is doubtful that the third commissioner had authority to accept the resignation of his colleague and if not there were two on the board and the rate was not made by a majority.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1) affirming the judgment at the trial in favour of the respondent.

In applying the provisions of the Act R.S.N.B. [1903] ch. 159 "An Act respecting Sewers and Marsh Lands" to the conditions existing in Albert County as disclosed in the above head-note Mr. Justice White who tried the case decided all the material issues in favour of the respondent and his judgment was affirmed by the Appeal Division (1) Crockett J. dissenting. Only one of these

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

(1) 45 N.B. Rep. 90.

issues was dealt with by the Supreme Court of Canada on this appeal, namely, whether or not the sole Commissioner of Sewers who remained in office after one of the three elected had refused to act and another had tendered his resignation which was accepted, could fix a rate for payment by the districts of the parish of the cost of work done by the board.

Mr. Justice Crockett based his dissent from the judgment of the Appeal Division on the incapacity of the sole remaining commissioner to make the rate notwithstanding the fact that it was done in obedience to a writ of mandamus ordering the "Commissioners of Sewers" to levy the assessment. The majority of the judges in the Supreme Court of Canada, in reversing the judgment appealed against, contented themselves with adopting the reasoning of this dissenting opinion, Mr. Justice Anglin adding the view ascribed to him in the head-note. The appeal was allowed with costs.

J. B. M. Baxter K.C. appeared for the appellants and Teed K.C. for the respondent.

Appeal allowed with costs.

Solicitor for the appellants: *M. B. Dixon.*
Solicitors for the respondent: *M. & J. Teed.*

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THE ROYAL BANK OF CANADA.....APPELLANT;

AND

THE TOWN OF GLACE BAY.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Assessment and taxes—Bank—Net annual income or profit—Municipal assessment—Business done in municipality—Assessment Act, 8-9 Geo. V, c. 5—Validating Act—Pending cases—Right of appeal.

By the Nova Scotia Assessment Act a bank doing business in any municipality may be taxed on the "net annual income or profit" derived from such business. In 1921 the branch of the Royal Bank at Glace Bay received a large sum on deposit by its customers which was remitted to the head office of the bank in Montreal and merged in the general funds there. Without regard to any use made of this money by the head office the branch was credited with interest at four per cent on the amount.

Held, per Idington, Anglin and Mignault JJ., Davies C.J. and Duff and Brodeur JJ. *contra,* affirming the judgment of the Supreme Court of Nova Scotia (56 N.S. Rep. 120), that the sum so credited, less the amount of any loss incurred in the other operations of the branch, constitutes the "net annual income or profit" of the bank derived from its business in Glace Bay which was liable to taxation.

Held, per Idington and Brodeur JJ., Anglin J. *contra,* that an Act of the legislature validating the assessment roll for 1921 and omitting the provision in former Acts of the kind that it would not apply to pending cases, takes away the bank's right to appeal in this case which was pending when the Act came into force.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment of the County Court Judge in favour of the appellant in proceedings to set aside an assessment on the net income or profit of the bank derived from its business in Glace Bay in the year 1921.

The essential facts of the case are stated in the above head-note.

Jenks K.C. and *J McG. Stewart* for the appellant. The bank earned no income or profit in its business at Glace Bay during the year 1921. Such profit, if any, was earned in Montreal. See *Sulley* v. *Attorney General* (2); *Grainger* v. *Gough* (3).

Commissioners of Taxation v. *Kirk* (3) can be distinguished. In that case it was proved that profit was

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

(1) 56 N.S. Rep. 120.
(2) 5 H. & N. 711.
(3) [1896] A.C. 325.
(4) [1900] A.C. 588.

made from business partly done in New South Wales. Here no such profit has been or could be proved.

C. B. Smith K.C. and *McArthur* for the respondent. The legislation, by omitting from the Act validating the assessment roll of 1922 the usual provision that it would not apply to cases pending intended that it should so apply and the right of appeal in this case is taken away. See *Reg.* v. *Price* (1) per Cockburn C.J. at page 416.

The earnings from the deposits is derived from the business done in Glace Bay; *Commissioner of Taxes* v. *Kirk* (2); and the four per cent credited to the bank represents the profit.

THE CHIEF JUSTICE.—The substantial question to be determined in this appeal is the proper construction of section 4 of the First Schedule of the Assessment Act, 1918 (chapter 5, Acts of 1918) of Nova Scotia which reads as follows:

> All banks and public or private banking companies and agencies of such banks and banking companies doing business within any incorporated town or municipality shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where the same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

The facts as I gather them from the case in appeal and the argument of counsel at bar are that the Royal Bank of Canada, having its head office at Montreal, maintains a branch in the town of Glace Bay, an incorporated town under the provisions of the "Town Incorporation Act" (1918 Acts of Nova Scotia, c. 4). This bank receives deposits, lends money and carries on the usual business of a branch bank. In the year 1921 the average daily excess of deposits over loans amounted to $727,000. The surplus of moneys so deposited and not required for the branch's purposes in Glace Bay were remitted to the head office of the bank in Montreal and there merged with similar remittances from other branches and with the general assets of the bank, and the fund so formed was lent or invested or otherwise dealt with by the head office of

(1) L.R. 6 Q.B. 411.
(2) [1900] A.C. 588.

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The Chief Justice.

the bank in various places at varying rates of interest. No part of this fund was lent or invested in the town of Glace Bay during the year; nor had the Glace Bay branch any record or information as to the lending or other dealing with this fund. Leaving out of account the interest or income earned on the said central fund or on the monies remitted by the Glace Bay branch to head office there was a deficit of approximately $26,000 on the operations of the Glace Bay branch for the year 1921.

When preparing the assessment rates for the year 1922 the assessors of the town of Glace Bay assessed the bank in respect of "income" for $12,000. On appeal by the bank to the Assessment Appeal Court for the town of Glace Bay this assessment was confirmed. On appeal to the County Court for the district the appeal of the bank was allowed. From this decision the town of Glace Bay appealed to the Supreme Court of Nova Scotia in banco, and the latter court allowed the appeal.

The appellants here contend that the judgment below is wrong because the agency of the Royal Bank of Canada at Glace Bay did not derive any "net income or profit" from its business done in the town of Glace Bay; and because the income or profit, if any, in respect of deposits made in the town of Glace Bay and remitted by the Glace Bay branch to head office was derived where the monies were loaned or invested. (Such income or profit, if made at places in Nova Scotia where the Royal Bank maintained branches would be assessed there by the local municipalities.)

My construction of the above quoted section 4, is that such section authorizes the assessment of banks and agencies doing business in any incorporated town or municipality of Nova Scotia only, as expressed, on the "net annual income or profit" derived by them from the business done by them in the town or municipality making the assessment. The mere receipt of deposits in Glace Bay and their transmission to a head office for investment elsewhere than in Glace Bay would not of itself make the bank liable to the local municipality. Such liability could only arise under the section quoted in towns and municipalities in

Nova Scotia where a bank had loaned or invested its money and derived income or profit therefrom.

In other words the mere taking in and remitting of deposits by a branch to a head office, which is only an incidental step toward realizing income or profit, is not of itself sufficient to authorize an assessment under the section quoted. The intention of that section is, I think, simply and solely to authorize assessment upon income or profits derived by a bank from the business done by it in the town or municipality. Such income or profits cannot be said to be so derived except from loans or investments made in the town or municipality. If it were otherwise a bank might be taxed at its branch which received the deposits and also at each branch in the province through which loans or investments were made and income or profit derived therefrom. I cannot think the latter is the proper construction of this section.

For these reasons I would allow the appeal.

IDINGTON J.—I would dismiss this appeal with costs for the reason that the income of the appellant at its Glace Bay agency is exactly what the appellant has quite properly determined is the proper measure of its profits derived by carrying on the agency at Glace Bay.

The head office, in the language of its accountant at Glace Bay, is a borrower from that agency, as shewn by the following extract from his evidence:

Q. What did you do with it?—A. We had it in Glace Bay on deposit and it was controlled by our head office.

Q. What did you do with it?—A. It was transferred to head office.

Q. Any entry in the books about that?—A. No, there is no actual entry, they borrow the money from us.

Q. What do they pay?—A. The head office records only would show.

Q. You say they borrow that money from you, what do they pay?—A. They don't pay anything direct.

Q. In this statement where you showed a loss of $25,000 you showed no earnings for this $727,000?—A. No.

Q. You lent that to your head office for nothing?—A. Yes, the records are all kept at head office, that is in regard to loans of money.

Q. In other words you took $727,200 of the savings of the people in Glace Bay and transferred it to head office and lent it to them for nothing and then you say that you operated at a loss?—A. We did.

Q. Who pays your salaries?—A. Head office, at the end of the year it is debited to head office.

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Idington J.

Q. But don't they in any way give you credit for that $727,200?—A. At the head office in Montreal at the end of every year they make up a general balance sheet for every branch.

Q. Have you got that?—A. They don't furnish us with a statement. We figure it up roughly.

All the arguments dependent on the ultimate result of such borrowing are beside the question.

If the appellant keeps track properly of such borrowings it will only be chargeable elsewhere with the earnings made on due allowance being made for the interest it has to pay depositors at Glace Bay. And on that basis its losses will be chargeable also and thus things be evened up. If what the banks have long estimated as profits from carrying on agencies as the business basis reason for carrying them on is adhered to and observed everywhere as it should be, justice will be done all around and no evil results arise. The admissions made seem to cover the whole ground if we have regard to what the parties concerned have to deal with and mean by the language used. I do not think we should attempt to impose upon business men our ideas of what income may mean; they clearly have another well founded in long practice. The mode of arriving at the basis for taxing personal property is certainly novel.

I do not think any reference should have been directed and that the $12,000 result arrived at by the respondent's Court of Revision is correct.

The confirming legislation by the legislature, according to my view, should have been held effective unless there is a blunder therein, as Mr. Jenks submits, by using the term municipalities in one Act cited.

But there is another Act, passed in April, 1922, which seems to fit the case.

The judgment appealed from should be modified by striking out the reference and restoring the assessment.

DUFF J.—I think the appellant bank's contention should be sustained.

It is, perhaps, convenient to consider the enactment from the point of view of its application to the case of a branch deriving profit directly through lending the funds of the bank. It seems a reasonable application of the enactment

to hold that the profits derived from such loans made by the branch and received by the branch are profits derived directly from the business of the branch and assessable accordingly.

It is argued, however, that such a profit is the result of a series of operations beginning with the deposit or other borrowing and ending with the payment by the person to whom the loan has been made, and it is said that in order to ascertain the profits derived from the business of the branch it is necessary to decompose this profit derived from the whole series of operations, ascribing to each operation which forms a term in the series that part of the profit which ought justly to be apportioned to it. It is conceivable, no doubt, that a legislature might embark upon the design of taxing branch banks upon such a system. The probability, however, of such a plan commending itself to practical legislators seems to be rather remote and a consideration of the practical difficulties in the way of putting such a system into operation, coupled with the absence of any provision in this statute for machinery by which the necessary information could be collected, convinces me that a construction of the statute which would necessitate the ascertainment of the assessable profit by such a process would not give effect to the intention of the legislature.

Stress was naturally placed upon the circumstance that a book-keeping credit is allowed to the branch by the head office in respect of loans. This, it was argued, constitutes sufficient evidence that to the extent of this credit at least the bank is receiving profit from the business of the branch in question.

But the real question is not a question to be solved by evidence of that character. The Act applies not only to the appellant bank and to the particular banks mentioned in the evidence, but to all banks and banking corporations doing business in Nova Scotia, and the primary question is whether the statute contemplates a process of dividing the whole ultimate profit received by a given branch by ascertaining parts of it which should be considered to be severally derived from the different operations in the whole profit-earning series; and for the determination of that question the credits relied upon do not assist us.

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The respondents relied largely upon *Commissioners of Taxation* v. *Kirk* (1). That case, in my opinion, has no bearing upon the present question. There the real point was whether the ore was income derived or arising or accruing from mines held under lease from the Crown or from "some other source" in New South Wales. There was no difficulty in ascertaining the value of the merchantable ore shipped from the colony to the smelter, and no practical reason such as exists in this case forbidding the adoption of the construction which their Lordships of the Judicial Committee ascribed to the statute they were called upon to apply.

I should like to express my appreciation of the ability with which the appeal was argued on both sides.

The appeal should be allowed and the judgment of the County Court judge restored.

ANGLIN J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia, allowing an appeal from the judgment of the judge of the County Court for District No. 7, whereby he set aside an assessment of the appellant for the year 1922 for $12,000 of personal property made under section 4 of the first schedule of the Nova Scotia Assessment Act of 1918, c. 5. That section reads as follows:—

> All banks and public or private banking companies, and agencies of such banks and banking companies, doing business within any incorporated town or municipality, shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

The assessment of $12,000 is based on a net income or profit of $2,400 derived during the year 1921 by the bank from business done by its branch agency in the town of Glace Bay. The principal question on the appeal is whether the bank has shown that it did not derive such an income from its business done at Glace Bay, a subsidiary question being whether legislation, passed in 1922 (c. 35, s. 2) after the assessment had been upheld by the

(1) [1900] A.C. 588.

Assessment Appeal Court, and after notice but before hearing of the further appeal by the bank to the County Court judge, validating and confirming the assessment roll for 1922, precluded further prosecution of such pending appeal.

During the year 1921 the average daily excess of deposits with the Glace Bay branch over loans made through it was approximately $727,000. That amount was transmitted to the head office at Montreal to be used in the appellant's banking business. It is admitted that, including as an item of expense interest payable to depositors, the cost of operating the branch at Glace Bay for 1921 exceeded profits received by it during that year by the sum of $25,938.86. In arriving at this figure no account is taken of any part of the bank's earnings from the $727,000 deposits transmitted from the Glace Bay branch. It is also admitted that in preparing an annual return made to head office, known as "The Value of the Branch Return," the bank officials in charge of the Glace Bay branch took credit for a sum equal to 4 per cent on the $727,000 average excess of deposits transmitted by it during 1921 to head office, amounting approximately to $29,000. This was estimated to be the value to the bank of the work done by the Glace Bay branch office in getting in and forwarding the deposits. It is in evidence that a branch with large deposits and small loans is a very valuable branch. There is no evidence in the record that the getting in and forwarding of $727,000 of deposits for use in the general banking business of the bank was worth less to it than the $29,000 for which credit was so claimed in "The Value of the Branch Return."

Assuming therefore, as I think we may as against the bank, that the $29,000 for which credit was thus taken represents the proportion of the earnings made by the bank in 1921 through the use of the $727,000 fairly attributable to the business of getting in the deposits making up that sum and of transmitting them to head office—processes which formed a material part of what had to be done by the bank in earning whatever profits it made by the handling of the $727,000—it would seem to be a legitimate conclusion that the net income or profits derived from busi-

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ness done by the appellant in the town of Glace Bay in 1921 was at least $3,000—$29,000 less $25,938.86.

The learned County Court judge was of the opinion that it was not possible upon the evidence to find that any net profit or income had been derived by the bank from the business done by it at Glace Bay, since the particular money transmitted from that branch could not be traced so as to ascertain whether the use made of it by the bank had resulted in its earning any definite amount of profit. He accordingly reduced the assessment of $12,000 so that the amount payable on account of the rating under the first schedule of section 4 (c. 5, 1918) would not exceed the sum of $150, as prescribed by the statute. Mr. Justice Russell in the court *in banco* expressed a similar view. Mr. Justice Mellish, however, with whom Mr. Justice Chisholm concurred, thought that profits derived or losses suffered from deposits having been made at Glace Bay which were transmitted to head office must be taken into account in determining the annual profits of the business done there by the appellant bank and then an accounting would be necessary to ascertain the amount of such profits, if any. The case was accordingly remitted to the judge of the County Court for that purpose.

I agree with the learned County Court judge and the majority of the learned judges in the Supreme Court *in banco* that the passing of the statute validating and confirming the assessment rolls for 1922 did not prevent the prosecution of the appeal then pending. I should require a very clear expression of intention to determine rights presently pending before the courts—to supersede the provision conferring a right of appeal which the appellant was actually in the course of exercising.

On the merits I regard this case as not distinguishable in principle from that before the Judicial Committee in *Commissioners of Taxation* v. *Kirk* (1). Here, as there, part of the processes by which the income or profit made (out of the $727,000) was earned—part of the business from which that income or profit was derived—was carried on within the territory for which the assessment was levied.

(1) [1900] A.C. 588.

Adapting the language of Lord Davey in *Kirk's Case* (1) (p. 592):

> At first sight it seems startling that the ultimate result in the form of profit of business carried on in the municipality is not to some extent taxable * * * So far as relates to the processes of getting the deposits and forwarding them to head office the income was earned and the profits were arising and accruing in Glace Bay.

In *Kirk's Case* (1) ore was extracted and treated in New South Wales. It was then shipped abroad and sold abroad, the profits, of course, coming from the price obtained on such foreign sale. The question before the court was whether the respondent had any income taxable in New South Wales under the Land and Income Tax Assessment Act of 1895. By section 15 of that Act a tax was imposed on all incomes (1) arising or accruing to any person from any profession, *trade*, employment or vocation carried on in New South Wales; (3) derived from lands of the Crown held under lease or license; (4) arising or accruing to any person from any kind of property (except certain land), or from *any other source whatever*. Section 27 provided for the deduction of losses, outgoings and expenses. It was held that the respondent had *some* income taxable in New South Wales, (*a*) in respect to the process of extracting the ore as a step in the production of income arising from Crown lands held under lease (s. 3); (*b*) in respect of the treating or manufacturing process as a step likewise so productive and, if not within the meaning of the word "trade" in subsection 1, as certainly included in the words "any other source whatever" in subsection 4. Here the processes of getting in the deposits and forwarding them to head office similarly conduced to the earning of the income or profit ultimately resulting to the bank from the use of the money.

But it is urged that the $727,000 having been blended with other moneys of the bank to form a common loaning fund it is not possible to tell what part of the earnings of that fund were derived from the use made of that particular money. It is doubtless true that the precise money sent in from Glace Bay cannot be followed and the particular investments of it traced. But the bank's annual earnings from its loaning fund are known and what pro-

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portion of them was fairly attributable to the use of the Glace Bay deposits as part of that fund is readily determinable. The bank is in a position to say what the taking in on deposit and the handing over of the $727,000 by the Glace Bay branch was worth to it by ascertaining to what percentage of the total loaning fund employed by it (of which the $727,000 formed part) its profits therefrom for the year amounted and apportioning, as its experience enables it to do, the percentage so earned between the branch obtaining and forwarding the money and the branches which subsequently dealt with it. On that basis it was apparently satisfied to allow what in current commercial language is termed a "spread" of 1 per cent over the cost of the money, i.e., the 3 per cent interest paid to depositors, and therefore to credit the branch bank with 4 per cent on the total average daily balance in hand representing deposits received from it.

It is further urged, however, that it is not possible to apportion the earnings of the $727,000 so as to know with any degree of certainty what proportion of them should be ascribed to the business done at Glace Bay. A sufficient answer seems to be that the bank has not found that obstacle insuperable. It has been able to estimate the proportion which would be so allowed and has fixed the amount at $29,000. It cannot reasonably complain if its estimate is adopted by the municipal assessor. The evidence as a whole does not impeach the accuracy of this estimate; on the contrary, it rather upholds its fairness and moderation. Expert bankers must be able to ascertain with at least approximate precision what the collection and forwarding of deposits by a branch is worth to a bank. They must, and they do, arrive at a conclusion on these matters, satisfactory to themselves at least, in order to determine as a matter of practical business the value of a branch office at which the deposits largely exceed the amounts loaned. As already stated, upon the evidence such branches are very valuable to the banks operating them. In the present instance on the basis of $29,000 credit taken by the Glace Bay branch in respect of $727,000 deposits "loaned" by it to head office, the net earnings, income or profits of

the branch for 1921 exceeded $3,000. The impeached assessment is based on an income or profit of $2,400. This margin of over 25 per cent would seem to be sufficient to cover any possible adverse inaccuracy in the bank's estimate.

With respect, therefore, I think a reference back to the County Court judge for the purpose of an accounting is unnecessary. The assessment should simply be restored to the figure at which it stood before the appeal to the County Court judge. With this modification the appeal should be dismissed with costs.

BRODEUR J.—This appeal is concerning the assessment of the income or business of the appellant, the Royal Bank. The law of Nova Scotia as passed in 1918 provides that the banks doing business in a town shall

be rated as holding one hundred dollars of personal property for every twenty dollars *of net annual income or profit derived from the business done by them in the town or municipality where same is assessed.*

The question which has been raised is whether the deposits which have not been utilized in the branch of the Royal Bank at Glace Bay but which have been transferred at the head office at Montreal should be considered in determining the profit made in the town of Glace Bay.

By virtue of the legislation of 1918, the bank was assessed upon the assessment roll for the year 1922 at a rate of $12,000 for its income and business. An appeal from that assessment was made to the assessment appeal court on the 28th of February, 1922, and was dismissed. On the 21st of March, 1922, an appeal was made to the County Court by the bank from the decision of the Assessment Appeal Court, and on the 23rd of June, 1922, the County Court judge heard the parties, and he rendered his decision on the 12th of October, 1922, allowing the appeal and quashing the assessment.

It should be here mentioned that when this assessment was before the County Court, viz., on the 13th of April, 1922, the legislature of Nova Scotia passed chapter 5 of the acts of 1922 declaring in section 2 that

the assessment rolls for the present year and the revisers' lists of electors completed this year are hereby legalized and confirmed.

It is now contended by the town of Glace Bay that the

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assessment complained of by the Royal Bank cannot be disturbed and has been legalized and confirmed.

A similar statute has been passed for years by the legislature of Nova Scotia. It is evidently intended to prevent actions instituted against the assessment rolls from being a serious obstacle to the good administration of the municipality.

It is certainly a very wise provision and permits the municipalities to carry on their business in a regular way. They can with such legislation go on with the fixing of the rate of local taxation and with the collection of their taxes.

It has been argued that this confirming statute covered only the irregularities of procedure in making the assessment roll and would not confirm some substantial injustice. If some provisions of the Assessment Act, viz., sections 61 and 171 did not already declare that all defects and errors or irregularities on the part of the municipal authorities are cured, this contention that the law did not refer to illegalities or substantial injustices would have a great deal of strength. But if the legislature has thought fit, as it has done, to pass the confirming legislation in question, we must give it some meaning and some effect, as the Interpretation Act of Nova Scotia says that every enactment shall be deemed remedial (ch. 1, R.S.N.S. [1900] s. 23, s.s. 2).

In former enactments of this legislation by the legislature a provision was inserted in order to exempt pending cases from the application of the law. But in this year, 1922, which is under consideration, no such reservation was made and we must then read the statute as having a general application.

The assessment roll having been declared valid by the legislature, I am bound with regret (for I am convinced that the assessment of the bank was not legal) to maintain the decision of the Supreme Court *en banc* with costs throughout and to declare that the assessment roll has been legalized and confirmed.

MIGNAULT J.—This is an appeal by special leave of the Supreme Court of Nova Scotia against a judgment of that court reversing the judgment of the County Court for Dis-

trict No. 7, which had set aside the respondent's assessment of the branch of the appellant bank at Glace Bay, N.S., at $12,000 for net income during 1921.

The assessment was made under the Nova Scotia Assessment Act (ch. 5 of 1918), section 4 of which reads as follows:

> 4. All banks and public or private banking companies, and agencies of such banks and banking companies, doing business within any incorporated town or municipality, shall each be rated as holding one hundred dollars of personal property for every twenty dollars of net annual income or profit derived from the business done by them in the town or municipality where same is assessed; provided, however, that the amount payable on account of such rating shall not be less than one hundred and fifty dollars.

As shown here, the bank is rated as holding $100 of personal property for every $20 of net annual profit or income derived from its business in the assessing municipality, so that a rating of $12,000 is based on an annual net income of $2,400.

The contention of the appellant is that in 1921 its business at Glace Bay was conducted at a loss. The accountant states that its total deficit was $25,938.86, but although he charges to expenses interest on deposits amounting to $22,206.63, he admits of no revenue from a sum exceeding $700,000 deposited with the bank and which he says was used and controlled by the head office.

In the admissions signed by the solicitors of both parties it is however stated that the average daily deposits of the bank at Glace Bay during 1921, exceeded the average daily loans and money required for operating expenses by approximately $726,200 and that this surplus of deposits was transferred to the head office of the bank at Montreal; that the head office credited the Glace Bay branch in its annual return known as "the value of the branch return" with interest at 4 per cent on the sum so transferred, viz., approximately $29,000 for the year 1921. The accountant of the branch in his testimony said that the head office borrowed this surplus of deposits from the branch office.

It appears to me that when the branch bank charged in its expenses $22,206.63 for interest on deposits it should have treated as revenue the 4 per cent credited to it by the head office. The latter invested, no doubt at profit, the

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amount it thus borrowed from the branch office, and its credit of 4 per cent shews that it considered that this percentage represented the share of the branch in this profit. Adding $29,000 to the receipts of the branch office would more than justify the rating of $12,000 complained of.

In view of the admissions of the parties I think the cases cited by Mr. Jenks are without application. It is also unnecessary to determine under these circumstances whether the confirmation by the legislature, by chapter 5 of the Acts of 1922 of the assessment rolls of the year took away the appellant's right to complain of the assessment.

I would dismiss the appeal with costs, but would modify the judgment appealed from by striking out the provision for a reference back to the County Court judge. I find in the record all the evidence necessary to sustain the assessment which should therefore be confirmed.

Appeal dismissed with costs.

Solicitor for the appellant: *Colin Mackenzie.*
Solicitor for the respondent: *D. A. Cameron.*

THE SECURITY EXPORT COMPANY...APPELLANT; 1923

AND

THE HONOURABLE J. E. HETHERINGTON, PROVINCIAL SECRETARY-TREASURER OF THE PROVINCE OF NEW BRUNSWICK..... RESPONDENT.

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

Certiorari—Collection of tax—Distress—Secretary-Treasurer of Province —Judicial or ministerial Act—Tax on liquor for export—Direct or indirect taxation—B.N.A. Act s. 92 (2)—12 Geo. V, c. 3 (N.B.), Liquor Exporters' Taxation Act.

By section 3 of the Liquor Exporters' Taxation Act of New Brunswick (12 Geo. V, c. 3), every person who has liquor for export from the province shall pay to the Crown a tax thereon at a specified rate and, by section 4, within a specified time; by section 6 in default of payment the amount of the tax may be levied by distress under a warrant signed by the Provincial Secretary-Treasurer, or (section 7) the Secretary-Treasurer may bring an action to recover it; and section 9 authorizes the Lieutenant-Governor in Council to make regulations for, *inter alia*, "the fixing and determining of the amount of the said tax." In a case of distress under these provisions it was not shown how the amount had been determined.

Held, Anglin and Mignault JJ. dissenting, that the act of the Secretary-Treasurer in signing the warrant is judicial and not ministerial merely and that certiorari will lie to bring the proceedings before the Supreme Court of the province for review.

Held also, Anglin and Mignault JJ. expressing no opinion, that the imposition of a tax on liquor kept for export is indirect taxation and *ultra vires* of the provincial legislature.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick quashing a writ of certiorari obtained by the appellant to have the proceedings on distress of its goods reviewed.

Two questions were raised on the appeal, namely, whether or not certiorari lies under the circumstances set out in the head-note and secondly, whether or not the Liquor Exporters' Taxation Act of New Brunswick was *intra vires* of the legislature of the province. The Appeal Division held that certiorari does not lie in such a case which made unnecessary any decision as to the validity of the Act.

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

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Geoffrion K.C. and *Fred. R. Taylor K.C.* for the appellant. The Secretary-Treasurer in signing the distress warrant performs a judicial act.

For the contrary proposition the respondent and Mr. Justice White in the Appeal Division rely on *Ex parte Taunton* (1). That case merely decides that the issuing of a distress warrant under 43 Eliz., c. 2, is a ministerial act but is no authority on its issue under other conditions. A much earlier case *Harper* v. *Carr* (2), not referred to in *Ex parte Taunton* (1), was such a case. There the issue of the warrant was held to be judicial.

In *Painter* v. *Liverpool Gas Light Co.* (3) the issue of a warrant without first hearing the parties was held to be illegal. This is one test of the ministerial or judicial character of the act. Another test is given in *Staverton* v. *Ashburton* (4) where Wightman J. said: "Were not the justices under the statute 43 Eliz., c. 2, entitled to withhold their assent if they thought fit? That is the test as to whether the act is ministerial or judicial." This test was adopted by Allen C.J. in *The Queen* v. *Simpson* (5) at page 474.

The modern judicial tendency is towards giving to the term "judicial act" a very broad scope "including many acts that would not ordinarily be termed judicial." Per Fletcher-Moulton L.J. in *Rex* v. *Woodhouse* (6).

The tax on liquor held for export is indirect taxation and the act imposing it is *ultra vires*. See *Bank of Toronto* v. *Lambe* (7); *Attorney General for Quebec* v. *Queen Ins. Co.* (8).

Byrne K.C., Attorney-General of New Brunswick for the respondent. The court below in quashing the writ exercised a discretion which should not be interfered with on appeal. Moreover the judgment appealed from is not final and this court has no jurisdiction. *Faucher* v. *Compagnie du St. Louis* (9).

(1) 1 Dowl. 54.
(2) 7 T.R. 270.
(3) 3 Ad. & El. 433.
(4) 4 E. & B. 526.
(5) 20 N.B. Rep. 472.
(6) [1906] 2 K.B. 501
(7) 12 App. Cas. 575.
(8) 3 App. Cas. 1090.
(9) 63 Can. S.C.R. 580.

As to the character of the Provincial Secretary's act we rely on the opinion of Mr. Justice White. And see also *The Queen* v. *Shurman* (1).

The validity of the Liquor Exporters' Taxation Act in question in proceedings is pending in the Supreme Court of New Brunswick.

IDINGTON J.—The Chief Justice of the province of New Brunswick granted, on the application of the appellant, on the 31st of August last, an order absolute for the issue of a writ of certiorari directed to the respondent, and a rule nisi to quash a distress warrant which he had, in his quality of Provincial Secretary-Treasurer pretending to act under the Liquor Exporters' Taxation Act, being 12 Geo. V, c. 3 of the said province, issued against the goods of appellant directing the sheriff of the city and county of St. John, in said province, to levy thereon the sum of $62,042.

The return of the said respondent to the said writ was as follows:—

I, J. E. Hetherington, Provincial Secretary-Treasurer of the province of New Brunswick, do hereby certify that before the coming of the writ of our said Lord the King to me directed and to this schedule annexed, I did, as Provincial Secretary-Treasurer of the province of New Brunswick, on the 10th day of August, A.D. 1922, sign and issue a distress warrant, and on the 12th day of August, A.D. 1922, deliver the said distress warrant to Amon A. Wilson, Esq., which distress warrant is in the words and figures following:

"Amon A. Wilson, Esq.,
High Sheriff of the city and county of St. John.

Sir: Under and by virtue of section 6 of the Act of Assembly 12 George V, chapter 3, cited as "The Liquor Exporters Taxation Act," default having been made by the Security Export Company, Limited, of the tax imposed upon it by the said act within the time limited for payment. Therefore, I do hereby authorize and require you the said Sheriff to distrain the goods and chattels of the Security Export Company, Limited, wherever found within the province of New Brunswick and levy by distress upon the goods and chattels of the said Security Export Company, Limited, the sum of sixty-two thousand and forty-two dollars, being the amount of the tax due to the Crown for use of His Majesty in right of the province of New Brunswick by the said Security Export Company, Limited, upon forty-nine thousand six hundred and forty-two gallons of liquor, which the said Security Export Company, Limited, owns, now has, keeps or has property rights in, within the province of New Brunswick for export to a place outside of the province of New Brunswick, and you the said Sheriff shall levy the said sum of sixty-two thou-

(1) [1898] 1 Q.B. 578.

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sand and forty-two dollars aforesaid and all costs of sale of the goods and chattels of the said Security Export Company, Limited, or so much thereof as may be necessary to satisfy the said tax and the costs of the said distress.

Dated this 10th day of August, A.D. 1922.

J. E. HETHERINGTON,
Provincial Secretary-Treasurer,
of the province of New Brunswick."

That the said warrant of distress is now, I verily believe, in the possession of the said Amos A. Wilson, Esq., High Sheriff of the city and county of St. John, aforesaid, and was so in his possession at the time of the receipt of the said writ by me, and I have not now, nor did I have at the time, nor at any time since the receipt of the said writ, the said distress warrant in my custody or keeping.

And this is my return to the said writ.

Dated this 9th day of September, A.D. 1922.

J. E. HETHERINGTON,
Provincial Secretary-Treasurer
of the province of New Brunswick.

The said writ was granted by the said Chief Justice upon the following grounds:—

1. That the Provincial Secretary-Treasurer has no jurisdiction to issue the distress warrant or execution whereon the levy was made on the goods of the Security Export Company, Limited.

2. That the Liquor Exporters' Taxation Act is *ultra vires* of the Legislature of the province of New Brunswick and in violation of the British North America Act.

3. That the document in this case purporting to be a distress warrant is irregular in that it is not a formal warrant directing the Sheriff to levy the said tax with costs, but merely a letter of direction to the Sheriff to levy the said tax.

The appellant being, as seems to be admitted, lawfully engaged in the export of liquor, in course of such business stored in the King's bonded warehouse in St. John about 49,642 gallons of liquor for export to places outside the said province, upon which said Sheriff, on the 14th of August, 1922, levied by virtue of the said distress warrant.

The Appeal Division of the Supreme Court of New Brunswick having heard the questions raised upon the return of said rule nisi according to the practice provided by the Judicature Act, 1909, and order 62 thereunder, discharged said rule nisi, holding that the act of respondent in issuing said warrant was a mere ministerial act and in no sense a judicial act.

The court in so holding seems to rely upon section 9 of the said Act, which provides as follows:—

9. The Lieutenant-Governor in Council may, notwithstanding anything contained in this Act, and in so far as it is within the jurisdiction of the province so to do, make regulations, and the same repeal and amend from time to time, regarding the premises and kind of premises in which liquor shall be kept for export purposes, inspection of the said premises and the liquor kept therein, the kind and quality of liquor so kept, the marking and labelling of packages for exportation, the fixing and determining of the amount of the said tax, the cost to be allowed to the Sheriff executing any warrant of distress, the providing for the registration of all persons, firms, associations, companies and corporations carrying on a liquor export business or having liquor stored for export, and the returns to be made by them or their agents of liquor received, sold, exported and on hand, and generally all such matters and things incidental to or in any way connected with the liquor export business and the method and manner of conducting the same.

(1) Such regulations, or such parts thereof as the Lieutenant-Governor in Council shall determine, shall be published in the *Royal Gazette*, and, when so published, shall have the same force and effect as if incorporated as provisions of this Act, and the violation of or failure to comply with any such regulations shall constitute an offence and subject the offender thereof to the penalty hereinafter mentioned.

Counsel for appellant herein in the course of his argument produced a copy of the publication of such regulations; stated that same were published in the local *Royal Gazette* of the 7th of June, 1922, and that no others ever had been published; and submitted, as I think correctly, that the court could take judicial notice thereof.

The Attorney-General for New Brunswick, who appeared as counsel for respondent herein, neither pretended to deny said statements nor to challenge said submission.

He suggested mildly that the Lieutenant-Governor in Council could legally alter same from time to time as to each parcel of goods happening to come into store for exportation, and vary the tax as advised, without publication in the *Royal Gazette*.

I cannot assent thereto as a correct interpretation and construction of the Act, or of said section.

On the contrary I hold that until publication in the *Royal Gazette* such changes of regulations could have no legal effect.

I have taken the liberty of reading the said publication therein and cannot find, either that it changes the rate of taxation, or pretends to assign to any one the determination of the amount due by any exporter in respect thereof. It provides for the appointments of an inspector and assist-

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ant to give certain receipts and in many ways check exporters thereby from infringing the law. In course thereof he is to keep books and do many things, but, not in a single sentence nor altogether, is he assigned the duty of declaring anything due upon or in request of which a warrant of distress may be issued.

The fair inference to be drawn from sections 4, 6 and 7, which read as follows,—

4. The tax imposed by this Act in respect of all liquor had or kept as aforesaid at the time of the passing of this Act shall be paid to the Provincial Secretary-Treasurer within one month from the date at which said Act shall come into force, and on all liquor subsequently acquired, kept, sold or shipped as aforesaid, said tax shall be paid to the Provincial Secretary-Treasurer within fifteen days from the date when such liquor is acquired, kept, sold or shipped.

6. In default of payment within the time limited of any tax by this Act imposed, the same may be levied, with costs, by distress upon the goods and chattels, wherever found, of the person, firm, association, company or corporation liable therefor, under a warrant signed by the Provincial Secretary-Treasurer, directed to the Sheriff of any county, and the sheriff to whom the same is directed shall levy the tax and all costs, by sale of the goods and chattels of the person, firm, association, company or corporation in default, or so much thereof as may be necessary to satisfy the tax and the costs of said distress.

7. Any tax imposed by this Act may, at the option of the Provincial Secretary-Treasurer, be recovered by and in the name of the Provincial Secretary-Treasurer, by action in any court of competent jurisdiction,

coupled with the preamble reciting that the purpose of the Act was to assign to a department of the Government the control of liquor export business, is that the respondent, or he filling that office which he then filled, should decide and determine what the amount demanded should be, and, incidentally thereto, should decide when to issue a warrant of distress. In course of doing so he certainly would require to have the evidence before him to enable him to so determine and ought to act judicially in regard thereto, and he has not pretended, in his reply, above quoted, aught else, or that any one else had so decided or had the duty to decide. I infer that he might use the inspector's books and other material, as well as the bank account of his own department and record of his receipts thereby, as proper means of determining what was due from any exporter. Evidently the respondent's was the department to which the control as recited was intended to be assigned.

I am for these reasons, as well as from the bare act of deciding the truth of what is recited by him in the warrant, of the opinion that he was not in what he did or should have done, limited to discharging mere ministerial functions.

I therefore cannot agree with the court below in holding otherwise.

After reading many of the cases cited in argument and many more, I am inclined to agree with Mr. Justice White that it is almost impossible to reconcile all the cases in question, but much of the apparent conflict is due to many changes in the law governing certiorari.

And much, of all that, is cleared up by the reasoning in the modern cases to which I will presently refer, or cite.

Meantime I may point out that the learned justice speaking for the court seems to rest the decision of the court now appealed from, almost entirely upon the authority of the case of *Ex parte Taunton* (1), arising out of and resting upon what 43 Elizabeth, c. 2, section 4, provided for in regard to two Justices of the Peace issuing a distress warrant to levy the amount assessed and declared due, by the mode described in a full and amply detailed manner in previous sections of the Act.

Judgment had thereby been definitely declared and the amount due clearly ascertained. How that furnishes any analogy for what we have herein to deal with, I respectfully submit, passes my understanding. At best it was the decision of a judge in the Practice Court. Here we have no such declaration of any finding of the amount due except in this warrant of distress issued by the respondent and presumably determined by him on such material as he was *ex parte* furnished with. It seemingly combines judgment and warrant of distress in one document.

It seems rather an irregular method but that is what is complained of.

The case of *The Overseers of Staverton* v. *The Overseers of Ashburton* (2), is also referred to by Mr. Justice White, as if it turned upon the same section of said Act of Elizabeth, which it does not, as *Ex parte Taunton* (1). Instead

(1) [1836] 1 Dowl. 54.

(2) [1855] 4 E. & B. 526.

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it turned upon section 5, which deals with an entirely different subject matter, relative to the question of apprenticeship. The judgment therein is, however, very valuable for our purpose, inasmuch as it has to deal with the distinctions between what is the discharge of a judicial duty and a ministerial duty.

It was attempted therein in appeal to uphold the judgment of a court appealed from that the mere assent of two justices was a ministerial act and could not be held or called the discharge of a judicial duty.

The contention there seemed quite as plausible as that which respondent herein so successfully set up below. It was overruled therein and the court appealed from reversed and seems to point our duty to do likewise herein.

It also upheld the decision in the case of *The King* v. *Hamstall Ridware* (1), which had turned upon a like narrow distinction between what was a judicial, though contended to have been only a ministerial duty.

The counsel for appellant calls attention to the following note on page 21 of Paley on Summary Convictions, 8th ed.,

> In general the issuing of a warrant of distress or commitment is a judicial act as the party against whom it is sought should have an opportunity of showing that he has obeyed the order or conviction which the warrant is intended to enforce.

Of those cited by Paley counsel for appellant selects *Rex* v. *Benn* (2); *Harper* v. *Carr* (3); *Painter* v. *Liverpool Gas Co.* (4), and *Hammond* v. *Bendyshe* (5).

Numerous others are cited by Paley in said note but none, though distinguishing many from those just cited, which seem to help respondent herein.

The cases cited by either side herein have all been fully considered save a number of American decisions and others that would not bind us. I find that the American cases cited for the most part rest on local statutes.

The sole question that has given me most trouble was that which the court below proceeded upon. And upon that the only case respondent's counsel cites which, if still

(1) [1789] 3 T.R. 380.
(2) 6 T.R. 198.
(3) 7 T.R. 270.
(4) [1831] 3 Ad. & E. 433.
(5) [1849] 13 Q.B. 869.

law, could bind us, is the case of *Reg.* v. *Sharman; Ex parte Denton* (1), which as counsel for appellant points out, was expressly overruled by *The King* v. *Woodhouse* (2). And I find that this latter was in turn reversed by the House of Lords in *Leeds Corporation* v. *Ryder* (3). What is the result in neat law? I find much to interest as well as help in the reasoning of many judges, but nothing decisive of the case in hand.

I am quite satisfied on the foregoing cases and many others I have looked at that the act of the respondent was judicial and not ministerial and that certiorari would lie herein.

As an illustration of how wide the range of the authority of the court given the jurisdiction to issue a writ of certiorari extends, I may refer to the case of *Reg.* v. *Coles* (4).

Counsel for respondent argued that this writ of certiorari in question herein was against the Crown.

I fail to see how on the facts I have dealt with.

It certainly is against a servant of the Crown and so is every other directed to a justice of the peace, or to the Quarter Sessions, or any other inferior jurisdiction.

The Attorney-General on behalf of the respondent seemed to hint or suggest that the Lieutenant-Governor in Council in fact had directed all that was done herein.

I hope not. But if so, such fact was not proven or relied on in any way in the return made by the respondent, who responded as if he and his department were in control as much as any justice of the peace or other officer subject to the supervision of the court having the powers implied in its power to issue a writ of certiorari.

I come now to the question of the validity of the legislation.

The Provincial Legislature, according to my reading of the British North America Act, never had the power to impose either import or export duties except under and by virtue of a special reservation relative to timber and lumber, provided for by section 124 of the Act in favour of New Brunswick. That demonstrates how completely

(1) [1898] 1 Q.B. 578.
(2) [1908] 2 K.B. 501.
(3) [1907] A.C. 420.
(4) 8 Q.B. 75, in 1844.

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all concerned in framing the Act looked upon other export duties as without foundation, within the B.N.A. Act.

The exceptional privilege was cancelled by an agreement between New Brunswick and the Dominion at a price of $150,000 a year, as evidenced by the Dominion Statute 36 Vict., c. 41.

In the Attorney General's factum herein for respondent he makes no allusion to the contention set up, as the second of the grounds upon which the Chief Justice had ordered the issue of the writ and rule nisi, namely the invalidity of the said legislation in question herein by reason of its being *ultra vires*.

Yet he sets up as a reason in said factum that there is some other litigation pending which would decide the question of *ultra vires*.

Numerous cases can be found where parties have exhibited the like perversity of pursuing two different paths to find the law, when the shortest would have sufficed.

Sometimes the pursuer of both remedies found one had been taken away by legislation, but in other cases he found both had been left open, and that is so in this case, because the legislature failed to take away the writ of certiorari, though evidently quite willing to go very far.

The appellant's counsel relies upon our decision in *Martinello* v. *McCormick* (1), which, if we had in this record evidence of what is meant by the King's shop, where the liquor was stored, might in itself be conclusive against respondent.

Many other reasons might be assigned to shew how completely *ultra vires* this legislation is which seems to be quite regardless of the limits of power existent in the legislature.

I am of the opinion that this appeal should succeed and the appeal be allowed with costs here and in the Appeal Division below; the warrant quashed, and the course made clear, according to local practice, for pursuing any other remedies those concerned have resorted to or may desire to pursue.

(1) 59 Can. S.C.R. 394.

There is some question raised in my mind as to the effect of recent legislation taking away the right of appeal in cases of certiorari and making the amount involved the only test unless where leave of appeal given.

Having considered the question and seeing no point made of it by respondent, I conclude that, the amount involved far exceeding the $2,000 limit, the appeal lies.

No leave to appeal here appears in the record and I assume therefore no leave asked for.

DUFF J.—The statute under which the Secretary-Treasurer proceeded is entitled "The Liquor Exporters' Taxation Act," and the relevant enactments provide that (section 3) any person

who now has or keeps or has property rights in * * * liquors for export to any place outside the said province or who in the said province sells or ships liquors to be delivered at any place outside the said province

shall pay to the Crown a specified tax, calculated according to the quantity of liquor

now or hereafter had or kept within the province * * * or sold or shipped * * * for delivery outside

of the province; (section 4),

the tax * * * in respect of all liquor had or kept * * * at the time of the passing of this Act shall be paid * * * within one month

from the coming in force of the Act,

and on all liquor subsequently acquired, kept, sold or shipped as aforesaid

within fifteen days

from the date when such liquor is acquired, kept, sold or shipped;

the tax is to be a first lien and charge upon all the property in the province of any person liable to pay it; and by section 6, in default of payment within the time limited, the tax may be levied by distress upon the goods of the person liable

under a warrant signed by the Provincial Secretary-Treasurer, directed to the Sheriff of any county, and the Sheriff * * * shall levy the tax and all costs by sale of the goods * * * of the person in default.

I think it is quite clear that there is no duty and no authority to adjudicate in the sense of giving a binding decision as to the conditions under which the statute authorizes the issue of a warrant.

The general rule touching the office of the writ of certiorari is usually expressed by saying that it lies to remove

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acts of inferior courts and judicial acts of bodies possessing statutory jurisdiction, but it does not lie to remove acts which are merely ministerial. Obviously the application of the rule turns upon the scope of the words "judicial" and "ministerial." In applying the rule in particular cases, some judges have found the criteria of removability by developing the scope of "judicial" used in this sense, and others by considering the scope of "ministerial." What is "judicial" is not, for the purposes of the rule, "ministerial"; what is "ministerial" is not, for the purposes of the rule, "judicial."

As White J., who delivered the judgment of the New Brunswick Court of Appeal, observes, it is, perhaps, impossible to reconcile all the cases, but fortunately the subject has been discussed in modern times in judgments which have illuminated it, from which, I think, a criterion may be adduced which is sufficient to determine the question arising on this appeal.

In a case of prohibition *Reg.* v. *Local Government Board* (1), Brett L.J. (Lord Esher) said:

> Whenever the legislature entrusts to any body of persons, other than the Superior Courts, the power of imposing an obligation on individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

And May C.J., said, in *The Queen* v. *Corporation of Dublin* (2):

> For the purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others.

The judgment containing the most valuable exposition of the subject is that of Fletcher Moulton L.J., (as he then was) in *Rex* v. *Woodhouse* (3). The Lord Justice there points out that while certiorari is often said to be applicable only to "judicial acts," the cases by which this limitation is supposed to be established shew that the words "judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed "judicial," and his conclusion is this:

(1) [1882] 10 Q.B.D. 309 at p. 321.

(2) [1878] 2 L.R. Ir. 371, at p. 377.

(3) [1906] 2 K.B. 535

The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts * * * in short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

There is no conflict, I think, between this modern statement of the rule and that cited by Mr. Taylor from *Rex* v. *Glamorganshire* (1):

This court will examine the proceedings of all jurisdictions erected by Act of Parliament and if they under pretence of such Act proceed to encroach jurisdiction to themselves greater than the Act warrants, this court will send a certiorari to them to have their proceedings returned here to the end that this court may see that they keep themselves within their jurisdiction and if they exceed it to restrain them, and the examination of such matters is more proper for this court.

My conclusion is that the issuing of a warrant of distress by the Secretary-Treasurer in exercise of the authority given by the Act or in assumed exercise of such authority is not an act which can be described as merely ministerial. Assuming the conditions of authority to be fulfilled, he has the right and duty to decide, and the statute leaves it to his discretion, whether taxes shall be collected by means of distress or not, and the effect of his decision, the formal expression of which is the issue of the warrant, is that, always assuming the conditions of authority to exist, the person liable to pay the tax becomes subject to the additional liability to have his goods distrained and sold for the payment of what is due without previous judicial ascertainment of it. He is no mere passive instrument of the law. The liability to distress is a liability resulting from the determination of the Secretary-Treasurer that a distress warrant shall issue.

A question which will require discussion, namely, whether there is anything in the statute itself, in the terms in which the authority is given, in the special nature of the subject matter with which the statute deals, showing that the authority given the Secretary-Treasurer ought not to be regarded as judicial for our present purpose, may conveniently be postponed for a brief examination of the grounds on which the court below proceeded in holding that the warrant of the Secretary-Treasurer is not removable by certiorari. The Appeal Division followed the

(1) 1 L. Raym. p. 580.

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previous decision of the Supreme Court of New Brunswick in *The Queen* v. *Simpson* (1), in which a County Treasurer's warrant for the collection of taxes was under consideration, which proceeded largely on the authority of the decision in *Ex parte Taunton* (2), in which it was held that a warrant issued by justices for the collection of a poor-rate under the statute of Elizabeth was not removable. *Ex parte Taunton* (2) has never been expressly overruled, and no case has been referred to in which such a warrant has been held to be removable, and, moreover, no decision was cited that is necessarily inconsistent with it; and I have been unable to find any such decision prior, at least, to the year 1910. There are, moreover, decisions and weighty dicta which lend it support. In *The Queen* v. *Webber* (3), Ridley J., and Darling J., both express the opinion that the distress warrant in question in that case was a merely ministerial act. The passage cited above from the judgment of May C.J., is preceded by this sentence:

> It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant.

This judgment of May C.J., had the approval of Lord Fitzgerald at the time, and the sentence I have just quoted, together with the passage quoted before, are reproduced with approval in the judgment of Palles C.B. in *Reg.* v. *Local Government Board* the Wexford Case (4), which had the concurrence of Walker L.J., and Holmes L.J.; and Fletcher Moulton L.J., at p. 535 of the judgment already referred to, observes that

> the process of certiorari does not apply * * * to the issue of a warrant to enforce a poor-rate.

An early case, *Rex* v. *Lediard* (5), in which a warrant issued under the authority of statute was held not to be removable, on the ground that the issuing of it was a ministerial act merely, was followed in a subsequent case, *Rex* v. *Lloyd* (6).

(1) 20 N.B. Rep. 472.
(2) 1 Dowl. 54.
(3) [1899] 16 Times L.R. p. 1.
(4) [1902] 2 Ir. 349.
(5) Sayer 6.
(6) Cald. 309.

Mr. Taylor vigorously assailed the judgment in *Ex parte Taunton* (1), but I do not think it is necessary to decide, for the purposes of this appeal, whether or not the question, if it had arisen in more recent times as touching a warrant for collection of a poor-rate, would have been the same. What we are really concerned about is whether or not the decision in *Ex parte Taunton* (1) and other cognate decisions and the dicta to which I have referred furnish any rule or principle for our guidance in relation to the question now before us.

There is a most important distinction between the act of magistrates in issuing a warrant for the collection of a poor-rate and the act of the Secretary-Treasurer in issuing a warrant for the collection of the liquor tax. The jurisdiction of justices in proceedings for the recovery of a poor-rate under the Act of Elizabeth was a very peculiar one. It is quite true that it was the duty of the justices not to issue a warrant without calling upon the party whose goods it was proposed to distrain to shew cause against it; that is decided in a number of cases cited by Mr. Taylor, most of which will be found at pp. 21-22 of Paley's Summary Convictions. It is sufficient to refer to two of them: *Rex* v. *Benn* (2); *Harper* v. *Carr* (3). But while it was the duty of the justices to hear what the party affected had to say for the purpose of shewing that the rate was not a valid rate, as, for example, that though rated as an occupier, he was not an occupier, or that the land was outside the territorial jurisdiction of the rating authority, or that he was not liable to pay because he had already paid, the decision of the justices upon these points, as Parke B., points out in *Newbould* v. *Coltman* (4), was not a judicial decision, the inquiry into these matters not being a judicial inquiry, in the sense that their decision upon it was binding upon anybody and a party whose goods were distrained being consequently entitled afterwards to raise in an action the very matters which he had brought before the justices in answer to the summons, if it appeared either that the rate was an invalid rate or that the plaintiff was not liable

(1) 1 Dowl. 54.
(2) 6 T.R. 198.
(3) 7 T.R. 271.
(4) [1851] 6 Ex. 189, at page 199.

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to pay. Another striking feature of this proceeding was that if it appeared that the magistrates had jurisdiction, mandamus would lie to compel them to issue the warrant. *The Queen* v. *Bradshaw* (1); *Church Wardens of Birmingham* v. *Shaw* (2); *Reg.* v. *Marsham* (3). In *Bradshaw's Case* (1) and *Marsham's Case* (3) it was laid down in terms that the duty of the magistrates, their jurisdiction being unquestioned, was purely ministerial and having regard to the practice and the course of decision it is indisputable that, assuming the conditions of authority to exist, the magistrates in issuing such a warrant had no discretion, had no authority or duty to decide, and were mere passive instruments of the law; while any inquiry they might make as to the conditions of authority was not a judicial inquiry, and any conclusion they might reach had not the conclusive quality which is the attribute of a judicial decision. There is, indeed, a decision of a Divisional Court in the year 1910 (Lord Alverstone L.C.J., Channel and Coleridge JJ.) which suggests that the modern tendency is to regard as judicial for the relevant purpose the issue of such a warrant on the ground, perhaps, that the duty of the magistrates to inquire into the question of non-payment of the rate, for example, is a circumstance which marks the proceeding a judicial one. In the case referred to, *The King* v. *Doherty* (4), the application was to remove a warrant of commitment under a conviction which had adjudged that the defendant should be committed in default of payment of a fine, and in default of sufficient distress the fine, unknown to the defendant, had in fact been paid, and that circumstance not having been brought to the attention of the magistrate, a warrant of commitment had issued. The warrant was removed and quashed, Lord Alverstone observing,

> it is now too late for this court to hold that a warrant of commitment is not a judicial act.

It would not be easy to distinguish between a warrant of commitment under this conviction and a warrant of distress under the same conviction; nor, perhaps, is it easy to find a distinction between such a warrant of distress and a warrant of distress to enforce a poor-rate. The judg-

(1) [1860] 29 L.J. M.C. ,176.
(2) [1849] 10 Q.B. at page 881.
(3) [1922] 50 L.T., 142.
(4) [1910] 74 J.P. 304.

ment illustrates, I think, a modern tendency to enlarge the scope of certiorari. See the observations of Vaughan Williams L.J., in *Reg.* v. *Nicholson* (1).

It is useful, I think, to contrast the act of magistrates issuing a warrant for the collection of a poor-rate and the act of magistrates in assenting to the indenture of pauper apprentices under the Statute of Elizabeth. In *Staver* v. *Ashburton* (2) this latter act was held to be a judicial act. Wightman J., in the course of the argument, suggested that the true test for distinguishing between judicial acts and merely ministerial acts was to be found in the answer to the inquiry whether or not mandamus would lie. If the magistrates, assuming, of course, the conditions of their authority to exist, were entitled to withhold their hand or to act in their discretion, then mandamus would not lie, and the act would not be said to be ministerial merely.

These considerations convince me that *Ex parte Taunton* (3) and decisions like it do not afford a satisfactory guide for passing upon the point now before us. But another important question remains, and that is whether the act of the Secretary-Treasurer is an act which for the want of a better term I shall describe as "administrative" and outside the scope of certiorari. The authority given by the Act is not an authority conferred upon the Crown; it is given to the Secretary-Treasurer by his title of office, and, moreover, when the tax is sued for the action is to be brought in the name of the Secretary-Treasurer. I think it is clear that the Secretary-Treasurer acts in exercise of an authority given to him as Secretary-Treasurer by the statute. There are two decisions to which I think reference should be made in this connection. The first is the case of *Degge* v. *Hitchcock* (4), a decision of the Supreme Court of the United States. The question was whether certiorari would lie to bring up a "fraud order" made by the Postmaster General in effect prohibiting the persons against whom it was directed from using the mails. It was held that this order was not removable on two grounds: first, that as regards the conditions of the Postmaster General's author-

(1) [1899] 2 Q.B. 455.
(2) 4 E. & B. 526.
(3) 1 Dowl. 54.
(4) 229 U.S.R. 162.

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ity or any suggestion of arbitrary and therefore unauthorized exercise of statutory power, no decision of the Postmaster General on such points could be conclusive, and that the parties affected might resort to equitable process for the purpose of correcting any excess of jurisdiction or abuse of authority, and assuming jurisdiction to exist, the authority of the Postmaster General was held primarily intended to be exercised for the protection of the public, and therefore falling within a class of acts in exercise of governmental functions which under the description "administrative" had been held to be outside the scope of the remedy invoked. The other case is a decision of the High Court of Australia in *The King* v. *Arndel* (1). The question arose there in relation to an order made by the Postmaster General similar to that which came before the Supreme Court of the United States eight years later in the case just referred to. The opinion which prevailed as expressed in the judgment of Griffith C.J., at page 572, was that the order was not judicial in its character because, having regard to the nature of the subject with which the legislature was dealing and to the terms in which the authority was conferred, he drew the inference that the legislature contemplated the exercise of a duty in circumstances of emergency, and consequently without notice to the parties who might be affected. He drew the conclusion from this that the authority given by the statute could not consistently with the terms and the object of the statute be treated as "judicial" for the purpose of certiorari proceedings.

It is not without interest to observe, as appears from the report of *Degge* v. *Hitchcock* (2), that in exercising a jurisdiction of the same type the Postmaster General of the United States would be amenable to restraint by equitable process for arbitrary exercise of his jurisdiction and that, in fact, the practice in respect of such orders in the United States appears to be that they are only made there after an investigation in which the parties affected are heard.

I have considered it right to refer to these decisions, but the analogy between the questions presented for decision

(1) 3 C.L.R. 557. (2) 229 U.S.R. 162.

in these cases and the questions now before us is not sufficiently close to enable us to derive much instruction from them. There is a wide difference between the authority of the Postmaster General to regulate the business of his department by orders made for the protection of the public against fraud and immorality and the jurisdiction of the head of a department to collect a debt due to the Crown by summary process in the absence of any judicial determination of liability. Administrative the act is, perhaps, in some sense, but its predominant characteristic is that it is an extraordinary remedy for the collection of a civil debt. Urgent, no doubt, this summary process might be in an easily conceivable emergency, but I am by no means prepared to hold that under the authority of this statute the Secretary-Treasurer is entitled to disregard the principle which was held to govern magistrates in issuing a warrant under the statute of Elizabeth and to require them first to give the person affected an opportunity to question his liability.

The statute cannot contemplate the issue of the warrant without inquiry by the Secretary-Treasurer into the facts; an inquiry which, though not judicial in the sense that his decision is binding, is judicial in the sense that it aims at ascertaining the facts with a view to a possible proceeding in the nature of an execution, the issue of which execution rests in his discretion. Even assuming the facts ascertained by the Secretary-Treasurer in such a manner as to establish to his own satisfaction the existence of authority he might well in any given case conceive it to be his duty, in view of possible dispute, not to proceed *breve manu.*

On the merits, the question to be dealt with is whether the legislation in question, the Liquor Exporters' Taxation Act, is an enactment which the province had authority to pass in execution of its power to legislate in relation to the subject of "direct taxation within the province" under item (2) of section 92. The statute professes to impose a tax on everybody who has in the province liquor for export and upon everybody in the province who sells or ships liquor to be delivered at any place outside the province.

It is perhaps worth while to emphasize the point that

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the sole question we have to consider is whether the legislation can be supported as legislation under item (2), and if it properly falls within item (2) then it is clearly within the power of the province to enact. There is here no ground for suggesting, as was held in Wharton's case, that under the guise of imposing a tax for the purpose of raising a revenue the province is really attempting to enact legislation upon a subject outside of its legislative jurisdiction—the regulation of trade and commerce, for example. There is not the slightest ground for suggesting that the statute is anything other than it professes to be, namely, a taxing statute, a statute passed with the object of raising a revenue for the public purposes of the province by imposing duties upon the export of liquor and upon the sale of liquor for export.

It seems very clear, however, that the tax imposed is one which cannot be brought within the category of "direct taxation." Postponing for a moment any reference to the decisions upon the construction of this phrase as used in the British North America Act, it may be well to note that so far as one is aware there is no principle of classification of taxes as "direct" and "indirect" that has found acceptance among economists or practical financiers according to which such a tax as that in question would not fall within the class of indirect taxes. A tax on commodities, such as a customs duty, an excise duty, is mentioned by Mill as a typical indirect tax. In the Oxford Dictionary one finds the statement that a direct tax is

> one levied immediately upon the persons who are to bear the burden, as opposed to indirect taxes levied upon commodities, of which the price is thereby increased so that the persons on whom the incidence ultimately falls pay indirectly a proportion of taxation included in the price of the article.

The principle of distinction adopted, according to Professor Bastable, by "practical financiers," which regards those taxes as direct that are levied on "permanent and recurrent occasions" and those as indirect which are levied upon "occasional and particular events" would equally exclude this tax from the class of direct taxes. If, therefore, the question now arose for the first time one must, I think, have been driven to the conclusion that whether

the phrase "direct taxation" was to be read according to the sense which would be ascribed to the words by economists or by practical financiers or in popular use, the tax under discussion does not fall within it.

The phrase "direct taxation" has, however, received a construction in a series of cases beginning with *The Attorney General* v. *The Queen Ins. Co.* (1), and coming down to *Alleyn* v. *Barthe* (2), and in effect it has been authoritatively held that the definition of "direct tax" given by John Stuart Mill as one which "is demanded from the very person who it is intended or desired should pay it," is to be taken as giving the sense in which the words are used in the B.N.A. Act because, to quote the judgment of Lord Hodhouse in *Bank of Toronto* v. *Lambe* (3), this definition has appeared to the judges who have been called upon to construe the words

> to embody with sufficient accuracy * * * an understanding of the most obvious indicia of direct and indirect taxation which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act.

It was urged before us with a good deal of vigour by the Attorney General of New Brunswick that the legislature of New Brunswick was concerned only with the persons on whom the tax was levied; and indeed that the problem of determining the incidence of such a tax is one involved in so much obscurity that it cannot be assumed that the legislature acted upon any view of it, or with any view other than that of collecting the tax from the persons who by the statute are made liable to pay it.

I think it may well be doubted whether the legislature of New Brunswick was in the least concerned with the point of the ultimate incidence of the tax, but this is by no means conclusive and is of little if any relevancy to the question now raised before this court, whether or not the legislature had legislative authority to create the tax. For the purpose of applying the definition of Mill in order to decide questions arising under item (2) of section 92, one must assume that the legislature imposing the tax contemplates the normal effect of such a tax imposed in the exist-

(1) 3 App. Cas. 1090. (2) [1922] 1 A.C. 215.
(3) 12 App. Cas. 575.

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ing circumstances, and the question one must ask oneself is whether, in view of the normal effect and tendency of a given tax, it may be affirmed that the tax is demanded from the very persons who are ultimately to bear the burden of it. Normally, every addition to the cost of supply inevitably tends to increase the supply price—the price that is to say, which is sufficient to call forth the exertions necessary for producing the given quantity—and thus has a tendency to raise the market price. If the market price falls below this point permanently, then the given source of supply will inevitably be cut off. For the purpose of determining the cost of supply from a given source, there is no difference between the case of manufacture, the cost of transport, or a toll as a customs duty which must be paid in order to get the goods to market, and the seller who has to pay these things will require, if he can, the reimbursement of them in addition to his profit. No distinction of substance in this respect can be drawn between what is commonly known as a sales tax, a custom duty, an excise duty and the duties imposed by the statute now under consideration. The market price is a product of variable factors, and in particular circumstances may be such that goods are sold at a loss, but whether they are sold at a loss or at a profit, as a rule taxes on manufactured commodities which can be indefinitely reproduced enter into the factors determining the price at which the commodities are sold just as the cost of manufacture and the cost of transport do, and in the same degree.

It is therefore impossible to affirm that such a tax as this, which the taxpayer will certainly add to the price of his commodity if he can, is intended to be borne by the very persons from whom it is demanded.

ANGLIN J. (dissenting).—The purpose of these proceedings was to bring before the Supreme Court of New Brunswick a distress warrant issued by the Provincial Secretary-Treasurer under section 6 of "The Liquor Exporters' Taxation Act" of that province (1922, c. 3). This warrant was directed to the sheriff of the City and County of St. John to levy the amount of a tax imposed by section 3 of that statute on the appellant. The right to issue the warrant is chal-

lenged not because the terms of the statute did not authorize the imposition of the tax, nor because there is any question as to its amount, or as to the existence of the conditions on which liability to pay it arises under the statute (all these matters are covered by the provisions of subsections 3, 4, 8 and 9), nor because there had not been default in payment, but solely on the ground that the statute itself was *ultra vires* of the Provincial Legislature in that the tax thereby imposed is not "direct taxation." While the Provincial Secretary must satisfy himself that the tax, in respect of which he proposes to issue his warrant, is due and that the person whose goods are to be distrained is in default, he is not empowered to adjudicate upon those matters. He is merely authorized to provide for the collection of a tax actually in arrear by means of a distress warrant—and this is not without significance. *Newbould* v. *Coltman* (1).

Inasmuch as other means of effectually raising the question of the validity of the statute are available—we were told that it is presently in issue in an action in the Chancery Division of the Supreme Court of New Brunswick brought by the present appellant for equitable relief, and the right so to raise it was not questioned—and the act which it is sought to review is that of an executive officer of a provincial government (*Rex* v. *Arndel* (2)), I gravely doubt the propriety of resort being had to the extraordinary remedy of certiorari and am disposed to think the court below would have exercised a sound discretion had it set aside the writ accordingly. *Degge* v. *Hitchcock* (3).

But I am also of the opinion that the writ was properly set aside by the Appeal Division of the Supreme Court of New Brunswick on the ground that the act of the Provincial Secretary-Treasurer in issuing a distress warrant under section 6 of the "Liquor Exporters' Taxation Act" was a purely ministerial and not a judicial act. No doubt the phrase "judicial act" must be taken in a very wide sense and includes many acts not ordinarily termed judicial and of bodies not ordinarily considered to be courts. But

(1) 6 Ex. 189, 199-201. (2) 3 C.L.R. 557, 571-2.
(3) 229 U.S.R. 162, 171-2.

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I do not regard the making out and delivery of a distress warrant which a statute provides may be issued upon default in making payment of a tax by it ordained as such an act. The case of the issuing of a warrant to enforce a poor rate is clearly analogous, and to that Fletcher-Moulton L.J., said in *Rex* v. *Woodhouse* (1):

> the process of certiorari does not apply * * * even though the rate is one which could itself be questioned by certiorari.

The issuing of such a warrant in the opinion of the Lord Justice is an instance of a "purely ministerial act." Indeed it is given as a typical example of such acts in most of the authorities; Short and Mellor's Crown Practice (2 ed.), p. 42; 10 Hals. L. of E., p. 172. The issue of a warrant to the sheriff by the secretary of a county under section 86 of "The Act Respecting Rates and Taxes" (C.S.N.B., c. 170) to levy the amount of rates is a similar act. Another analogous act or series of acts is what occurs upon the signing of judgment and the issue of execution thereon by the clerk of a court under statutory provisions or rules of court authorizing him to do so upon default of appearance by the defendant to a writ of summons. In both these cases the default, including all the circumstances requisite to put the person against whom the process is to issue *in mora,* must be made to appear to the official by the prescribed proof. But his act is none the less simply ministerial. He is only required to satisfy himself that the conditions under which he is empowered to act have been shewn to exist. His conclusion that they do in fact exist binds nobody

For other instances in which the issue of process under circumstances not dissimilar has, on the ground that the act is simply ministerial, been held not to be a proper subject for certiorari reference may be made to *Rex* v. *Lediard* (2), cited with approval in *Rex* v. *Pryse-Lloyd* (3); *Ex parte Taunton* (4); *The Queen* v. *Overseers of Salford* (5); *Rex* v. *Marsham* (6); *The Queen* v. *Webber* (7). The issue of a warrant of commitment for non-payment of a fine and costs has been regarded as an act of a different

(1) [1906] 2 K.B. 501, at p. 535.
(2) Sayer 6.
(3) Cald. 309.
(4) 1 Dowl. 54.
(5) [1852] 18 Q.B. 687.
(6) 50 L.T. 142.
(7) 16 Times L.R. 1

character involving the exercise of judicial functions; *Rex* v. *Doherty* (1).

It is urged that the Provincial Secretary-Treasurer acted judicially in issuing the distress warrant in question because the statute gives him an option to withhold it and to resort to an action to enforce payment of the overdue tax (section 7). But such an exercise of judgment and discretion did not give to his decision to issue the warrant a judicial character. *The People ex rel. Corwin* v. *Walter* (2). It is the duty of the Provincial Secretary when satisfied that the tax is in arrear to take one or other of the means directed by the statute to recover it. The liability of the appellant was in no sense imposed by the Provincial Secretary's determination to issue the warrant; it arose under the statute. The existence of the right to issue the warrant no doubt depended upon a contingency and, as an executive officer, the Provincial Secretary had to determine whether or not the contingency had happened. But, notwithstanding the necessity for such determination, the exercise of the power remained a ministerial act. *The Queen* v. *Dublin* (3); *Reg. (Wexford C.C.)* v. *Local Government Board* (4); *Rex* v. *Kerry County Council* (5). The Provincial Secretary's determination does not bind. The happening of the contingency may be questioned in an action brought to try the validity of the act done under the alleged exercise of the power. ([1902] 2 Ir. R. 374.)

Nor were the rights of the appellant affected by the action of the respondent *per se*. The only right involved in what he did was his own right as an executive officer of the Crown to choose as between the two remedies available under the statute; one or the other it was his duty to take. In making the choice he may have been influenced by considerations of policy and expediency to which effect quite properly would be given in discharging such an administrative duty, but which may not be fit grounds for judicial action. Having said that certiorari is the process by which the High Court controls the exercise of jurisdiction by inferior courts. For our purpose "judicial" must include juridical,

(1) 74 J.P. 304.
(2) 68 N.Y. 403, 410.
(3) 2 L.R. Ir. 371, 376.
(4) [1902] 2 Ir. 349, 373-4, 383-4.
(5) [1905] 2 Ir. 299, 303.

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Fitzgibbon L.J. (1), after quoting the words of Brett L.J. in *The Queen* v. *Local Government Board* (2)—an application for prohibition,—

> wherever the legislature entrusts to any body of persons other than the Superior Courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given them by Act of Parliament,

and the definition of a "judicial act" given by May C.J. in the Dublin case (supra),—

> an act done by a competent authority upon the consideration of facts and circumstances, and imposing liability or affecting the rights of others,

proceeds:

> These statements have been criticized but, as applied to the cases under consideration, I respectfully venture to say that they appear to me to be right. They were made in cases where the acts considered were done in the exercise, or assumed exercise, of judicial, as distinguished from any other authority. Ministerial and administrative acts may be done by courts as well as by others; they may involve consideration of facts and circumstances; they may impose liabilities and may effect rights; and yet such acts may not be controlled by certiorari. Therefore, the statements which I have quoted must be confined to acts involving the exercise, or assumed exercise, of some jurisdiction.

There was in this case no exercise, or assumed exercise, of jurisdiction in the sense in which the Lord Justice uses that term.

I am, for these reasons, of the opinion that it was properly held by the Supreme Court of New Brunswick that the remedy of certiorari is not available and that this appeal should, accordingly, be dismissed.

BRODEUR J.—A preliminary question has been raised as to whether the act of the Secretary-Treasurer of the province of New Brunswick, the Honourable Mr. Hetherington, in issuing the warrant of distress is purely ministerial and not judicial.

The court below held that he acted ministerially and that consequently the writ of certiorari does not lie.

To decide this question we have to consider the legislation passed by the legislature of New Brunswick in 1922 and called "The Liquor Exporters' Taxation Act."

By this Act, section 3, a tax of $1.25 a gallon is imposed on a person or company having in the province liquors for export to any place outside the province. The tax has to

(1) [1902] 2 Ir., at p. 383. (2) [1882] 10 Q.B.D. 309, at p. 321.

be paid within a certain delay (section 4); and if there is default of payment within this delay, the tax may be levied by distress upon the goods of the person liable under a warrant signed by the Provincial Secretary-Treasurer directed to the sheriff (section 6), or the Secretary-Treasurer may at his option take an action in his name before a court of competent jurisdiction to recover the amount of the tax (section 7). By section 9 the Lieutenant-Governor in Council is authorized to make regulations as to the premises in which liquor shall be kept for export, as to its inspection, its kind and quality and marking, as to the registration of all firms and persons carrying out the business and as to "the fixing and determining of the amount of the said tax."

We have nothing before us shewing how the amount of the tax mentioned in the distress warrant has been determined. The Secretary-Treasurer has not thought advisable to submit the question to the courts as he had the option to do under section 7 of the Act; he has preferred to proceed against the appellant company by distress warrant.

Before issuing this distress warrant the Secretary-Treasurer had to satisfy himself that the appellant company had in its possession a certain quantity of liquor, that it had property rights in the liquor kept, that it was liable for the tax claimed, that there had been a demand for payment and default on the part of the debtor and that the law which he had as a Minister of the Crown to carry out was within the competency of the legislature.

All these questions could have been submitted at his discretion to the courts of the land to be determined but he has preferred to proceed by distress warrant, and it cannot be seriously contended for one moment that he did not then himself determine those questions of fact and of law before taking such a serious step as to levy the tax by distress upon the goods of the person liable. All those circumstances shew that he could not issue the warrant without determining those different questions. He has, upon consideration of facts and circumstances, imposed a liability and has affected the rights of the appellant company

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and consequently has made a judicial determination. *The Queen* v. *Corporation of Dublin* (1).

Anybody who possesses authority from the legislature to perform judicial acts constitutes a court so as to be amenable to the writ of certiorari (*Rex* v. *Woodhouse* (2)). It has been in England a question whether certiorari lies as to the licensing justices. *Reg.* v. *Sharman* (3), and *Reg.* v. *Bowman* (4), are authority for the proposition that the licensing justices under the law as it existed before the licensing Act of 1904 were acting in an administrative capacity and that certiorari would not lie. But in the case of *Rex* v. *Woodhouse* (2), these decisions of *In re Sharman* (3) and *In re Bowman* (4) were not followed; and it was decided that the acts of the licensing justices were judicial acts and that certiorari lies in respect of them.

I was inclined to think at first that the acts of members of an executive council in a province were not amenable before the courts by way of certiorari; but in the very recent cases of *The Board of Education* v. *Rice* (5), and of *Local Government Board* v. *Arlidge* (6) it was decided that in a question which was the subject of an appeal to those departments, though it should not be considered as being tried, an opportunity should be given to the parties in the controversy to be heard; and if the boards failed in that duty their orders might be subject of certiorari. See also *The Queen* v. *Local Government Board* (7).

It seems to me that the decision of the Provincial Secretary-Treasurer of New Brunswick in issuing the warrant in question may be considered as a judicial act subject to review by certiorari.

As to the issuing of warrants, it has been decided that they are not judicial acts in the following old cases: a warrant to apprehend an offender *Rex* v. *Lloyd* (8); *Rex* v. *Lediard* (9); a warrant to levy a poor-rate *Ex parte Taunton* (10); a warrant for the maintenance of order *Rex* v. *Webber* (11). But we find also that the following warrants

(1) 2 L.R. Ir. 371.
(2) [1906] 2 K.B. 501.
(3) [1898] 1 Q.B. 578.
(4) [1898] 1 Q.B. 663.
(5) [1911] A.C. 179.
(6) [1915] A.C. 120.
(7) [1902] 2 Ir. 349.
(8) Cald. 309.
(9) Sayer 6.
(10) 1 Dowl. 54.
(11) 16 Times L.R. 1.

have been held judicial acts; a search warrant under 48-49 V, ch. 69, which relates to the protection of women and girls *Hope* v. *Evered* (1); a warrant of arrest under the same act *Lea* v. *Charrington* (2).

It has been decided in England, in a case almost similar to this one, that the certificate given by commissioners of income tax authorizing repayment of sums paid in respect of income tax may be removed by certiorari in order to be quashed. *Rex* v. *City of London Commissioners of Income Tax* (3).

For these reasons, I consider that the writ of certiorari would lie.

We have then to decide the main issue which has been raised by the appellant company as to whether this legislation imposing a duty on liquor to be exported is *ultra vires*. On this point I need not repeat what has been so well said by my brother Duff, in whose view I concur, that this tax is *ultra vires*.

For these reasons the appeal should be allowed with costs of this court and of the court below.

MIGNAULT J. (dissenting).—While at common law certiorari lies only to review proceedings of a judicial or quasi-judicial nature, it is very difficult, if not impossible, to define with absolute precision what are judicial or quasi-judicial acts (Corpus Juris. *Certiorari*, no. 68, vol. 11, p. 121). There is no doubt the term "judicial" or "quasi-judicial" is here used in a very wide sense, but on the other hand if the act be a purely ministerial one, certiorari certainly does not lie. As said by Fletcher-Moulton L.J., in *Rex* v. *Woodhouse* (4):

> The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

The instance suggested by Fletcher-Moulton L.J., the issue of a warrant to enforce a rate where certiorari does

(1) 17 Q.B.D. 338.
(2) 23 Q.B.D. 45.
(3) 91 L.T. 94.
(4) [1906] 2 K.B. 501, at p. 535.

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Mignault J.

not lie, although the rate itself could be questioned by that process, is most pertinent in the present case, for here the act attacked is a distress warrant to enforce a tax, and it is hard to distinguish this case from the instance suggested by the learned judge.

There are no doubt cases under statutes requiring the assent of two justices for the issue of a warrant, where the giving of this assent, when there was no inquiry and judicial act preliminary to the assent of the justices, was held to be a judicial act. *The King* v. *Inhabitants of Hamstall Hidware* (1); *Overseers of Staverton* v. *Overseers of Ashburton* (2); *Harper* v. *Carr* (3). But such cases are clearly distinguishable from the one under consideration, the statute here giving the respondent no discretion to refuse to collect the tax when the contingency provided for has happened.

This appears to me the deciding factor in this case as to the possibility of attacking by certiorari the distress warrant issued by the respondent. Section 6 of 12 Geo. V, ch. 3 (New Brunswick) states that in default of payment within the time limited (by the statute) of any tax by the Act imposed, the same may be levied under a warrant signed by the Provincial-Treasurer directed to the sheriff. Section 7, it is true, gives the Secretary-Treasurer the option of taking an action to recover the tax in any court of competent jurisdiction. But he must do one thing or the other, issue the warrant or take action before the courts, and in so doing his act is of a purely ministerial and administrative character and in no wise a judicial one. He does not determine the liability of the taxpayer, he decides nothing, he merely issues a warrant or takes an action to recover a tax imposed by the statute. Should he institute an action to collect the tax it would not be contended that his act was a judicial one. And if that be so, the mere signing of a warrant under which the sheriff proceeds to levy the tax, which decides no question of liability but only puts the machinery of the law into motion, is surely not a judicial act.

(1) 3 T.R. 380.

(2) 4 E. & B. 526.

(3) 7 T.R. 270.

On this ground, I think the appeal fails. The substantial question of the validity of this statute, which cannot be determined upon these proceedings, is, I understand, in issue before the New Brunswick courts in another action. This lessens the regret that I would otherwise feel to have to dispose of this case on the rather technical ground that the appellant misconceived its remedy when it attacked the distress warrant by certiorari. There does not appear, however, any possibility of avoiding the conclusion that this is not a case for certiorari.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Fred. R. Taylor.*
Solicitor for the respondent: *H. C. Ramsey.*

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HOME APPLIANCES MANUFACTURING COMPANY (PETITIONER)..... } APPELLANT;

AND

THE ONEIDA COMMUNITY (OBJECTING PARTY)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Refusal to register—General trade-mark—Application to register for use as to goods not manufactured by holder—"Calculated to deceive or mislead the public."

A manufacturing company had registered the word "Community" as a general trade-mark descriptive of the goods which it made and another company applied to have the same word registered as a specific trade-mark to be used in connection with the sale of washing machines which were not made by the former company.

Held, affirming the judgment of the Exchequer Court ([1923] Ex. C.R. 44) Duff J. dissenting, that such use of the word "Community" as a specific trade-mark was calculated to "deceive or mislead the public" and its registration was properly rejected.

Per Brodeur J., Duff J. contra. A general trade-mark protects the registered owner not only in respect to goods which it makes but also as to those which it is authorized to make by its charter.

APPEAL from the judgment of the Exchequer Court of Canada (1) refusing to overrule the refusal of the Minister of Agriculture to register the word "Community" as a specific trade-mark descriptive of the washing machines manufactured by the appellant company.

The Oneida Community does a very large manufacturing business in connection with which it has registered the word "Community" as its general trade-mark. The Home Appliance Co. applied for registration of the same word as a specific trade-mark to designate the electrical washing machines which it makes and which have never been made by the Oneida Community though it could do so under its charter. The application of the Home Appliance Co. was refused and such refusal was confirmed by the judgment of the Exchequer Court (1). The Home Appliance Co. appealed from this judgment to the Supreme Court of Canada.

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

(1) [1923] Ex. C.R. 44.

R. S. Smart for the appellant. A general trade-mark only protects the owner in regard to goods which use and mode of dealing have rendered definite. *Edwards* v. *Dennis* (1). And see *In re Vulcan Trade-Mark* (2).

The goods designated by the specific trade-mark applied for cannot possibly be mistaken for those of the respondent and therefore are not calculated to mislead or deceive the public. *Payton & Co.* v. *Snelling, Lampard & Co.* (3); *Lambert Pharmacal Co.* v. *J. Palmer & Sons* (4).

W. L. Scott K.C. for the respondent. The word "Community" has become so identified with respondent's goods that any use of it by other manufacturers is calculated to deceive. See *In re Gutta Percha and Rubber Company's Application* (5); *Aunt Jemima Mills Co.* v. *Rigney & Co.* (6).

Where there is a doubt as to whether or not the registration will cause confusion it should be refused. *Eno* v. *Dunn* (7); *E. Z. Waist Co.* v. *Reliance Mfg. Co.* (8).

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be dismissed with costs.

I would do so on the ground that the Minister having exercised his discretion and having properly, under the circumstances, refused the appellant's application for the registration of the word "Community" as a specific trade-mark, on the ground that its use by the appellant was calculated to deceive or mislead the public and this having been confirmed by the Exchequer Court to which an appeal had been taken, this court should not now interfere.

Everything that could have been said for the appeal was well said by Mr. Smart, for the appellant.

IDINGTON J.—The appellant made an application, to the Commissioner of Patents, to have registered under the provision of the "Trade-Mark and Design Act," a specific trade-mark consisting of the word "Community" which

(1) 30 Ch. D. 454.
(2) 15 Ex. C.R. 265; 57 Can. S.C.R. 411.
(3) 17 Cut. P.R. 628.
(4) Q.R. 21 K.B. 451.
(5) 26 Cut. P.R. 428.
(6) 247 Fed. R. 407.
(7) 15 App. Cas. 252.
(8) 286 Fed. R. 461.

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Idington J.

the respondent had previously, many years before, adopted as its general trade-mark and had obtained the registration thereof under said Act.

The minister in charge of the department having to consider such application, acting under the powers conferred upon him by said Act, refused said application of the appellant.

The question raised herein is whether the said minister acted within his powers, under section 11 of said Act, R.S.C., chapter 71, which reads as follows:—

11. The Minister may refuse to register any trade-mark,—

(*a*) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark;

(*b*) if the trade-mark proposed for registration is identical with, or resembles, a trade-mark already registered;

(*c*) if it appears that the trade-mark is calculated to deceive or mislead the public;

(*d*) if the trade-mark contains any immorality or scandalous figure;

(*e*) if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking.

There is ample authority, in my opinion, for the minister, within the said first three subsections which I quote, upon the relevant evidence presented herein, to reject said application.

The appellant appealed by way of petition to the late Sir Walter Cassels, the President or Judge of the Exchequer Court of Canada, to overrule the said decision of the Minister. He refused to do so, and dismissed the application with costs.

There happen to have been two cases in which the minister, at the respective times there in question, was overruled, and in one of them, *In re Vulcan Trade-Mark* (1), the question so raised was brought before this court. See (2), in which the jurisdiction of the court below was in question.

We upheld the jurisdiction and agreed in the result the court below had reached.

That case does not seem to me to have any resemblance to this. The petitioner there had, in fact, long used a specific trade-mark which it was contended was being infringed, and seemed likely to be liable to suffer an injustice unless the registration of it was permitted.

(1) 15 Ex. C.R. 265. (2) 51 Can. S.C.R. 511.

The numerous cases cited, and questions raised, by the appellant therein seem to me almost all beside the question involved herein which is simply whether or not the minister's power has been exceeded.

The impropriety of adopting respondent's name and general trade-mark for its own purpose is to me quite sufficient ground for the minister's refusal.

Then there are others who had adopted the word "Community" as part of the corporate name.

The confusion liable to be created by a new company coming in and obtaining the use of such name as Community, even as a specific trade-mark, is one of the many things the minister, in order to protect the public as well as the parties so concerned, is not only entitled, but also bound, I submit, to consider.

The appellant's persistence suggests something, not its own, is to be gained at the expense of others if we should unhappily give it what it asks for, and make of the court below and this court such superintendents of the minister as never was, I imagine, within the contemplation of Parliament.

I think this appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal, in my opinion, should be allowed. There is no ground, I think, on which it can properly be held that the use of the word "Community" by the appellant is calculated to mislead the public into thinking that the appellants' washing machines are the products of the respondents' manufactory. The respondents have, in point of fact, confined their trade in Canada to animal traps, silverware, cut glass and fruits. The evidence adduced by the respondents is worthless, and there are no facts from which I feel entitled to concur in an inference that such will be the effect of the use of the word "Community" by the appellants.

I am unable to agree with the learned trial judge that the registration of a general trade-mark gives a right to exclude others from the use of it as a specific trade-mark in connection with any goods of any description that a corporation, being the registered holder of it, is entitled to manufacture or sell under its constitution. That, I think,

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Duff J.

is not consistent with the description given by statute of a general trade-mark (section 4 (*a*)), which shews, I think, very plainly that it was only intended to protect the use of it by the registered proprietor in connection with some class of commodities in which the proprietor deals at the critical moment when the question arises. I adopt the view advanced by Mr. Smart in his able argument that the protection accorded by the statute to the proprietor of a general trade-mark does not affect the use of it by others as a specific trade-mark in connection with the sale of articles not within the scope of the trade, business, occupation or calling carried on by him at the time when any question of infringement or proprietorship arises. I have no hesitation in holding that the use of the word "Community" by the appellants as descriptive of their washing machines would not have been at the date of their application an infringement of the respondents' trade-mark.

Much was made upon the argument of a supposed exercise of discretion by the Minister. The conclusion to which I have come is that there was no exercise of discretion by the minister. I am convinced that in this case the minister has, in accordance with the usual practice, dismissed the appellants' application for the sole reason that the word "Community" appears on the register as the respondents' general trade-mark.

The appeal should, in my opinion, be allowed with costs.

ANGLIN J.—By section 11 (c) of The Trade-Mark and Designs Act (R.S.C. c. 71) the minister is empowered

> to refuse to register any trade-mark * * * if it appears that the trade-mark is calculated to deceive or mislead the public.

By section 42 the Exchequer Court is given jurisdiction to order the entry of a rejected trade-mark

> on information * * * of any person aggrieved by any omission without sufficient cause to make (such) entry in the register of trade-marks.

In the case at bar the minister refused the appellant's application to register the word "Community" as a trade-mark for washing machines. The respondent already had that word registered as its general trade-mark—"destined to be (its) sign in trade" (subsection 4 (*a*) and 16), but had never applied it to washing machines. We are not

informed as to the grounds on which the Minister proceeded.

The late President of the Exchequer Court in dismissing the appellant's petition or information, preferred under section 42, after referring to the extended business of the respondent, the fact that it is a well known trading company and the enormous sums spent by it in advertising, said:—

> There is no reason why the petitioner should have adopted this particular name for its trade-mark. It appears as if the object of the petitioner was to gain some benefit from the market created by the objector's company at enormous expense.

There was in the circumstances before the learned judge, apart from any evidence of dubious admissibility, quite enough in my opinion to justify the inference that the trade-mark which the appellant seeks to have registered "is calculated to deceive or mislead the public."

It would I think be unwarrantable on the record before us to find that the appellant was "aggrieved by an omission without sufficient cause to make (the) entry" which it sought.

The appeal fails and should be dismissed with costs.

BRODEUR J.—The respondent company, the Oneida Community, is a large manufacturing company incorporated under the laws of the State of New York and carries on a hardware business.

In 1908, it had the word "Community" registered in Canada as a general trade-mark. The goods which it has manufactured and sold since have borne this trade-mark.

The appellant company, which is manufacturing washing machines, applied for the registration of the same word "Community" as a trade-mark for its washing machines. The application was refused, on account of the existence on the register of the respondents' general trade-mark, under the provisions of section 11 of the Trade-Mark and Design Act.

This section 11 provides that

> the Minister may refuse to register any trade-mark (*a*) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark, (*b*) if the trade-mark proposed for registration is identical with or resembles a trade-mark already registered, (*c*) if it appears that the trade-mark is calculated to deceive or mislead the public.

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The powers and discretion of the Minister are very wide under this section. The trade-mark legislation protects the trader who has established a reputation from the unfair competition of other persons who might sell their goods in such a guise that the purchaser would think that they were his. It constitutes for its owner a statutory monopoly.

The goods of the respondent company command in the city of Winnipeg, where the appellant has established lately its business, a very high reputation and their *per capita* sales in that city are larger than in any other city, Canadian or American.

It is true that to-day the Oneida Company does not manufacture washing machines; but under their charter they are authorized to manufacture machinery generally and their corporate powers would not prevent them from dealing with this class of goods.

A general trade-mark which is used by a manufacturer or a dealer gives him the exclusive use of the mark not only as respects articles which he is actually manufacturing but also concerning articles which he has the right to manufacture. The rights arising out of the possession of a registered trade-mark are not limited to the exact kind of goods for which the mark has been used and may depend on the circumstance that the goods in question are sold by the same class of persons. Kerly, Trade-Marks, 4th ed., p. 34.

The word which constitutes his trade-mark should not be used by others and the minister has not only the power but it was his duty to avoid any confusion which would necessarily result from the use of this same word as a trade-mark by some other manufacturers. Besides, the minister has exercised a discretion with which I would not like to interfere. The discretion which entitles the minister to refuse to register marks on the ground of similarity to other marks should be exercised even where the owners of the latter have consented. *In re Dewhurst's Application for a Trade-Mark* (1).

For these reasons the appeal should be dismissed with costs.

(1) [1896] 13 Cut. P.C. 288.

MIGNAULT J.—With some doubt I have come to the conclusion not to interfere with the judgment of the late President of the Exchequer Court. I am not clear that section 11 of the Trade-Mark and Design Act confers on the minister a discretion which should not be reviewed by the court except where a case of abuse of discretion is made out. But here the specific trade-mark "Community" in connection with washing machines could well be said to be "calculated to deceive or mislead the public." It further seems probable that the application for the registration of this specific trade-mark was prompted by the desire to profit by the reputation which the respondent had created for its trade-mark as applied to goods put by it on the market. And no doubt purchasers of the appellant's goods under such a name might be induced to believe that they were buying the respondent's goods.

I do not mean to hold that by registering a general trade-mark a person can monopolize the use of the mark for any purpose whatsoever. The judgment here can rest on the simple ground that the specific trade-mark which the appellant sought to have registered was objectionable under section 11.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fetherstonhaugh & Co.*
Solicitors for the respondent: *Ewart, Scott, Kelley & Kelley.*

1923
*May 18.
*June 15.

H. W. SMITH AND OTHERS (DEFENDANTS)—APPELLANTS;

AND

J. W. LEVESQUE ES-QUAL (PLAINTIFF)....RESPONDENT.

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

Constitutional law—Succession duty—Bank stock—Company shares—Head office—Situs of property—"Succession Duty Act," R.S.Q. (1909), Arts 1375 and 1376, as amended by 4 Geo. V, c. 9—Art. 6 C.C.

The respondent, acting on behalf of the province of Quebec, claimed from the appellants, executors of the estate of the late W. Smith, domiciled at his death in Halifax, succession duties on the following: first on 2,076 shares of the Royal Bank of Canada having its head office in Montreal but having established at Halifax a local registry under section 43 of the "Bank Act"; and secondly on 100 shares of the Montreal Trust Company, incorporated by the Quebec Legislature and 175 shares of the Abbey Fruit Salts Company incorporated under a Dominion charter, both having their head offices in Montreal.

Held that the executors were not liable to pay succession duty on the shares first mentioned which have already been declared by a judgment of this court to be situate in the province of Nova Scotia. *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia* (58 Can. S.C.R. 570).

As to the shares secondly described, this court was equally divided: Davies C.J. and Idington and Anglin JJ. holding that these shares were not liable to Quebec succession duty as they were not "actually situate within the province." Duff, Brodeur and Mignault JJ. *contra*.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court at Montreal, and maintaining the respondent's action.

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

E. L. Newcombe K.C. and *Hague K.C.* for the appellants. The late W. Smith being domiciled at the time of his death in Nova Scotia, all these shares must be deemed to have their situs there: *mobilia sequuntur personam.*

These shares are not "actually situate within the province of Quebec," within the meaning of section 92 of the B.N.A. Act and of sections 1375 and 1376 of the Quebec "Succession Duty Act," or within the limits of the constitutional powers of that province.

These shares do not fall within the scope of the word "property" as used in Art. 1375 and therefore do not come

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

within the operation of the taxing clauses under which the province claims. Art. 1376 enacts what the word "property" includes. As the shares in question are intangible property, they are therefore not, and cannot be "actually situate" within the province. The effect of Art. 1376 is to exclude all property not comprised within the description given by that article from the operation of Art. 1375.

As to the shares of the Royal Bank of Canada, this court has already held that they were situate in the province of Nova Scotia. *Smith* v. *The Provincial Treasurer of Nova Scotia* (1).

Aimé Geoffrion K.C. for the respondent. The shares are "situate within the province" of Quebec. Generally speaking, the head-office of a company is the place where its property and the shares in it of the particular holders are situated. *Attorney-General* v. *Higgins* (2); *Attorney-General* v. *Sudeley* (3).

THE CHIEF JUSTICE.—I concur with my brother Anglin's reasons for allowing this appeal and dismissing the action in this case.

I desire it to be understood that I do not in any way modify or alter my reasons for judgment in the case of *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia* (1), where I stated at page 576

> that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate and that such taxation could only be levied by the province of the domicile.

IDINGTON J.—The late Wiley Smith, long domiciled before and at the time of death, in Halifax, died there intestate on the 28th February, 1916.

Letters of administration were shortly thereafter duly granted to the appellants by the probate court of the probate district of the County of Halifax.

Among the assets of the estate so transmitted were 2,076 shares of the Royal Bank of Canada; 100 shares of the Montreal Trust Company and 175 shares of the Abbey Fruit Salts Company.

(1) [1919] 58 Can. S.C.R. 570. (2) [1857] 2 H. & N. 339.
(3) [1896] 1 Q.B. 354.

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A question was raised in the case of *Smith* v. *The Provincial Treasurer for the Province of Nova Scotia* (1), as to the liability of the appellants on behalf of the estate to pay succession duties claimed by said Provincial Treasurer, and this court, Mignault J. dissenting, held that the appellants were liable.

Notwithstanding that judgment (4th Feb. 1919) and payment of the amount so held due, the respondent on behalf of the Government of Quebec sued herein, in December, 1919, to recover succession duties claimed to be due the province of Quebec under and by virtue of articles 1375 and 1376 of the R.S.Q., 1919, as amended by 4 Geo. V, c. 9, which reads as follows:—

1375. All property, movable or immovable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

1376. The word "property" within the meaning of this section includes all property, movable or immovable, actually situate within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province or are due by the debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

I adhere to my opinion as expressed in pages 576 to 582 of said report of said case and need not repeat same here, but refer thereto for my reasons relative to that item of the claims herein.

The Montreal Trust Company originated in an Act of the Quebec legislature incorporating its predecessor, whose name and charter by many amendments were changed into that name it now bears, and range of action it now enjoys.

So far as I can discover there is nothing in that legislation or some of the articles of the "Quebec Companies Act" made by such legislation applicable to it, that would require for the transfer of its shares any ancillary probate or letters of administration or anything equivalent thereto, in order to enable the appellants (of whom that very Trust Company seems to be one) to dispose of said shares.

Indeed (if counsel understood my question put during the argument herein, and I their reply), there is nothing

(1) 58 Can. S.C.R. 570.

of that kind in question herein as to either of the companies referred to and concerned in this case.

The Abbey Fruit Salts Company is admitted to have been incorporated under the Dominion "Companies Act." There certainly is nothing in its charter either requiring or entitling it to require ancillary probate or letters of administration before assenting to transfer of its shares by the executors or administrators of any estate embracing such shares.

I assume, therefore, that there is no need for appellants to seek anything in way of Quebec governmental authority to complete their title or enable them to dispose of said shares. *Lovitt* v. *The King* (1), and in appeal *Rex* v. *Lovitt* (2), turned upon that test, and nothing else, raising, of course, the constitutional question.

The property therein was thus essentially of that kind to which the maxim *mobilia sequuntur personam* is applicable.

And the case of *Lambe* v. *Manuel* (3) governs all that in my view is necessarily applicable to resolve this case. True the Quebec Act has been revised since, but so far as it contravenes that decision in principle is *ultra vires*.

If I had to depend only upon the question of the interpretation or construction of the above quoted sections of the Act, which taken literally is, in some of the terms of the second section, so absolutely *ultra vires* that I am surprised to find its literal reading contended for, I should be inclined to adopt Mr. Newcombe's argument as to its meaning, but I do not find that necessary in my view.

The adoption of what the respondent's counsel contends for herein, in relation to each item in question, would render this the most important case we have heard for many years; if we only use a very little common knowledge and recognize the fact that Montreal and Toronto are the headquarters of banking, of railway and other commercial enterprises that reap from all Canada, and in order to do so are dependent on the legislative and judicial protection of their manifold interests furnished by and at the expense of many provinces other than Quebec or Ontario.

(1) [1909] 43 Can. S.C.R. 106. (2) [1912] A.C. 212.
(3) [1903] A.C. 68.

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I wish always, in anything we have to decide, and especially the interpretation and construction of the B.N.A. Act, to look ahead and see where the decision we may reach would land the powers that be in the practical results. Over refinement of words leads in such case, if ever, to undesirable results.

Are we to conclude that such a result as double taxation is inevitable? That is, above all things, to be avoided, and certainly not invited.

I would allow this appeal with costs throughout and dismiss respondent's action.

DUFF J.—In the previous case of *Smith* v. *The Provincial Treasurer for Nova Scotia* (1), the majority of the court proceeded upon the ground that the bank shares being by law transferable in Nova Scotia, they had a local situation there, and as we are bound by that decision, the appeal must obviously, as to these shares, be allowed.

Mr. Newcombe now raises for the first time a question as touching the other assets in Quebec, namely, the shares in the Montreal Trust Company and the Abbey Fruit Salts Company—the first being a Quebec company, the second being a Dominion company, and both having their head offices in Montreal.

The application of the Quebec statute does not appear to have been challenged in the courts below in respect of the shares in these companies except upon the ground that being intangible property they could only have a local situation in the place of the domicile of the debtor—a contention which would appear to be disposed of by the decision of the Judicial Committee in *Rex* v. *Lovitt* (2).

The point now raised by Mr. Newcombe which, as I say, is an entirely new one, is that these shares do not fall within the scope of the word "property" as used in article 1375, and therefore do not come within the operation of the taxing clauses under which the province claims. By article 1376 it is enacted:

> The word "property" within the meaning of this section includes all property, movable or immovable, actually situate within the province, and all debts which were owing to the deceased at the time of his death,

(1) 58 Can. S.C.R. 570. (2) [1912] A.C. 212.

or were payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province;

and Mr. Newcombe's argument is that as the shares in question are intangible property, they are therefore not, and cannot be "actually situate" within the province, and that the effect of article 1376 is to exclude all property not comprised within the descriptions given by that article from the operation of article 1375.

It will be more convenient first of all, I think, to consider the general scope of the section in which Art. 1376 appears—c. 9 of 4 Geo. V. Chapters 9 and 10 of the statutes of that year were passed, as is well known, in consequence of the decision in *Cotton* v. *The King* (1). The second of these statutes deals with the subject of succession duties upon transmissions within the province in consequence of the death of persons domiciled therein, of movable property having a "local situation" outside the province and duties are thereby imposed upon such transmissions. By chapter 9, all property, movable or immovable, "actually situate" within the province, and debts owing to the deceased, either payable in the province or due by a debtor domiciled within the province which is transmitted owing to death, wherever the deceased was domiciled and wherever the transmission takes place, is subject to the duties provided for. *Prima facie,* Art. 1375 seems to proceed upon the assumption that the whole estate comes under the operation of that section; that is to say, the whole estate within the province. Where the estate is partly in and partly out of the province, the "whole estate" appears to be assumed by Article 1377 to be divided into two parts—that part which is "actually situated" without the province, and that part which is "actually situated" within. Article 1382 again seems to proceed upon the assumption that shares and bonds of incorporated companies and individual interests in partnerships having their chief places of business within the province are subject to the operation of the Act.

(1) [1914] A.C. 176.

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The two statutes, chapters 9 and 10, are complementary to one another, and they appear to be designed to tax in the one case transmissions taking place within the province of property having a "local situation" outside the province, where the deceased had his domicile in the province; and in the other to tax property transmitted irrespective of the domicile of the deceased and irrespective of the question whether the transmission takes place within the province or without the province where the property is "actually situated," to use the words of Article 1376, "within the province."

The effect of Mr. Newcombe's contention is that from this latter class of property all intangible property is excluded, with the exception of debts which are specially mentioned; and in particular, all shares in joint stock companies and in partnerships, even where the company or partnership carries on business exclusively within the province. Admittedly this class of property is taxed where it has a "local situation" outside the province and the transmission takes place within the province on the death of a person domiciled therein, and, as I have already mentioned, Article 1382 seems to proceed upon the assumption that such property comes within the operation of chapter 9.

Mr. Newcombe's argument proceeds, broadly, upon two lines: first, the phrase "actually situated," he says, in itself has no application to intangible property; and second, he argues that the special mention of debts in Article 1376 and the use of the phrase "locally situated" in chapter 10, which admittedly may apply to intangible property, afford presumptive evidence that in Article 1376 the legislature was deliberately employing a phrase of less comprehensive import.

I think Mr. Geoffrion's contention is sound that the special mention of debts in Article 1376 has little or no significance. The statute is there giving the indicia of the classes of debts governed by the Act; and in fixing these indicia neither the common law rule nor the civil law rule is adopted in its entirety; and that, I think, sufficiently accounts for the special mention of debts.

I have been unable to come to the conclusion that "actually situate" in Articles 1376 and 1377 differs in meaning in any presently material respect from the phrase "locally situate" in Article 1387 (*b*). They are both, I think, used as Mr. Dicey uses the latter (Conflict of Laws, 3 ed., note (*p*), p. 340) in contrast with "constructively or fictitiously situate in the country where the deceased dies domiciled, in accordance with the principle *mobilia sequuntur personam.*" "Actual," no doubt, is a word constantly used by English lawyers in contrast with "constructive" or "fictitious," and the argument is that "actually" here is used in contradistinction to what does not physically exist but is only deemed to exist for juridical purposes.

The fallacy, I think, lies in construing these words without regard to the sense they commonly bear in legal discussion and exposition in connection with the subject of succession duties, with which this legislation deals. "Locally situate" is a phrase which has been in constant use in the sense ascribed to it by Mr. Dicey at the place mentioned; that is to say, as indicating a situation not ascribed to property in obedience to the theory that movables have a *situs* at the domicile of their owner. "Local situation" is hardly a phrase which anybody but a lawyer would be likely to apply to an incorporeal right such as a debt. Lawyers employ it, not for the purpose of indicating that debt has in fact a location in any absolute sense, but that it may have certain attributes of locality which determine its *situs* for legal purposes, which *situs* is determined from the attributes of the debt itself, independently altogether of the domicile of its owner and of the fiction *mobilia sequuntur personam.* The use of the phrase "actually situate" is not so common, but it would, perhaps, be difficult to give a good reason why, for the purpose of excluding the fiction *mobilia sequuntur personam,* "actual" would not be as appropriate an adjective as "local".

One may advert, perhaps, for a moment to the circumstance that the *situs* ascribed to intangible property for the purpose of determining the authority of the excutor to deal with it, for example, is not, strictly speaking, a fictitious

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situs. The authority of the ordinary, as the Chief Baron points out in *The Attorney General* v. *Bouwens* (1), over the effects of the deceased rested upon the circumstance that these effects were so situate that "he could have disposed of them *in pios usus*." At p. 192 he points out that the ordinary could administer all chattels within his jurisdiction, and if an instrument was created of a chattel nature, capable of being transferred by acts done within his jurisdiction and "sold for money" there, there was no reason why the ordinary or his appointee should not administer that species of property. And the Chief Baron's judgment, I think, points to the essential element in determining *situs* in the case of intangible chattels for the purpose of probate jurisdiction as

> the circumstance that the subjects in question could be effectively dealt with within the jurisdiction,

to quote Mr. Dicey's words, at p. 342. I repeat that such a *situs* cannot in my opinion be described as a "fictitious" *situs*. This view of the effect of these words is not without support from very high authority. There is, for example, the well-known judgment delivered by Sir Arthur Hobhouse on behalf of the Judicial Committee in *Blackwood* v. *The Queen* (2). The controversy had arisen out of the contention that all movables of the deceased, which included in part, at least, intangible property, should be considered to have a *situs* in the Colony of Victoria, where the deceased was domiciled, the estate contending that the enactment there under consideration applied only to such property as had an actual situation in the colony. Sir Arthur Hobhouse, at p. 91, says that the question was whether

> all moveable assets belonging to the deceased, wherever actually situate,

should be brought into account by the executor or only so much as came under his control by authority of the probate. The phrase "actually situate" is here used in contrast to a *situs* ascribed to movables in obedience to the maxim *mobilia sequuntur personam*. Similar language is used more than once in the judgment of the Judicial Committee

(1) [1838] 4 M. & W., 171, at p. 191. (2) [1882] 8 App. Cas. 82.

in *Rex* v. *Lovitt* (1). At p. 218 the phrase "actual *situs*" (the property in question was a bank deposit) is used as an equivalent of "situate". At p. 220 this sentence is employed to state the contention there advanced:

> The defendants, however, contended that the situation of the property is to be determined not by its actual locality, but according to the principle expressed in the maxim *mobilia sequuntur personam.*

On the same page the phrase "actual situation" is used in the same sense. Mr. Geoffrion has called attention to the circumstance that in the judgments of this court in *The King* v. *Cotton* (2) the word actual is employed for the same purpose more than once in the judgments of different members of the court.

By Art. 6 of the Civil Code the rule that personal property is governed by the law of the owner's domicile is formally adopted as part of the law of Quebec. That rule has been so commonly stated in the form that personal property is deemed to be situate wherever the owner is domiciled, that it is not surprising to find in this legislation phrases obviously used with the object of excluding that fiction in determining *situs*. Nor do I think it is surprising to find the phrase "actually situated," which has been so frequently used in authoritative judgments dealing with the very subject with which the legislature was concerned in a sense including intangible property to which the law ascribes a *situs* by virtue of some quality inherent in the property itself and having no relation to the domicile of the owner.

The appeal should, as regards these shares, be dismissed but the appellant is entitled to the costs of appeal.

ANGLIN J.—In *Smith* v. *Provincial Treasurer of Nova Scotia* (3), in which the Attorney General of Quebec intervened, a majority of this court held that the *situs* of the 2,000 shares in the Royal Bank, in respect of which the Province of Quebec now claims succession duty, was at Halifax, N.S., where a local registry had been established under s. 43 of the "Bank Act," and not at Montreal, where the head office of the bank is located. We are bound by that decision and cannot entertain the respondent's contention

(1) [1912] A.C. 212. (2) [1911] 45 Can. S.C.R. 469.
(3) 58 Can. S.C.R. 570.

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that those shares were "actually situate within the Province" of Quebec. Article 1376 (4 Geo. V, c. 9),

The position is different as to the other stocks in respect of which succession duty is claimed viz., 100 shares in the Montreal Trust Company and 175 shares in the Abbey Fruit Salts Company. Both these companies have head offices in Montreal and shares in them are transferrable there only. Nevertheless the attribution of a *situs* to such shares at Montreal is purely fictitious. They were the property of a decedent domiciled without the province. In order that they should be liable to Quebec succession duty they must have been "actually situate within the Province." Notwithstanding Mr. Geoffrion's ingenious suggestion, based on *The King v. Lovitt* (1), that we should construe the word "actually" as intended merely to exclude the fictitious *situs* of personal property dependent on the application of the rule *mobilia sequuntur personam,* I am of the opinion that we are not justified in giving to that word any other than its ordinary connotation, especially where to do so would have the effect of extending the scope of a statute imposing taxation.

Actual *situs* is ordinarily used in contradistinction to fictitious or notional or ideal situs on whatever basis the latter may be attributed to property and whether such property possesses some other physical *situs* or is without any such *situs.* Indeed actual *situs* and physical *situs* seem to be almost interchangeable terms, both implying, to use the language of Mr. Dicey (Conf. of L. 2 ed. p. 71) "real local situation"—the occupation of a definite space. I am unable to place on the words "actually situate", *réellement situé,* in Art. 1376 any other construction. The phrase, "actually situate" in Art. 1376 (4 Geo. V., c. 9) seems to be used in contradistinction to the phrase "locally situate" employed in Art. 1378 (*b*), (4 Geo. V., c. 10) and to imply a greater restriction, as might be expected in a provision covering non-residents as well as residents.

I have not overlooked the use of the word "includes" rather than the word "means" in Art. 1376, but in dealing with a taxing statute I am not disposed on that account to

(1) [1912] A.C. 212.

treat the definition of "property" in that article as other than exhaustive.

It follows that the appeal should be allowed and the action dismissed. The appellant is entitled to her costs.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J.—The respondent, acting on behalf of the Crown in right of the Province of Quebec, claims from the appellants, administrators of the estate of the late Wiley Smith, domiciled at his death in Halifax, Nova Scotia, succession duties on the following movable property.

1. 2,076 shares of The Royal Bank of Canada, the head office of which is in Montreal;

2. 100 shares of The Montreal Trust Company, a corporation incorporated by the Quebec Legislature, with head office in Montreal;

3. 175 shares of Abbey Fruit Salts Co., Limited, a company incorporated under a Dominion charter, the head office of which is also in Montreal.

As to the 2,076 shares of The Royal Bank of Canada, a majority of this court distinctly held in *Smith* v. *The Provincial Treasurer of Nova Scotia* (1) that these shares were situate, at Wiley Smith's death, in Nova Scotia, at the branch registry office of the bank in Halifax. While I did not concur in that holding, I am, of course, bound by it. As a consequence, the appeal must succeed as to these shares on which, on account of their situation, the Province of Quebec could not impose a succession duty where the succession devolved outside of the province.

I will therefore consider the merits of the appeal merely as to the shares of the Montreal Trust Company and of Abbey Fruit Salts Co., Limited. It was held by both courts below that these shares were situate at the head office of these companies and therefore within the Province of Quebec.

As Wiley Smith died in Nova Scotia, the right of the Province of Quebec to impose succession duties on these shares depends on their being "within the province" in the meaning both of sect. 92, s.s. 2, of the British North

(1) 58 Can. S.C.R. 570.

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America Act and of the Quebec statute, 4 Geo. V, c. 9, Arts. 1375 and 1376.

Chapters 9 and 10 of 4 Geo. V contain the law concerning succession duties of the Province of Quebec. They add two new sections—sections XX and XXa—to chapter 5 of Title 4 of the Revised Statutes. The scheme of section XX is to tax property actually situate within the province transmitted by the death of a person domiciled within or without the province, and of section XXa to tax the transmission by death within the province of property locally situate outside of the province. If the shares in question can be taxed it is only under the provisions of section XX.

Article 1375 of section XX renders all property, movable or immovable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, liable for succession duties. And the word "property" is defined as follows by Article 1376:—

1376. The word "property" within the meaning of this section includes all property, movable or immovable, actually situate within the province and all debts which were owing to the deceased at the time of his death, or payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole, whether the deceased at the time of his death had his domicile within or without the province or whether the transmission takes place within or without the province.

Mr. Newcombe on behalf of the appellants contended that, with the exception of "debts" which are specially referred to, intangible property, such as the shares in question, is incapable of *actual* situation anywhere, and therefore is not comprised in the definition of the word "property." This would entail the consequence that these shares are not within the meaning of the taxing provision, Article 1375.

If "actually situate" means "physically situate," of course intangible or incorporeal property cannot have such a situation. But if "actually" is used to exclude a fictitious or notional situation, such as one derived from the rule "*mobilia sequuntur personam*,"—and this seems to result from the French version of Article 1376, which uses the words "*réellement situé*," thus denoting the *real* as opposed to the *fictitious* or *notional* situation—I do not

think that Article 1376 should be so construed as to leave out of the contemplation of this statute the whole class of intangible property, debts only excepted as being expressly mentioned, for the sole reason that such property cannot have an "actual" situation. That certainly was not the intention of the legislature as is shewn by Article 1382, which requires from every corporation, company or firm having its chief office in the province a notice of any interest, shares, stock or bonds possessed therein by any person dying outside of the province.

Moreover it has always been considered that intangible property can have an actual or real situation at least for the purpose of probate duties. The shares in question could be transferred only at the head office of these two companies, so any sale of the shares, to be effective as against the companies, would have to be perfected by a transfer of the shares at the head office in Montreal. In England, and for the purpose of probate duty, these shares, I think, would be considered as having an actual situation if there were a register in England where sales or transfers could be registered. Of course, this is a succession and not a probate duty, but if these shares can have an actual situation for the purpose of a probate duty, I fail to see why they cannot have one for a succession duty, or a legacy duty to which the taxes imposed by chapter XX bear a very close resemblance. On this question, I may perhaps be permitted to refer generally to the authorities cited in my judgment in *Crosby* v. *Prescott* (1).

I do not think that a different situation can be ascribed to these shares under the Quebec civil code. Article 6, in the case of movables, admits of the rule *mobilia sequuntur personam* except, *inter alia,* where the rights of the Crown are involved, when the Quebec law applies. And it would seem to follow that shares in Quebec companies, which are movable by determination of law (article 387 C.C.), being subject to Quebec law when the question involved relates to the rights of the Crown, should also be held to be actually situate in the province of Quebec by the laws of which they are governed. I cannot conceive of a company having

(1) [1923] S.C.R. 446 at pages 452 et seq.

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an actual *situs* at its head office and its shares having no real *situs* anywhere. And if the shares, for instance, of the Montreal Trust Company, incorporated under a Quebec charter, are not in Quebec, it would be difficult to say where they really are.

The words "actual *situs*" have been used by the Judicial Committee in respect of intangible property. See for example *Rex* v. *Lovitt* (1). In *Cotton* v. *The King* (2) we find several times, in connection with bonds, debentures, shares, etc., the expression "locally situate" which is also used in 4 Geo. V (Que.) c. 10, article 1387b. If Mr. Newcombe's contention is well founded, shares, bonds or debentures could have no local situation. So I venture to think that the legislature uses these expressions in the sense in which they are used in these cases, as indicating that this species of property can have an actual or local situation which I would place at the head office of the company.

The affidavit of the appellants, which is the respondent's exhibit no. 1, expressly refers to the shares of the Royal Bank of Canada, the Montreal Trust Company, and Abbey Fruit Salts Co. as being

that portion of the estate *which was situate in the province of Quebec* on the day of the death of the deceased.

The appellants, of course, may not be bound by their admission on what is really a question of law, but I may perhaps refer to it as shewing how novel Mr. Newcombe's construction really is.

I therefore think that this very ingenious contention cannot be upheld, and, in my opinion, the shares of the Montreal Trust company and of Abbey Fruit Salts Co. were actually situate in the province of Quebec and therefore subject to the duty claimed.

Being, however, bound by the decision of this court in *Smith* v. *Provincial Treasurer* (3), I would allow the appeal as to the 2,076 shares of the Royal Bank of Canada, and the amount by which the judgment should be reduced can easily be determined by the parties, and if not it can be

(1) [1912] A.C. 212 at p. 218. (2) [1914] A.C. 176.
(3) 58 Can. S.C.R. 570.

spoken to. I would give the appellants their costs in this court and would not interfere with the disposition of costs in the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitor for the respondent: *Charles Lanctôt.*

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May 1, 2.
June 15.

J. G. REID, H. H. FISHER AND A. B. CAMPBELL (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE LINNELL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Excavation in adjoining land up to border line—Person falling into from his own land—Absence of warning or protection—Liability.

The appellant Reid, intending to build upon his lot no. 17, let a contract to the appellant Campbell who in turn let the work of excavation to the appellant Fisher. The respondent was a sub-lessee of certain premises situate on the adjoining lot no. 18. The excavation was made at the back of buildings already existing, up to the lane and extended to the border line of the two lots; but it was not shored up and was left without fence, or railing, or warning lights. The respondent, while passing at night through the yard back of his house, fell into the excavation, of which he was not aware, was injured and sued the appellants for damages. The action was tried as one of negligence and was submitted as such to the jury who brought in a general verdict for the respondent.

Held, Davies C.J. dissenting, that the appellants were liable.

Per Duff J.—Having regard to the course of the trial, it is not open to the appellants now to ask for a new trial, and they could only succeed in the appeal by shewing that the evidence adduced is sufficiently complete and conclusive as to negative the appellant's liability. The fact that the fence on the dividing line between the two properties was removed is in itself a complete answer to the appellant's contention that what was done by them was done solely in the ordinary exercise of the proprietor's rights in respect of his own land.

Per Anglin and Mignault JJ.—Although there was no absolute duty to guard independent of negligence, the exercise by the appellants of their rights to excavate entailed an obligation to do for the protection of those who they knew might be expected to make use of the adjoining yard what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent a person using ordinary care from falling into the excavation while moving about the yard as was customary; and the verdict of the jury implies both the existence of this duty and the omission to discharge it, constituting actionable negligence.

Per Brodeur and Mignault JJ.—The contract between the appellant Reid and his contractors provided specifically for lights and railings in order to avoid accidents, thus showing that this was a reasonable precaution that should have been taken, and their failure to provide same renders them liable.

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

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Per Davies C.J. (dissenting).—The excavation was made by the appellant Reid, or with his authority, on his own land, in the exercise of his rights to the ordinary enjoyment of his land; and there was no evidence of negligence which could justify the verdict of the jury.

Judgment of the Court of Appeal ([1923] 1 W.W.R. 900) affirmed, Davies C.J. dissenting.

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

The material facts of the case are stated in the above head-note and in the judgments now reported. As already said, the case was tried as an action brought upon a charge of negligence and was submitted to the jury as such by the trial judge, both in his charge and in the specific questions framed by him, with the expressed approval of the counsel. The jury, ignoring the above specific questions, brought in a general verdict for the respondent, awarding him $5,000. Upon appeal to the Court of Appeal and to this court, the appellants raised a contention not urged at the trial, that the respondent must fail because the acts complained of were acts done without negligence by the appellant Reid or by his authority on his own land in exercise of his rights as proprietor and in the ordinary enjoyment of his property. The respondent's reply was first, that the making of the excavation had the effect of depriving the adjoining land of its natural support, and no other support having been substituted, the excavation itself was a contravention of that adjoining proprietor's right to lateral support for his land, and second, that the excavation, although done on appellant Reid's own land, constituted a danger in the absence of a protection or warning to persons who might, without knowledge of its existence, be in the vicinity after dark, and that these circumstances imposed upon the appellants a duty to provide such protection or warning. The court expressed no opinion on the first ground raised by the respondent.

L. G. McPhillips K.C. for the appellants.

H. R. Bray for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal by the defendants from the judgment of the Court of Appeal

(1) [1923] 1 W.W.R. 900.

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of British Columbia dismissing by an equal division of the court an appeal by the defendants from the judgment of Mr. Justice Morrison in the Supreme Court of British Columbia, whereby the learned trial judge (after the jury had brought in a general verdict for the plaintiff respondent for $5,000, but did not answer the special questions the learned judge had put to them, as was their right under the law of British Columbia), pronounced judgment for that amount with costs.

The action was brought to recover damages for injuries which the respondent alleged he suffered by falling into a pit or excavation in the lot immediately adjoining the lot of which he was a part sub-lessee by reason of the excavation not having been shored up and being left without fence or railing or warning lights.

I have carefully read and considered the evidence and judgments and have reached the conclusion that the appeal should be allowed.

I am so fully satisfied with the reasons for their judgment of Martin and McPhillips JJ. in the Court of Appeal, that I have really nothing useful to add to them.

The quotations made by them from the decisions of the learned judges who determined, in the English courts, the many cases cited, and especially the decision of the House of Lords in *Dalton* v. *Angus* (1) clearly established to my mind the right of the defendants to excavate up to the limits of the boundary line (provided such excavation was done without negligence) the cellar into which the plaintiff fell and negative the obligations which the plaintiff claimed were attached to that right of either shoring up the adjoining land or of fencing off the same or of keeping the same lighted during the hours of darkness.

I am quite unable to find any evidence of negligence on the part of the defendants in carrying out their legal right to make the excavation they did which could justify the verdict of the jury.

The attempt to apply the law which governs relating to excavations alongside a public road or private way for the protection of those using those roads or ways should not prevail, in this case, where there was no such road or way but a simple boundary line between two lots.

(1) [1881] 6 App. Cas. 740.

IDINGTON J.—The appellant Reid was the owner of a lot numbered 17, lying alongside of another lot, numbered 18, and, intending to build upon his said lot 17, let a contract therefor to his co-appellant, Campbell, who in turn let the work of excavation to the other co-appellant Fisher.

The said lot 18 had erected upon it a large building when one Mrs. Roberts, three years previous to the incidents in question herein, had become the tenant of said lot 18 and the erections thereon and so continued at the time of the occurrences in question herein.

She lived therein and had sub-let different parts of said building respectively to a number of different tenants, of whom respondent was one, and a social club was another, besides others.

The said building fronted on a leading street and in its rear there was, between it and a lane running past the rear end of both lots, a vacant space of about twenty-five feet wide by twenty-eight feet in length, which was used by tradesmen and others serving those in the building and also by the tenants and numerous members of said club, as occasion might require either for ingress or egress or to serve their purpose in any way such as might happen to be respectively needed by them or their guests or visitors.

One use therefor was found by respondent in depositing his garbage in a tin can placed in that vacant space close to the lane but even by cars which served the business of those those like him in occupation of the said building had similar tin cans to receive their respective accumulations of garbage.

In short the said vacant rear space was used not only as a pathway in from the lane and out from the building to the lane and even by cars which served the business of those having dealings with any one in said building.

The appellants' work of excavation on lot 18 was begun on the 7th February, 1922, and by the night of the 10th of said month had reached at the line between said lots at the rear part thereof, a depth of five or six feet.

That night was dark and stormy, when respondent went out shortly after six, when he had got done with his day's work carrying his refuse to deposit it in his garbage can, whilst on his way to the lane in rear, to avail himself of an

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offer made by a friend to carry him home in his (the friend's) car.

From his room in the building he had no chance of seeing what was going on in the way of the excavation in question and was absolutely ignorant of what had been done in regard thereto.

To proceed from his room on said errand it was necessary to descend a stairway. When he reached the foot of the stairs he of necessity had to turn a step or two to his can, which took him close to said excavation. The next turn was to the left and thence to the lane. He had not gone another step, he thinks, until the earth at the edge of the excavation gave way and he fell down into same and broke his leg and suffered other grievous injuries.

This action was brought to recover damages suffered as result of said fall.

There is no pretence that any notice was given by the way of lights or otherwise or any protection by railing, or in any way.

There had been a fence there according to the evidence of Mrs. Roberts and that, she says, was removed by those engaged in the work of excavation.

This is denied in such a peculiar way that I would not be surprised to learn that the jury accepted Mrs. Robert's version as they had a perfect right to do.

A perusal of the entire evidence, I think, leaves that course clearly open to them and leaves a very decided impression on my mind that there was something there or thereabouts to keep strangers coming from lot 17 off the rear end of lot 18.

The whole question of fact was left to the jury by the learned trial judge in a fair charge of which no complaint was made at the time of the trial, and which ended by submitting to them for their answers the following questions:

1. Did the defendants do anything which persons of ordinary care and skill would not have done under the circumstances?

2. Have they omitted to do anything which persons of ordinary care and skill under the circumstances would have done?

3. Did the plaintiff do anything which a person of ordinary care would not have done under the circumstances?

4. Did he omit to do anything which a person of ordinary care would have done under the circumstances and thereby contribute to the accident?

The jury did not answer these questions.

In British Columbia they are not bound to, and are so told by the learned trial judges.

Nevertheless the consideration of such questions helps I think, so long as not confusing by number or frame thereof, to keep the minds of jurors concentrated on the proper issues.

The counsel for appellants at the trial expressly declared himself as well satisfied with the questions.

The jury found a verdict for plaintiffs (now respondents) and assessed the damages at $5,000, for which the learned judge entered judgment.

The Court of Appeal was equally divided.

This appeal raises the question whether or not appellants in excavating up to the line of the division between lots 17 and 18, or either of them, owed, under such circumstances as in question herein, any duty to others entitled to walk on the rear part of said lot 18.

It has been argued on their behalf herein that no duty exists under such circumstances to any one save those using a public highway.

That seems to me rather a startling proposition. Nor do I find it maintained by the cases cited in support of it.

The fundamental principle upon which the cases holding that those passing along a highway are entitled to recover by reason of the owner of adjacent land having, either by excavation or by structural erection on his land, created a source of danger to such persons as used the highway, is that they having an absolute right to be where they are, the land owner must not, in the use of his land, disregard their right to pass in safety.

It does not follow, that the principle upon which those cases so rest is exclusively confined to highways. It is no doubt most frequently resorted to in cases of injury arising out of the use of a highway. And it has been extended by statutes in England relative thereto and they are substituted as the basis of most actions there. And penalties in most of said statutes are imposed for the purpose of deterring such plain and unjustifiable use of one's land. But in no case has the legislation obliterated the original common law principle.

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I need not elaborate the development of the law, or set forth each case more or less applicable. The facts in this case as above set forth entitled the respondent to use as a means of exit from his place of business the rear part of the lot 18, and to assume that it was in the same safe condition as it had been for years before the appellants swept away the railing or guard Mrs. Roberts testified to as existent, and made the excavation thereby a double source of danger.

In the case of *Clayards* v. *Dethick and Davis* (1), the defendants in constructing a trench across the private entrance of plaintiff to his stable, had as absolute a right to excavate as appellants had herein but, by reason of neglecting to take due care of the plaintiff's rights in the premises, were held liable to damages arising therefrom.

In the case of *Bower* v. *Peate* (2), Chief Justice Cockburn sets forth the principle which must govern the acts of adjoining proprietors as follows:—

> The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

This exposition on the following pages demonstrates what is correct law to apply.

In the case of *Hughes* v. *Percival* (3), Lord Blackburn suggests how and in what respect that expression of the principle might in some cases, but not affecting what we have to deal with herein, be too broad.

(1) [1848] 12 Q.B. 439. (2) [1876] 1 Q.B. 321, at p. 326.
(3) [1883] 8 App. Cas. 443.

That case and the cases of *Pickard* v. *Smith* (1); *Corby* v. *Hill* (2); *Lynch* v. *Nurdin* (3); and *Kimber* v. *Gas, Light and Coke Company* (4), and authorities cited in each, all illustrate the law applicable herein in its different aspects, and some of them show how the owner is deprived herein of the claim he makes to be distinguished from his co-appellants herein.

It may be noted here that when letting his contract to Campbell he had a different conception of the law from what his counsel sets up herein for that contract expressly provided for guards and lights to prevent just such accidents as in question herein, yet never were provided and I infer he must have known so.

The appellants' counsel's complaint of the changing the basis of action from nuisance to negligence as if important, tempts me to quote from Stroude's Judicial Dictionary the following early definition of "nuisance":—

> "Nusauns" is where any man levieth any wall, or stoppeth any water, or doth any thing upon his owne ground, to the unlawful hurt or annoyance of his neighbour (Terms de la Ley: *Vf*, Cowel: Jacob).

What follows may be usefully studied by any one feeling he has a similar ground of complaint as made herein.

I think this appeal should be dismised with costs throughout.

DUFF J.—This appeal presents some curious features. The grounds upon which the appeal is based are grounds which were not even suggested at the trial, although in the main I think, open on the pleadings. They were raised in Court of Appeal, and upon them the judges of that court were equally divided.

The action was tried as an action brought upon a charge of negligence, was treated by all parties at the trial as such, was submitted to the jury as such by the learned trial judge, both in his charge and in the specific questions framed by him; and the course of the trial judge in the submission of the case to the jury was not only not objected to, but was expressly approved by counsel, counsel for Reid, speaking in presence of all counsel engaged, saying to the judge,

(1) [1861] 10 C.B. (N.S.) 470; 142 Eng. Rep. 535.
(2) [1858] 4 C.B. (N.S.) 556; 140 Eng. Rep. 1209.
(3) [1841] 1 Q.B. 29, at p. 37; 113 Eng. Rep. 1041.
(4) [1918] 1 K.B. 439.

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we are really satisfied with the questions you have put. In these circumstances the appellants are, I think, clearly disqualified from asking for a new trial. It is a sound rule and a necessary rule that if a party at the trial deliberately elects to fight his case upon a given issue on which he is beaten, he cannot afterwards claim a new trial on the ground that the case really turned upon another issue.

This is not a case to which the enactment of s. 55 of the Supreme Court Act would apply, that a party's right to have the issues of fact submitted to the jury is a right which may be "enforced by appeal" notwithstanding any failure to take exception at the trial. In *Scott* v. *The Fernie Lumber Co.* (1), a decision pronounced in 1904, it was held by the full court that this enactment, which was then s. 66 of the Supreme Court Act, of 1904, had not wholly repealed the rule that a litigant is bound by the way in which he conducts his case at the trial, and that nothing in the section should be taken to give a right to a new trial in cases where counsel have expressly agreed upon the issues to be submitted to the jury or where the issues as submitted, have been accepted by all parties, as the only issues upon which the jury is to pass. Since that decision, s. 66 has been re-enacted at least once without alteration, and as far as I am aware the principle laid down in *Scott* v. *The Fernie Lumber Co.* (1) has been acted upon by the British Columbia courts down to the present time. (See the judgment of McDonald C.J., in *National Pole Co.* v. *Thurlow Logging Co.*

This, however, by no means concludes the matter. Though a new trial should not be accorded the appellants for the purpose of raising issues which they elected not to raise before the jury, it would, I think, be going too far if the facts in evidence entitled the defendants to have the action dismissed on the ground that there is no right in law upon the facts admitted or found by the jury or incontestably established, (and by that I mean established by evidence of so complete and conclusive a character as would have justified a judgment for the defendants in face of a finding against the defendants by the jury) to deny them, notwithstanding what occurred at the trial, on appeal the right to have the action dismissed.

(1) [1904] 11 B.C.R. 91.

Accordingly I think the principal contention of the appellants' counsel was open to him upon appeal in British Columbia and is open here, that contention being that the plaintiff must fail because the acts complained of are conclusively shewn to have been acts done by the defendant Reid or by the authority of the defendant Reid on his own land in exercise of his rights as proprietor and in the ordinary enjoyment of his property, and that contention I proceed to examine.

I premise that in my opinion it is not open to serious dispute that there was evidence from which a jury might properly find that, in the absence of a light or some other means of warning or a protecting barrier, the excavation constituted a danger exposing the owner of the adjoining property and persons using the adjoining property as the owner's tenants and licencees, without negligence, to the risk of serious injury, and in effect the jury has found that; and that there was evidence from which a jury might find that persons who, like the plaintiff, were entitled to use the adjoining property as tenants or licencees of the owner, were likely in the ordinary course to be sufficiently near the excavation to make that excavation, in the absence of any warning or protection, a real danger to them while in the exercise of their rights.

Is it an answer to the *prima facie* case thus established that the excavation was made by Reid or with his authority on his own land and in the exercise of his right to the ordinary enjoyment of that land?

The respondent's reply first, that the making of the excavation had the effect of depriving the adjoining land of its natural support, and no other support having been substituted, the excavation itself was a contravention of the adjoining proprietor's right to lateral support for his land; and secondly, that the acts of Reid and his contractor and workmen were not acts done in the ordinary enjoyment of Reid's rights as proprietor, but that in the special circumstances of the case the excavation, although done on Reid's own land, obviously constituted a danger in the absence of a protection or warning to persons who might, without knowledge of its existence, be in the vicinity of it after dark, and that these circumstances imposed upon those

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who were responsible for the excavation a duty to provide such protection or such warning.

Upon the first point I do not think it is necessary to pass. I cannot refrain from observing, however, that in the extreme form in which the point was presented by counsel for the appellants I can find very little in any of the authorities cited to give countenance to it. Counsel contended that the presence of the owner in person would amount to the imposition of an "artificial" weight upon the land in respect of which his right to lateral support from his neighbour's land would cease to be operative.

Consider the case of the surface owner and subjacent proprietor where the right of support is of the same character. The surface owner is entitled to the support of the surface in its natural state, on the ground, as Lord Campbell said in *Humphries* v. *Brogden* (1), that otherwise the surface property could not be "securely enjoyed as property"; a reason which would seem to be broad enough at least to extend to the case in which the owner is in person upon the land doing some necessary act for the assertion or protection of his rights. I can at all events entertain little doubt that Lord Selborne, in *Dalton* v. *Angus* (2), in speaking of "that which is artificially imposed upon the land", which "does not itself.. .. ..exist" *ex jure naturae,* was not thinking of the person of the owner. I think it is unnecessary, however, to pass upon this point; and I shall assume that the plaintiff was not entitled to recover on the ground that the acts of the defendants did constitute a violation of the adjoining proprietor's right of lateral support.

The ground on which I think the appeal should be dismissed is this: A jury under a proper direction might have found that the situation, created by the excavation in the place in which it was, constituted, for the reasons above mentioned, in the absence of protection or warning, a danger to persons who might be present in the vicinity of it in the ordinary enjoyment without negligence of their right to be there under the authority of the owner of the adjoining property, and the circumstances under which the situation was created as disclosed by the evidence gave rise to

(1) [1850] 12 Q.B. 739, at pp. 744-5. (2) 6 App. Cas. 740, at p. 792.

a duty on the part of those concerned to provide such protection or warning.

A fact of cardinal importance was deposed to by Mrs. Roberts, the plaintiff's landlady, namely, that there was a fence between her property and Reid's, and that this fence was taken down in course of the execution of the work complained of without her permission, with a promise to replace it that was never carried out. This evidence of Mrs. Roberts was not contradicted, and there was no cross-examination upon it. It was argued by Mr. McPhillips that it must be left out of consideration. But it is impossible to ignore it for the simple reason that, as I have mentioned already, the defendants are only (if at all) entitled to have the action dismissed upon the ground that from the evidence as it stands the only proper conclusion is that the plaintiff has no cause of action.

It is a reasonable assumption that the fence was where it ought to have been, namely, on the line between the two properties, and that fact is fatal to the contention that the appellants in creating the situation out of which the action arose were strictly limiting themselves to acts done in the ordinary enjoyment of Reid's proprietary rights.

There is indeed much force in the argument advanced on behalf of the respondents that even in the absence of the fence the law would have imposed upon the defendants the duty of taking proper measures to protect Mrs. Roberts and her tenants and licensees from the danger created by the existence of the excavation on the principle that there is a duty to give warning of dangers one creates which are not discernible by reasonable care by people whom one knows, or with reasonable care ought to know, may lawfully be in the vicinity of the danger so created.

I respectfully concur in the opinion expressed by Scrutton, L.J. in *Kimber's Case* (1). I think there is much to be said for the view that the principle of the highway cases *(Hadley* v. *Taylor* (2),for example) is properly applicable. A hole placed near the highway, if so near to the highway that a person lawfully using the highway and using it with ordinary caution, accidentally slipping, might fall into it, constitutes a nuisance to the highway and an

(1) [1918] 1 K.B. 439, at pp. 446-7. (2) [1865] L.R. 1 C.P. 53.

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actionable nuisance at the suit of a person injured by reason of its existence there. That is to say, the rights of the owner of land adjoining a highway are qualified by this, that he must not in the ordinary use of his land create a danger of such a character, and it is one of those cases to which Lord Campbell referred in *Humphries* v. *Brogden* in these words:

> The books of reports abound with decisions restraining a man's acts upon and with his own property where the necessary or probable consequence of such acts is to do damage to others.

Why is the principle not applicable to qualify in like manner the rights of a proprietor of land whose property adjoins a private way? The decision in *Corby* v. *Hill* (1), (and particularly the judgment of Mr. Justice Willes), suggests that as regards the duty of persons engaged in a lawful work upon a way who creates a situation which in the absence of warning or protection is dangerous to persons using the way in a reasonable manner, there is no distinction between a public way and a private way; in both cases there is the duty to provide protection and warning imposed upon the person who creates the danger. Why should any distinction exist between a public way and a private way in respect of a danger created upon adjoining property? And if the duty arise in such circumstances is it not a duty resting upon principle, and is the principle not equally applicable where the dangerous condition of affairs arises from acts which are done by a proprietor upon his own land but immediately adjoining a place on his neighbour's property that is in common use and which may expose to risk of injury persons using it without negligence and without warning?

I put the example on the argument of a foot path between the gate and the door of the owner of one of two adjoining houses and an excavation created without warning in midwinter immediately adjoining the footway by his neighbour. Can there be any distinction in principle between the case of the messenger boy who, after dark, slips and falls into the excavation, and the wayfarer who in like circumstances suffers a like mishap in passing along the public road? I can perceive no sound distinction between the two cases. I do not overlook the passage from the judgment of Lord

(1) 4 C.B. N.S. 556, at p. 567.

Penzance in the case of *Dalton* v. *Angus* (1) cited by Mr. Justice Galliher, in which Lord Penzance says that if not bound by authority, he would have considered it no unreasonable application of principle to hold that an owner of land, if he desires to excavate it and does so in a quarter adjoining his neighbour's property, should be obliged to take measures to prevent the excavation resulting disastrously to his neighbour. The proposition suggested thus broadly cannot, of course, now be maintained consistently with the settled doctrines of the English law, but I think there is much to be said for the view that it would be no unreasonable application of the principle of *Hadley* v. *Taylor* (2) and like cases to hold that the appellants were under an obligation to Mrs. Roberts and her tenants and licensees to give warning of the excavation made on their own property. However that may be, it is, as I think, beyond dispute that the act of the defendants in removing the fence imposed upon them an obligation to provide something which would be an effective substitute.

I think the appeal should be dismissed.

ANGLIN J.—The plaintiff was tenant of part of a messuage on lot 18 and enjoyed, in common with other occupants of that lot, rights of user of a yard on the rear part of the lot, which abutted on a lane. The defendant, Reid, owned the adjoining lot, 17; his co-defendants were a contractor and sub-contractor, the latter of whom made an excavation for a building to be erected by the former for Reid on the rear of his lot. This excavation extended to the boundary between lots 17 and 18 and along the yard on lot 18.

On a dark night in February, the plaintiff, while lawfully passing through the yard, to reach his automobile, in which he intended to leave the premises *via* the lane, fell into the excavation on lot 17 and was seriously injured. A jury awarded him $5,000 damages and the judgment entered on that verdict against the three defendants was sustained as the result of an equal division in the Court of Appeal. The dissenting judges, Martin and McPhillips JJ. A. dealt with the case as one depending entirely on an alleged breach by

(1) 6 App. Cas. 740. (2) L.R. 1 C.P. 53.

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the defendants of their duty to the owner and occupants of lot 18 not to deprive that lot of such lateral support as was necessary to sustain it in its natural state, which in their opinion meant without the addition of any superincumbent weight—even that of a person lawfully walking upon it. They were of the opinion that since breach of the duty so defined had not been shown and the defendants owed no other duty to the plaintiff he could not recover.

Galliher J. was of the opinion that, assuming that the earth near the edge of lot 18 had slipped under the plaintiff's weight as he deposed and as the jury was entitled to find it did, there had been such an interference with lateral support as would entail liability. Eberts J. concurred in dismissing the appeal.

Although otherwise presented in the pleadings, the case was submitted to the jury solely as one of negligence. As they were entitled to do under the law of British Columbia, they brought in a general verdict, ignoring certain specific questions put to them by the learned trial judge. While the verdict imports such findings as are necessary to support a judgment based on negligence, it leaves us in the highly unsatisfactory position of not knowing what views the jury took on several questions of fact which were distinctly in issue. For instance, whether the plaintiff's fall was due to the earth on lot 18 near the edge of the excavation giving way under his weight or to his inadvertently, but not negligently, stepping over the boundary and into the hole, as the evidence that the bank or side of the excavation was found intact on the following morning suggests; and whether the defendants had removed a fence between the two properties, are matters of importance. But, inasmuch as the verdict may have been based on the view that the defendants owed to the plaintiff a duty either to warn him of the existence of the excavation or to guard him as one of the lawful users of lot 18 against the danger of falling into it by erecting barriers or placing warning lights, we would not, I think, be justified in assuming either that the plaintiff's fall was in fact attributable to a withdrawal of whatever lateral support the defendants were legally bound to leave, or that a trap had been created by the removal of a fence

on the presence of which, as marking the boundary of lot 18, the plaintiff had been wont and was entitled to rely.

We must, however, assume that the jury found some breach of duty amounting to actionable negligence on the part of the defendants and that they negatived contributory negligence on the part of the plaintiff, probably accepting his story that he was wholly ignorant of the existence of the excavation.

Counsel for the defendants frankly conceded the hopelessness of attempting to re-open the issue of contributory negligence, but he insisted that there was no evidence on which the jury could properly have found negligence on the part of the defendants, maintaining that their only duty was not to take away such lateral support as the law required them to leave for lot 18; that that would not include support for the land plus the weight of a person walking upon it; and that in any event, there was no finding that subsidence of the earth on lot 18 was the cause of the plaintiff's fall. With the contention last stated I am disposed to agree and consequently am not prepared to uphold the judgment in so far as it rests on deprivation of lateral support.

Having regard to the evidence of the known user of the yard by the occupants of lot 18 and by persons having business with them, and especially to the fact that the defendant Reid deposed that it was used as a back entrance to the buildings on lot 18—a trades entrance—the jury, in my opinion, was entitled to find that it was incumbent on the defendants in the exercise of ordinary prudence to make reasonable provision for safeguarding a person lawfully using the yard on lot 18, as the plaintiff did, against the obvious danger of falling into the excavation which they had made immediately adjoining it by taking some means for that purpose such as the erection of a barrier or the placing of danger lights or other reasonably efficient means of protection or warning. In this view it is immaterial whether the plaintiff's fall was due to the earth along the edge giving way under his weight or to his having accidently over-stepped the boundary line.

There was in this case no absolute duty to guard independently of negligence, such as exists where an excavation

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is adjacent to a highway and the maintenance of it unprotected is unlawful, a nuisance and indictable. *Hardcastle* v. *South Yorkshire Railway Co.* (1); Beven on Negligence, p. 360. But the right of the defendants to excavate as they did, like other rights of using property, was subject to the qualification implied in the maxim *sic utere tuo ut alienum non laedas.* Their right to excavate as they did is unquestioned; but the exercise of that right entailed an obligation to do for the protection of those who they knew might be expected to make use of the adjoining yard what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent a person using ordinary care from falling into the excavation while moving about the yard as was customary.

Although neither of them is upon its facts at all directly in point, in two cases I find expressions of judicial opinion which indicate this duty. In re *Williams* v. *Groucott* (2), Blackburn J. said:

> Looking at the general rule of law that a man is bound to use his property so as not to injure his neighbour, it seems to me that when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights.

In *Hawken* v. *Shearer* (3), Mathew J. said:

> It appears to me that the true principle has been well laid down in Groucott v. Williams, which is this, that where an alteration has been made in the normal state of things, calculated to cause injury to a neighbour, an obligation is cast upon the person who makes such an alteration to protect his neighbour from injury.

And Cave J. said:

> A man may dig a pit in the middle of his own field, and leave it unfenced, but if he does so at the side of the road he must fence it and if he alters an existing state of things whereby he makes a highway dangerous, he is liable for any accident occasioned by such alteration. No doubt there are certain limitations to this general principle * * * But it equally applies to the case of an adjoining owner.

The same principle underlies statements of the Lords Justices in the recent case of *Kimber* v. *Gas, Light and Coke Co.* (4). Bankes L.J. said (page 445),

> If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his

(1) [1859] 4 H. & N. 67, at p. 74.
(2) [1863] 4 B. & S. 149, at p. 157.
(3) [1887] 56 L.J. Q.B. 284, at p. 286.
(4) [1918] 1 K.B. 439.

own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning. There may be cases in which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence * * * The duty arises quite independently of the occupation of the premises. It does not arise out of any invitation or licence. It is not a case of mere omission. The duty arises out of the combination of all the circumstances.

Scrutton L.J. said (p. 446),

It is clear that persons lawfully doing work which interferes with a public right, as contractors opening the highway, must use reasonable care not to injure persons lawfully using the highway, which would include taking reasonable precautions to warn such persons of dangers created by the contractor which the passer-by could not with reasonable care discover. But it is said the case is different when the work is done on private premises in which the contractor has no proprietary or possessory interest and on which he is only a licensee of the owner. The contractor's duty it was said was only, not actively and negligently to injure other persons on the premises, as by carelessly dropping hammers on their heads, and included no duty to warn them of dangers, even hidden ones, which the contractor's work had created * * * There are of course cases where there is moral culpability, but no legal liability. A sees B, a blind man, walking along a highway straight into a pond and gives him no warning, A is not legally liable for he is under no legal duty to B. But if A has himself made the hole in the highway, he is under legal liability at once: *Penny* v. *Wimbledon Urban Council* (1). I cannot see that it makes any difference that B is a person lawfully on private premises where A has made the hole or that A is under a duty as to his acts towards B such as not to hit him with his tools, different from his duty to warn B of dangers A has created which are not discernable by reasonable care on the part of B. It is A's duty to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B, who is going towards the hidden danger A has created.

See also 21 Hals. L. of E. pars. 888 and 896.

There was in my opinion evidence on which it was competent for the jury to find that the defendants owed to the plaintiff the duty of safeguarding him against, or at least of taking reasonable means to warn him of the existence of, the danger they had created. Failure to discharge that duty, if it existed, is not questioned. The verdict of the jury implies both the existence of the duty and the omission to discharge it, constituting actionable negligence.

The case is not one of so-called casual or collateral negli-

(1) [1899] 2 Q.B. 72.

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gence on the part of the sub-contractor. The making of the excavation as contracted for up to the boundary line necessarily involved creating the hazardous situation. The owner and his contractor were bound to see that reasonable protection was provided. They did not avoid responsibility by entrusting the work to a sub-contractor, however reputable, even though they expressly stipulated for effectual precautions being taken by him.

If the fall of the plaintiff into the excavation was due to the negligence of the defendants, the fact that in so falling he became an involuntary trespasser cannot avail them as an answer to his claim.

I am for these reasons of the opinion that the judgment appealed from should be sustained.

BRODEUR J.—This action was brought by Linnell to recover damages which he suffered by falling into an excavation in the lot immediately adjoining the lot on which he was a part sub-lessee. He claims the excavation should have been shored up and should not have been left without fence, railing or warning lights.

The lot on which the excavation was made is called lot 17, and the adjoining lot on which Linnell resided is called lot 18. Lot 17 belonged to the defendant Reid, and the other defendants, Fisher and Campbell, were respectively contractors and sub-contractors for this excavation.

The plaintiff Linnell had the right to be at the place where the accident happened. He was going through the yard of his residence, in a dark night, to deposit some garbage in cans lying in the yard; and, when he was near the excavation, the ground being likely loosened by frost, gave way under the weight of the plaintiff. A question of contributory negligence was raised against Linnell; but the jury, by returning a general verdict, has evidently discarded the contention of contributory negligence.

The defendants contend that there was no duty imposed by law upon them to guard the excavation against persons lawfully using lot 18.

It is settled beyond question that an owner is entitled to have his soil supported in its "natural state" and as an incident to the land itself. *Dalton* v. *Angus* (1).

(1) 6 App. Cas. 740.

It does not mean however that this right to lateral support should be considered as a right to have the adjoining soil remain in its natural state, but a right, as said by Lord Blackburn in the case of *Dalton* v. *Angus* (1),

> to have the benefit of support, which is infringed as soon as and not until damage is sustained in consequence of the withdrawal of that support.

Lord Penzance, in the same case, said that

> it would be, I think, no unreasonable application of the principle *sic utere tuo ut alienum non laedas* to hold that the owner of the adjacent soil should take reasonable precautions by way of shoring or otherwise to prevent the excavation from disastrously affecting his neighbour.

In the present case, the contract of Mr. Reid, the owner of the property, with his contractors, provided specifically for lights and railings being provided in order to avoid any accident. Nothing of the kind was done. This provision of the contract shows conclusively that precautions of that kind were needed and that their omission was not a prudent act. None of these precautions were taken. The contract was in that respect violated.

Every man may use his own land for all lawful purpose without being answerable for the consequences, provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent land owner.

If in this case the defendants had taken the precaution of doing what their contract provided for, the accident of which the plaintiff was the victim would have been avoided.

It has been contended in that respect by the defendant Reid, the owner, that he is not liable for the injuries received by the plaintiff as a result of negligent acts of the other defendants who were independent contractors, and he was not liable for the collateral or casual negligence of an independent contractor.

This point has been fully considered in the case of *Dalton* v. *Angus* (1), and I may then in that respect quote the following passage from the opinion of Lord Blackburn which shows conclusively that the defendant Reid's contention is not well founded:

> Ever since *Quarman* v. *Burnett* (2), it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them, so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape

(1) 6 App. Cas. 740, at p. 808. (2) [1840] 6 M. & W. 499.

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from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

Lord Buckley, in *Robinson* v. *Beaconsfield Rural District Council* (1), expressed the same view in the following terms:

> Even if the council had contracted for the discharge of this duty, they would have remained liable to the plaintiffs for the contractors' failure to perform the duty.

For these reasons, the appeal should be dismissed with costs.

MIGNAULT J.—This case has been somewhat confused by the appellants treating it as if it involved a question of support of land, and by the respondent applying to it the rules governing the liability for allowing an obstruction or an excavation to be on a highway or in close proximity thereto.

The real question is whether an owner who makes an excavation on his own property extending to the boundary line of the neighbouring property, there being no fence between the two properties, is under any duty to persons whom he knows are likely to pass to and fro on the adjoining property to protect the excavation by railings or barriers or to place a light over it at night in order to prevent accidents.

The appellant Reid was the owner of a lot of land known as no. 17, with a building fronting on Granville Street, Vancouver. The neighbouring property, no. 18, with a building also fronting on Granville Street, was occupied by several tenants or sub-tenants, the respondent being one of the latter. In the rear of both buildings was a vacant piece of land, there being apparently no fence between the two properties, and behind the vacant land was a public lane. In the rear of the building on the neighbouring property was a stairway leading to the second story and this stairway, as well as the vacant land, to the knowledge of Reid, was used as a means of egress and ingress by the tenants of the neighbouring property and by persons whose business brought them there. Reid decided to build on the rear of his property, and gave a contract for the building to the appellant Fisher. For that purpose it was

(1) [1911] 2 Ch. 188.

necessary to excavate a trench up to the line between the two properties and the work of digging this trench was undertaken by the appellant Campbell. It was a condition of the specifications accompanying Reid's contract that the contractor would at all times maintain the necessary guards around the excavations and other places requiring them and all night lights, etc., so as to prevent accidents.

On the evening of the 10th of February, 1922, there being no railing on the side of the trench towards the property occupied by the respondent, nor a light over it, the respondent, when leaving the neighbouring building by the stairway and crossing the vacant space in the rear in order to reach a motor car waiting for him, fell into the trench and was badly injured. The night was dark and stormy and the respondent did not know, he says, that an excavation had been made on Reid's property, and, in fact, the digging had been commenced only two or three days before. The jury evidently believed the respondent's testimony, and having returned a general verdict for the respondent, instead of answering the questions submitted to them, (a most inconvenient practice, I must say, although permitted by statute), they must be taken to have found all necessary facts in the respondent's favour.

The appellants' theory—they had no witnesses who could say how the accident happened—was that the respondent walked into the excavation. The latter says that the ground gave way under his right foot and then he fell. This statement of the respondent has given rise to an interesting discussion on the law governing the support of land between neighbouring properties, but with all possible deference to the learned judges who thought otherwise, it is in my opinion unnecessary to express any opinion on this question. The legal problem which arises is the one I have stated above, and its solution depends on the answer given to the question whether the appellants owed any duty towards persons lawfully on the neighbouring property, and who, they knew, were likely to pass thereon in close proximity to the excavation, to guard the trench and have it lighted at night in order to prevent such an accident as that which occurred.

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No exactly parallel case has been cited, for different considerations apply to the highway cases and the question, I have said, is really not one of support of land. It may be admitted that Reid was within his rights when he dug the trench up to the boundary line of his property, as was also the respondent when he passed over the rear portion of the property at night in ignorance that an excavation had been made on the line of his neighbour's property. But rights of ownership and of enjoyment of property are not without certain limitations which the due protection of similar and co-equal rights renders necessary. The old maxim *sic utere tuo ut alienum non laedas* is an undoubted rule of law, although it must be applied with proper caution so as not to come in conflict with the equally venerable maxim *qui jure suo utitur neminem laedit.* Broom (Legal Maxims, 8th ed., p. 308) commenting on the rule *sic utere tuo,* etc., lays down five propositions which he deduces from the decided cases. I will cite the two first.

1. It is, *prima facie,* competent to any man to enjoy and deal with his own property as he chooses.

2. He must, however, so enjoy and use it as not to affect injuriously the rights of others.

The respondent among other cases cited the recent decision of the English Court of Appeal in *Kimber* v. *Gas, Light and Coke Co.* (1). In that case workmen, in repairing an old building and converting it into two dwellings, had left a hole in the floor of a dark landing, and the plaintiff, who visited the building during the work, under a permit with the view of renting the upper portion, and was admitted by the workmen but not warned of the existence of the hole, fell into the hole and recovered damages against the contractor. I find stated in the judgments there a legal principle which can be applied in a case like the one under consideration. I quote from the language of Scrutton, L.J., at p. 447:

> It is A's duty (A is a person carrying on work, and, *ex hypothesi,* lawfully doing so) to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work.

Scrutton L.J., very pertinently cites the remark of Lord Macnaghten that the plainer a proposition is the harder it

(1) [1918] 1 K.B. 439.

often is to find judicial authority for it. The learned Lord Justice indeed goes as far back as *Corby v. Hill,* (1) to support his proposition. *Corby* v. *Hill* (1) was the case of building materials placed on a private road by a builder with leave of the owner, and the builder was held liable to the plaintiff whose horse was injured by coming in contact with the obstruction.

In deciding that Reid and his contractors and workmen were under a duty towards persons lawfully passing on the neighbouring property to guard the excavation he had dug out up to the boundary of his land, I am unconscious of unduly stretching the rule I have just quoted. Although I have not found any absolutely parallel case, I think this is a most reasonable, and, I may add, a common sense application of the old maxim *sic utere tuo ut alienum non laedas.* Such an excavation on a dark night was a real trap. Moreover the specifications had directed that guards should be placed around it, and this shows that such a precaution was considered reasonable by the parties themselves. In my opinion, the liability of the appellants for not having properly guarded his excavation cannot be questioned.

Mr. McPhillips argued that the respondent's action was framed as an action based on a nuisance and that the learned trial judge dealt with it in his charge to the jury as an action of negligence. I think however that the statement of claim sufficiently alleges the negligence of the appellants to stand as an action in tort.

There is no trespass established here. The respondent was where he was entitled to be when he fell into the trench.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Senkler, Buell & Van Horne.*
Solicitor for the respondent: *H. R. Bray.*

(1) 4 C.B. (N.S.) 556.

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*May 2.
*June 15.

THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... } APPELLANT;

AND

THE CUDWORTH RURAL TELEPHONE COMPANY (DEFENDANT).. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Company—Bills and notes—Rural telephone company—Power to make promissory notes—"The Rural Telephone Act," Sask. 1912-13, c. 33, s. 43; 1918-19, c. 46, s. 48; R.S.S. 1920, c. 96—"The Companies Act," (Sask.) 1917, c. 34, s. 42 (3); R.S.S. 1920, c. 76, s. 14; R.S.S. 1922, c. 76.

The respondent company was organized under the provisions of the "Rural Telephone Act" and, pursuant to those provisions, was duly registered and incorporated under the Saskatchewan "Companies Act."

Held that the respondent company had no power to make a promissory note under the provisions of the "Rural Telephone Act."

Held, also, Idington J. dissenting, that it has no such power under section 14 of the "Companies Act."

Per Idington, Brodeur and Mignault JJ.—Section 14 applies to the respondent company. Duff J. *contra;* Davies C.J. and Anglin J. expressing no opinion, although Anglin J. *semble* in the affirmative.

Held, Idington J. dissenting, that, on the assumption that section 14 did apply, there is nothing in it to extend the limited and clearly defined powers of the respondent company under "The Rural Telephone Act."

Per Davies C.J. and Mignault J.—The word "capacities" in the second part of section 14 does not mean "powers."

Per Duff J.—The effect of section 14 as regards the extraprovincial capacities of companies to which it applies is to establish as a rule of construction the rule laid down by Blackburn J. in the *Ashbury Company's Case* (L.R. 7 H.L. 653) but held by the House of Lords in that case not to be applicable to companies incorporated under "The Companies Act" of 1862, the rule being that companies affected by it have *prima facie* all the capacities of a natural person but subject to all restrictions created expressly or by necessary implication by any statutory enactment by which such companies are governed. Section 14 does not apply to companies incorporated for the purpose of working a rural telephone system under "The Rural Telephone Act," since the memorandum of association of such a company must be read as incorporating the restrictions upon the capacities of such a company to be found in "The Rural Telephone Act" which by necessary implication exclude the operation of section 14 in relation to such companies.

Per Anglin J.—Under the provisions of "The Rural Telephone Act," the respondent company already possessed for the purposes for which it was incorporated all "actual powers and rights" and the fullest

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

"capacity" which the legislature could bestow (*Honsberger* v. *Weyburn Townsite Co.*, 59 Can. S.C.R. 281); and section 14 did not add anything to such "capacity."

Per Idington J. (dissenting).—The corporate powers and capacity of the respondent company rest upon "The Companies Act" entirely, and section 14 impliedly gives to it the capacity and power to make promissory notes.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 1211) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of Bigelow J. at the trial (2) and dismissing the appellant's action.

This was an action on a promissory note for $5,407.50 made by the respondent company, payable on demand to one George Foley and indorsed by him to the appellant bank.

On the trial, the principal defence raised on behalf of the respondent company was that making the promissory note was beyond the powers of the company.

F. F. MacDermid for the appellant.

F. A. Sheppard for the respondent.

THE CHIEF JUSTICE.—The single question in this appeal is whether the respondent company did or did not have the power to make the promissory note in question.

The respondent is a non-trading corporation organized under "The Rural Telephone Act" of Saskatchewan (see Statutes of Saskatchewan 1912-13, c. 33, since repealed by 1918-19, c. 46) for a specific purpose. As such it had no power to make a promissory note. *Bateman* v. *Mid-Wales Railway Co.* (3). That act provided explicitly for the manner in which it could raise or borrow the necessary moneys required to carry out its object and purpose, viz., by debentures. Every step the organized company had to take had to be approved of by the Minister and the Lieutenant-Governor in Council.

After being organized under "The Rural Telephone Act" it became incorporated under "The Companies Act" of Saskatchewan and the question at once arises whether such incorporation conferred upon it the power, under section 14 of that Act, to do what it could not do before and make the promissory note in question.

(1) [1922] 2 W.W.R. 1211. (2) [1922] 1 W.W.R. 287.
(3) L.R. 1 C.P. 499.

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The Chief Justice

That section reads as follows:—

Every company heretofore or hereafter created (*a*) by or under the authority of any general or special ordinance of the North West Territories; or, (*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act, or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extra-provincial powers and rights, and to exercise its powers beyond the boundaries of the province and to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The question arises under the second part of this section and really is whether the words

such incorporation shall so far as the capacities of such companies are concerned

extend to or embrace "powers" not given to it by its organization under "The Rural Telephone Act." I do not think they do. Lord Haldane in delivering the judgment of the Judicial Committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1) drew a clear and broad distinction between "capacities" and "powers." I frankly say that I do not clearly understand what the word "capacities" in the second part of the above section really means. But I am satisfied it does not embrace "powers." The language used is very precise in expressing the intention of the legislature as it says "so far as capacities" of such companies are concerned, which to my mind impliedly excludes "powers." Unless, therefore, the word "capacities" is construed in this section as embracing "powers" I cannot see how it can apply to extend the limited and clearly defined powers of the company under "The Rural Telephone Act."

In the view I take of the meaning and extent of "The Companies Act" above quoted it is not necessary for me to express any opinion with respect to the ground on which the Court of Appeal for Saskatchewan based its judgment, viz. that section 14 of "The Companies Act" does not apply to companies created under "The Rural Telephone Act."

I would dismiss the appeal with costs.

(1) [1916] 1 A.C. 566.

IDINGTON J. (dissenting).—The respondent was duly incorporated on the 8th of May, 1918, under and by virtue of the Saskatchewan Act known as "The Companies Act." The memorandum of association presented as the basis of such incorporation in compliance with sections 5 and 6 of said Act, stated that

the object for which the company is established is the construction, maintenance and operation of a telephone system.

In the course of carrying on its business within the limits of the said object it had become indebted to one Foley and as the result of a settlement between him and respondent of their said dealings it was agreed that the said indebtedness amounted to the sum of $5,407.50, and therefore the respondent gave on the 12th of June, 1920, to said Foley its promissory note payable on demand to the order of said Foley for the said amount.

He discounted same with the appellant shortly after and thus it became in due course the holder thereof.

The respondent's authorities, upon payment being demanded by appellant, professed to have discovered that a mistake had been made in the amount due said Foley and that the amount of said promissory note exceeded by a considerable sum what was actually due said Foley, and refused payment.

This action was brought by appellant to recover the amount of said promissory note.

The respondent in answer thereto pleaded amongst other things its incorporation and, what it contends in law, that the making of said note was beyond the powers of the said company.

It was conceded at the trial that the appellant was the holder of said promissory note in due course and entitled, under the "Bills of Exchange Act," to recover if the respondent could be held to have given it within its power and capacity to make same.

The learned trial judge overruled this defence and entered judgment for the amount claimed.

He relied upon an amendment originally enacted in 1917, in the following words:—

13 (*a*). Every company heretofore or hereafter created:

(*a*) by or under the authority of any general or special ordinance of the North West Territories; or

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(b) by or under the authority of The Companies Act, being chapter 72 of the Revised Statutes of Saskatchewan, 1909, or under this Act or any Act that may hereafter be substituted therefor; or

(c) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

This in substance is now section 14 of chapter 76 of the Revised Statutes of Saskatchewan, 1920.

The learned trial judge quoted the last sentence as the essential part thereof, in which I agree, but owing to the Court of Appeal having dealt with same from another angle of vision, to which I am about to refer, I quote the entire amendment. He seemed to rely upon the decision of the Ontario Appellate Division in the case of *Edwards* v. *Blackmore* (1), in which it had to consider a similar enactment.

The Court of Appeal reversed said judgment, holding that the said amendment could not be made applicable to the case of the respondent.

The learned Chief Justice referred to "The Rural Telephone Act" of Saskatchewan as being that under which respondent was organized.

I, with great respect, cannot adopt his reasoning.

The corporate powers and capacity of the respondent rest upon "The Companies Act" entirely, and the amendments thereto made by the legislature of Saskatchewan so expressly, as above, were such as no one can properly discard. It impliedly gave the capacity and power to make a promissory note.

That legislature had given, by "The Rural Telephone Act," certain jurisdiction over the respondent and its like creatures to the Minister named, as it was quite competent for the said legislature to enact, and thereby it limited the borrowing powers of such creations as respondent.

(1) [1918] 42 Ont. L.R. 105.

I have read the said "Rural Telephone Act" to see if it said anything therein as to the power of the respondent to give a promissory note for anything else than borrowed money, and I fail to find anything therein touching the power to make a promissory note for anything else than borrowed money and even that only impliedly in section 31.

This note now in question was not given for borrowed money. Therefore I fail to see how its powers in regard to what is here in question can be held to be in any way touched by the provisions of "The Rural Telephone Act."

I submit that even if there had been any such provisions in said Act it was quite competent for the legislature to have modified all that.

It has not done more than declare, as set forth in the above quoted section, that unless a contrary intention is expressed in a special Act or ordinance incorporating it, or in a memorandum of association thereof certain new capacities are to be given to the corporate creations of "The Companies Act."

There was no special Act incorporating it. Its incorporation was solely within the powers given therefor by "The Companies Act," and there was nothing in the memorandum of association by which that expressed a contrary intention.

The fact that such men as the promoters of such an association required the sanction or approval of a certain minister as preliminary to such an application does not constitute that as part of the memorandum of association.

I submit it is the plain meaning of the language used that must govern us and not something imaginary as result of a metaphysical train of reasoning that we have to deal with.

The later enactments when expressed plainly always should overrule the prior enactments of the same legislature. If the latter has erred that is the court to go to.

I respectfully submit that to uphold and give effect to the judgment appealed from instead of leaving the matter to the legislature we would run grave danger of doing more harm than any good to be gained by defeating what as regards Foley may be an unfounded claim.

Moreover, I am unable to understand how the respondent can get away from the effect of sections 113 and 114

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of "The Companies Act" as it now stands, and has stood in otherwise numbered sections.

There may be some explanation that I have failed to discover, for the point was not made clear in argument, though appellant's factum refers to a section 98 which, unless one of these sections is what it meant, I cannot understand.

The references of respondent to section 117 dealing with borrowed money is beside the question and should have been left aside for we are not concerned with borrowed money.

As to the *Edwards Case* (1) relied upon by the learned trial judge I do not see how it helps us herein or if the converse view had been taken how it could hinder us. It turned upon an Ontario amendment to its "Companies Act" each respectively framed quite differently from the Saskatchewan "Companies Act" and the amendment thereto now in question herein.

I think this appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the learned trial judge be restored.

DUFF J.—The crucial question concerns the effect of section 14 of "The Companies Act." I have reached two conclusions as to the effect of that section: first, it does not, as I think, apply to the respondent company; secondly, on the assumption that it did apply, there is nothing in it to exclude the express and implied prohibition touching the exercise of the company's capacities and powers to be found in "The Rural Telephone Act." As to the first point. Section 14 is in the following words:

Every company heretofore or hereafter created:

(*a*) by or under the authority of any general or special ordinance of the Northwest Territories; or,

(*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act, or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province and to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have

(1) 42 Ont. L.R. 105.

and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal. 1917, c. 34, s. 42 (3).

A rural telephone company, by which phrase I shall designate a company incorporated for the purpose of working a rural telephone system under "The Rural Telephones Act," is a company incorporated and organized under the joint authority of "The Rural Telephones Act" and "The Companies Act." The first step in the proceedings is a petition to the Minister charged with the administration of the Act, in which are set forth a description of the proposed system, in accordance with the regulations of the department, a statement of the amount of capital proposed, evidence that a majority of the resident occupants who may be charged or taxed under the Act are to be shareholders of the company, and that a minimum sum in cash amounting to five dollars per pole mile of the system as described in the specifications has been actually raised. The Minister may in his discretion grant the prayer of the petition and permit the petitioners to organize a company for the purpose of working the system, and then, and then only, is it competent to these persons to proceed to incorporation for that purpose under "The Companies Act."

The design of the statute is to produce a scheme by which the inhabitants of rural districts may combine in a company to provide a telephone system for the benefit of the district and to raise the necessary funds by debentures charged upon lands adjoining the system. The general plan is that every person having a telephone connection with the system is a shareholder in the company, that everybody is entitled to have such connection who is a resident occupant along the line of the system, and that all property actually or presumptively accommodated by the presence of the system is chargeable with the payment of moneys raised in the first instance for construction and is taxable for the purpose of meeting the interest on such moneys.

The authority given by the Minister is an authority to incorporate a company for the purpose of constructing and working such a system under the provisions of the Act. It is a strictly limited authority, to establish a co-operative telephone system under the conditions prescribed by the

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Act and to use therefor the machinery of incorporation provided by "The Companies Act." It is most important to note also that the permission of the Minister is an essential part of the proceedings for incorporation under "The Companies Act." By section 44 of "The Rural Telephone Act," 1912, no company can be incorporated under "The Companies Act" for the purpose of working a telephone system without the sanction of the Lieutenant-Governor in Council unless the proceedings prescribed by "The Rural Telephone Act" have been taken. Every memorandum of association, therefore, of a company to be incorporated under the authority of "The Rural Telephone Act" strictly ought to shew on its face that it is a company to be incorporated under the permission of the Minister for the establishment of the system sanctioned by the Minister; and every such memorandum of association must, in my judgment, be read, however general its language may be, as incorporating by reference the objects of the company as shewn by the petition and the permission of the Minister. The certificate of incorporation of the respondent company correctly refers to the company as a company "organized under the provisions" of "The Rural Telephone Act."

I find little difficulty in concluding, when the matter is looked upon in this way, that the memorandum of association does contain or must be deemed in law to contain within the meaning of section 14, an expression of the "contrary intention" which excludes the operation of that section. The learned Chief Justice of Saskatchewan has called attention to the fact that the objects of the company under "The Rural Telephone Act" are territorially limited in the strictest way. The area within which the system is to operate is fixed by the Minister; no extension of the system is permitted without the authority of the Minister; and it is only such a company which, through the machinery of "The Companies Act," the memorandum of association, and so on, can be given corporate capacity to work a rural telephone system. It obviously follows that that part of section 14 which gives to certain companies capacity to acquire extra-provincial powers and rights to an unlimited extent can have no application to

such companies. Nor can the other limb of the section be applied. The objects as stated in the memorandum of association, if correctly stated (or perhaps one ought to say, in the memorandum of association as one must interpret it in light of the special provisions of "The Rural Telephone Act" already referred to), are objects limited in such a way as necessarily to exclude the idea of a general capacity such as that acquired by a company incorporated by letters patent.

Assuming, however, that companies incorporated under "The Rural Telephone Act" are not excluded by the express language of section 14 from the operation of that section, I should still be disposed to think that the effect of "The Rural Telephone Act" was to restrict the powers of companies organized under it in such a way as to exclude the capacity to create negotiable instruments generally.

In order to get a just conception of the purview of this section, it is necessary to bear in mind that it was passed in consequence of the decision of the Privy Council in the *Bonanza Creek Company's Case* (1), and it is important, I think, to note one or two points in the judgment of the Judicial Committee delivered by Lord Haldane in that case. The company whose powers were there under consideration was an Ontario company incorporated by letters patent and governed by the Ontario Companies Act.

His Lordship, in the course of his judgment, pointed out that the effect of the decision of the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) was that a company deriving its existence solely from statute must be deemed to have only such capacities as those conferred upon it either expressly or by implication by the language of the statute creating it. In such a case it is not admissible to treat the words creating the corporation as conferring upon it all the capacities of a corporation at common law, subject only to such restrictions as may be found in the statute, as the legislature has not in view in such a case a common law corporation, but only its own creature.

(1) [1916] 1 A.C. 566.
(2) [1875] L.R. 7 H. L. 653.

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It is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation.

And this, His Lordship says, is the error into which the House of Lords held that Blackburn J., as he then was, had fallen in his judgment in the Exchequer Chamber. But His Lordship points out, at page 578, that although the assumption that the legislature had a common law corporation in view may be wrong, because the language of the statute may not

> warrant the inference that it has done more than concern itself with its own creature,

nevertheless

> the language may be such as to shew an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn J. will be the true one.

The effect of section 14 is, as I think, to bring the companies to which it applies within the principle thus enunciated by Lord Haldane. It is difficult indeed to escape the conclusion that it was precisely this passage in Lord Haldane's exposition which the legislature had in view in enacting section 14.

And what is the result? If we turn to the judgment of Blackburn J., in the Exchequer Chamber (1), there is this passage:

> I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified.

And at p. 264 he formulates thus the question that must be answered:

> Does the statute creating the corporation by express provision, or necessary implication, shew an intention in the legislature to prohibit, and so avoid the making of, a contract of this particular kind?

The effect, then, of section 14 upon the companies to which it applies is not to abrogate entirely the doctrine of *ultra vires* but to establish a rule of construction which in

(1) [1874] L.R. 9 Ex. 224, at p. 262.

effect is that such companies are to be deemed to have the capacities of a common law corporation, subject to such restrictions as the legislature has evidenced an intention of imposing upon it. In declaring in section 14 that the companies referred to are to have the capacities of a common law corporation, the legislature cannot be supposed to have intended to abrogate the restrictions and prohibitions which the legislature itself has shewn an intention to impose upon such companies. A company created by charter, as Lord Haldane points out at pp. 582-3, is necessarily subject to the restrictions imposed upon it by the legislature, and where the enactment imposing such restrictions evinces an intention that a given transaction shall not be entered into, then any attempt on the part of the company to enter into such a transaction must be inoperative in law. Lord Haldane's judgment, as I read it, gives the sanction of his approval to the principle expressed in the first of the passages quoted above from Blackburn J., in those cases in which Blackburn J's principle of construction is properly applicable.

In this view I am disposed to think that there is ample evidence to be found in the provisions of "The Rural Telephone Act" of an intention to prohibit the giving of promissory notes and negotiable instruments generally by rural telephone companies; and consequently that on the assumption upon which we have been proceeding, the promissory notes in question must be held not to have been the promissory notes of the company.

It is desirable, I think, to refer before taking the leave of the case to the point which was made on the argument that the whole of section 14 is limited to the capacity to acquire extra-provincial powers and rights. I may say at once that such a reading appears to me to involve the deletion of the second limb of the section. Evidence could be accumulated indefinitely of the use of the words "corporate capacity" to describe the powers of companies and other corporations to enter into contracts, make promissory notes and do other acts in the law. In his judgment in the *Bonanza Company's Case* (1), Lord Haldane draws a

(1) [1916] 1 A.C. 566.

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distinction between "capacities" and "actual powers and rights" which for his purpose is, of course, a most useful and illuminating one; because he is there dealing with the validity of acts which depend for their validity upon two coefficients—the capacity of a corporation derived from the law from which it takes its being, and the power and right of the corporation to exercise its capacities in a territory where that law is without authority; and the words of section 14 "capacity * * * to accept extraprovincial powers and rights" are natural and appropriate to that part of this section which deals exclusively with such "powers and rights." The distinction may come into play in cases where the respective jurisdictions are not marked off by territorial delimitation; such, for example, as the case of a Dominion corporation seeking to acquire land in a province deriving its "capacity" in the sense in which Lord Haldane uses the word, from the Dominion, and its right to exercise that capacity from the province which requires a license in mortmain, or in the case of a provincial corporation executing a bill of exchange or promissory note. The law which recognizes a bill of exchange or promissory note made by an artificial person as a good bill or note is a Dominion law while the capacity to make such instruments is a capacity which the corporation could derive from the province alone.

But there is, of course, nothing in Lord Haldane's judgment throwing a doubt upon the propriety and aptitude of the phrase "corporate capacity" sanctioned by the widest and most inveterate usage as applied to the power now in question.

It has been suggested, indeed, that the words, "as far as the capacities of such companies are concerned" are on this view superfluous. What I have already said will sufficiently indicate that in my opinion they are far from superfluous; on the contrary they indicate a deliberate intention to adopt for the purpose of determining the capacities of such companies the principle of construction laid down by Blackburn J., as explained by Lord Haldane. And indeed a moment's reflection shews that the use of some such phraseology was necessary in order to confine the

effect of the enactment by reference to the purpose the legislature had in view. One rule of law, for example, touching common law corporations which it might very well have been thought desirable to avoid is the rule that subjects a corporation created by letters patent which has infringed some provision of its charter to proceedings in *scire facias* for the recall of the charter. The jurisdiction of the courts in such cases at common law is strictly confined to corporations created by matter of record. *The Queen* v. *Hughes* (1). The effect of the omission of the words in question might very well have raised a serious point as to whether or not in addition to the statutable machinery for the winding-up of companies created by special Act or under the "Companies Act" the common law procedure by *scire facias* would have been available. I do not pursue the point. I mention this as one example of the things which it may have been desired to avoid by the use of these words.

Although not suggested on the argument, a point has arisen as to the effect of sections 112 to 114 of "The Companies Act."

I shall state with brevity and directness my view upon this point. I infer from Form A, which gives the general form of memorandum of association, that the statute contemplates, in cases in which the power to make negotiable instruments is not by implication involved in the statement of the principal object or objects of the company and this power is intended to be taken, that it shall be taken by express words in the memorandum of association.

The sections mentioned are not to be read as enacting that every company—an athletic association, for example, —formed under "The Companies Act," is to have the capacity to create negotiable instruments, even though the memorandum of association be silent upon the subject.

Where the memorandum of association is silent upon the subject, then the question of the existence or non-existence of the capacity is to be solved by answering the question whether a grant of the power is implied in the statement of the objects of the company and the other provisions of the memorandum.

(1) [1865] L.R. 1 P.C. 81

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I have already said sufficient to shew that in my opinion a memorandum of association containing, as the memorandum now before us contains, no statement as to the company's objects except the statement that the company is formed to construct and to work a rural telephone system, does not give such a power by implication.

The appeal should be dismissed with costs.

ANGLIN J.—Whether the giving of a promissory note for an indebtedness admittedly incurred in carrying out the purpose for which it was incorporated was *ultra vires* of the respondent company is the question before us on this appeal.

Incorporated in 1918 under the Saskatchewan "Companies Act" (R.S.S. 1909, c. 72), the respondent is a purely statutory corporation to which the doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), applies. It possesses, however, all the powers conferred on companies by that Act, except as varied by "The Rural Telephone Act" (1912-13, c. 33, s. 43). Those powers were expressly continued and confirmed by section 48 of "The Rural Telephone Act," 1918-19, c. 46 (R.S.S. 1920, c. 96). See also section 46 of the same statute. By an amendment to the Companies Act, made in 1917 (c. 34, s. 42 (3) (R.S.S. 1920, c. 76, s. 14) it was provided that

> Every company heretofore or hereafter created:
>
> (*a*) by or under the authority of any general or special ordinance of the North West Territories; or
>
> (*b*) under any general or special Act of this legislature shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The contrary intention was not so expressed.

As at present advised, I am not prepared to accede to the view which prevailed in the Court of Appeal that s. 14 of c. 76 R.S.S. 1920, is inapplicable to the respondent.

(1) L.R. 7 H.L. 653.

That section expressly provides for its application to every company created under any general or special act of the legislature. The respondent is such a company. But it is probably not necessary to determine that question.

I agree with the opinions expressed below that the respondent is a statutory non-trading corporation, whose authority to make promissory notes must be found in the statutes which confer its powers. *Bateman* v. *Mid-Wales Ry. Co.* (1). The note was not given for borrowed money. Therefore, while section 117 of "The Companies Act" (1915, c. 14) cannot be invoked to authorise it, neither would section 31 of "The Rural Telephone Act," 1918-19, c. 46, by implication exclude the power of the company to make it. Having regard to the language of section 48 of "The Rural Telephone Act," 1918-19, c. 46 (R.S.S. 1920, c. 96), nothing in that Act can be invoked to cut down whatever powers the respondent acquired by virtue of its incorporation in 1918 under "The Companies Act" subject to the provisions of "The Rural Telephone Act," 1912-13 (c. 33); vide s. 43.

But, assuming the applicability of section 14 of "The Companies Act" (R.S.S. 1920, c. 76), above quoted, to the respondent, it does not in my opinion help the appellant. The word "capacity," as first used in that section, is explicitly restricted to its passive or subjective sense—the capacity "to accept extra-provincial powers and rights"—as Viscount Haldane used it in the *Bonanza Creek Case* (2), at page 576—"capacity to acquire and exercise rights and powers." As his Lordship said, at page 583:

> Actual powers and rights are one thing and capacity to accept extra-provincial powers and rights quite another.

The word "capacities" occurs again in the latter part of the section in this context—

> such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

Apart altogether from the familiar rule of construction that where a word occurs twice in the same statutory provision, it will ordinarily be given the same meaning in

(1) L.R. 1 C.P. 499.

(2) [1916] 1 A.C. 566.

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each case, the obviously limitative purpose of the phrase, "so far as the capacities of the companies are concerned," and the known fact that this legislation, like somewhat similar legislation in other provinces, was enacted in consequence of the decision in the *Bonanza Case* (1) make it reasonably certain that the word "capacities" is here again used in the purely passive or subjective sense. It confines the operation of section 14 to enabling companies to which it applies to accept and exercise powers and rights otherwise conferred upon them and does not import or imply any grant of "actual powers or rights" additional to those conferred elsewhere in the statute.

For reasons stated in *Honsberger* v. *Weyburn Townsite Co.* (2), I strongly incline to the view that the respondent company already possessed for the purposes for which it was incorporated all "actual powers and rights" and the fullest "capacity" which the legislature of Saskatchewan could bestow. I doubt therefore whether section 14 was at all necessary and rather think it added nothing to the "capacity" which the defendant company already had. Its purpose was to put it beyond doubt that companies incorporated under the Saskatchewan Companies Act or special Acts, which could not invoke the benefits held in the *Bonanza Case* (1) to result from the instrument of incorporation having taken the form, prescribed by the Ontario "Companies Act," of Letters Patent issued under the Great Seal, should, nevertheless, "so far as their *capacities* are concerned," be in the same position as if that form of incorporation had been authorized and adopted—that and nothing more.

I find nothing in section 14 which would confer on a non-trading statutory corporation, such as the defendant, the actual power to bind itself by making a promissory note.

I am therefore of the opinion that the giving of the note in question was *ultra vires* of the defendant company and that the judgment in appeal should be affirmed.

BRODEUR J.—The question to be decided is whether the respondent company had the power to sign a promissory note.

(1) [1916] 1 A.C. 566.

(2) [1919] 59 Can. S.C.R. 281, at p. 306.

Some corporations are given special authority to sign promissory notes by their charters or by the general laws by which they are governed. (Revised statutes of Canada, c. 79, sec. 32; Revised statutes of Saskatchewan, c. 72, s. 96.) In the case of others such authority is implied from the nature of their object (*Royal British Bank* v. *Turquand* (1). Trading companies could not easily carry on their trade without having the implied power of signing notes, which have become an instrument of primary necessity in their business relations.

In England, it is stated that the authority cannot be implied from the mere power to contract debts, since the power to issue negotiable paper involves something more than the contracting of a debt, namely the imposition upon the corporation of the liability to innocent indorsers for debts which the corporation is not authorized to contract (Lindley on Companies, p. 242). It has been held in England that this implied power is not possessed by a water works company. *Neale* v. *Turton* (2). But the tendency of recent decisions is towards a more liberal interpretation of these powers. *Re Peruvian Railways Co.* (3).

The corporation which has signed the note in question in this case is a telephone company incorporated as a public service corporation under the provisions of "The Rural Telephone Act" of Saskatchewan. This Act requires that persons desirous of constructing a telephone system should apply to the Minister for the purpose of obtaining his authorization. Plans and specifications of the proposed system and a statement of the amount to be raised by debenture have to be submitted to the Minister. The area within which the construction and operation can be carried out is determined by the Minister. The capital of the company is limited at $10 per pole mile and is divided into shares of $5 each and not more than four shares may be held by any one person. To raise the money for the construction, the company is authorized to issue debentures, but written notice has to be given of the resolution authorizing the loan to all the shareholders, and the resolution must be approved by the Minister and by the local Government

(1) [1856] 6 E. & B. 327. (2) [1827] 4 Bing. 149.
(3) [1867] 2 Ch. App. 317.

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Board. The debentures must be countersigned by the Minister and form a lien on the lands adjoining the system. The moneys for the payment of these bonds are obtained exclusively from taxes levied on the lands affected.

It seems admitted that these telephone companies were not authorized to sign promissory notes until the law was passed in 1917 by the Saskatchewan Legislature which reads as follows:—

14. Every company heretofore or hereafter created:

(*a*) by or under the authority of any general or special ordinance of Northwest Territories; or

(*b*) under any general or special Act of this legislature; shall, unless a contrary intention is expressed in a special Act or ordinance, incorporating it or in a memorandum of association thereof, have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit; and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

At first sight, we might say that this section gives every company the same powers as a company incorporated under the great seal which is authorized to make notes. But it would be, according to my mind, to give to this section an effect which the legislature never intended. This legislation of 1917 was passed with the purpose of complying with the suggestion made by the Privy Council in the *Bonanza Creek Case* (1). It had been said by Lord Haldane that

the words "legislation in relation to the incorporation of companies with provincial objects" (B.N.A. Act, sec. 92, s.s. 11) do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create by or by virtue of a statute a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation whether by legislation or by executive act according with the distribution of legislative authority of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*.

It had been contended by the federal authorities in this *Bonanza Creek Case* (1) that a provincial company could

(1) [1916] 1 A.C. 566.

not carry on business outside the territory of the incorporating province. In deciding this question, the Privy Council made in 1916 the suggestions above quoted. The Legislature of Saskatchewan, at the session of 1917, passed a necessary remedial legislation which is embodied in section 14, which I have also quoted above.

The legislature evidently intended to grant to its provincial companies the capacity of accepting extra-provincial powers and of exercising its powers beyond the boundaries of the province as far as the laws of the country or province in which the powers are sought to be exercised permit. Going further than that would be giving these companies a more extended power than the remedial legislation contemplated.

I then come to the conclusion that the Cudworth Rural Telephone Company was never authorized by the statute of 1917 to sign promissory notes.

For these reasons the appeal should be dismissed with costs.

MIGNAULT J.—The appellant's argument chiefly centres around section 14 of chapter 76 of the Revised Statutes of Saskatchewan, 1920, which is "The Companies Act" of that province. This section was added as section 13a to "The Companies Act" by chapter 34, section 42, of the statutes of 1917 after, and I think I may say because of, the decision of the Judicial Committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1). It was there held that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario "Companies Act" with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights conferred by the authorities of the Dominion and the Yukon Territory.

Speaking on behalf of their Lordships, Lord Haldane, referring to the power granted to a province by section 92, par. 11, of the B.N.A. Act for the incorporation of companies "with provincial objects," said (p. 576):—

> Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province.

(1) [1916] 1 A.C. 566.

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Further on, his Lordship said (p. 582):—

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) does not apply where, as here, the company purports to derive its existence from the act of the sovereign and not merely from the words of the regulating statute * * * If validly granted it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings.

And further, at p. 583:—

The limitations of the legislative powers of a province expressed in section 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extraprovincial powers and rights is quite another. In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires,* although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies.

And at p. 584:—

The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra.*

The law having been thus authoritatively stated, the Saskatchewan legislature amended its "Companies Act" by adding thereto the enactment which is now section 14 of chapter 76 of the revision of 1920. It is declared by what I will call the first part of this section that every company then or thereafter created by or under the authority of any general or special ordinance of the Northwest Territories or under any general or special Act of the

(1) L.R. 7 H.L. 653.

Legislature, unless a contrary intention is expressed in a special Act or ordinance incorporating it, or in a memorandum of association thereof, shall have and be deemed to have had since incorporation the capacity of a natural person to accept extraprovincial powers and rights, and to exercise its powers beyond the boundaries of the province to the extent to which the laws in force where such powers are sought to be exercised permit. And after this general declaration, which exactly covers the point determined in *Bonanza Creek Gold Mining Co.* v. *The King* (1), the second part of section 14 states:

and unless the contrary intention is expressed in a special Act or ordinance incorporating the company or in a memorandum of association thereof, such incorporation shall, so far as the capacities of such companies are concerned, have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the Great Seal.

The scheme of the Saskatchewan Companies Act is incorporation by means of a memorandum of association and not by letters patent, so that, without the general declaration of the first part of section 14, a company so incorporated would come within the rule of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2). The intendment of the first part of section 14 is to give the company, notwithstanding its mode of incorporation, the capacity of a natural person to accept extra-provincial powers and rights and to exercise its powers beyond the boundaries of the province in so far as permitted by the law where these powers are sought to be exercised. This confers on a company incorporated in Saskatchewan by means of a memorandum of association a capacity which it would not have under *Bonanza Creek Gold Mining Co.* v. *The King* (1), which refers merely to companies incorporated by royal charter, so that in Saskatchewan the distinction between the two kinds of incorporation, in so far as the capacity to accept extra-provincial rights is concerned, becomes immaterial.

The second part of section 14 gives rise to a serious difficulty. It declares that "such incorporation," to wit, incorporation by statute, unless the contrary intention is expressed in a special Act or ordinance incorporating the

(1) [1916] 1 A.C. 566. (2) L.R. 7 H.L. 653.

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company, or in a memorandum of association thereof, shall, *in so far as the capacities of such companies are concerned,* have and be deemed to have had the same effect as if the company were or had been incorporated by letters patent under the great seal.

There is no question here of the acceptance of extra-provincial powers and rights. The statutory company is to have the *capacity* of a company incorporated under royal charter, unless the contrary intention is expressed in the statute incorporating it. This, it is contended, does entirely away with the rule of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1). And the words of Lord Haldane,

> in the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter

are relied on as supporting the contention that the defence of *ultra vires* cannot be sustained.

On the other hand, it is argued that the word "capacity" or "capacities" is used in the passive sense in section 14. This can be granted as to the first part of the section. It may be added that this word is primarily so used, for capacity is defined as "ability or fitness to receive" (Stroud's Judicial Dictionary). And the point considered in the *Bonanza Company Case* (2) was the ability of a provincial company to receive or accept extraprovincial rights, that is to say capacity in the passive sense—so it is contended that the words of section 14, "so far as the capacities of such companies are concerned," should be considered as restricting or cutting down the generality of the declaration of the legislature.

It must be admitted that, in so far as the abolition of the doctrine of *ultra vires* is concerned, the legislature has weakened what otherwise would have been an unequivocal declaration by the introduction of qualifying words in the second part of section 14. Of course also the memorandum of association must be looked at, and here the purpose mentioned is

> the construction, maintenance and operation of a telephone system,

which seems to negative the existence of unlimited powers.

(1) L.R. 7 H.L. 653.

(3) [1916] 1 A.C. 566.

The word "capacity" in the first part of the section is used in the passive sense and it is not an unfair inference that if this word was intended to have in the second part the meaning of powers and rights the latter expressions would have been employed, if for no other reason, in order to avoid the use in this section of the same expression with two different meanings. So I think that section 14 does not in the present instance conclude the matter as contended by the appellant. This suffices to distinguish this case from *Edwards* v. *Blackmore* (1), the Ontario statute being differently worded, and no doubt the company was of a different nature, and I desire to be understood as expressing no opinion as to the decision of the Ontario court.

On the other branch of the case, I have no difficulty in coming to the conclusion that the respondent company had no power to issue the note here in question. Granting that under section 48 of "The Rural Telephone Act" it had all the powers conferred on companies by "The Companies Act," except as varied by "The Rural Telephone Act," my opinion is that, reading these two Acts together with the memorandum of association and considering the nature of this company which is a local public service organization and the restrictions placed on its borrowing powers, the issuing of negotiable instruments clearly transcended its corporate powers.

I would therefore not interfere with the unanimous judgment of the Saskatchewan Court of Appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Ferguson, MacDermid & MacDermid.*

Solicitors for the respondent: *McCraney, Hutchinson, Carroll & Sheppard.*

(1) 42 Ont. L.R. 105.

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*May 3, 4.
*June 15.

A. H. CHURCH AND OTHERS.....APPELLANTS;

AND

MARY A. V. HILL.....RESPONDENT.

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

Will—Construction—Specific devise of land—Effect of subsequent sale—Proceeds falling into residue—"Land Titles Act" (Alta.) [1906] c. 24, s. 41—"An Act respecting the transfer and descent of land," (Alta.) [1906] c. 19, s. 2.

Where a testator in his will makes a specific devise of land but subsequently sells same under agreement for sale, the devise is rendered inoperative; the devisee is not entitled to any part of the unpaid purchase money, which falls into residue.

Per Davies C.J. and Idington, Duff, Anglin and Mignault JJ.—This effect is not altered by the provisions of sect. 2 of c. 19 of "The Transfer and Descent of Land Act," (Alta.) [1906], which assimilate the course of descent of real estate to that of personality.

Per Idington, Anglin and Mignault JJ.—The settled jurisprudence in this matter applies notwithstanding the provisions of section 41 of "The Land Titles Act," (Alta.) [1906] c. 24.

Per Duff J.—The amendment to "The Land Titles Act" made by s. 7 of c. 39 [1921] in regard to executions does not affect the application of such jurisprudence.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J. at the trial (2).

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

Parlee K.C. for the appellant.

Geo. F. Macdonnell for the respondent.

THE CHIEF JUSTICE.—While I feel myself compelled by the decided cases to allow this appeal and restore the judgment of Mr. Justice Ives, I may say that I do so with great regret.

Under the circumstances the costs throughout of all parties as between solicitor and client must be borne by the estate.

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

(1) [1922] 3 W.W.R. 1207.

(2) [1922] 2 W.W.R. 1268.

IDINGTON J.—The line of decisions begining with *Farrar* v. *Winterton* (1), and down to *Beddington et al* v. *Baumann et al* (2), holding that the subject matter of a specific devise or bequest made by a testator, having been sold by him, the devise or bequest was thereby adeemed so settled the English law of wills that it thereby became the law of the North West Territories before Alberta was set apart and hence when that happened it continued to be the law of Alberta until changed by legislation, which the legislature has not seen fit to enact.

Having received, from a consideration of the will and events relative thereto now in question, a very decided impression that the result of so holding as the learned trial judge felt he must would lead to thwarting the testator's probable intention, I have examined the line of decisions I have referred to and a great many more.

In the result I am driven by the weight of authorities to conclude that the judgment appealed from cannot be maintained.

I had hoped to find, inasmuch as Jarman had considered that the legal estate passed to the devisee in the case of a mere bargain and sale there might be a basis upon which to found something that would uphold the judgment appealed from. That, however, turned out, by a consideration of some of the cases, of which *Re Clowes* (3) was one, which showed that owing to the Imperial Conveyancing Act and Law of Property Act, 1881 (Imp.), c. 41, sec. 30, even the legal estate was taken away and would pass to the executor or administrator.

And that was the state of the English law and I suspect well fitted when introduced into the Northwest to receive the Torrens system of registration and other items upon which Mr. Justice Beck rests, in a way which, with great respect, I cannot.

In short it was the old common law doctrine that I had imagined might have saved the situation if in course of developing our judge made law, some court happened to discover a possible cause of injustice, and by its decision furnished a remedy we could adopt.

(1) [1842] 5 Beav. 1.
(2) [1903] A.C. 13.
(3) [1893] 1 Ch. 214.

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No such precedent existing, I see no help for it but to allow the appeal and restore the learned trial judge's judgment.

I think the costs of all parties in the courts below and here should be allowed out of the estate.

DUFF J.—I am constrained, I regret to say, to the conclusion that this appeal must be allowed and the judgment of Ives J., restored. The costs of all parties as between solicitor and client should be borne by the estate. I can add nothing of any value to the judgment of Mr. Justice Clarke.

ANGLIN J.—It is now too well settled to admit of controversy that the right of a vendor of land to the purchase money, though secured by lien upon the land sold, is not such an estate or interest as s. 23 of the English Wills Act, 1837 (Imp.), c. 26 (in force in Alberta entitles a devisee of the land under the will of such vendor, made prior to the sale, to claim. The decisions to that effect of Lord Langdale in *Farrar* v. *Winterton* (1), and of Lord Romilly in *Gale* v. *Gale* (2), have been followed ever since, the latter having been explicitly approved by the House of Lords in *Beddington* v. *Baumann* (3).

The assimilation in Alberta of the course of descent of real estate to that of personalty affords no ground for a departure from such a well settled rule. Section 23 of the Wills Act applies equally to real and to personal estate.

The result of decisions of this court in *Jellett* v. *Wilkie* (4), *Williams* v. *Box* (5), *Smith* v. *National Trust Co.* (6), *Yockney* v. *Thomson* (7), *Grace* v. *Kuebler* (8), and other cases, is that, notwithstanding such provisions as s. 41 of ch. 24 of the Alberta statutes of 1906, equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected. The presence of that provision in the Alberta statutes does not afford sufficient ground for holding that

(1) 5 Beav. 1.
(2) [1856] 21 Beav. 349.
(3) [1903] A.C. 13.
(4) [1896] 26 Can. S.C.R. 282.
(5) [1910] 44 Can. S.C.R. 1.
(6) [1912] 45 Can. S.C.R. 618.
(7) [1914] 50 Can. S.C.R. 1.
(8) [1917] 56 Can. S.C.R. 1.

where a testator has, after making his will, executed an agreement for the sale of his entire interest in a parcel of land in that province specifically devised in the will, the devisee is entitled to claim any part of the purchase money thereof remaining unpaid as an interest preserved to him by the operation of s. 23 of the Wills Act.

I would allow this appeal and restore the judgment of Mr. Justice Ives.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The three appellants and the respondent are the children of the late Arthur W. Church, who died in Edmonton, Alberta, on February 5, 1921, leaving a will, executed at Edmonton on February 28, 1916, whereby he purported to divide his property real and personal among his four children. The principal clause of this will is as follows:—

> I give, devise and bequeath all my real and personal estate, of which I may die possessed, in the manner following, that is to say: To my youngest daughter, Mary Alice Viola Hill (wife of Stewart Hill) of Edmonton, Alberta, I bequeath Lot 15, Block 46 (the house number on this lot being 10649, 80th Avenue) in the city of Edmonton (South), province of Alberta. The balance of my property to be divided equally between my daughter, Amy Ethel Watson (wife of Harvey G. Watson), of Central Park, British Columbia, my son Arthur Harvey Church, of Edmonton, Alberta, and my daughter, Kate Adeline Joyce (wife of A. Joyce) of Edmonton, Alberta.

On April 1, 1920, the testator entered into an agreement of sale with one Lockerbie whereby he agreed to sell to Lockerbie and the latter agreed to purchase from him lot 15, block 46, in the City of Edmonton, to wit, the property he had devised to the respondent, for the sum of $4,500, whereof $500 was paid immediately, and the balance was made payable in monthly instalments of $30 with interest at eight per cent payable half yearly. Rigorous provisions secured the payment of this balance, as, for instance, a clause that on default of payment of any instalment of principal or interest, the whole amount outstanding would become due and payable, or the agreement forfeited and determined, at the option of the vendor; also a clause that until the completion of the purchase, the purchaser should hold the premises as tenant to the vendor at a rental equivalent to the instalments

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of principal and interest, the legal relation of landlord and tenant being constituted between the vendor and the purchaser. Lockerbie was given immediate possession by the agreement.

Notwithstanding these clauses intended to secure the payment of the purchase price, and although Lockerbie could demand a conveyance only when he had entirely completed the payment of the price and interest, it is unquestionable that he immediately acquired an equitable interest in the property.

In the Appellate Court Mr. Justice Stuart cited the well-known case of *Ross* v. *Watson* (1), as determining what are respectively the rights of the vendor and the purchaser under a sale agreement such as this. The question there was whether the purchaser, who had ceased his payments on account of non-fulfilment of representations (which were adjudged to be sufficient to absolve him from specific performance) had a lien on the property for the payments he had already made. The decision was that the purchaser had such a lien and it was clearly laid down by the Lord Chancellor, Lord Westbury, and by Lord Cranworth, who concurred with him, that where by an agreement of sale the ownership of an estate is transferred subject to the payment of the purchase price, every portion of the purchase money paid in pursuance of the agreement is a part performance and execution of the contract, and, to the extent of the money paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate.

In *Ross* v. *Watson* (1) the purchaser, in the exercise of his right to do so, had refused to complete the purchase, and it was decided that he had a lien on the property for the money he had paid. But, with deference, I cannot think that, to quote the language of Mr. Justice Stuart, the decision casts

> some doubt upon the wide general proposition that in equity the property is the property of the purchaser.

It appears, on the contrary, that the ownership in equity of the purchaser in *Ross* v. *Watson* (1) was the foundation of the lien which he was held to possess.

(1) [1864] 10 H.L. Cas. 672.

Lockerbie therefore, at the death of the testator, had acquired in equity, and to the extent of the purchase money paid by him, the ownership of a corresponding portion of the estate of the testator.

It will be said, and such was the reasoning of Mr. Justice Stuart, that the testator, at his death, had still a substantial interest in the property, to the extent at least of the purchase money still unpaid. But he could assert no such interest against Lockerbie if the latter continued, as he has done, to pay the purchase money as it became due. So long as the conditions of the agreement of sale were carried out, the vendor was entitled only to this purchase money, and the purchaser, on completing its payment, had the right to demand a conveyance. Had the vendor refused to make this conveyance, the purchaser would have been entitled to compel him to do so by an action for specific performance; and therefore the interest which the purchaser acquired under the sale agreement was certainly an interest which equity would recognize and one commensurate with the relief which equity would give by way of specific performance. *Howard* v. *Miller* (1).

It is suggested that this recognition of an equitable interest belonging to the purchaser under a sale agreement cannot be relied on where there prevails a land titles system such as that in force in Alberta. And the respondent cites section 41 of the Land Titles Act, Alberta, under which, after a certificate of title has been granted for any land,

no instrument until registered under this Act shall be effectual to pass any estate or interest in any land.

It would probably be sufficient to say that section 41 is mainly intended for the protection of third parties who have obtained registration and that the respondent claiming under her father's will is not in a better position than the latter would have been to contend that an equitable interest did not pass to Lockerbie under the sale agreement. While giving to section 41 and similar provisions full effect for the protection of third parties who have complied with the Act, it does not appear possible, and certainly not *inter partes,* to exclude from the Land Titles

(1) [1915] A.C. 318, at p. 326.

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Act equitable interests in property resulting from sale agreements. Equitable interests in property subject to the Act were expressly recognized by this court in *Jellett* v. *Wilkie* (1), and the provisions of the Act authorizing the filing of caveats show that such interests cannot be summarily excluded. I have found in the New Zealand reports a case decided by a single judge where, under section 38 of the New Zealand law corresponding with section 41 of the Alberta statute, it was said that in enforcing according to equitable doctrines contractual rights created by an unregistered instrument, the court cannot act inconsistently with section 38 by holding an interest to pass where the section says none shall pass *Orr* v. *Smith* (2). See also *Howie* v. *Barry* (3). In these cases there were rival claimants to rent, and the rights of the debtor who had paid the rent in good faith to the registered lessor were involved. I have however found, under the Torrens system, no authority excluding equitable interests as such, and certainly not as between the registered owner and a person to whom he has agreed to sell the property, and it does not seem possible to exclude them here. (See Hogg, Registration of Title to Land Throughout the Empire, pp. 111 et seq.).

I have referred to these matters because they were relied on by the learned judges who formed the majority of the Appellate Divisional Court. I cannot think, however, that they afford the respondent any answer to the contentions of the appellants. Moreover, the respondent, under the devise made to her, seeks to obtain the balance of the purchase money rather than an interest in the land itself, which interest the testator could not have asserted against Lockerbie so long as the latter fulfilled all the conditions of the promise of sale. The question now is whether this devise has become inoperative by reason of the sale of the devised property.

The legal position here can be stated as follows: By reason of the sale agreement, any interest in the property in question of the vendor as against the purchaser, and so long as the latter made the stipulated payments, was

(1) 26 Can. S.C.R. 282. (2) [1919] N.Z.L.R. 818 at p. 828.
(3) [1909] 28 N.Z.L.R. 681.

converted into a claim for the purchase moneys. What the testator devised to the respondent was the property itself. What he had at his death—and it is then that the will speaks—was the right to the price and not the property. The devise therefore fails because its subject matter no longer existed at the testator's death.

A different situation was dealt with by this court in the recent case of *Hicks* v. *McClure* (1). There the testator had himself sold a property which by his will he had directed his executors to sell and divide the proceeds between his two sons, and it was held that the bequest was really of the proceeds of the property. Here the devise is of the property itself.

It does not appear to me to matter that in Alberta real estate has been assimilated to personal property, both going to the personal representative of the deceased. So long as Lockerbie is not in default, the respondent could not claim either from him or from the personal representative of the deceased the property itself, and the answer to any demand by her of the purchase money is that it was not given to her under the devise of the property.

I cannot therefore avoid the conclusion that the devise to the respondent entirely fails. But can the appellants claim the purchase moneys under the bequest to them of the balance of the testator's property? The answer should be in the affirmative if the bequest is a residuary bequest.

The language used,

> the balance of my property to be divided equally between * * * *

taken in connection with the declaration of the testator,

> I give, devise and bequeath all my real and personal estate of which I may die possessed of in the manner following * * *

certainly indicates the intention that the appellants shall have everything except the property specifically devised to the respondent. They take therefore the residue of the estate, for the "balance" mentioned in the will is certainly what is known to the law as the "residue," both expressions having the same meaning. And the residue comprises this purchase price, so that it must go to the appellants.

That the testator ever contemplated that his youngest daughter, the respondent, would take nothing under his

(1) [1922] 64 Can. S.C.R. 361.

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will, and that the price of the property he had left to her would go to his other children, or that he intended any such result, seems very doubtful. But the court cannot make a will for him or provide the respondent with an equivalent for the loss of the property which the testator had devised to her. Nothing would be more dangerous than to refuse to apply the settled rules as to the ademption of legacies because it may be conjectured that the result would be contrary to the intention of the testator. *Dura lex,* it is true, *sed lex,* and the law must be applied.

Without therefore concealing my regret that this result cannot be avoided, I have come to the conclusion to allow the appeal with costs here and in the appellate court, payable out of the estate, and to restore the judgment of the learned trial judge.

Appeal allowed, costs to be paid by the estate.

Solicitors for the appellants: *Parlee, Freeman, McKay and Howson.*

Solicitors for the respondent: *Emery, Newell, Ford and Lindsay.*

CALPER *v.* EDMONTON, DUNVEGAN & BRITISH COLUMBIA RY. CO. AND OTHER RAILWAY

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*May 4, 7.
*Oct. 9.

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

Negligence—Railways—Employee operating speeder—Collision with railway velocipede.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Walsh J. (2), and dismissing the appellant's action.

A railway employee, while operating a speeder over the "joint section" of the two respondent companies, was killed in a collision with a railway velocipede owned by one of the respondents and operated by an employee on the joint section. In an action on behalf of deceased's dependents, the trial judge gave judgment for damages, holding that the collision was caused by the negligence of the velocipede driver and that although deceased had been negligent his negligence did not contribute to the accident. The Appellate Division reversed this decision, holding that the velocipede driver was not negligent and even if he were, the highest ground appellants could take was that the accident was the result of the joint negligence of both, and appellants therefore could not recover.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal, the court being equally divided.

Appeal dismissed.

Lafleur K.C. and *Van Allen* for the appellants.

Johnstone K.C. and *Parlee K.C.* (*Geo. F. Macdonnell* with them) for the respondents.

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

(1) [1923] 1 W.W.R. 1141. (2) [1922] 3 W.W.R. 849.

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*May 7, 8.
*Oct. 9.

THE CITY OF LETHBRIDGE (PLAINTIFF) APPELLANT;

AND

THE CANADIAN WESTERN NATURAL GAS, LIGHT, HEAT AND POWER CO., LTD. (DEFENDANT).... RESPONDENT.

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

Contract—Statute—Franchise—Supply of natural gas to municipality—Right to discontinue—Injunction to enforce continuance—Declaratory judgment—Mandatory order—Public Utilities Act—Remedies available thereunder—(Alta.) 1915, c. 6, ss. 20, 21, 23e, 27, 39, 40, 52 and seq., 64, 69 (2), 70—(Alta.) 1923, c. 53, s. 54 (2).

On July 30, 1912, the city appellant passed a by-law under which the respondent company obtained exclusive power to lay pipes in the streets of the city for the purpose of supplying natural gas at a certain price and for a period of fifteen years. Its terms and provisions were accepted by the respondent. On the 5th of April, 1922, the respondent company notified the city appellant that it would cease in the month of May to sell gas owing to the impossibility of continuing to sell it at the price fixed in the by-law and in view of the refusal by the city to grant any increase in rates. The city appellant then asked for an injunction to restrain the respondent from discontinuing the sale of gas and for a declaration that the respondent was bound to supply gas at the price and for the period stipulated. The judgment of the trial judge, maintaining the appellant's action, was reversed by the Appellate Division; and the appeal to this court was dismissed on equal division.

Per Davies C.J. and Anglin and Mignault JJ.—Although the courts may not have been denuded of jurisdiction to entertain the present action, they should decline to exercise it and should relegate the parties to the Board of Public Utilities which the legislature has constituted to deal with such cases and has clothed with powers adequate to enable it to do full and complete justice.

Per Idington, Duff and Brodeur JJ.—On the construction of the agreement between the parties, their reciprocal obligations were of a contractual character.

Per Idington and Brodeur JJ.—The case is one for remedy by injunction without the city appellant being obliged to submit the question of rates to the Board.

Per Davies C.J. and Anglin and Mignault JJ.—Under the circumstances, a merely declaratory judgment should not be rendered. Duff J. *contra.*

Per Duff J.—In view of the existing circumstances, the respondent is not entitled to raise before this court any question as to the propriety of a declaratory judgment.

Per Davies C.J. and Duff, Anglin and Mignault JJ.—It is not convenient, as it might otherwise have been just as between the parties, to grant appellant's claim for a mandatory order, as other interests may be affected by it.

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

Per Duff and Brodeur JJ.—No provision in the Alberta "Public Utilities Act" deprives the Supreme Court of authority to deal with the questions raised in this case, Davies C.J. and Anglin and Mignault JJ. expressing no opinion as to whether the effect of that Act was to oust the jurisdiction of the ordinary courts.

Judgement of the Appellate Division ([1923] 1 W.W.R. 838) affirmed on equal division of the court.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge and dismissing the appellant's action.

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

Lafleur K.C. and *Johnstone K.C.* (*Ball* with them) for the appellant.

Hellmuth K.C. and *Savary K.C.* for the respondent.

THE CHIEF JUSTICE.—Not without much doubt I have reached the conclusion that this appeal must be dismissed with costs. I concur in the reasons for dismissal stated by my brother Anglin.

IDINGTON J.—The appellant is a municipal corporation endowed with all the corporate capacity and powers enabling it to enter upon such a contract as it contends was made between it and the respondent, which is a corporation engaged in the procuring of natural gas, and its distribution and sale, and also endowed with the corporate capacity and power to enter into such a contract as appellant contends was entered into between them, in respect of a supply of natural gas for use thereof by appellant and its inhabitants.

The long history leading up to the creation of the relations, whatever they are, between the said parties, has been set forth in great detail by the learned trial judge and in part so far repeated by the learned judges in the Court of Appeal, who heard the case there, that I do not see any useful purpose to be served by repeating same here.

Suffice it to say that the predecessors in title of the respondent had been in negotiation with appellant for the acquisition of a franchise from it to sell gas to it and its inhabitants for a term of years and had progressed so far

(1) [1923] 1 W.W.R. 838.

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that the appellant had passed a by-law relative thereto in 1910 pursuant to agreement with said parties.

That was entered into under circumstances which rendered it of necessity largely conditional.

About eighteen months later the respondent having acquired such rights as its predecessors in title had, and other interests which opened up for it much brighter prospects and possibilities, approached appellant with a view to bringing about a contract much more favourable for it, the respondent induced appellant to amend its said by-law and by revote of the electors they duly assented thereto.

That amending by-law and its terms and provisions were duly accepted and agreed to by the respondent, in the following letter:—

128 Seventh Avenue East,
Calgary, Alta., 1st August, 1912.

To the Mayor and Council
of the city of Lethbridge, Alta.

Gentlemen,—We beg respectfully to acknowledge receipt of a certified copy of by-law No. 154 of the city of Lethbridge, being a by-law to amend by-law No. 99 of the said city, such by-law No. 99 being a by-law to grant a franchise to lay pipes through the city of Lethbridge for the distribution of natural gas.

We hereby notify you that we consent and agree to the amendments set forth in said by-law No. 154 and will conform to and fulfil all the matters and provisions therein referred to and contained.

Given in behalf of the Canadian Western Natural Gas, Light, Heat and Power Company, Limited, at Calgary, this first day of August, 1912.

EUGENE COSTE,
President.
JOHN BAIN,
Secretary.

[Seal]

Both parties having acted in conformity therewith for nearly ten years, except in one particular to which I will presently refer, respondent in a notice, dated 5th April, 1912, gave to the parties who had been using its gas in Lethbridge, that it would on the tenth of May following cease to supply same. The only excuse given was that it could not, except at a future loss, continue to supply at the agreed upon rates. A novel reason, it seems to me, for breach of contract by leave of a court of justice ignorant of the profits hitherto reaped.

There had been a previous failure to supply manufacturers which, I incline to think, was so far tacitly assented

to by the appellant that possibly an injunction in that respect might, if applied for, have been well refused.

In all other respects I see no reason, if contracts are to be observed at all, why the respondents can claim to be relieved so long as the supply of gas is available.

The question raised herein is whether or not there ever has been a contract between the parties or anything beyond the mere concession of a franchise which respondent can abandon at will.

I consider that there clearly was a contract which constituted an obligation and bound respondent to observe all the matters and provisions therein referred to and contained, from which nothing but an absolute failure of supply of gas, cost what it may, can relieve them.

I fail to see the analogy in law between the cases of railway franchises such as came in question in the *Great Western Railway Company* v. *The Queen* (1); *York and North Midland Railway Company* v. *The Queen* (2), or the more recent case of *Darleston Local Board* v. *London & North-Western Railway Co.* (3), and others cited by respondent's factum, and this case.

Respondent's counsel when citing, at the end of a long list of decisions, the case of *La Ville de St. Jean* v. *Molleur* (4), comes, accidentally I imagine, on a decision much more closely in point than any other he cites.

That decision arose out of an attempt the converse of which is attempted herein, but in principle I submit should destroy (although the converse attitude of the parties was there involved) any claims of respondent to pretend that the relation of the parties herein was other than contractual and implied an obligation upon the party obtaining from a municipality such a franchise as herein involved to give the promised consideration therefor.

At least for my part in that case I tried, perhaps at too great length, to demonstrate that the nature of the relation was contractual.

In that I see I referred to the English law as well as the Quebec Code, for it arose out of the application of

(1) [1883] 1 E. & B. 874, 118 E.R. 663.
(2) [1883] 1 E. & B. 858, 118 E.R. 657.
(3) [1894] 2 Q.B. 694.
(4) [1908] 40 Can. S.C.R. 629.

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municipal laws which are much alike and only that the Quebec code gave specifically a remedy if the nature of the relation created could be held contractual as it was in that case by this court.

I agree so fully with the dissenting judgment of Mr. Justice Stuart in the court below that I need not waste effort here to repeat same reasoning.

Out of respect to the majority opinion I may say I am quite unable to see how the appellant can be forced to have recourse to the local Board of Commissioners unless and until the legislature sees fit to go further and adopt the more modern fashion of regulating things by commission.

I do not think that the injunction granted under the circumstances and limited to the causes calling for it after ten years mutual observance of the contract, exceeds the bounds of such relevant law as it rests upon.

It is not the case of an attempt to enforce specific performance *ab initio* when it might have been met by the fatal objection of involving too much supervision of the due performance of obedience to the injunction granted.

Certainly it is not a case where damages could be allowed at all adequate to the breach of the contract involved.

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

DUFF J.—I am unable to escape the conclusion that paragraph two of by-law 154 gives expression to the terms of a contract on behalf of the company, to which contract the company gave its adherence by the acceptance of the by-law, to supply on demand the demand for gas of the city and the inhabitants thereof along the line of the five miles of pipe referred to in the preceding limb of the paragraph. I am unable to concur with the view that the company can get rid of this obligation of its own mere motion by going through the form of abandoning its rights under the by-law. It may well be that the termination of those rights under the terms of the contract, by the operation, for example, of article 13, would put an end to the personal obligation under paragraph two; but that it is unnecessary to consider for the purposes of this appeal.

The appellant municipality is, I think, entitled to a declaration to the above effect.

The propriety of a declaratory judgment was not disputed by the defendant, either in the pleadings or at the trial. Judgment having gone in favour of the plaintiff municipality, the trial judge having construed the contract in accordance with the plaintiff municipality's contention, the respondent company appealed to the Appellate Division, not upon the ground that there was any impropriety in the trial judge entertaining the action and deciding the questions raised upon their merits, but actually asking for a decision in its favour on the construction of the contract, a decision on the merits of the issues raised. Having asked for and got such a decision, it is not competent to the respondent company in answer to the plaintiff municipality's appeal to raise any question as to the propriety of a declaratory judgment. To entertain such an objection in such circumstances would be contrary to settled principles as well as to authority. *Bickett* v. *Morris* (1); *Burgess* v. *Morton* (2); *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3).

The claim for a mandatory order stands on a different footing. Interests other than the interests of the plaintiff municipality may be affected by such an order, and the Board of Public Utilities has ample power to protect such interests. In these circumstances it is not "convenient," although it might otherwise have been "just," as between the parties, to grant such a mandatory order.

I have examined with care the provisions of the Alberta statute establishing the Board of Public Utilities, and can find nothing in that statute depriving the Supreme Court of Alberta of authority to deal with the questions in controversy in this action in accordance with the course of the court.

ANGLIN J.—The appellant is a municipal corporation; the respondent, a public utility subject to the legislative jurisdiction of the province of Alberta.

By s.s. 2 of s. 54 of "The Public Utilities Act of Alberta, 1923," c. 53, it is provided that, in the absence of a filed

(1) [1866] L.R. 1 H.L. Sc. 47. (2) [1896] A.C. 136 at p. 143.
(3) [1921] 2 A.C. 438.

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consent to the contrary, all statutory provisions applicable prior to the enactment to the statute to contracts made before the 1st day of May, 1923, and to the price to be charged for the supply of a commodity or service thereunder shall remain applicable thereto. The contract in question in the present case was made in 1910 and amended in 1912. The question at issue must, therefore, be determined under the Public Utilities Act of 1915, c. 6, and amendments thereto made prior to the 21st of April, 1923.

By s.s. 2 of section 69, of the Public Utilities Act of 1915, which constituted the Board of Public Utilities Commissioners of Alberta, it is provided that:

> The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act.

Section 21 declares that:

> The Board shall have a general supervision over all public utilities subject to the legislative authority of the province.

By clause "c" of section 23, the board is given power to fix just and reasonable rates, tolls, and charges

> whenever the Board shall determine any existing individual rate, joint rate, toll charge, etc., to be unjust, insufficient or unjustly discriminatory, or preferential.

(I rather incline to agree with Mr. Justice Clarke that the construction put on this latter clause in *Northern Alberta Natural Gas Development Co.* v. *Edmonton* (1), was too narrow.)

By s. 27 the board is empowered to require every public utility (*a*) to conform to the duties imposed upon it by any municipal by-law or by any agreement with any municipality, and (*b*) to furnish adequate and proper service, etc.

Section 39 empowers a municipal council by resolution to authorize an application to the board whenever it deems that the interests of the public in the municipality, or a considerable part thereof, are sufficiently concerned; and s. 40 provides for action by the board on such application. Other sections confer on the board plenary powers for redressing grievances and enforcing rights in all matters in respect of which it is given jurisdiction. *Vide* s.s. 52 *et seq.*

The decision of the board is made final and *res judicata* (s. 64) and, subject to a restricted right of appeal (s. 70),

(1) 15 Alta. L.R. 416.

binding and conclusive on all companies and persons and municipal corporations and in all courts. (S. 69 (1)).

While a great deal may be said for the view that the effect of this legislation was to oust the jurisdiction of the courts in regard to such matters as are presented in this action, the present appeal may be disposed of without so deciding.

For reasons stated by my brothers Duff and Mignault, I agree that the mandatory order sought should in no event be granted. I am also, with my brother Mignault, of the opinion that a merely declaratory judgment should not be pronounced.

The avowed intention of the legislature was that the board should exercise general supervision over all public utilities; jurisdiction, when conferred upon it, is declared to be exclusive; the enforcement of agreements between public utilities and municipalities is expressly made a subject of the jurisdiction of the board; the board is empowered to determine all matters of law and of fact requisite for the decision of questions within the ambit of its jurisdiction and to order and require any company, person, or municipal corporation to fulfil any obligation imposed by any agreement or by any order or direction of the board. Having regard to these provisions of the statute and also to the fact that no order for concrete relief would follow upon any judgment declaratory of the rights of the parties to this action, I am of the opinion that a merely declaratory judgment could not prove other than embarrassing to the board, to whose jurisdiction the parties must ultimately have recourse. Out of respect to the legislature and to carry into effect the spirit, if not the letter, of its policy, as expressed in the Public Utilities Act, the courts, although they may not have been denuded of jurisdiction to entertain such an action as that now before us, should, I think, decline to exercise that jurisdiction, if they possess it, and should relegate the parties to the board which the legislature has constituted to deal with such cases and has clothed with powers adequate to enable it to do full and complete justice in the premises.

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Subject, therefore, to the reservation indicated in the conclusion of Mr. Justice Clarke's opinion, I would, solely for the foregoing reasons, dismiss this appeal with costs.

BRODEUR J.—The most important issue in this appeal is whether by the agreement between the parties the respondent company is bound to supply gas to the city of Lethbridge.

In 1910 and 1912, by-laws were passed by the council of the city by which the respondent company obtained exclusive power to lay pipes in the streets of the city for the purpose of supplying natural gas within the city to the plaintiff corporation and its inhabitants at a certain price and for a period of fifteen years.

It is claimed on the part of the plaintiff that by the agreements which have been passed between the city and the gas company and which are based on the above by-laws, the gas company is bound and obliged to supply gas at the price mentioned for the above period of fifteen years. On the part of the defendant gas company, it is contended that there is no obligation on its part to supply gas for a definite period, that it could relinquish the privilege which it possessed to use the streets of the city at any time it desired and that their contractual relations would then come to an end.

On the fifth of April, 1922, the gas company notified the city of Lethbridge that it would cease in the month of May to sell natural gas within the city because of the impossibility of continuing to sell gas at the price fixed by its franchise and the refusal of the city to any increase in rates.

Then the present action has been instituted by the city for an injunction to restrain the gas company from discontinuing the sale of gas and for a declaration that the company is bound to supply gas to the city and its inhabitants at the price and for the period stipulated in the agreements.

The trial judge decided in plaintiff's favour but his decision was reversed in appeal.

As I said before, there were two by-laws passed by the city; the first one was passed in 1910 and was of a tentative nature. It provided for the granting of the franchise in the future because the owners of the gas wells were

still in the experimental stage and would not make a formal and binding contract for the supplying of gas during a certain period of time. But the by-law and the contract of 1912 were more explicit. The experimental stage had passed away and now the respondent company felt that it could stipulate more explicitly as to the supply and the period of the exclusive franchise. A price was agreed upon and the period of fifteen years determined.

By section 2 of the contract, the company agreed to construct its pipe line in the city before January, 1913, and to supply the demand for gas to the city and its inhabitants.

By section 9 it is provided that the franchise shall be used subject to the terms hereof by the company until the expiration of fifteen years.

By section 10 the price for the supplying of gas for domestic purposes is fixed.

With such provisions, is it possible for a company to withdraw from the field before the period of fifteen years has elapsed, on the assertion that the supplying of gas at the price stipulated is not a paying proposition? I cannot agree with such a contention.

The franchise obtained was for a period of fifteen years and was with the obligation on the part of the company to supply gas at a certain price. The transaction involves the very essence of reciprocal obligation of a contractual character.

In two cases which came before this court some years ago, viz., *La ville de Chicoutimi* v. *Légare* (1), *and La ville de St. Jean* v. *Molleur* (2), it was decided that the franchises for waterworks in these two municipalities constituted contractual relationships which created for both sides rights and obligations.

In this case the gas company obtained the exclusive right for fifteen years to lay its pipes in the city limits, but with the obligation during that period to supply the inhabitants with gas at the price agreed upon.

The contractual relations cannot now be changed without the consent of both parties.

It was urged on the part of the respondent company that the ordinary courts of the land had no power to deal with

(1) [1897] 27 Can. S.C.R. 329. (2) 40 Can. S.C.R. 629.

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the question but that the Public Utilities Commission had an exclusive jurisdiction in that matter. This point was not raised by the company in its plea but was brought up in the Appellate Division by some of the learned judges and seems to be the ground upon which they relied to decide in favour of the gas company.

The statute of Alberta as to the Public Utilities does not, in my opinion, give the board the right to adjudicate with respect to rights arising out of past transactions, but its power seems to be limited to directing what is to be done in the future and the board is not empowered to deal with the breaches of agreements which might be urged. It may be—and I do not decide that point—that contractual relations may be the subject of decisions by the board; but it does not dispossess the ordinary courts of the land of the right of dealing with the result of contractual obligations which might have been stipulated between the parties.

For those reasons the appeal should be allowed and the judgment of the trial judge restored, with costs of this court and of the Appellate Division.

MIGNAULT J.—The injunction which the learned trial judge granted to the appellant against the respondent was to restrain the latter

from shutting off its supply of natural gas from the plaintiff (appellant) or the inhabitants of the city of Lethbridge or in any way interfering with the supply of the same to the said city or its inhabitants or from discontinuing the supply of the same to the said city or its inhabitants at the price or prices or upon the terms set out in by-laws 99 and 154 of the city of Lethbridge and the defendant's (respondent's) letter of August 1, 1912, directed to the mayor and council of the said city, until the expiration of the term of fifteen years from the said 30th day of July, 1912.

This injunction was accompanied by a declaration

that the plaintiff city is entitled to a supply of natural gas from the defendant company sufficient for the requirements of the city and its inhabitants for a continuous period of fifteen years from the 30th day of July, 1912, at a price or prices not greater than those set forth in by-law 99 as amended by by-law 154 of the said city.

The injunction in the terms in which it was granted is equivalent to an order to the respondent to continue the supply of natural gas to the city of Lethbridge and its inhabitants at the prices fixed by the by-law until the end of the fifteen-year period mentioned therein. Quite in-

dependently of the question whether the court should make such an order,—and I must frankly say that I think it objectionable—there can be no doubt, even admitting that the respondent violated its contract with the appellant, that the court should not exercise its extraordinary powers and grant such an injunction, if another convenient and equally effective remedy is available to the appellant.

This calls for the consideration of the provisions of the Alberta Public Utilities Act (chapter 6 of the statutes of 1915) referred to in the judgment of Mr. Justice Clarke in the appellate court.

The object of this statute is to create a body, called the Board of Public Utility Commissioners, clothed with full jurisdiction and power to deal with all questions relating to public utility services, such as the furnishing of water, light, gas, heat or power, as well as with disputes between public utility corporations and the municipalities and persons who are entitled to these services. That the respondent is a "public utility" within the meaning of section 2, subsection (*b*), of the statute can admit of no doubt. And it is equally certain that a contract to supply natural gas to a city and its inhabitants is one with respect to which the jurisdiction of the board can be exercised.

The powers and jurisdiction of the board are set out in sections 20 and following of the Act. Thus under section 27, the board has power, after hearing, upon notice, by order in writing to require every public utility

(*a*) to comply with the laws of this province and any municipal ordinance or by-law affecting the public utility, and to conform to the duties imposed upon it thereby, or by the provisions of its own charter or by any agreement with any municipality or other public utility.

By section 39 it is provided that

every municipal council, whenever it deems that the interest of the public in a municipality or in a considerable part of a municipality are sufficiently concerned, may by resolution authorize the municipality to become a complainant or intervenant in any matter within the jurisdiction of the board; and for that purpose the council is authorized to take any steps and to incur any expense and to take any proceedings necessary to submit the question in dispute to the decision of the board, and if necessary to authorize the municipality to become a party to an appeal therefrom.

Section 40 enacts that

if the Attorney General, a municipality or any party interested makes a complaint to the board that any public utility, municipal corporation,

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company or person has unlawfully done or unlawfully failed to do, or is about unlawfully to do, or unlawfully not to do, something relating to a matter over which the board has jurisdiction as aforesaid, and prays that the board do make some order in the premises, the board shall, after hearing such evidence as it may think fit to require, make such order as it thinks proper under the circumstances.

To the same effect, as conferring the widest jurisdiction on the board and providing for the enforcement of its orders, sections 52 and following may be mentioned without quoting them at length, and by section 64 it is provided that

the decision of the board upon any question of fact or law within its jurisdiction shall be final and be *res judicata.*

Without going to the length of holding that the jurisdiction of the ordinary courts is ousted by this statute, as this court held it was ousted by such a statute as the Ontario Workmen's Compensation Act, *The Dominion Canners Co.* v. *Costanza* (1), I think that when the extraordinary jurisdiction of the court is appealed to, it is quite a pertinent inquiry whether the complainant cannot obtain full redress under such a statute as the Alberta Public Utilities Act by applying to the board created by that statute. And because I am convinced that this appellant can do so in order to enforce its rights under the contract it made with the respondent, and that the remedy provided by the statute is a convenient and effective one, I do not think that the appellant has made out a case which would justify this court in restoring the mandatory injunction which was set aside by the appellate court.

Mr. Lafleur, on behalf of the appellant, pressed for at least a declaration of the asserted right of the appellant to a continuation, during fifteen years, of the services of the respondent upon the terms and at the prices stipulated in by-law no. 99 as amended by by-law no. 154 of the city of Lethbridge. I think the whole matter had better be left to the determination of the board of public utility commissioners, without any pronouncement on the rights, contractual or otherwise, of the appellant, but I do not wish to be taken as acquiescing in the view, entertained by some of the learned judges of the appellate court, that there was no binding contractual obligation on the part of the re-

(1) [1923] S.C.R. 46.

spondent to continue the service of natural gas during the fifteen years upon the terms and at the prices mentioned in the by-law, or that the respondent could, by abandoning its franchise, escape from any such obligation. I would leave all these questions to be finally determined by the board whose decision, the statute states, is final and constitutes *res judicata*.

The right to resort to the jurisdiction of the board to obtain redress is reserved to the appellant under the judgment appealed from, and all the rights and proper remedies of the appellant are thus safeguarded.

For these reasons, my opinion is that the appeal should be dismissed with costs.

Appeal dismissed, no costs.

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

Solicitors for the respondent: *Savary, Fennerty & McLaurin.*

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*May 16.
*Oct. 9.

THE CITY OF HULL (DEFENDANT).....APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Statute—Construction—Municipal law—Hull city charter—Interpretation (Q.) 1908, 8 Edw. VII, c. 88, s. 392a.

With a view to the beautification of the cities of Ottawa and Hull, the Dominion Government passed an order in council providing that a commission be constituted consisting of at least six members, including the mayors of both cities, charged with the details of taking all necessary steps to perfect such plan, the cost of the plan to be borne by the government for one-half and by the cities of Ottawa and Hull proportionally to their population for the other half. This was communicated to the city appellant with a request that it state whether it was willing to pay its share of the expenses, and the city council at a special meeting passed a resolution approving of the project submitted and appointing a committee to confer with the government and the other bodies interested. Subsequently the city appellant passed another resolution that having heard the report of its representatives, it approved of the project as submitted. This was communicated to the government which thereupon by order in council appointed the commission, the mayor of Hull becoming a member. He was present at most meetings and copies of plans prepared by the commission were sent to the city which obtained leave to use parts thereof to advertise the city. The appellant's charter, as amended by 8 Edw. VII, c. 88 provides (s. 392*a*) that "no resolution of the council authorizing the expenditure of money shall be adopted or have any effect until * * * —and also that "the city shall not be liable for the price or value of work done * * * unless * * *" "—a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such * * * work done * * * or other services rendered." By the present action, the government seeks to recover the city appellant's share, $6,500.32.

Held, Idington and Brodeur JJ. dissenting, that in the absence of such a certificate by the city treasurer, no right of action exists in favour of the government to recover from the city appellant the amount claimed.

Judgment of the Exchequer Court ([1923] Ex. C.R. 27) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the respondent's action.

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

(1) [1923] Ex. C.R. 27.

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

R. V. Sinclair K.C. for the appellant.

Nap. Champagne K.C. for the respondent.

IDINGTON J. (dissenting).—This is an appeal from a judgment of the Exchequer Court of Canada (1) in a case tried by Mr. Justice Audette wherein he adjudged that the appellant was liable to pay the respondent the sum of $6,560.32.

The relevant facts (which are undisputed) are fully set forth in the reasons of the said learned trial judge.

I agree in all the essential features of the reasoning of the said judge and therefore conclude that this appeal should be dismissed with costs.

I observe amongst the cases cited by the counsel for the appellant the case of *Larin* v. *Lapointe* (2), as disposed of at one stage in the Superior Court of Quebec.

That case ultimately came before this court (3) and the majority of us who heard it, relying upon much more stringent provisions in the charter of the city of Montreal than exist in appellant's charter, and are relied upon by counsel for the appellant herein, and applying said provisions, accepted the view taken by the Court of Review and allowed the appeal therein.

In due time that was appealed from to the Judicial Committee of the Privy Council. That court reversed us, as appears by the case of *Lapointe* v. *Larin* (4).

The court above, to put the result briefly, held that the council, having authorized what was done and complained of, the resolution was valid.

If that is applied to what is argued for herein by appellant's counsel it should, I submit respectfully, sweep aside the major part of his argument and reduce the question to the narrow compass of the necessity for a by-law which does not seem to me necessary to found such a piece of business as the contract in question herein.

(1) [1923] Ex. C.R. 27.
(2) [1909] Q.R. 36 S.C. 249.
(3) [1909] 42 Can. S.C.R. 521.
(4) [1911] A.C. 520.

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DUFF J.—The appeal should be allowed, and the action dismissed. Section 392 (*a*), c. 88, 8 Edw. VII, is in point and is conclusive. The legislature had no doubt good reasons for this stringent enactment, which makes it very difficult for the municipality to incur legal responsibility in respect of contracts for work and materials or for professional services. It is not for us to canvass the reasons for such an enactment nor to look for expedients for evading it.

ANGLIN J.—Seldom, if ever, has a public body presented in this court a defence so palpably devoid of merit as that put forward in this case. That the council of the defendant municipality solemnly undertook by resolution to pay its proportionate share of the cost of the work and services for which it now repudiates liability, that such work and services were duly rendered, and that the municipality has had the benefit of them there has been no attempt to deny. That the city council could now, if so minded, legitimately and properly provide an appropriation to cover the debt which it morally owes to the plaintiff and could thus enable a certificate to be given by the city treasurer

that there are funds available appropriated for the particular object for which payment is sought,

is not seriously controverted. But the city council is not so minded. It sets up in answer to the plaintiff's demand the following special provision, added to its charter in 1908 (8 Edw. 7, c. 88) as s. 392a:

No resolution of the council authorizing the expenditure of moneys shall be adopted or have any effect until a certificate of the city treasurer is produced establishing that there are funds available and at the disposal of the city for the service and purpose for which such expenditure is proposed, in accordance with the provisions of this charter.

No contract or agreement whatever shall be binding on the city unless it has been approved by the council.

The city shall not be liable for the price or value of work done, materials supplied, goods or effects furnished of any kind whatever, nor for any fees for professional services, salary, wages or other remuneration, without the special authorization of the city council, nor *unless* in any case *a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such* contract, agreement, *work done,* materials supplied, *or other services rendered.*

In making this statutory provision the legislature no doubt intended to provide a means which would enable the municipal council to resist claims arising out of ill-advised and unauthorized undertakings entered upon by unwise officials. It had confidence that the privilege so conferred would not be taken advantage of for the repudiation of liabilities incurred by the authority of the council itself and to which the municipality had no moral defence. That confidence was misplaced.

With deep regret that any Canadian municipal council should be found willing to take a position so humiliating, I find myself constrained to uphold the defence put forward and to allow the city's appeal because effect must be given to the plain and explicit terms of the statute that, without the city treasurer's certificate

that there are funds available, appropriated for the particular object for which payment is sought * * * no right of action shall exist.

The contract now before us does not concern one of those unimportant matters of frequent occurrence, to which Viscount Haldane alludes in the *Mackay Case* (1), and in which "convenience almost amounting to necessity" has been held to dispense from compliance with formalities prescribed by statutory provisions not dissimilar in their purport and scope to Art. 392a of the appellant's charter.

The appeal must, therefore, be allowed and the action dismissed.

BRODEUR J. (dissenting).—En 1913, le Conseil Privé du Canada a recommandé la nomination d'une commission qui préparerait des plans d'ensemble pour l'ouverture et l'embellissement de parcs et de boulevards dans les cités d'Ottawa et de Hull et il a suggéré que le gouvernement fédéral payât la moitié du coût de ces plans et que l'autre moitié fût payée par Ottawa et Hull proportionellement à leur population. Cet ordre en conseil fut transmis aux autorités de Hull et le conseil de cette municipalité, après avoir délibéré deux fois sur cette proposition du gouvernement fédéral, décida de l'approuver le 18 juillet 1913.

La proposition du gouvernement ayant été acceptée par les deux villes intéressées, un contrat s'est alors implicite-

(1) [1920] A.C. 208, at p. 213.

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ment formé par lequel le gouvernement paierait la moitié du coût des plans et l'autre moitié serait payée par les deux cités proportionnellement à leur population.

Le 12 septembre 1913, la commission était nommée par ordre en conseil du gouvernement et le maire de Hull en était nommé l'un des membres.

Des plans auraient été préparés par la commission dans les années suivantes et sur demande du maire des copies de ces plans auraient été remises à la cité de Hull en 1916.

La cité de Hull refuse maintenant de payer sa proportion du coût de ces plans en disant que la résolution qu'elle avait adoptée était *ultra vires* parce qu'elle n'avait pas eu au préalable un certificat de son trésorier établissant qu'elle avait des fonds disponibles à cette fin. Elle invoque à ce sujet l'article 392a de sa charte qui a été adopté en 1908 et qui se lit comme suit:—

Nulle résolution du conseil, autorisant la dépense de quelques sommes d'argent, ne pourra être adoptée ou n'aura d'effet tant qu'un certificat du trésorier de la cité n'aura pas été produit, établissant qu'il y a fonds disponibles et à la disposition de la cité pour le service et les fins pour lesquels cette dépense est proposée, conformément aux dispositions de la présente charte.

Aucun contrat ni arrangement quelconque ne liera la cité à moins qu'il n'ait été approuvé par le conseil.

La cité ne sera pas responsable du prix ou de la valeur des travaux faits, matériaux fournis, marchandises ou effets vendus de quelque sorte que ce soit, ni d'honoraires pour services professionnels, salaires, gages ou autre rémunération, sans l'autorisation spéciale du conseil de la cité, ni, à moins, dans chaque cas, qu'un certificat du trésorier de la cité ne soit produit, établissant qu'il y a des fonds disponibles et effectés aux fins spéciales pour lesquelles le paiement est demandé; et aucun droit d'action n'existera contre la cité, à moins que les formalités ci-dessus n'aient été strictement observées, bien que la cité puisse avoir bénéficié de tel contrat, arrangement, travaux faits, matériaux fournis et autres services rendus.

Cette disposition de la charte est extrêmement sévère et restreint considérablement les relations d'affaires que la cité est tenue d'avoir, et même dans certains cas elle pourra nuire à son crédit, mais il ne nous appartient pas d'en scruter les motifs et de connaître les circonstances qui ont donné lieu à cette législation. Elle n'est d'ailleurs que la reproduction presque textuelle des articles 336 et 337 de la charte de la cité de Montréal. (62 Vic., c. 58).

Cette corporation, avec ses nombreux échevins et officiers, était exposée à encourir des dettes que le conseil municipal lui-même n'aurait pas sanctionnées; et alors le

législateur a cru devoir la protéger en décrétant que le conseil municipal seul pourrait lier la corporation et que même dans certains cas les résolutions du Conseil seraient sans effet si le trésorier ne certifiait pas qu'il y avait des fonds disponibles.

Dans le cas actuel, nous avons une résolution du conseil de Hull approuvant le contrat qui s'est fait entre le gouvernement fédéral et les cités d'Ottawa et de Hull par lequel des plans devaient être préparés pour l'embellissement de ces deux municipalités. Etait-il nécessaire que le conseil de Hull eût un certificat de son trésorier avant d'approuver ce contrat?

L'appelante prétend que oui et elle se base particulièrement sur le troisième paragraphe de l'article 392 a.

Je ne crois pas cette prétention bien fondée. Cet article nous met on présence de trois cas distincts; 1. autorisation du conseil pour un paiement d'argent; 2. confection de contrats par la cité; 3. travaux qui peuvent donner lieu à une réclamation *quantum meruit*. Il est généralement admis que le premier cas ne se présente pas dans la cause actuelle. Le conseil, par sa résolution du 18 juillet 1913, n'ordonnait pas le paiement d'aucune somme d'argent, et par conséquent, le certificat du trésorier n'était pas nécessaire.

Si on voulait étendre cette première partie de l'article à toutes les conventions ou à tous les règlements qui pourraient occasionner une dépense d'argent, on atteindrait un résultat bien étrange. Ainsi, par exemple, la cité est autorisée, je crois, à acheter du pouvoir électrique pour éclairer ses rues et ses édifices. Il est important que ces contrats d'éclairage couvrent plusieurs années. Comment pourrait-elle avoir un certificat de son trésorier pour toute le période du contrat? Ce serait impossible, vu que les revenus disponibles ne sont que pour les dépenses d'une année.

Des contrats de la nature de celui qui nous occupe sont valides sur simple approbation du conseil municipal et il n'est pas nécessaire qu'il y ait un certificat du trésorier. C'est ce que le législateur a voulu couvrir en disant dans la deuxième partie de son article 392 (a) "aucun contrat ni arrangement quelconque ne liera la cité à moins qu'il n'ait été approuvé par le conseil."

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Alors si le conseil l'approuve, la cité est liée. C'est ce qui s'est produit dans le cas actuel.

Par la troisième partie de l'article, le législateur a voulu éviter ces réclamations nombreuses qui devaient se faire contre la corporation et qui donnaient lieu à l'action *quantum meruit* parce que la cité en avait profité et parce que certains échevins ou officiers zélés avaient fait faire certains travaux ou ordonné l'achat de certains matériaux. La législature a voulu mettre fin à ces abus. Voilà toute la portée, suivant moi, de ce dernier paragraphe.

En tant que les contrats sont concernés, l'article n'enlève le droit d'action que dans le cas où ils n'ont pas été approuvés par le conseil.

Il n'y a pas de doute que par les dispositions de la charte la cité avait le droit de faire des plans non-seulement pour améliorer son propre territoire mais aussi en dehors (arts. 92 et 144).

L'appelante prétend aussi qu'un règlement aurait dû être adopté pour autoriser ce contrat. Je ne vois pas de grande différence entre la résolution qui a été adoptée et la disposition qui se trouverait incorporée dans un règlement.

La question est venue devant le conseil à deux reprises différentes. Nous ne savons pas d'ailleurs si le conseil de ville a décrété que deux ou trois lectures des règlements municipaux devaient être faites avant leur passation ainsi qu'elle y était autorisée par l'article 4400 S.R.P.Q. (1908).

Il s'agirait tout au plus, si un règlement était requis. d'une insuffisance de désignation qui ne saurait invalider dans l'esprit général de la loi la décision du conseil. (arts 4185 et 4186 S.R.P.Q.).

Pour toutes ces raisons, je considère que l'appelante a été légalement condamnée à payer la somme qui lui est réclamée.

L'appel doit être renvoyé avec dépens.

MIGNAULT J.—The facts of this case are not in dispute.

On June 5, 1913, an order in council was adopted by the Dominion Government on a memorandum submitted by the Minister of Finance who stated that he had had under consideration the need for the adoption of a comprehensive scheme or plan looking to the future growth and develop-

ment of the cities of Ottawa and Hull and their environs, particularly providing for the location, laying and ornamentation of parks and connecting boulevards, the location and architectural characteristics of public buildings and adequate and convenient arrangements for traffic and transportation within the area in question. And the minister recommended that a commission be constituted, consisting of at least six members, including the mayors of Ottawa and Hull, charged with the duty of taking all necessary steps to draw and perfect such a plan for the purpose of the beautification and systematic development of the two cities, to carry out which plan the cities of Ottawa and Hull and the Ottawa Improvement Commission together with the transportation and traffic companies would be required to co-operate with a view to its gradual completion. It was added that it would seem equitable that the Government should pay half the cost of preparing such a plan and that the other half should be paid by the two cities jointly and ratably according to population. The minister therefore recommended that the civic authorities of the respective cities be invited to express their views as to the proposals made, to say whether they were willing to bear half of the expense involved and to assent to the appointment of their respective mayors on such commission.

The minister sent a copy of this order in council to the mayor of Hull, requesting that the city council express its view as to the proposals made, and if the proposals met with its approval to say whether the city was willing to bear its proportion of the expense as suggested and to consent to the appointment of a representative of the city on the commission as proposed.

A special meeting of the city council of Hull took place on June 20, 1913, and the council adopted a resolution expressing its approval of the scheme and named a committee to meet with the members of the committee of the city council of Ottawa, the Ottawa Improvement Commission and the members of the Privy Council in order to discuss the proposals, this committee to report to the council.

The committee met the bodies referred to and reported to the Hull council, and at a meeting of the latter on July 18, 1913, the following resolution was adopted:

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Que ce conseil, après avoir entendu le rapport verbal du comité spécial chargé de rencontrer les représentants du gouvernement fédéral relativement à l'embellissement des cités d'Ottawa et de Hull, approuve le projet tel que soumis par le ministre aux membres du comité, et que copie de cette résolution soit envoyée au Ministre des Finances, à Ottawa.

A copy of this resolution was sent to the Minister of Finance by the city clerk.

Thereupon another order in council was adopted on September 12, 1913, creating an honorary commission composed of the mayors of Ottawa and Hull and of four other members, to take all necessary steps to draw up and perfect the scheme or plan as proposed in the first order in council, the commission being authorized to employ clerical and other assistants, to engage city planners, landscape gardeners, architects, engineers and other experts, to summon before them witnesses and generally to take such steps as might be necessary to accomplish the objects of the commission.

The mayor of Hull acted on this commission which prepared an elaborate report, translated and printed in French and in English, with plans, etc., Hull duly receiving copies thereof. The city of Hull asked permission to use the plans and plates for the advertisement of the city, and this permission was granted and presumably the plans were used by it.

The total cost amounted to $75,809.08, of which the Government assumed one half, and the other half, to wit $37,904.54, was payable by Ottawa and Hull jointly and ratably according to their population, Ottawa's share was $31,344.22 and Hull's $6,560.32. The accounts were duly sent to both cities in August, 1918. Ottawa has paid its full share. Hull, in reply to numerous requests, put off payment on one pretext or another, until at last this action was taken by the Government to compel payment.

It is admitted by the appellant that if there be any legal liability on its part to pay the respondent anything, the amount payable by it is $6,560.32, with interest from the 20th August, 1918.

The plea of the city of Hull is a purely technical one. It does not pretend that the expenditure was not incurred in conformity with the orders in council and the approval it had expressed, but in order to escape payment, it invokes

certain provisions of its charter, and the failure by it to take the measures prescribed before a financial liability can be incurred by the city.

I cannot help regretting that the city of Hull has seen fit to raise this technical objection in order to resist payment of its share of the expenditure incurred. Its excuse is that it did not take the steps required by its charter in order to assume this obligation. It could easily have taken these steps, and could do so now, and its neglect in that regard is deliberate. The city of Ottawa has paid its full share, nearly five times greater than that of Hull, of the expenditure which both Ottawa and Hull authorized by their city councils, thus establishing a painful contrast between the conduct of the two cities. This, however, does not dispose of the difficulty, nor would it justify the court in disregarding the provisions of the charter of the appellant corporation which the plea invokes, if these provisions are an answer to the action of the respondent.

It therefore remains to be seen whether, in view of the statutory provisions invoked by the city of Hull, the action of the Government can be maintained.

The city of Hull was incorporated under a statute of the province of Quebec, 56 Victoria, ch. 52, to which many amendments have since been made. By 8 Edward VII, ch. 88 (1908), section 392a, which read as follows, was added to the charter:

392a. No resolution of the council authorizing the expenditure of any moneys shall be adopted, or have any effect until a certificate of the city treasurer is produced, establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed, in accordance with the provisions of this charter.

No contract or agreement whatever shall be binding upon the city, unless it has been approved by the council.

The city shall not be liable for the price or value of work done, materials supplied, goods or effects furnished of any kind whatever, nor for any fees for professional services, salary, wages or other remuneration, without the special authorization of the city council, nor unless, in every case, a certificate of the city treasurer is produced establishing that there are funds available appropriated for the particular object for which payment is sought; and no right of action shall exist against the city, unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such contract, agreement, work done, materials supplied or other services rendered.

Here the approval of the city council was given by the resolutions adopted on June 20 and July 18, 1913. What

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was wanting was a certificate of the city treasurer establishing that there were funds available and at the disposal of the city for the service and purposes for which the expenditure was proposed. That the appellant could have observed this formality is beside the question, for if the omission of the certificate that funds were available for the expenditure contemplated is a fatal omission, if in the words of section 392a

> no right of action shall exist against the city, unless the foregoing formalities are strictly observed, notwithstanding that the city may have benefited by any such contract, agreement, work done, materials supplied or other services rendered,

there is no escape from the conclusion that the respondent's action cannot be maintained.

After the most anxious consideration, I cannot place any meaning on section 392a other than that it is an absolute bar to any claim to hold the appellant liable for the expenditure incurred under the orders in council. In my opinion, with deference, the debt claimed by the respondent cannot be treated, as the learned trial judge somewhat suggested, as a "judicial obligation" within the meaning of section 393 of the appellant's charter, which authorizes the city council in cases of urgent necessity, either for the purpose of meeting a "judicial obligation" or for other unforeseen or uncontrollable causes, to procure the necessary funds to meet obligations of that character by such means as it may deem advisable. There can be no "judicial obligation" without a judgment enforcing a liability, and there can be no judgment against the city in a case where the statute states that no right of action shall exist.

It may be added that the appellant corporation has a very wide power to provide by by-law for municipal services of all kinds which entail the expenditure of public moneys (sect. 92 of the charter), and an appropriation of the amounts necessary for these purposes is made yearly in the month of February (sect. 390). To such by-laws, paragraph 1 of section 392a does not apply, for its whole scope is to guard against resolutions (and not by-laws) authorizing the expenditure (and not merely the payment) of public moneys. Paragraph 2 of section 392a requires the approval of the city council before any con-

tract or agreement whatever shall be binding on the city, and should be read with paragraph 3. The latter paragraph, in the case of work done, materials supplied, goods or effects furnished of any kind whatever, or fees for professional services, salary, wages or other remuneration, requires two formalities before the city can be held liable, viz., the special authorization of the city council and the production of a certificate of the city treasurer that funds are available. The special authorization of the city council would generally form a contract between the city and the person or corporation performing the work or furnishing the goods or materials, but, notwithstanding what is stated in paragraph 2, and saving the case of by-laws under section 92, it would still be necessary to obtain the certificate of the city treasurer. I think, as I have said, that paragraph 2 must be read with paragraph 3, and not given such an effect as to render in most cases the latter paragraph meaningless.

The result is that the appeal must be allowed and the respondent's action dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *J. W. Ste. Marie.*

Solicitor for the respondent: *Napoléon Champagne.*

1923
*Oct. 9.
*Oct. 22.

JOSEPH L. MORIN (PLAINTIFF).....APPELLANT;

AND

HERMAN WALTER (DEFENDANT).....RESPONDENT.

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

Appeal—Motion to quash—Payment of costs below—Thread of execution —Acquiescence in judgment—Right of appeal.

Payment of costs in the courts below made under threat of execution does not amount to acquiescence in the judgment rendered and the right of appeal to this court therefore still exists.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The respondent moved to quash the appeal on the ground of acquiescence in the judgment appealed from by payment of the costs of the Court of King's Bench and the Superior Court.

THE CHIEF JUSTICE.—I concur in dismissing with costs the respondent's motion to quash on the ground that the payment of costs by the appellant under the circumstances was not such a voluntary act as would indicate an intention to acquiesce in the judgment and forego his right of appeal therefrom.

IDINGTON J.—The respondent moves to quash the appeal herein on the ground of acquiescence on the part of the appellant in the judgment appealed from.

The alleged acquiescence consists simply in the appellant having paid the costs, or asked the surety to pay the costs, awarded the respondent in the court below.

The payment was made in response to repeated threats that unless the costs were paid proceedings would be taken to enforce payment either from appellant or his surety.

I am of the opinion that payment of costs under such circumstances is not an acquiescence in the judgment which would bar appellant's right to come here.

I think, therefore, the motion should be dismissed with costs.

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

DUFF J.—I can find no evidence of an intention on part of the appellant to forego his right of appeal or of facts which in point of law must be treated as abandonment of his right of appeal. My conclusion is that the payment was made under a threat of execution. Nevertheless, I should not wish to commit myself to the proposition that payment of a judgment in response to a demand of the judgment creditor without an express threat of execution, or initiation of execution proceedings, could, save in very exceptional circumstances, properly be treated as a voluntary payment.

ANGLIN J.—The fair conclusion from the material before us would appear to be that the appellant caused the costs, for which the respondent had judgment against him, to be paid under threat of execution. That payment was not such a voluntary act on his part as would indicate an intention to acquiesce in the judgment and forego his right of appeal therefrom. The respondent's motion to quash cannot succeed and should be dismissed with costs.

MIGNAULT J.—The respondent moves to quash the appeal on the ground of acquiescence in the judgment appealed from by payment of the costs of the Court of King's Bench and of the Superior Court on the dismissal of the appellant's action.

With the consent of the appellant, the costs were paid by The United States Fidelity & Guarantee Company, which had given security for these costs at the time of the appeal to the Court of King's Bench. It appears however by the correspondence between the attorneys of the two parties that these costs were paid after the respondent's attorneys had threatened to issue execution against the appellant if they were not paid. They wrote to the surety, to whom they had been referred by the attorney for the appellant, demanding payment and stating that if they did not receive a satisfactory answer before a stated date they would immediately have the appellant's property seized. It was under these circumstances that the payment of the costs was effected.

Although no reservation of the right of appeal was made, which of course would have been more prudent, my opinion is that this was not a voluntary payment from which

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acquiescence in the judgment can be inferred. I find a decision of *la cour de cassation,* of the 28th May, 1867 (Dalloz, 1867.1.215) very much in point. It was held that

> le paiement des frais d'un arrêt, après signification de l'arrêt et de l'exécutoire de dépens, et sur une menace écrite d'exécution forcée, n'emporte pas acquiescence à cet arrêt, et, dès lors, ne rend pas non recevable le pourvoi en cassation forme contre le même arrêt.

I would therefore dismiss the motion with costs.

Motion dismissed with costs.

Gregor Barclay for the motion.
C. M. Cotton contra.

DAME D. BEDARD (DEFENDANT).....APPELLANT;

AND

OWEN DAWSON (PLAINTIFF).....

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC (INTERVENANT).....RESPONDENTS.

1923
May 17.
June 15.

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

Constitutional law—Disorderly houses—Provincial statute ordering their closing—Intra vires—(Q.) 10 Geo. V, c. 81.

The Quebec statute entitled "An Act respecting the owners of houses used as disorderly houses," 10 Geo. V, c. 81, authorizing a judge to order the closing of a disorderly house, is *intra vires* the provincial legislature, as it deals with matter of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Supreme Court and maintaining the intervention in this case.

The questions in issue are fully stated in the judgments now reported.

Théberge K.C. for the appellant.

Geoffrion K.C. for the intervenant.

IDINGTON J.—This action was taken by the respondent Dawson under and by virtue of 10 Geo. V, c. 81 of the Quebec Legislature, entitled "An Act respecting the owners of houses used as disorderly houses," which provides, by sections 2, 3, 4, and 7, as follows:—

2. It shall be illegal for any person who owns or occupies any house or building of any nature whatsoever, to use or to allow any person to use the same as a disorderly house. A certified copy of any judgment convicting any person of an offence under section 228, 228*a*, 229 or 229*a* of the Criminal Code shall be *prima facie* proof of such use of the house in respect of which such conviction was had.

3. Any person knowing or having reason to believe that any building or part of a building is being made use of as a disorderly house, may send to the registered owner, or to the lessor, or to the agent of the registered owner, or to the lessee of such building, a notice, accompanied by a certified copy of any conviction as aforesaid, if any there be, by regis-

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

(1) [1922] Q.R. 33 K.B. 246.

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tered mail to the last known address of the said owner, agent or lessee, as the case may be.

4. Ten days after the mailing of such notice, if such building or any part thereof still continues to be used as a disorderly house, any person may apply for and obtain an injunction directed to the owner, lessor, lessee or occupant of such building, or to all such persons, restraining them, their heirs, assigns or successors from using or permitting the use of such building or any other building for the purposes above-mentioned.

7. If the judge finds that the use of such building as a disorderly house continues, he shall by his final judgment, in addition to all other orders he is by law empowered to make, order the closing of the said building against its use for any purpose whatsoever for a period of not more than one year from the date of judgment.

The power of the legislature to so enact having been questioned, by appellant pleading in defence, the Attorney General for Quebec became an intervenant immediately thereafter. Thereupon the intervenant pleaded, the now appellant answered same, and the intervenant replied.

The case thus constituted was heard by Mr. Justice Maclennan who gave judgment for the respondent and granted the injunction claimed by him as provided in said section 7 of said Act, and for the intervenant with costs maintaining the constitutionality of the Act.

From that judgment the present appellants appealed to the Court of King's Bench for Quebec.

That court seemed to be divided on the questions raised. The majority held that it was not quite satisfactorily proven by the mere production of a registrar's certificate shewing title in appellant that she was in fact the owner at the time of the trial.

Indeed there was evidence tending to the contrary and hence the court sent the case back to the Superior Court to hear evidence and determine that question.

The Court of King's Bench, however, by a majority, there being a dissenting judge on the question, upheld the constitutionality of the Act and dismissed the appeal as to that issue, with costs to the responding intervenant.

Then the appellants brought this appeal here. A question was raised as to the case so disposed of, being ripe for appeal here. The majority of this court held, however, that as between appellant and intervenant the judgment appealed from was final and decided that this court had jurisdiction and should hear the case as to the said issue.

I confess as to some doubt as to that course being entirely the best for if the issue between the other parties should, in the court below, result in the appellant's success on the reference back there, perhaps they should not be subjected to the costs of this hearing. I rather think the case is unique in this regard. The appeal, however, has been taken here by appellants and the question raised is a very important one to have determined if there can exist doubt when applied only as herein.

I have long entertained the opinion that the provincial legislatures have such absolute power over property and civil rights, as given them by section 92 of the B.N.A. Act, item 13 thereof, that so long as they did not in fact encroach upon the powers assigned by the said Act to the Dominion Parliament it would be almost impossible to question any such exercise of power so given unless by the exercise of the veto power given the Dominion Government. That veto power was originally designed to prevent an improper exercise of legislative power by the provincial legislatures.

I, therefore, do not see that if properly interpreted and construed the said Act now in question herein can be said to be *ultra vires*.

There is, however, one aspect of it which rather disturbs me, and that is this: The Act takes certain sections of the Criminal Code as the basis of its subject matter and then proceeds to apply convictions thereunder as the basis of its application.

And if, as might well happen, the keeper of the disorderly house so penalized should also be the owner thereof, and this Act applied in such a case, it would look very much like adding as a matter of course to the penalties imposed by Parliament for the offence in question, when Parliament alone is endowed with the power and has imposed on it in so doing the sole responsibility of determining what is the proper measure of punishment.

That, however, is not the case presented on the facts in question herein. I point it out as being the possible cause of future embarrassment and would have preferred to see its enactment somewhat differently framed.

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Idington J.

As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime; and yet not produce worse forms of it, or tending thereto.

Sometimes we may doubt the wisdom of what is done in that direction and find it in fact productive of crime or a lowering of the usual standard observed by mankind. That possibility may exist in regard to many phases of social life. What we are concerned with herein, however, is merely the question of the power of the legislature so far as the relevant facts raise same. It certainly has, I think, the power called in question herein so far as the relevant facts require. Indeed the duty to protect neighbouring property owners in such cases as are involved in this question before us renders the question hardly arguable.

There are many instances of other nuisances which can be better rectified by local legislation within the power of the legislatures over property and civil rights than by designating them crimes and leaving them to be dealt with by Parliament as such.

Mr. Justice Maclennan and others in the court below have so well presented the exposition of the law as it has been expounded in many well known cases relative to the overlapping of the powers of Parliament and local legislatures, that I need not repeat the citation of cases here.

I think the appeal should be dismissed with costs to the intervenant.

DUFF J.—The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

ANGLIN J.—This litigation began on the 4th of June, 1920. The right of the appeal to this court is therefore governed by the Supreme Court Act as it stood before the

amendments which became effective on the 1st of July of that year.

By the judgment of the Court of King's Bench the main action between the plaintiff and the defendant is remitted to the Superior Court to permit of further proof being adduced in regard to the ownership of the property in question. That is not a final judgment and is therefore not appealable here.

The judgment of the Superior Court maintaining the intervention of the Attorney General on the other hand was confirmed and in that proceeding there is a final judgment upholding the constitutionality of the Quebec Statute (10 Geo. V, c. 81). Substantially for the reasons stated by Mr. Justice Greenshields, I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

The appeal fails and should be dismissed with costs.

BRODEUR J.—Nous avons à décider sur cet appel si la loi provinciale de 1915 concernant les propriétaires de maison de prostitution est inconstitutionelle.

Le parlement fédéral, dans sa loi criminelle, a déjà puni par l'amende et l'emprisonnement les propriétaires qui permettent sciemment que leurs maisons soient employées comme maisons de prostitution. (Art. 228 a Code Crim.)

La législature provinciale de Québec, sachant que ces maisons affectaient considérablement la valeur des propriétés du voisinage et rendaient plus difficile la réglementation policière, a jugé à propos d'ordonner leur fermeture si, après avis, les propriétaires ne voyaient pas à y faire cesser le commerce immoral qui s'y faisait.

La jouissance d'un immeuble est une matière concernant "la propriété et les droits civils" qui, par les dispositions de l'article 92 ss. 13 de l'acte de la Confédération est du

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ressort des provinces; et la législature provinciale a le pouvoir exclusif de faire des lois sur cette matière.

Vouloir enlever aux provinces ce pouvoir législatif parce que le parlement fédéral déclare criminelles les tenancières d'une maison de prostitution me paraît être absolument contraire à l'esprit de notre constitution. Nos lois provinciales fourmillent d'exemples et de cas où les lois criminelles sont invoquées pour déterminer les droits et les obligations civiles des citoyens. Certains contrats sont déclarés illégaux par nos lois civiles parce qu'ils violent des dispositions du code criminel. Les articles 984 et 990 du code civil en sont des exemples typiques quand ils déclarent qu'un contrat est fait sans considération et est illégal, si cette considération est contraire aux bonnes moeurs et à l'ordre public, ou si elle est prohibée par la loi. La jurisprudence consacre également ce principe quand elle déclare illégale tout contrat de nature à favoriser la prostitution.

Je pourrais à ce sujet citer-Fuzier-Herman vo. propriété no. 88, où il dit:—

> On admet que l'établissement d'une maison de tolérance est susceptible de donner lieu en faveur des voisins à une action en dommages-intérêts à raison de la dépréciation de valeur locative ou vénale que leur propriété a subie par ce fait.

Il est incontestable que si une personne maintient une maison ou fait une chose qui constitue une nuisance, et que cet acte soit considéré criminel par le parlement fédéral, nos tribunaux peuvent être autorisés par des lois provinciales à émettre une injonction pour mettre fin à ces violations du droit public. La coopération des deux pouvoirs législatifs est désirable dans ces cas-là. J'aurais bien du doute de savoir si le parlement fédéral pourrait ordonner la fermeture d'une maison de prostitution; mais je suis bien convaincu que ce pouvoir réside dans la législature provinciale. Le parlement fédéral peut déclarer criminelle une action quelconque; mais cela ne saurait empêcher les provinces de légiférer sur la même matière en tant que les droits civils sont concernés.

Je n'hésite donc pas à conclure que la législation attaquée par l'appelante est constitutionnelle et que l'appel doit être renvoyé avec dépens.

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Mignault J.

MIGNAULT J.—Il s'agit d'un appel contre un jugement de la cour du Banc du Roi en date du 20 décembre 1921. Je tiens à dire que le long délai qui s'est écoulé depuis ce jugement est entièrement le fait des parties. Cette cause paraissait sur nos rôles depuis plusieurs termes, mais on en demandait toujours la remise. Si enfin elle a été plaidée c'est que nous avons cru devoir y insister.

La cause d'ailleurs n'est appelable ici qu'en tant que l'intervention du procureur général est concernée; quant à l'action de la demanderesse, la cour du Banc du Roi l'a renvoyée devant la cour supérieure pour preuve additionnelle et ce n'est pas là un jugement final dont on puisse interjeter appel à cette cour.

L'intervention du procureur général a pour but de combattre la prétention de la demanderesse que la loi 10 Geo. V (Qué.) ch. 81 (1920), est inconstitutionnelle. Cette loi déclare qu'il est illégal pour toute personne qui possède ou occupe une maison de l'utiliser ou de permettre qu'on en fasse usage comme maison de désordre. On peut obtenir à cette fin une injonction d'un juge de la cour supérieure pour prohiber cet usage, et si le juge constate que cette maison continue à être employée comme maison de désordre, il peut en ordonner la fermeture pour toute fin quelconque pendant une période n'excédant pas un an.

C'est cette loi que l'appelante attaque prétendant qu'elle empiète sur la juridiction du parlement canadien sur le droit criminel. A mon avis, il n'y a pas là législation criminelle. La législature veut empêcher qu'on ne se serve d'un immeuble pour des fins immorales; elle ne punit pas l'offense elle-même par l'amende ou l'emprisonnement, mais elle ne fait que statuer sur la possession et l'usage d'un immeuble. Cela rentre pleinement dans le droit civil.

Les jugements des honorables juges de la cour du Banc du Roi sont très complets et j'y adhère pleinement.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Théberge & Germain.*

Solicitors for the plaintiff respondent: *Bercovitch, Calder & Gardner.*

Solicitor for the intervenant respondent: *Charles Lanctôt.*

1923
*May 29.
*June 15.

THE CANADIAN NATIONAL FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

COLONSAY HOTEL COMPANY AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Fire—Extent of loss—"Actual value"—Replacement value—Statutory conditions—"The Saskatchewan Insurance Act," R.S.S. (1920), c. 84, s. 82.

One of the statutory provisions, made a part of every contract of fire insurance by section 82 of *The Saskatchewan Insurance Act*, R.S.S. 1920, c. 84, is that a fire insurance company is not liable "for loss beyond the actual value destroyed by fire."

Held, reversing the judgment of the Court of Appeal (16 Sask. L.R., 146), that "actual value" means the actual value of the property to the insured at the time of the loss and not its replacement value.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), affirming the judgment of the trial judge and maintaining the respondents' actions.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

P. M. Anderson K.C. for the appellants.

G. H. Yule for the respondents.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin J. I would allow this appeal and direct a new trial.

IDINGTON J.—This appeal arises out of the trial of three actions brought by the respondents against three different insurance companies and consolidated for the purposes of the trial and final determination of the issues raised in each case which are in substance the same.

The said insurance companies had each insured the respondents against loss by fire as alleged in the respective declarations against each company, as follows: The Canadian National Fire Insurance Company on the buildings, $4,600, $200 and $200, and on the furniture and other personal contents $1,500; The Union Insurance Society of

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

(1) 16 Sask. L.R. 146.

Canton, Limited, on the buildings, or one of them $3,000, and on the hotel furniture, $875, and on liquors, cigars and cigarettes, $125; The British Crown Assurance Corporation, Limited, on the buildings, $3,000, and on the furniture, supplies and personal effects, $875, and on liquor, cigars, cigarettes, etc., $125.

Each of these insurances had been effected between the 1st of February, 1920, and the 7th of August, 1920.

The main building was a large structure and with other smaller buildings had been used in carrying on a hotel business and the contents chiefly used for same purpose in a village of only one hundred and fifty inhabitants.

The property had been built in 1910 or 1911, and sold to one Daley with contents in 1912 for $20,000.

That was before prohibition was in sight. The result of the prohibition enactments was so ruinous to the entire property in so small a place that in 1917 Daley turned it over to the Saskatchewan Brewing Company for $3,200, or $3,300, which he owed it.

That company sold it in February, 1920, to two of the individual respondents for $3,000.

A Chinaman who had been using it for his business purposes sold the contents to same parties in same month for $950, which were only slightly added to before the fire.

The individual respondents (Lashkewicz and Rosalia Pura) then entered into a partnership under the name of "Colonsay Hotel Company," now one of the respondents.

They had as part of the articles of partnership agreed to do their business with the Bank of Toronto, then the only bank carrying on business in said village of Colonsay.

From the accounts so kept the business latterly did not seem to be prosperous, indeed would seem to have been a losing one.

Yet respondents pretend that during such losing period Lashkewicz sold to respondent, Peter Pura, his half interest in the hotel property and its contents, on the 20th September, 1920, for $7,000, of which $1,000 was professed to be paid in cash.

No one seems to have been able to trace this alleged $1,000.

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Idington J.

A fire took place on the 3rd of October, 1920, which consumed the entire building and most of the contents. The adjuster, one Morkill, after almost a day taken up with Peter Pura, settled, as was supposed by him, the entire loss with which appellants are chargeable, at the sum of $5,700, but his wife, respondent Rosalia Pura, refused to accept any such sum. Hence these actions which were tried by Mr. Justice McLean with a jury.

Many questions were raised by the pleadings and at the trial with which we need not concern ourselves, in the view I take and to which I am about to refer, arising out of the learned trial judge's charge to the jury who, under said charge, returned a verdict estimating the value of the hotel building at $16,500, and of the insured contents at $3,500.

The learned judge then directed a judgment to be entered for a total of $13,376.64, distributed ratably to be borne by the respective appellants as in the formal judgment appears.

A number of the learned trial judge's directions were taken exception to but in the result need not be dwelt upon here.

The learned trial judge, in regard to the measure of loss, directed the jury as follows:—

> The contract of insurance is to indemnify the assured against loss. I suppose the ideal way, or the way that would come most near to indemnifying the plaintiff in this case would be to place upon that site a building of the same dimensions, the same number of rooms, and the same basement, and the same appliances and the same equipment, and from that building and equipment to deduct, in some mysterious way, ten years wear and tear. He is not entitled to a new building, because he did not lose a new building. He is entitled to the same kind of building less the wear and tear on the building that he lost. I am going to instruct you as a matter of law, and if I am wrong there is another court that will set me right, that in respect to this building, and in the condition of the hotel business the proper basis on which you should fix the value of that hotel is this: a similar building erected there, at the time of the loss with the same equipment, and ten years wear and tear and depreciation taken off that;

and as follows:—

> The contract of insurance also contains this clause—you will find it on the back of each of the policies, as these policies are required by law to contain it—that instead of making payment, the insurer can rebuild or replace within a reasonable time the property damaged by loss, giving notice of intention, and so on. That gives the insurer the privilege of replacing. On the strength of that provision, and the interpretation I put on the term "market value," and the interpretation I put on the

contract of indemnity, my instructions to you are that the proper legal basis on which you should fix the value of that building for the purposes of compensation, if they are entitled to compensation under those insurance policies, is the replacement value.

The appellants herein appealed against this and the resultant judgment to the Court of Appeal for Saskatchewan. That court maintained the learned judge's said charge and dismissed the appeal with costs.

Hence this appeal herein therefrom.

The question thus raised is most important in light of the facts which I have outlined above in order to present the salient features and leading facts of the case to which the charge had reference.

I entertain a very decided opinion that the learned trial judge erred in so directing the jury, and that the judgments below should be reversed.

There are, no doubt, many cases in which such a charge might be upheld, where the loss sustained and the cost of replacement might be the equivalent of each other. But I respectfully submit that the statutory condition, imposed by section 82 of chapter 84 of R.S.S., forms part of every fire insurance contract entered into in Saskatchewan, and which reads as follows,

14. The company is not liable for the losses following, that is to say: (*a*) For the loss of property owned by any other person than the assured, unless the interest of the assured is stated in or upon the policy; nor *for loss beyond the actual value destroyed by fire* nor for loss occasioned by ordinance or law regulating construction or repair of buildings

has not been properly applied herein.

Indeed the words therein " nor for loss beyond the actual value destroyed by fire " mean just what they say, and that is the cash market value. Market value is often made up of cash and a credit convertible into cash. They do not permit of any imaginary value the owner may be inclined to hold out for and expect, even reasonably, in the future.

These policies, in question herein, each and all contained also the following as part of the contract:—

Total concurrent insurance including this policy limited to sixty-six and two-thirds per cent of the actual cash value of the property insured.

These words used in framing each of the contracts in question herein as to what the respective insurance policies in question were intended to cover and give the insured, should, I respectfully submit, have put this case, now pre-

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sented, beyond all doubt as to the meaning of the words "actual value" in the statutory condition. Indeed I suspect they have escaped the court below.

It is not the appellants alone who are interested for they evidently had over-insured, but also the general public suffering so much from over-insurance.

The counsel for appellants cited the case of *Pitman* v. *Universal Marine Insurance Co.* (1), and *Westminster Fire Office* v. *Glasgow Provident Investment Society* (2), and MacGillivray on Insurance, page 672 and, I should add the cases cited by that author, and the case of *Castellain* v. *Preston* (3).

The cases cited in all these are instructive and useful as a guide. I respectfully submit it would be impossible to find any express decision reaching such remarkable results as herein in question.

I think a new trial should be directed with costs in any event of the appeals below and herein, and costs of the first trial to abide the result of the new trial.

DUFF J.—I am unable to concur in the judgment of the Court of Appeal in this case. A very serious mistake was, I think, made by the learned trial judge. The jury ought to have been told that the pecuniary loss suffered by the insured in the destruction of the hotel was the true and only measure of the indemnity to which it was entitled. It seems to be quite clear that the loss should in the circumstances be measured by the value of the property—not necessarily the selling value, if the insured could establish a value in use greater than the selling value—and I can entertain no doubt whatever that the point upon which a jury should have been told to apply their minds was that of ascertaining the value to the insured of the property destroyed.

The appeal should be allowed and a new trial directed. There seems to be no reason for departing from the usual rule as to costs. The appellants therefore should have their costs on both appeals, and the costs of the abortive trial should abide the event.

(1) [1882] 9 Q.B.D. 192. (2) [1888] 13 App. Cas. 699.
(3) [1883] 11 Q.B.D. 380.

ANGLIN J.—The verdict for the plaintiffs and the judgment founded on it for $13,376.64 must in my opinion be set aside because they involve substantial wrong occasioned by misdirection.

A large hotel containing upwards of twenty-two rooms, in the village of Colonsay (population 150), built in 1910 was sold in 1912 for $20,000. Subsequently deprived of a license because of the introduction of prohibition, after having been occupied for a time by a Chinaman, it was acquired, with its appurtenances and contents, by the plaintiffs, about eight months prior to its destruction by fire on the 3rd of October, 1920, for $3,950. The equipment was supplemented by a further expenditure of about $450. There is no evidence of any increase in the value of the property between the time of its acquisition by the plaintiffs and its destruction. For the six months immediately prior to the fire the hotel appears to have been run by the plaintiffs at a substantial loss and the evidence presents no ground for believing that they entertained any expectation of an improvement in this condition of affairs.

The plaintiffs had insured the buildings with the defendant companies for $11,000 and the contents, including supplies, for $3,500—$14,500 in all.

Defences of fraud in making proofs of loss were negatived by the jury and were not further pressed here, the sole ground of the present appeal being that the jury's valuation of the buildings at $16,500 and the contents at $3,500 at the time of the fire were grotesquely excessive, and that the recovery awarded on that footing by the trial judge of $13,376.64 far exceeded any possible actual value of the property destroyed.

After the fire, Peter Pura, one of the plaintiffs, would appear to have been ready to settle the amount of the loss with the adjusters, representing the three defendant companies, at $5,100 which they offered to pay; but his co-plaintiff, Rosalia Pura, would not assent thereto.

The jury was instructed by the learned trial judge in these terms:

> My instructions to you are that the proper legal basis on which you should fix the value of that building for the purpose of compensation, if they are entitled to compensation under those insurance policies, is the replacement value.

* * * *

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> You will take the same basis for valuing the hotel and for valuing the furniture, that is, replacement value.

There is nothing in the charge to qualify these directions, which have since had the approval of the Court of Appeal.

Each of the policies insures against loss or damage by fire the property therein described and each contains on its face this stipulation:

> Total concurrent insurance, including this policy, limited to 66⅔ per cent of the actual cash value of the property insured.

In the case of the National Fire Insurance Company's policy on the furniture and supplies for $1,500 there is an unfilled blank for the percentage of the concurrent insurance. That policy may therefore be read with the words " * * * per cent of " deleted from it. Each of the policies was also subject to the statutory conditions imposed by the Saskatchewan Insurance Act (c. 84, R.S.S. 1920), one of which (s. 82, s.s. 14 (*a*)) provides that

> The company is not liable * * * for loss beyond the actual value destroyed by fire.

I am, with great respect, very clearly of the opinion that " replacement value " (by which I understand is meant what the replacement *in statu quo ante* the fire of the insured property destroyed or injured would cost, less a reasonable allowance for depreciation) is not either " the actual value destroyed by fire " or " the actual cash value of the property insured." Both these phrases—one in a statutory condition, the other on the face of each policy—I think mean the same thing and that is " the actual value of the property to the insured at the time of the loss," having regard to all the conditions and circumstances then existing—not necessarily its market value on the one hand and certainly not, on the other, its " replacement value " which, while it may sometimes be less than its actual value to the insured, will more often exceed that value and sometimes, as in the present instance, very grossly exceed it. The right of recovery by the insured is limited to the actual value destroyed by fire.

That there was in the direction I have quoted from the change manifest error in my opinion is indisputable; that it directly induced the jury's findings whereby they valued the hotel building at $16,500 and the insured contents at $3,500 is equally clear; that substantial wrong or mis-

carriage was thereby occasioned in the trial (Con. R., 650) admits of no doubt.

The appeal must therefore be allowed with costs here and in the Court of Appeal and a new trial had. Costs of the abortive trial will abide the event of the new trial.

MIGNAULT J.—The learned trial judge in these three cases instructed the jury that the proper legal basis on which they should fix the value of the hotel building under the insurance policies was the replacement value.

With much deference, I think this was clearly misdirection in law. According to statutory condition 14 (contained in The Saskatchewan Insurance Act, chapter 84, R.S.S. 1920, section 82) the insurance company is not liable for loss "beyond the *actual value* destroyed by fire." Condition 17 gives the company the option, instead of making payment, to repair, rebuild or replace, within a reasonable time, the property damaged or lost on giving notice of its intention within fifteen days after the receipt of the proofs of loss.

The construction of the contract adopted by the learned trial judge would render this option of no possible benefit to the insurers, for they would be called upon to pay the cost of replacing the property whether they chose to replace it or not. Moreover, it is the "actual value" which they have to pay, subject to their right to replace if they elect to do so, and this is not necessarily the "replacement value."

I cannot help thinking that this instruction of the learned trial judge to the jury was the cause of the large award which they made for this hotel and its furniture. Had they been properly instructed as to the mode of determining the amount of the loss, there would have been no ground for complaint on the question of quantum, but I am constrained to hold that the instruction given them was erroneous.

I would allow the appeal with costs here and in the Court of Appeal, and direct a new trial. Costs of the abortive trial should abide the event of the new trial.

Appeal allowed with costs.

Solicitors for the appellants: *Anderson, Sample, Bayne & Noonan.*

Solicitor for the respondents: *G. H. Yule.*

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Feb. 26.
*June 15.

JAMES BARBER McLEOD.....APPELLANT;

AND

THE CITY OF WINDSOR.....RESPONDENT.

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

Assessment and taxes—Trustee under will—Income to be accumulated—Unknown beneficiaries—Constitutional law—Direct or indirect taxation—Assessment Act R.S.O. [1914] c. 195 ss. 13 (1) and 83.

By section 5 of the Ontario Assessment Act "all income derived either within or without Ontario by any person resident therein" is assessable and by section 13 (1) "every agent, trustee, or person who collects or receives, or is in any way in possession or control of, income for or on behalf of a person who is resident out of Ontario shall be assessed in respect of such income."

Held, reversing the judgment of the Appellate Division (50 Ont. L.R. 305), Idington J. dissenting, that a trustee under a will cannot be assessed for income received which, as directed by the will, had to accumulate for a designated term of years and then be apportioned among testator's children when neither the identity of the beneficiaries nor the amount to be assessed against the trustee can be presently ascertained. As to beneficiaries resident in Ontario they and not the trustee should be assessed if their identity could be ascertained.

Per Duff J. Sec. 13 (1) provides for indirect taxation and is *ultra vires* of the Ontario Legislature.

By section 83 of the Act every tribunal or judge to which an appeal may be taken can determine whether "any person or things are or are not assessable or are or were legally assessed or exempted from assessment."

Held per Duff J. that notwithstanding these provisions a person assessed may, after the assessment has been upheld, bring action for a judgment declaring it illegal on the ground that the legislation professing to impose it is *ultra vires.* Idington J. *contra.*

Per Davies C.J. and Anglin, Brodeur and Mignault JJ. The judgment of this court declaring the assessment illegal deprives the trustee of any interest he may have had to challenge the validity of the provisions of the Assessment Act assuming to impose it and the dismissal of the action for a declaratory judgment (52 Ont. L.R. 562) should be affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the County Court judge and confirming the assessment on income received by the appellant and *per saltum* from the judgment of Mr. Justice Orde (2) dismissing the appel-

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

(1) 50 Ont. L.R. 305. (2) 52 Ont. L.R. 562.

lant's action for a judgment declaring the assessment illegal on the ground that the legislation imposing it is *ultra vires*.

The material facts are sufficiently stated in the above head-note. The appellant appealed with success to the County Court judge whose judgment was reversed by the Appellate Division. He then brought an action for a declaratory judgment as stated above.

MacMaster K.C. and *Fraser* for the appellant. The Act does not allow a personal action to be taken against an executor in respect to income of persons resident out of the province. *In re Gibson* and *The City of Hamilton* (1).

This is indirect taxation which the legislature cannot impose. See *Burland* v. *The King* (2) at pages 223 to 225. See also *Oriental Bank* v. *Wright* (3).

F. D. Davis K.C. for the respondent.

Bayly K.C. for the Attorney General of Ontario.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, in which I concur, I am of the opinion that the appeal from the judgment of Mr. Justice Orde should be dismissed, the costs, including those of the Attorney General, to be paid by the appellants; and that the appeal from the judgment of the Appellate Division should be allowed and that the costs in that court and here should be paid by the municipal corporation to the appellant.

IDINGTON J. (dissenting).—Two appeals by said appellant are herein presented and heard together involving the assessment of his income as surviving trustee under the last will of the late John Curry of the said city, who died on or about the 11th day of May, 1912.

By his said last will the testator devised and bequeathed, after payment of his debts, testamentary and funeral expenses, all his real and personal property wherever situate, to his wife, his son, and his son-in-law in trust to convert same into money and to hold, invest, accumulate and dispose of same under and in accordance with the trusts hereinafter set out.

Said executors and executrix obtained probate of said will.

(1) 45 Ont. L.R. 458.
(2) [1922] 1 A.C. 215.
(3) 5 App. Cas. 842.

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The said wife died a few months after the testator, and the said son died in March, 1920, leaving the appellant, who was said son-in-law, sole surviving executor and trustee when the assessment in question was made.

The appellant, at the time of the testator's death and ever since, has resided in said city of Windsor. He was assessed in respect of the John Curry estate for an income assessment "liable for all taxes" of the sum of $100,000, and notice of such assessment is dated 30th October, 1920.

The appellant then gave the following notice of appeal:

NOTICE OF APPEAL

To the Assessment Commissioner of the municipality of the city of Windsor:

Sir,—Take notice that I intend to appeal against the above assessment for the following reasons:

Only the income of the estate payable to one annuitant under deceased's will resident in Windsor, to amount of $8,000 is assessable. The rest of income is accumulated until 1933 and is not taxable.

J. B. McLEOD,
Appellant.

The Court of Revision of said city confirmed the said assessment.

Thereupon the appellant appealed to the learned senior judge of the County of Essex who, holding himself bound by the authority of *In re Gibson* and *City of Hamilton* (1), allowed the appellant's appeal and reduced the said assessment for income to $14,000.

He then, no doubt intending to conform with the amendment of 1916 to the Assessment Act providing for an appeal to the Appellate Division of the Supreme Court of Ontario, by way of a stated case set forth the relevant facts of the amount of the income and what part thereof he had held assessable and the amount of the income derivable from real estate securities and submitted the following questions:—

First—Whether the income from the said estate is assessable for income under the Assessment Act.

Second—Whether in the event of income being payable by the said estate as found by the Assessment Commissioner for the city of Windsor and the Court of Revision thereof the interest upon moneys payable under the said agreements for sale of real estate of the deceased is exempt from income tax under section 21, s.s. 5 of the said Assessment Act or otherwise.

Dated this 7th day of February, 1912.

(1) [1919] 45 Ont. L.R. 458.

I am of the opinion that the income from the said estate is assessable and would answer the first question in the affirmative.

The legal owner thereof resides in Windsor and on the facts stated the income was not derived from anything outside Ontario.

Indeed on the case submitted we have nothing to do with that or with who may be the ultimate recipient, or his or her residence, though we were confused in argument by much irrelevant discussion thereof.

The case submitted to the Appellate Division of the Supreme Court of Ontario is all we have anything to do with except the decision of that court pursuant thereto. See the case of *Dreifus* v. *Royds* (1).

In passing from the first question and the bearing thereon of the decision in *In re Gibson* and *Hamilton* (2), I may be permitted to say that I fail to see how it can have any bearing on this case.

There a very curious situation was produced by reason of the testator having been domiciled in Beamsville and his trustees having been scattered so that it may have been difficult to find in the Assessment Act language to so fit such a case as to entitle Hamilton to assess the income.

Here we have a very simple case in that regard.

The point raised by the second question is quite as simple if we correct the printing of it from section 21, subsection 5, to section 5, subsection (2), as I suspect it should be, to accord with the reasoning of the learned judges below. Section 21 of the Assessment Act has no subsection (5).

So interpreting the second question I would answer the question in the affirmative.

The investment in agreements for sale of real estate has become a well recognized form of investment security.

Its income is neither interest on a mortgage nor rent of real estate.

It clearly falls within the definition of income given by the Assessment Act as amended and there is no exemption to fit it.

(1) [1922] 64 Can. S.C.R. 346. (2) 45 Ont. L.R. 458.

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We must give effect to the plain language of the Act and not try to engraft upon it another meaning we may think would in some cases be more just.

I therefore conclude that this appeal should be dismised with costs throughout.

The other appeal between same parties and heard at same time seems to me a rather extraordinary one.

It arises in this way—After the better part of a year of litigation pursuing the prescribed course of law and, as I hold, the only course of law (save possibly in case of fraud or an absolutely clear violation of an exemption by refusing to pay taxes) open to any one calling in question a municipal assessment and rectifying it, if wrong, the appellant, on the 8th of June, 1921, two months after the Appellate Division below had given judgment in the other case, and a month after the appeal therefrom to this court had been launched, issued a writ against respondent to restrain its officers from collecting the assessment.

The Assessment Act expressly declares the roll valid subject to such appeals as duly taken. In the case of *Macleod* v. *Campbell* (1), which counsel seem to have overlooked, we decided that a similar attempt should not be made to rectify an erroneous assessment. I still think that is good law though decided six years ago.

Moreover we have nothing to do with assessment appeals save what comes before us in the prescribed method adopted in appellant's first case, unless, of course, by special leave which has not been given herein and I respectfully submit never should be given in such a case as this second one.

I think that appeal also should be dismissed with costs.

DUFF J.—It will be more convenient, I think, to consider the two appeals together.

The effect of sections 5 and 15 of the Ontario Assessment Act is discussed in the judgment of Mulock C.J., in *In re Gibson and Hamilton* (2). The opinion of the learned Chief Justice as to these sections, in which Mr. Justice Riddell concurred, is thus stated by him at page 461:

According to section 5, "income," to be liable to taxation, must be income "derived" by a person resident in Ontario or "received in Ontario

(1) 57 Can. S.C.R. 517. (2) 45 Ont. L.R. 568.

by or on behalf of a person resident out of Ontario." That is, the income in respect of which any one is liable to taxation must be either (*a*) income derived by such person being resident in Ontario, or (*b*) income received by an agent, trustee, etc., for a non-resident.

In the former case the person assessable is the beneficiary; in the latter, it is his representative. The beneficiary "derives" the income, but the representative merely receives it.

Income to be assessable must, I think, fall within one or other of these two classes.

This view seems to me to be the right view, not only for the reasons appearing in the judgment of the learned Chief Justice, but because the subsequent legislation has adopted it. The decision in *In re Gibson and Hamilton* (1) was pronounced in May, 1919, and the amendment enacted in 1919, section 18, subsection 1 (*a*), 9 Geo. V, c. 50, s. 8, provided that a return to be made by any person as to income should be in the form prescribed by the Lieutenant-Governor in Council. By order in council passed on the 15th July, 1920, pursuant to this enactment, a form of return was prescribed, and the frame of the return so prescribed makes it quite clear that the person making a return, the prospective income taxpayer, is to give items of income which he is to receive beneficially during the current year, except in the case where the person making the return is in receipt of income on behalf of a non-resident in capacity of agent, trustee, guardian or executor. The order in council proceeds upon the theory that where income is received in trust for persons resident within Ontario, it is the beneficiary who is to be assessed and not the trustee; and this view of the Act is again the construction upon which the legislature itself proceeded in enacting s. 6, c. 67, 11 Geo. V, by which it is required that agents, trustees, executors and other persons who collect or receive or have in their possession or control income for or on behalf of a person resident in Ontario shall, on receipt of notice from the assessor, furnish a statement in writing giving the names and addresses of the persons resident in the municipality who

ought to be assessed for their income therein, together with the amount of income payable

to such person during the current year.

I am not overlooking the fact that by force of the provisions of the Interpretation Act the re-enactment of legis-

(1) 45 Ont. L.R. 568.

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lation which has been judicially construed is not to be treated as a legislative adoption of such construction. What we have here is not a re-enactment merely of legislation which had been construed judicially, but an adoption of a judicial construction by an order in council passed pursuant to specific statutory authority and subsequent legislation, which is plainly founded and shaped upon the theory that the construction so adopted by the order in council is the right construction.

It follows that the appellant was not properly assessed in respect of that part of the income of the estate which is in question on the appeal from the Appellate Division, and that the appeal should therefore be allowed and the judgment of His Honour Judge Coughlin restored.

Such being my view of the effect of s. 5 in so far as it relates to "income derived * * * by any person resident" in Ontario, it is unnecessary to consider the question raised whether or not, if the section, in that branch of it which deals with such income, had the scope which has been ascribed to it by the Appellate Division, it would have been impeachable as *ultra vires* of the legislature. But as regards the second branch of the section, and as regards s. 13, provisions dealing with income received or in possession or in control of any person in Ontario for or on behalf of a non-resident, the constitutional validity of these provisions must, I think, be examined. The trust does provide for the payment of a certain annual sum, $8,000 to a lady who is resident in Detroit and, as I understand it, permanently domiciled there. The municipality has asserted its right to assess the trustee in respect of this income.

It is necessary briefly to advert to the course of the proceedings. The appellant and his co-trustee, who has since died, appealed from the assessment of 1920 to His Honour Judge Coughlin, and before him they expressed themselves content with the assessment in so far only as it included two specific annuities of $8,000 and $6,000 and their liability to assessment in respect to these items of income and their liability to pay taxes in respect of them for the year 1920 are not in question. The judgment of His Honour was delivered December 28, 1920, adopting the contention

of the trustees, and accordingly reducing the assessment to $14,000.

On the 25th April, 1921, the Municipal Council, acting upon the power conferred by s. 56 (1) of the Assessment Act, passed a by-law providing that the municipal taxes for 1921 should be assessed and levied upon the assessment roll prepared in 1920, and the action was commenced in the following June. The necessary result of the decision of this court in appeal no. 1 would be, if s. 13 were *intra vires*, that the appellant would be taxed for 1921 upon income in his control as trustee in respect of the assessment of $8,000, according to the roll of 1920, as amended by His Honour Judge Coughlin.

But I can entertain no doubt that when the objection to an assessment is that the enactment professing to authorize it is *ultra vires* the roll, whether attacked by appeal under the Assessment Act or not, is not binding upon the person assessed.

Section 83 is framed in sweeping terms, no doubt, but it is an enactment relating to procedure, and it must be presumed in the absence of specific words that the legislature in enacting that section was not resorting to the very questionable course of giving force and effect to a tax it had no power to impose by placing obstacles in the path of those seeking a judicial determination upon the point of the legality of the tax. Section 83, in my opinion, applies only to assessments within the lawful authority of the provinces.

The course taken by the appellant before Judge Coughlin would not strictly, in view of the appeal of the municipality from that decision, preclude the appellant from impeaching the assessment of 1920 on the ground now taken in this action; and there can certainly be no impropriety in impeaching it for the purpose of disputing the liability of the estate to taxation in respect of it in 1921. The action in my opinion lies.

Nor is it any answer to the action to say that the annuity payable to Gladys Alma Curry is not income received by the trustee by or on behalf of her. It is quite clear that this income falls within s. 13 in the sense that it is income which has been received in Ontario, and at the moment when it becomes payable to her it is

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income in possession and control of the trustee for her and on her behalf, at which moment the funds in possession of the trustee and applicable in payment of the annuity are subject to a trust in her favour to the extent of the sum she is entitled to receive.

We come, then, to the point of substance, whether ss. 5 and 13, in so far as they apply to income received or held in trust for a non-resident, are within the powers of the legislature of the Province of Ontario to enact. The meaning and effect of the words "direct taxation" as they appear in item no. 2 of s. 92 of the British North America Act have been considered in many cases, and as Lord Moulton says in *Cotton* v. *The King* (1), it "is no longer open to discussion" that the meaning to be attributed to that phrase is substantially the definition quoted from the treatise of John Stuart Mill in these words:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it.

It is well to remember a circumstance which has been adverted to in the judgments of Their Lordships of the Judicial Committee more than once, that economists have not been in entire agreement as to the principle of the classification of taxes as direct and indirect. In *Attorney General* v. *Reed* (2) Lord Selborne pointed out in a passage which is cited by Lord Moulton in *Cotton's Case* (1), that the definition given by McCullough, for example, would have been more unfavourable to the provinces than the definition taken from Mill. And it may be added (see Bastable, Public Finance, ed. 1903, p. 271) that on the basis of the distinction adopted by "practical financiers" as the principle of the classification, the provinces would have been in a still less favourable position; that principle being that those taxes are considered direct which are levied on "permanent and recurring occasions," while charges on "occasional and particular events" are brought under the category of "indirect taxation."

On this basis death duties of all kinds would be excluded from the jurisdiction of the provinces.

(1) [1914] A.C. 176, at p. 193.

(2) [1884] 10 App. Cas. 141 at p. 143-4.

Generally speaking income tax, according to any basis of classification, would be regarded as a direct tax, but it is, of course, quite obvious that for the purpose of applying s. 92 of the British North America Act, a principle of classification having been adopted by the courts in giving effect to the language of the Act according to the sense in which it would most probably have been understood by the legislature which passed it, the provinces cannot have that principle applied for the purpose of empowering them to levy death duties and at the same time have it discarded when it seems to impose embarrassing restrictions upon the manner in which provincial fiscal authority is to be exercised.

From the terms of s. 11 (2) it is manifest that the income in respect of which the assessment is made is the income for the current year—the year in which the assessment is made. That is the normal rule, and the rule as given by that section must, I think, apply to assessments under s. 13. That seems to be the construction under which the order in council proceeds, as appears from the form of the prescribed return, and I think it is the correct construction. True, s. 13 applies only to income "collected or received" or "in possession or control," and *prima facie* this means income received in fact or in fact in possession or control. But the language of s. 5 as well as that of s. 11 does not materially differ from this and it is quite clear that where it is a person beneficially entitled who is assessed, it is s. 11 (2) that gives the rule by which the assessor is to be guided, and under that section the amount of the assessment may be the result of estimate or, if estimate is impossible, fixed at a sum not less than an arbitrary minimum determined by the amount of income received in the previous year. I think s. 13 must be read as imposing the liability only, and that s. 11 (2) must be considered as prescribing the method by which the amount of the assessment is to be ascertained. S. 56 must also be adverted to, under which a council may adopt the assessment of the preceding year—a proceeding which may entail the result that a person assessed in the year immediately preceding, pursuant to s. 11 (2), for an amount determined by his income the year before that

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may in consequence become liable to pay in one year—the year following that of the redaction of the roll—income tax in respect of the amount of income received two years before, although such amount may be far in excess of the sum received by him during the year for which he is assessed and taxed.

The effect of this section, then, is that a trustee in receipt of an income for a non-resident beneficiary may be liable to pay income tax in respect of an income of an estimated amount which he may only in part have received or not have received at all. It is past question not intended that he shall ultimately bear the tax. Normally he will indemnify himself, no doubt from moneys in his hands, but his liability is in no way conditioned upon the existence in his hands of a fund out of which the tax can be paid. The tax is not a lien upon the trust property, and the municipality has no recourse against such property. If he resort to funds in his hands for payment, it is not pursuant to any duty laid upon him by the taxing authority so to apply the funds, but as a means of indemnifying himself against the personal liability which the statute imposes upon him directly.

Where personal liability is imposed upon a trustee or agent in respect of income received by him as such and the tax is not charged upon the income and there is no recourse against it by the taxing authority and the trustee is under no duty to the taxing authority to retain the income in his hands and apply it in payment of the tax, we should appear to have a case in which the trustee is the very person from whom the taxing authority demands the tax it being left to him to secure his indemnity from those who are ultimately intended to sustain the burden.

The case is, of course, quite different where no personal liability is imposed, where, for example, the liability of the trustee or agent is limited to the amount in his hands for his beneficiary, as in the case of *Burland* v. *The King* (1).

Where, too, trust property is charged with the payment of the tax, it is conceivable that the proper inference as to the legislative intent would be that the primary source of payment should be the trust fund, and the personal liability

(1) [1922] 1 A.C. 215.

designed only as security for the proper application of the fund, but this is not a point of view with which we are concerned on this appeal.

The reasoning above was foreshadowed in the judgment of Lord Selborne in *Attorney General* v. *Reed* (1), and is that upon which the judgment of Lord Moulton proceeds in Cotton's case, and was expressly approved.

Both appeals to this court should, therefore, be allowed.

ANGLIN J.—The appellant (plaintiff) is the surviving trustee under the will of the late John Curry of the city of Windsor, Ontario, who died on the 11th of May, 1912. By his will he directed certain properties to be held by his trustees and the income thereof accumulated for a period not yet expired. The beneficiaries, who will be definitely ascertained only on the expiry of this period, are some resident in Ontario, some elsewhere, and some yet unborn.

The validity of the municipal assessment for the year 1920 by the city of Windsor of the appellant as such trustee in respect of annual income derived from properties so held forms the subject of this appeal. Following the procedure for appeal provided by the Ontario Assessment Act (R.S.O. 1914, c. 195) the appellant carried his case to the Appellate Divisional Court, unsuccessfully contending that, properly construed, the provisions of that Act do not authorize the impeached assessment. In an action subsequently brought for a declaratory judgment, he challenged the validity of the legislation invoked by the respondent to support the assessment if it should be given the construction put upon it by the Appellate Division. He now appeals from the judgment of the Divisional Court in the former proceeding; and, by consent, under s. 37 (*b*) of the Supreme Court Act (1920), *per saltum* from the decision of Mr. Justice Orde who dismissed the latter action. The tax on $72,310.57, the amount of the assessment in dispute, exceeds $2,000. Our jurisdiction to entertain both appeals in my opinion admits of no doubt.

The late Charles Curry, a co-trustee of the appellant who lives in Windsor, resided at Detroit in the State of Michigan and died there on the 24th March, 1920. A portion

(1) 10 App. Cas. 141 at p. 143.

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of the income of the estate derived from the purchase of properties in the city of Detroit, it is now claimed, was in 1920 kept in the First National Bank in that city, certain payments being made out of it and only the surplus (how much does not appear) was "checked into the estate in Ontario." The latter evidence, however, was not before the court on the original assessment appeal, having been given only in the subsequent action.

The case stated by the County Court Judge in the Assessment Appeal makes no reference to any foreign income but places the "net income within Ontario" at $86,310.57, the details of which appear in an appended statement furnished by the trustee. For the purpose of the appeal from the Divisional Court the suggestion that part of the assessed income did not come into Ontario must, therefore, be disregarded, notwithstanding the fact that the assessment of income for 1920 would appear to have been based by the assessor on the actual receipts of the year 1919, as provided for by section 11 (2) of the Assessment Act. Indeed the sum of $86,310.57 appears to have been treated throughout the proceedings which culminated in the judgment of the Divisional Court as income actually received in Ontario by the appellant trustee for the year 1920; and it was so treated in the factum filed on his appeal to this court from that judgment. It is, I think, too late now to enter upon any discussion of the actual amount of income received in that year in Ontario. The sum mentioned in the stated case must be accepted as accurate for the purposes of this appeal. That income, however, included, as appears in the stated case, a sum of $13,873.34 for interest paid by purchasers of real estate in Ontario, which forms the subject of a distinct ground of appeal.

Of the sum of $86,310.57, $6,000 was paid to a beneficiary residing out of Ontario and $8,000 to another beneficiary residing in the province. To his assessment in respect of this $14,000 the appellant submitted before the County Court Judge. The appeal, therefore, concerns his liability for assessment in respect of the balance of $72,310.57, of which the stated case says:—

> Under the provisions of the said will of the late John Curry the balance of the above-mentioned net income together with that of previous

and subsequent years is to be accumulated by the trustees for a period of twenty-one years commencing on the 11th day of May, 1912, and expiring on the 10th day of May, 1933, whereupon the accumulated trust fund is to be divided among persons at present unascertained and whose right and title will depend on the circumstances at the time fixed for the said division.

On behalf of the appellant it is stated and is not denied that some of the beneficiaries under this trust may be persons still unborn.

The material provisions of the Assessment Act are as follows:—

5. All real property in Ontario, and all income derived either within or without of Ontario by any person resident therein, or received in Ontario on behalf of any person resident out of the same shall be liable to taxation subject to the following exemptions:

(Here follow certain exemptions, including,

Subsection 21. Rent or other income derived from real estate, except interest on mortgages. 4 Edw. VII, c. 23, s. 5, par. 20).

11 (1). Subject to the exemptions provided for in sections 5 and 10: (*a*) every person not liable to business assessment under section 10 shall be assessed in respect of income.

12 (1). Subject to subsection 6 of section 40, every person assessable in respect of income under section 11 shall be so assessed in the municipality in which he resides, either at his place of residence or at his office or place of business. 4 Edw. VII, c. 23, s. 12 (1); 7 Edw. VII, c. 41, s. 2.

13 (1). Every agent, trustee or person who collects or receives, or is in any way in possession or control of income for or on behalf of a person who is resident out of Ontario, shall be assessed in respect of such income.

Section 5 declares the liability of income to taxation. I assume that it evinces a general intention that all income earned, derived or received in the province, not specially exempted, shall be taxable. But, as Taft C. J., said in delivering the judgment of the Supreme Court of the United States in *Smietanka* v. *First Trust and Savings Bank* (1), such an intention

must be carried into language which can reasonably be construed to effect it. Otherwise the intention cannot be enforced by the courts.

Assessment is the only basis of municipal taxation under the Ontario system (s. 3). As put by Sir William Mulock C.J. Ex., in *In re Gibson* and *Hamilton* (2).

there can be no taxation of income without previous assessment of some person in respect of such income.

A person assessed in respect of income is thereby made personally liable to pay a tax upon it at a rate imposed according to other provisions of the law. The only clauses under which it was contended at bar that the appellant is

(1) 257 U.S.R. 602. (2) 45 Ont. L.R. 458, 461.

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liable to assessment are s. 11 (1) and s. 13 (1). The question presented therefore is: Does the appellant in respect of the income for which he has been assessed fall within either of those provisions? The first point for determination is whether under s. 5, in respect of income received by him for accumulation under the trust above stated, the trustee appellant is properly assessable.

There can be no room for doubt that by the words "any person resident out of the same" in s. 5 is meant a beneficiary for or on whose behalf income is paid to some agent, collector, recipient or custodian in Ontario. The corresponding words "by any person resident therein" there can, I think, be little room for doubt are intended to designate a person standing in the like relation to the income, that is, the beneficiary of it, who is said to "derive" it, whereas the agent, trustee, collector, recipient or custodian on behalf of the non-resident is said merely to "receive" it. That distinction is carried out in s. 11 (1) and s. 13 (1). Under the former the resident beneficiary "deriving" the income is made assessable; under the latter, in respect of income derived by the non-resident beneficiary, not he, but the person who collects or receives it for or on his behalf is to be assessed. There may be little difficulty in applying these provisions where the income got in by the trustee or agent is payable forthwith to certain beneficiaries. But other considerations arise where the right of enjoyment is deferred by a trust for accumulation and where, as here, some of the beneficiaries are or may be unborn and the shares of those *in esse* are not presently ascertainable. For what proportion, if any, is the trustee assessable and for what the beneficiaries?

Unborn beneficiaries cannot properly be designated either as resident in Ontario or as resident out of the same. The proportion of the 1920 income to which they may eventually be entitled is problematical. In so far as that income may ultimately be payable to persons now resident in Ontario, if the amounts held for them had been ascertainable in 1920, I should incline to the view that such beneficiaries and not the trustee would have been assessable in respect thereof had the trust for accu-

mulation not prevented their presently obtaining it. I find no provision in the statute making a trustee for accumulation for the benefit of resident beneficiaries assessable in respect of the income ultimately to be "derived" by them.

In so far as the income in question belongs to non-residents, assuming the validity of s. 13 (1), I should think the trustee is the person to be assessed. But here again arises the question, insolvable in 1920, "for how much"?

After giving to the provisions of ss. 5, 11 (1) and 13 (1) much thought and consideration, my conclusion is that in respect to income directed to be accumulated by a trustee for future distribution amongst persons wholly or partially unascertained, some of them within and some of them without Ontario, he is not assessable. As to so much of that income as will ultimately be derived by resident beneficiaries s. 11 (1) applies and such beneficiaries when ascertained and when they derive the income are made assessable. The trustee is not. The contrast between s. 11 (1) and s. 13 (1), when read in the light of the distinction made in s. 5 between resident and non-resident beneficiaries, seems to make this reasonably clear. On the other hand as to so much of the income as is received or collected for or on behalf of non-resident beneficiaries *in esse* and will ultimately go to them the difficulty in the way of assessing the trustee for it seems to lie in the fact that the amount is unascertainable. As to whatever portion, likewise unknown, is to go to persons still unborn it is impossible to classify these either as resident or as non-resident. Hence the liability of the trustee to assessment is uncertain and that of the beneficiaries an impossibility. We seem to be confronted with another instance of *casus omissus* similar to that dealt with by the Supreme Court of the United States in *Smietanka* v. *First Trust and Savings Bank* (1).

For the respondent it is contended that the trustee is the person who "derives" the income of the trust estate; that *qua* income it is in reality his; that the right of the beneficiaries is not to receive income but to share in an

(1) 257 U.S.R. 602.

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accumulated fund; that, therefore, for purposes of taxation the income is that of the trustee and not that of the beneficiaries. It accordingly contends that the word " trustee " in s. 13 (1) is not used in the ordinary legal sense but signifies merely an accountable agent. I cannot accede to that view. It involves deleting the word " trustee " from s. 13 (1). I see no reason for giving that word any such restricted meaning. It is, I think, most improbable that in framing and enacting the Assessment Act the draughtsman and the legislature proceeded on the idea that income received by a trustee belongs to him and not to his *cestui que* trust—that he has any real ownership of it or a taxable interest in it. Where they intended to make him taxable in respect of such income, notwithstanding lack of beneficial interest, they expressly so provided—s. 13 (1). Sections 5, 11 (1) and 13 (1), when read together, seem to me to make it abundantly clear that only in the case of a non-resident beneficiary was it intended that the trustee should be assessable in respect of income.

Nor does s.s. 1 (*h*) of s. 22 of the Assessment Act, referred to by Mr. Justice Lennox, in my opinion help the respondent. Determination of assessability is not the office of section 22. That is dealt with by preceding sections. Section 22 merely defines the method to be pursued by the assessor in preparing the assessment rolls and in placing thereon the names of persons made assessable under such earlier provisions and the particulars of the various subjects of their assessments, etc.

I agree with the opinion expressed by Sir William Mulock C.J. Ex. in *In re Gibson* v. *City of Hamilton* (1).

In the view I have taken it is unnecessary to determine whether the $13,873.34 received as interest upon unpaid purchase money for lands falls within the exemption provided for by clause 21 of s. 5:—

> Rent and other income derived from real estate in Ontario, except interest on mortgages.

I incline to the opinion that it does not.

I am for these reasons of the opinion that the defendant was not assessable in respect of any portion of the $72,310.57 income in question. The appeal from the judg-

(1) 45 O.L.R. 459.

ment of the Appellate Divisional Court should, therefore, be allowed with costs in that court and here to be paid by the municipal corporation to the appellant.

The view I have taken of the assessment appeal proper —and which I understand finds favour with the majority of the members of the court—suffices to dispose of the liability of the appellant for the taxes in question and renders unnecessary consideration of the constitutional question presented in the action tried before Mr. Justice Orde. Indeed it does more; it deprives the appellant of his status to raise that question, inasmuch as in a proceeding already pending when that action was begun the assessment which he would impeach as involving indirect taxation is held not to be within the provisions of the legislation attacked on that ground. It is true that he repeats in that action his claim that the assessment be set aside on the ground already taken in his assessment appeal. But that was quite unnecessary and the only substantial purpose of the action was to bring the constitutional question before the court in the event of the judgment of the Appellate Division in the assessment appeal being upheld. As the result of the disposition of that appeal practically deprives the plaintiff of any interest he might otherwise have had to challenge the validity of the provisions of the Assessment Act under which the respondent sought to tax him, it follows that the judgment of Mr. Justice Orde dismissing that action, though on other grounds, should be upheld and the appeal from it dismissed with costs, including the costs of the Attorney General.

BRODEUR J.—These are two appeals concerning the validity of an assessment on the income of the Curry estate.

Mr. John Curry died in 1912 leaving a will of which the appellant, McLeod, is the sole surviving executor and trustee. Under the provisions of this will, the trustees are directed to pay from the income certain annuities to the wife and children of the testator and to invest the surplus income from the estate for a period of twenty-one years. At the expiration of the accumulation period the whole trust fund will be divided among the children of the testator; and, in the event of the death of any of them, the

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share of the one so dying will be divided amongst the testator's grandchildren.

As a consequence of the provisions of this will, the fund is accumulating in trust for the benefit of unascertained persons.

One of the questions raised is whether unascertained and unborn beneficiaries are assessable under the provisions of the Ontario Assessment Act.

Section 5 of the Act enacts that

> All * * * income derived either within or without of Ontario by any person resident therein or received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation.

In section 13 of the same Act, it is declared that

> Every agent, trustee or person who collects or receives or is in any way in possession or control of income for or on behalf of a person who is a resident of Ontario shall be assessed in respect of such income.

This question is not a new one. It was considered in a case of *Gibson* v. *City of Hamilton* (1), and there it was held by the Chief Justice of the Exchequer and by Mr. Justice Riddell that the income in respect of which any one is liable to taxation must be either income derived by a person resident in Ontario or income received by a trustee for a non-resident.

In the former case, the person assessable is the beneficiary; in the latter case, it is his representative.

Section 13 of the Act says that the trustee can be assessed only in the case where he collects the income for a person who resides out of Ontario.

But *quaere* where the beneficiary is unknown and where a trust fund has been created, as in this case, for persons who cannot be identified or ascertained.

It has been contended that the word "person" in section 5 of the Assessment Act would cover the trustee; and it is claimed then that McLeod as trustee of the estate could be assessed for the whole income of the estate.

It should not be forgotten in that respect that McLeod pays to the living daughters of Mr. John Curry a sum of $14,000 out of the income. The balance of the income, about $72,000, goes into the trust fund. If the City of Windsor can tax Mr. McLeod himself for these $14,000 paid to the children, it could also assess the same persons,

(1) 45 Ont. L.R. 459.

if they live in the City of Windsor; and in such a case those persons would be assessed twice, once through the trustee and once of their own right. That would be the result of the construction of section 5 if "any person" who is mentioned there covers not only the beneficiaries but also the trustee. I am of the view that the trustees can be taxed only for a person when such person resides out of Ontario; and where no such person exists, as in the present case because we do not know to whom the trust fund which is accumulated will be later on given, I am of opinion that the beneficiary in this case does not come within the class of persons mentioned in section 13, namely, persons residing out of Ontario. The assessment can be validly made only on a person living at the present time and residing out of Ontario. The principle is that municipal corporations can levy no tax unless the power is plainly conferred.

Dillon, Municipal Corporations, 5th ed., vol. 4, s. 1377; Maxwell, Interpretation of Statutes, 5th ed., pp. 463, 464; *City of Ottawa* v. *Egan* (1).

The Assessment Act of Ontario does not confer plainly upon the municipal corporations the right of assessing an income which is not to be paid to a living person residing outside of Ontario.

For these reasons the appeal should be allowed with costs of this court and of the court below and the assessment set aside.

There is also to be considered in this appeal the declaratory action instituted by the appellant to have the assessment declared illegal and also unconstitutional. I consider this action useless and it should be dismissed with costs throughout.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal from Appellate Division allowed with costs.
Appeal from Orde J. dismissed with costs.

Solicitor for the appellant: *McLeod and Bell.*
Solicitor for the respondent: *Davis and Healy.*

(1) [1923] S.C.R. 304.

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*May 30.
*Oct. 9.

DOROTHY L. DENT (DEFENDANT).....APPELLANT;

AND

HEBER C. HUTTON (PLAINTIFF).....RESPONDENT.

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

Vendor and purchaser—Agreement for sale—Assignment—Covenant by assignor—Foreign action by assignee—Consent judgment—Order for sale of land—Liberty to assignee to bid—Purchase by assignee—Action on foreign judgment—Alternative claim for original debt.

D. sold land in Saskatchewan by agreement of sale, the purchaser paying cash, assuming a mortgage on the land and undertaking to pay the balance of the price by instalments. D. assigned this agreement to H. and entered into a covenant to pay, on demand, any moneys as to which the purchaser made default. D. did not pay an amount as to which there was such default and H. brought action in Saskatchewan claiming the whole amount due him under the assignment, a declaration that he had a lien on the land and an order for sale in case the debt was not paid. D. filed a consent to judgment in these terms being entered and as entered it provided that on sale of the land H. should have leave to bid and the purchaser should receive a certificate of title "free from all right, title and equity of redemption" on the part of D. The judicial sale took place and H. became the purchaser. Later the land was sold to satisfy the mortgage against it and the title passed from H. who had taken an action in the Supreme Court of Ontario on the Saskatchewan judgment and also claiming on D's. covenant the amount due on said judgment.

Held, affirming the judgment of the Appellate Division (53 Ont. L.R. 105) that such action could be maintained and H. was entitled to recover the amount claimed less the full amount of the purchase money at the judicial sale.

Held also that D. could not claim that the leave to H. to bid at the sale was beyond the consent to the Saskatchewan judgment; that the consent to the order for sale covered all that could follow in the ordinary course of practice.

Per Mignault J.—H. was estopped from raising this question by failing to appeal from the Saskatchewan judgment.

Held further that the finality of the foreign judgment could not be raised by D. in this action.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial (2) in favour of the respondent.

The facts are fully stated in the above head-note.

Day K.C. and *Walsh* for the appellant. The respondent cannot have both the land and the personal remedy. See

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

(1) 53 Ont. L.R. 105. (2) 52 Ont. L.R. 378.

Sanderson v. *Burdett* (1) at page 129. *Mutual Life Assur. Co.* v. *Douglas* (2) at page 247.

Thompson K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Duff, in which I concur, I am of the opinion that this appeal must be dismissed with costs.

IDINGTON J.—The appellant being possessed of a quarter section of land in Saskatchewan, subject to a mortgage upon which there remained to accrue due a balance of $1,000, sold, on the 5th February, 1915, by articles of agreement of that date, said quarter section to one Boles for the price of $5,635, of which he paid $900 in cash, and assumed the balance of the said mortgage to be paid off by him.

On the 21st of May following she, in consideration of the sum of $3,035, by indenture of that date to which said Boles was a party, assigned said articles of agreement to the respondent; and assigned thereby also the said land to the respondent.

A long covenant therein by her with respondent assuring him of her right to so assign is followed by the following:—

> And the said assignor doth further, for himself, his heirs, executors, administrators and assigns, covenant, promise and agree to and with the said assignee, his heirs, executors, administrators and assigns, that in case of default by the purchaser in payment of any sum or sums of money which shall become due or owing under the articles of agreement, that he will forthwith on demand, well and truly pay or cause to be paid to the said assignee, his heirs, executors, administrators or assigns any sum or sums so in default.

The use of the masculine instead of the feminine terms properly applicable to appellant is covered by a general provision at the end of the document.

After this covenant on the part of the appellant just quoted in full, Boles, the purchaser, acknowledges notice of the said assignment and admits the amount owing by him is as thereinbefore set out.

Then he covenants as follows:—

> And the said purchaser doth further covenant, promise and agree to and with the said assignee that he will pay or cause to be paid to the assignee, the said sum of money still owing and unpaid under the said articles of agreement, on the days and times and in the manner therein set

(1) 16 Gr. 119. (2) 57 Can. S.C.R. 243.

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forth, and that he will keep, observe and perform all covenants, provisos and agreements in said agreement contained.

The following November the respondent's solicitor wrote the appellant about an over-due instalment of principal and interest on the said mortgage which was answered by her husband contending that she should not be thus called upon, as respondent had agreed to look to the land. That correspondence lasted many weeks and will be referred to later.

On the 27th January, 1914, respondent sued the appellant and Boles.

I need not recite the story of that litigation further than to say that part of it resulted in an order for the leave to sign judgment against the defendants therein for the sums named, and a direction for the sale of the land allowing respondent to bid, and is called an "Order nisi."

I am far from being convinced that everything done relative thereto was done in due order. I assume, however, that the respondent became the purchaser at the sheriff's sale, which, if previous values in question to be taken seriously, and not a mere myth, was a sale that should not have taken place, especially to the respondent conducting said proceedings; and in any event did not entitle him to hold same as against the appellant in the event of his resorting to her covenant sued on herein.

However all that may be, to which I will advert later, the sequel to said proceedings, so far as evidenced herein, seems to me far from what I should expect in a final judgment of a foreign country or province seeking recognition in a suit alleged to be founded thereon.

I am, however, presented, at some angles of the argument of this appeal, with a reminder of the case of *Davidson* v. *Sharpe* (1), wherein I proceeded upon the theory that the exemplification therein presented and received in evidence, being the final word of the British Columbia court issuing same, must be held conclusively in favour of the plaintiff appellant.

The majority having taken another view I am not quite sure, but think I had better adhere to the principles I there had in mind as to the necessity for finality of the

(1) [1920] 60 Can. S.C.R. 72.

proceedings had in a foreign jurisdiction which must be had in mind when a suit is brought on a foreign judgment.

I agree with the learned judges below in that regard and think with those taking that view that this action so far as founded upon said alleged final judgment, should be dismissed from the consideration of this case.

The fact that for half a century or so it has been by force of a statutory amendment possible to re-try, as it were, in Ontario the original causes of action and any proper defences existing in relation thereto, renders that aspect of this appeal of little consequence, for the respondent has presented his case alternatively and sued upon the appellant's covenant set forth above.

Upon that aspect of the case the appellant has met with little encouragement in the courts below, for the unanimous opinion seems to have been against her.

As to the grounds taken by her counsel herein, and apparently below also, that she is a mere guarantor, the cases they refer to as relevant thereto are cases of principal and surety, pure and simple.

And there is, I respectfully submit, not the slightest ground for contending that such a legal relationship existed between appellant and Boles. To use the word "guarantor" (which is one of wide import covering a suretyship, or a case of warranting a machine) as descriptive of appellant herein, does not help in argument of such a case as presented. We must look at the actual facts and realize, if we can, what the parties are about.

As to the suggested election by the respondent bidding and buying at the Saskatchewan sale barring his right here to resort to the covenant, the case of *Mutual Life* v. *Douglas* (1) seems irrelevant and, so far as not so, the decision is against appellant's argument.

The ground taken that the respondent by purchasing has lost any right, is to me quite untenable. He clearly had a right to bid, according to the local law, and we cannot impose upon the courts there our views as to the desirability, or otherwise, of his having such a right.

In my personal view as to the desirability of sanction-

(1) [1918] 57 Can. S.C.R. 243.

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ing such a system, without the most stringent provisions relative to upset or reserved bids, and the appearance at all of a party concerned appearing on the scene as an actor therein, is quite repugnant to what I hold as desirable. Perhaps we could not have a better illustration of the undesirability of having that done, than is to be got by looking at the results presented herein.

The respondent gets thereby the equity in a property he had, a year or so before, evidently deemed worth at least six or seven times what he bid for it.

It is, however, entirely another question that is raised as to the legality thereof. I cannot say it is entirely illegal.

Then where does that leave appellant? Her counsel argues stoutly that said suit having been to enforce a vendor's lien, the result, as between these parties, must be the same in law as if the case had been for foreclosure between a mortgagee and mortgagor, and the mortgagee, after obtaining his final order, had sold the property.

I have tried anxiously to find the foundation for such a proposition of law. I can find no case of enforcing a vendor's lien in any other way than by directing a sale of the land or interest bound by the lien. I venture to think no case exists of a proceeding by way of foreclosure, and hence the law relevant thereto is not applicable to the case of a lien.

The cases relied upon are either cases of foreclosure, or nothing akin to what we have to deal with herein.

But in another aspect of this case I am about to present, the legal situation may produce in my view analogous results.

There are some aspects of the transaction between the appellant and the respondent which are not unlike the case of a mortgagor and mortgagee; but when duly considered and analyzed, that transaction, in question herein, to my mind, is clearly not the creation of a mortgage, but an absolute sale of a security.

It is a case of bargain and sale, and that accompanied by a common business assurance that the quality of the thing the vendee is getting will be found such as her covenant imperatively requires it shall turn out to be.

That has failed. And though the statutory law of England changed in various ways, for the past three quarters of a century, some of the conditions relative to sales by those in the position of mortgagees, or the courts on their behalf, I have not been able to find a single decision that puts a vendee, in course of such sales, in the same position as a mortgagee is in relation to foreclosure.

The appellant's counsel seemed to me to assume that the mortgagee acquiring, by virtue of modern statutory legislation relative to sales of the mortgaged property, a title thereto must stand in every respect in the same position as a mortgagee who has obtained a final order of foreclosure, that is, that if he sues upon the covenant he opens up the whole matter and the mortgagor is entitled to redeem.

Not a single case of the many cited touches this point and supports such an assumption.

The correspondence which I adverted to above clearly offers the appellant, indeed assures her, that the basis of the deal between her and respondent was that upon repayment of the money advanced, with interest and costs of course, she should have all that the respondent had been assigned by her.

That, however, was not acted upon when available and is now no more than evidence of what in respondent's mind fair dealing required.

It seems difficult to believe that the quarter section, passing through different hands, and which the evidence herein discloses as being worth, at all events, from $3,000 to $5,600, should be sold by the prior mortgagee for apparently less than $1,000. The chances are any such sale is liable to be impeached and the prior mortgage redeemed.

The correspondence I have referred to presents on behalf of respondent exactly the legal implication existent by virtue of the assignment, and binds him to return all he got thereby including the resultant sale to himself. I infer it was that aspect of the correspondence that induced the consent to the order nisi. Respondent has not, according to his evidence, resold the equity he got thereby.

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I incline to the opinion that the judgment should have provided for the assignment by the respondent to appellant, upon payment to him of the amount found due herein, of any interest he may have acquired in said lands.

The evidence of what was done under the first mortgage is most unsatisfactory and there may yet be some means of redeeming same.

Again this action in any event is but for damages for breach of appellant's covenant.

It is the general principle of law that the party claiming damages for breach of contract is in duty bound to minimize the damages where he can reasonably be expected to do so.

The respondent seems to have dealt with the property he acquired in such a manner that if lost, as now pretended it was, there is strong ground for suspecting him of reckless neglect, including possibly a disregard of obligation under section 64 of the Saskatchewan Land Titles Act, and that it was through such neglect a valuable asset has been lost, to the detriment of appellant.

I should have preferred to see the reference directed cover this ground and, if what I suspect turned out correct, allowance duly made appellant in reduction of the judgment awarded against her.

I am bound to say, however, that no such contentions, thus limited, were presented in argument and must assume counsel had good reasons, not appearing in the case, for not so contending.

I must therefore assent to the formal judgment upon which the majority of this court has agreed.

DUFF J.—I have come to the conclusion that this appeal should be dismissed, but before explaining the grounds upon which I think the respondent Hutton is entitled, with a modification to be stated presently, to maintain the judgment in his favour in the courts below, it is important to make it quite clear that this conclusion does not involve any decision upon either of two points, one of great general importance and the other of some difficulty, which were rather elaborately argued. The first of these is the question whether an unpaid vendor who has, in proceedings to enforce his lien for the purchase money,

obtained leave to bid and, pursuant to that leave, purchased the property, can after the property has passed out of his possession and power proceed to enforce the judgment for the unpaid residue. Whether the vendor in such circumstances is in the same position as a mortgagee is a question of general importance, and before deciding it adversely to the view advanced on behalf of the appellant, the weighty considerations which were urged and might be urged in support of that view would require the most careful examination. The other question is whether, the respondent having lost his title to the property in consequence of proceedings taken by the holder of a paramount security, he is in any view of the law, in consequence of the provisions of the agreement between him and the appellant, free from the operation of the principle which the appellant invokes. Upon neither of these questions, it must be understood, is any opinion now expressed.

The grounds upon which I think the appeal fails are as follows: The respondent took proceedings in the courts of Saskatchewan for the recovery from Boles and Mrs. Dent, under the agreement of the 5th February, 1913, and the assignment of the same agreement of the 21st May, 1913, of the moneys due under the agreement, an alternative claim being for judgment against the defendants for the full balance of the purchase money and a declaration that the plaintiff, the respondent Hutton, had a lien on the lands for the same and for the sale of the property under the direction of the court to satisfy the plaintiff's claim. Boles, upon whom the writ of summons was served by special leave, did not appear. Mrs. Dent appeared and delivered a defence disputing liability, and subsequently the respondent moved for judgment for the moneys due under the agreement, for a declaration of the respondent's lien and for an order for the sale of the land under the direction of the court to satisfy the claim. On the return of this motion a judgment was given which, as appears from the formal judgment, included a direction that the respondent Hutton should have leave to bid and, further, that the purchaser should receive a new certificate of title of the land in question

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"free from all right, title and equity of redemption" on the part of the defendants or either of them.

It is plain, I think, that the effect of the judgment is that the respondent is to recover from Boles and Mrs. Dent the moneys due on the agreement subject to a deduction of the amount received for the sale of the lands, and that the respondent is to have leave to bid, and that if he becomes the purchaser he is to receive a title free from any equity of redemption just as any other purchaser would, and that the amount of the purchase money, just as in the case of a purchase by a stranger, is to be deducted from the amount of the judgment.

It is argued on behalf of the appellant that this judgment is inoperative as an estoppel, for several reasons; first, it is said that it is not a final judgment because there is no judgment of the court determining in figures the amount of the deficiency after crediting the amount of the purchase money; secondly, it is said that the judgment was a consent judgment, and that the direction by which the respondent had leave to bid and consequently the right to acquire the lands by purchase free from any equity of redemption or other equity went beyond the limits of the consent, and that it is therefore in no way binding upon the appellant.

Dealing first with the second of these objections, in the absence of evidence to the contrary it must be assumed, I think, that the formal judgment correctly expresses the view of the local master as to the judgment he intended to give. The formal consent which is in evidence was a consent to judgment in terms of the notice of motion, that is to say, to a judgment providing for a sale under the direction of the court. The consent, therefore, was clearly in terms a consent to judgment ordering a sale under such directions. If one is to assume that the formal consent was the only consent given it would not, I think, be fair to construe it as a consent in advance to a direction which could not properly be given or a direction which would not be *intra cursum curiae;* but it was nevertheless a consent to a sale subject to any direction which, according to the practice of the court, should be or become a binding direction. It would not preclude the appellant

from objecting to a particular direction, but it was nevertheless a submission to the jurisdiction in the fullest sense, and therefore a submission to any direction which, though wrong in point of law or practice, should be given in the ordinary course, and should be allowed to remain without challenge in accordance with the procedure of the court.

As to the first objection, although difficulty might have arisen if the respondent's action had been based upon the judgment alone, the appellant's acceptance of the judgment precludes her from setting up any equity inconsistent with the terms of it. On the other hand it seems to be clear that the respondent is bound to credit the appellant with the full amount of the purchase money payable under the sale by which the respondent acquired title to the property. By the terms of the judgment, it is true, the respondent was entitled to deduct his costs, but that must be taken to mean the costs as ascertained in the usual way by proceedings in the Saskatchewan court. No such proceedings are in evidence, and so far as we are informed the costs have not been ascertained in such a way as to enable the Supreme Court of Ontario to measure the extent of the deduction. The judgment should be modified accordingly. Success on this minor point, however, should not affect the matter of the costs in this appeal. Subject as above, the appeal should be dismissed with costs.

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

MIGNAULT J.—So far as the respondent's action in the Supreme Court of Ontario is based on the judgment he obtained in the Supreme Court of Saskatchewan against the appellant, I think the latter, not having appealed from the judgment, is not entitled to set up that this judgment went beyond the consent she had given to the motion of the respondent for judgment and the particulars of the judgment to be rendered mentioned therein. The judgment as rendered stands against the appellant and is binding on her, and she cannot attack it upon the ground for which I was of opinion that the master's order

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in the case of *Sayre* v. *Security Trust Company* (1) should be set aside as containing contradictory and irreconcilable provisions.

It is, therefore, conclusively determined against the appellant that the respondent could bid at the sale ordered by the judgment, and that if he became the purchaser the registrar should issue to him a certificate of title

free from all right, title and equity of redemption on the part of the defendants or either of them.

The respondent also holds a personal judgment against the appellant and her co-defendant for $4,563.52, with interest and costs to be taxed, and the sale was ordered in the event of the defendants failing, as they did, to pay into court the amount of the personal judgment against them, the proceeds of the sale to be applied in satisfaction of this judgment. No matter who became the purchaser at the sale so ordered, the respondent remained a judgment creditor of the appellant and her co-defendant for the balance outstanding of the judgment after deducting the proceeds of the sale.

The doubt I felt upon my first consideration of the case was whether the respondent, having, after the judgment and the sale ordered by it, suffered the property to be sold at the suit of the first mortgagee, could now recover from the appellant the balance outstanding of his personal judgment against her, not being in a position to reconvey the property on which he held a vendor's lien on payment of the balance due him. But there again it is conclusively determined against the appellant that the title of the purchaser at the judicial sale is to be free from all right, title and equity of redemption on the part of the appellant. In other words, by the effect of the judgment from which she has not appealed, the appellant loses her right of redemption and remains personally liable for the balance of the personal judgment against her. Upon this ground my opinion is that in an action in Ontario upon the Saskatchewan judgment, which I consider a final judgment, it is not open to the appellant to raise this objection, assuming that it could be urged in the case of a vendor's lien. Of course, it is unnecessary and would

(1) [1920] 61 Can. S.C.R. 109.

not be proper to express any opinion upon the merits of such a judgment, but I must not be taken as departing from the view I expressed in *Sayre* v. *Security Trust Co.* (1), where the merits of a somewhat similar judgment were in question.

Having said this, I may perhaps express my general concurrence in the judgment of my brother Duff which I have had the advantage of fully considering and which, I take it, is based upon the conclusiveness of the Saskatchewan judgment.

Appeal dismissed with costs.

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitors for the respondent: *Thompson & Proudlove.*

(1) 61 Can. S.C.R. 109.

1923
*Oct. 10.
*Oct. 22.

ARMAND BOISSEAU .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Reserved case—Insufficiency of the stated case—Authority to order copy of evidence—Arts. 1017, 1024 Cr.C.

By virtue of the combined effect of sections 1017 and 1024 of the Criminal Code, the Supreme Court of Canada, when it deems it necessary, may require the trial judge to supplement the material submitted by him as a reserved case stated pursuant to an order of the court of appeal, by furnishing a copy of such parts of the evidence at the trial as are material to the disposition of the questions directed to be submitted.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellant and dismissing the application made by him for a new trial on a stated case.

Laflamme K.C. and *Bazin K.C.* for the appellant.

Bertrand and *Fontaine* for the respondent.

THE CHIEF JUSTICE (for the court).—The accused was convicted on the 2nd December, 1922, of an offence under s. 477 of the Criminal Code by the Court of the Sessions of the Peace of the District of St. Hyacinthe; and the judge of that court having dismissed the application of the accused to have questions of law reserved for the consideration of the Court of King's Bench, an order was made by that court giving leave to appeal and directing the judge to state a case for the consideration of this court; and to reserve for the decisions of this court the following questions of law:

1. Did the indictment upon which the accused was arraigned, tried and convicted in this case disclose the commission of a criminal offence?

2. Was the said promissory note a false document as described by the code, article 335?

3. Was the said promissory note a forged document, as required by article 466 of the code?

4. Was the said promissory note a document such as described by article 477 of the Criminal Code?

5. Is there entire absence of proof of any intention to defraud on the part of the accused when signing and uttering the said document?

6. Was the evidence made by the Crown relating to the said note of $3,500 dated 2nd June, 1921, payable to Dame Euphémie Gauthier Reeves, to the promissory note of $1,500 dated 2nd November, 1921, pay-

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

able to H. Ernest Benoit, to the promissory note of $4,000 dated 12th November, 1921, payable to Alexander Choinière and to the note of $2,500 payable to one Pothier admissible in evidence? and that the said stated case be in due course transmitted to the clerk of the court with the record.

A document was accordingly forwarded by the judge of the Court of the Sessions of the Peace to the Court of King's Bench, which was treated by the latter court as being a stated case within the meaning of this order. Apparently the notes taken by the judge at the trial, if any, were not sent to the Court of King's Bench, nor was that court furnished with a shorthand note of the evidence.

In the opinion of the majority of the court the facts stated in the case as framed by the learned trial judge are not of such a character as to make it possible to answer question 5 in the negative, and in the absence of a complete statement of the material evidence it is obviously impossible to answer it in the affirmative. In respect of this question there was a dissenting judgment in the Court of King's Bench.

The order of the Court of King's Bench seems to have contemplated a stated case which should in itself contain a full account of the evidence given material to that question or that the Court of King's Bench should be put in possession of a note of the evidence taken at the trial. In these circumstances, in order that this court may be in possession of the information necessary to enable it to give an affirmative or a negative answer to the question, the proper course seems to be to direct that the judge of the Court of the Sessions of the Peace furnish to this court a copy of such parts of the evidence given at the trial as may be material.

By the combined effect of subsections 1017 and 1024 of the Criminal Code this court seems to have authority to make such an order.

1923
*Oct. 17.
*Nov. 5.

CANADIAN NATIONAL RAILWAYS (DEFENDANTS) ..... } APPELLANT;

AND

JOSEPH CLARK (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Railways—Level crossing—Automobile struck by train—Statutory warnings not given—Driver not looking more carefully—Contributory negligence.

Respondent's automobile was struck by appellant's train at a railway crossing. The statutory signals (ringing bell and blowing whistle) were not given. Owing to bluffs and shrubbery intercepting his view, the respondent was unable to see down the railway in the direction of the approaching train until he had reached the right-of-way. The respondent had listened for the whistle and looked for smoke. When he reached the right-of-way, he took a hurried glance along the track which did not disclose any danger. He then gave his attention to his automobile as it went up a grade towards the track and did not again look along the track until too late to avoid the accident. In an action for damages, the jury negatived contributory negligence on the part of respondent and he recovered damages.

Held, Davies C.J. dissenting, that the respondent's failure under the existing circumstances to make a more careful and complete observation, which would have disclosed the approaching train, did not so incontrovertibly amount to contributory negligence that no jury could reasonably find otherwise.

Wabash Railway Co. v. *Misener* (38 Can. S.C.R. 94), *Booth* v. *Ottawa Electric Railway* (63 Can. S.C.R. 444) and *Dublin, Wicklow & Wexford Ry.* v. *Slattery* (3 App. Cas. 1155) ref.—*Canadian Pacific Ry. Co.* v. *Smith* (62 Can. S.C.R. 134) distinguished.

Judgment of the Court of Appeal for Saskatchewan ([1923] 1 W.W.R. 1419) affirmed, Davies C.J. dissenting.

APPEAL from a decision of the Court of Appeal for Saskatchewan (1), affirming the judgment of the trial judge and maintaining the respondent's action.

The material facts are fully stated in the above headnote and in the judgments now reported.

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

Eug. Lafleur K.C. and *G. H. Yule* for the respondent.

THE CHIEF JUSTICE (dissenting).—At the close of the argument in this appeal I was of the opinion that it should be allowed on the ground of the contributory negligence of the respondent in not looking, after he had emerged from

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

(1) [1923] 1 W.W.R. 1419.

the shrubs and other obstructions which had impeded his view, to see if a train was approaching before he attempted to cross the level railway crossing. Had he looked when he did get an unobstructed view of the track he could not have failed to see the approaching train in time to avoid an accident. I have tried, but have failed, to excuse his neglect to look because he had not heard the statutory warnings. I cannot bring myself to doubt that had he looked, as the law obliges, before going on to the crossing, he could not and would not have failed to see the approaching train.

It is of the greatest public importance that this court should not fritter away the duty that is incumbent on all those who attempt to cross level railway crossings to look and listen before crossing to satisfy themselves that no train is approaching. This duty to look and listen before crossing is not abrogated because of a failure to hear the statutory warnings while approaching the crossing, or by the fact that the statutory warnings of ringing the bell or blowing the whistle were not given.

It may not be our law in Canada, as it is in some of the United States of America, that before crossing a level railway crossing there is a duty to "stop, look and listen," but it is law in Canada requiring alike to "look and listen" before attempting to cross such a crossing. Listening alone is not sufficient, particularly when looking is at the same time possible. To fail to look is to my mind such a breach of an obvious and necessary duty that it cannot be excused because there is or chances to be a concomitant breach of duty on the parts of the servants of a railway to give the statutory warnings.

Here the plaintiff before coming on to the crossing was driving his motor amongst shrubs and other obstructions which did not give him a clear view of the track. Whilst he was amongst these obstructions he did not hear the statutory warnings and so presumed that no train was approaching and that there was no duty on his part to look before crossing. In fact he says

I cannot say what I did, I merely glanced down.

I take this to mean that he did not look with such care as

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The Chief Justice.

he should have, because if he had he could and would certainly have seen the approaching train.

It has been alleged that he had only a few seconds in which to see the train when he did get clear of the obstructions. This in my opinion is no ground of excuse for not looking. He had plenty of time to look after he emerged into the open, but negligently considered that because he had not already heard the statutory warnings no train was approaching and it was not necessary for him to look. Whereas when he did get into the open he would certainly have seen the train had he looked—the train then being about 50 feet from the crossing.

In my opinion this appeal should be allowed on the ground of the contributory negligence of the respondent, but for which the accident would not have happened.

IDINGTON J.—For the reasons assigned by the learned judges in the court below I think this appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs. The evidence of the respondent, if accepted, affords a sufficient ground for a verdict within the principle of the observations both of Lord Cairns and of Lord Penzance in *Dublin, Wicklow & Wexford Ry.* v. *Slattery* (1).

ANGLIN J.—Accepting the jury's finding that the plaintiff's injuries were ascribable to the omission by their servants to give the statutory crossing signals, the defendants appeal from the unanimous judgment of the Court of Appeal of Saskatchewan holding them liable, contending that contributory negligence on the part of the plaintiff is so clearly established by his own evidence that no jury could have reasonably found otherwise. and that the case should therefore have been withdrawn by the learned trial judge and the action dismissed. Failure to look with reasonable care for an approaching train before crossing the railway is the fault charged against the plaintiff.

Owing to bluffs and shrubbery intercepting his view, the plaintiff was unable to see down the railway tracks in the direction of the approaching train until he had reached the

(1) 3 App. Cas. 1155.

right-of-way—at a distance of about 50 feet from the tracks. He testified that because of these conditions he listened with great care for bell and whistle signals but heard none and looked for smoke but saw none. Being thus more or less lulled into a sense of security, he did not, when he reached the right-of-way, look down the track as carefully as he would otherwise have done, contenting himself with a hurried glance, which did not disclose the danger, and then fixing his attention upon guiding his automobile over the crossing, approaching which the highway is only 9 feet or 10 feet wide and is flanked by ditches running along the railway and about 7 feet in depth. Can it be said that his failure under these circumstances to make a more careful and complete observation, which would have disclosed the approaching train, so incontrovertibly amounted to contributory negligence that no jury could reasonably find otherwise or could hold that he was excused from doing more than taking the hurried glance he did, which served to confirm the impression already created by the omission of the statutory signals and his failure to see any smoke when approaching the railway, that no train was coming? The four learned judges who constituted the Court of Appeal have already answered this question in the negative. Were they so manifestly in error that we should reverse their judgment? I think not. I regard the following observations of Lord Herschell in *Peart* v. *The Grand Trunk Ry.* (1), as most apposite:

> Then, on the other hand, it is to be remembered that, although the deceased knew perfectly well there was a crossing, and knew that some train might be coming along there, he also knew that if a train was coming, and if the duty of the company was performed there must have been from Lossings crossing and those other crossings a continuous whistling which he could not fail to hear, and that might, as the learned judge pointed out to the jury it was a fair thing for them to consider, deprive him of all suspicion that a train could be coming. Their lordships do not say that the evidence was conclusive at all to show that the deceased was not guilty of contributory negligence, but it shows that it was a fair and proper case for the jury to consider whether or not he was guilty of contributory negligence.

The case at bar appears to me to fall within the principles underlying the decisions of this court in *Wabash*

(1) 10 Ont. L.R. 753 at p. 757.

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Anglin J.

Railway Company v. *Misener* (1), and *Ottawa Electric Railway* v. *Booth* (2), and of the House of Lords in *Slattery's Case* (3), and is readily distinguishable from *The Canadian Pacific Ry. Co.* v. *Smith* (4), where the plaintiff had failed to take any precautions and in the view of the majority in this court there were no circumstances upon which a jury could have found that neglect excusable.

The damages awarded, while possibly too large, cannot be said to be so excessive as to shock the conscience of the court.

MIGNAULT J.—Judgment was rendered in this case in favour of the respondent for $11,483.25 on the verdict of a jury, and this judgment was unanimously affirmed by the Court of Appeal for Saskatchewan. The appellant brings the case to this court on practically two grounds:

1. That there was no evidence on which the jury could find that the plaintiff was not guilty of contributory negligence in not looking down the railway line to see whether a train was coming, before he attempted to cross the track. 2. That the amount of damages granted by the jury was excessive. No criticism is made of the charge to the jury of the trial judge.

The facts of the accident may be stated in the language of Mr. Justice Turgeon of the Court of Appeal:

> The accident occurred through the collision of the appellant's train and the respondent's automobile on a level crossing at the intersection of the railway line with a public highway. The company's servants were negligent in not ringing the bell and blowing the whistle as required by "The Railway Act," 1919, ch. 68. The respondent, who was driving the automobile accompanied by one Birkett, says that he was proceeding eastward towards the track at a speed of about 10 or 12 miles an hour. He knew that the train (a regular passenger train) was due to pass at about the time in question, and while still some distance away from the track he kept a lookout for smoke and listened for the whistle, but neither saw nor heard anything. His view of the track towards the south, from which direction the train was coming, was obscured by trees until the right-of-way was reached, 50 feet from the track. On arriving at this right-of-way he glanced down the track, but did not see the train. He then gave his attention to his automobile and continued towards the track. Just before reaching the rails he looked again, and this time he saw the train, as he says, "practically on top" of him. In the emergency

(1) 38 S.C.R. 94.
(2) 63 S.C.R. 444.
(3) App. Cas. 1155.
(4) 62 Can. S.C.R. 134.

he tried to speed up his car so as to clear the track, but this attempt failed. The collision occurred, his automobile was wrecked and he himself was severely injured. He admits that he would likely have seen the train in time to avoid the accident if he had looked more carefully, and that if he had seen the train from the entrance to the right-of-way he could have stopped his automobile in time. But he says he felt sure there was no train coming, because he had listened for the signal and had not heard it.

The jury, in answer to questions put to them, found that the plaintiff was injured by the negligence of the defendant, such negligence consisting in that the defendant had failed to blow the whistle and ring the bell, and that no negligence of the plaintiff had contributed to the accident. The damages were assessed at $1,483.25 as special damages and at $10,000 for general damages.

The rule which has frequently been applied in cases of this character is that a person in the position of the plaintiff is bound to exercise reasonable care, having due regard to all the circumstances of the case. Whether he has or has not done so is a question for the jury, properly instructed, to decide, and an appellate court will not interfere with their finding if there was evidence on which it could reasonably be based.

The case under consideration is very close to the line as will be apparent when it is compared to the recent decision of this court in *Canadian Pacific Ry. Co.* v. *Smith* (1), strongly relied on by the appellant.

In that case, a majority of the court held that the trial judge was justified in withdrawing the case from the jury at the close of the plaintiff's evidence and dismissing the action.

The facts were that Smith had driven his car for half a mile in full view of the defendant's railway where a train was then approaching the highway crossing, and the testimony of persons driving an automobile immediately behind Smith's car was that they had seen the approaching train during the whole of the time occupied in traversing this half mile stretch of the highway. The engine did not whistle until it gave two short blasts immediately before the accident, nor did the bell ring. Smith stated that he could not remember turning his head and looking to see

(1) 62 Can. S.C.R. 134.

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Mignault J.

whether a train was coming, although he thought he had looked because he always did so. Under these circumstances and because, in my opinion, no jury could reasonably find in favour of the plaintiff, I concurred in the judgment allowing the appeal from the Court of Appeal which had ordered a new trial.

The statement of the facts of this case above quoted shows that the respondent, when approaching the railway, knew that a train, a regular passenger train, was due to pass at about the time in question, and while still some distance from the track he kept a lookout for smoke and listened for the whistle, but neither saw nor heard anything. Until he reached the right-of-way, fifty feet from the track, his view in the direction whence the train was coming was obstructed by trees. On arriving at the right-of-way he glanced down the track, but did not see the train, and then he gave his attention to his car, for the roadway was rather narrow and the railway ditches were on either side. He admitted that had he looked more carefully on reaching the right-of-way he would likely have seen the train in time to prevent the accident, but he added that he felt sure there was no train coming because he had listened for the signals and had not heard any.

There is a difference between the two cases in that Smith for a full half mile had a clear view of the track and could have seen the train, as the people in the car behind him saw it, had he looked, and the inference was irresistible that he did not look. Here the plaintiff could not see the train until he reached a point fifty feet from the tracks, but then had he looked carefully he would have seen it. In both cases there was a failure to give the statutory signals and had these signals been given there was room in both cases for the contention that they might have prevented the plaintiff from crossing the tracks. In this case, there is also to be considered the statement of the plaintiff that the absence of signals led him to conclude that no train was coming, lulled him into a sense of security, to use the terms found in many of the cases, and so convinced him that he could cross the track in safety.

I think this statement of the plaintiff, which was evidently believed by the jury, sufficiently distinguishes

this case from the *Smith Case* (1) and permits us to consider whether on the whole evidence the conclusion of the jury that the plaintiff was not guilty of contributory negligence is so unreasonable that it should be disregarded as being perverse. While I do not think I would have acquitted the plaintiff of contributory negligence had I tried the case, the point is that the jury were the sole judges of the facts and I am not in position to say that there was no evidence whatever on which they could reach the conclusion they did.

There is a rather close parity between this case and the decision of this court in *Wabash Railroad Co.* v. *Misener* (2). The circumstances there were even more favourable to a finding of contributory negligence than the facts proved in the case under consideration. And yet this court declined to set aside a judgment of the appellate court which confirmed the judgment of the trial judge giving effect to the verdict.

Perhaps it may not be amiss here to refer to what I said in *Grand Trunk Pacific Co.* v. *Earl* (3), as to the doctrine of common fault which prevails in the province of Quebec. In my judgment, the facts of the present case would furnish a typical case for the application of such a doctrine, were it in force in Saskatchewan. But this is of course beside the question we have to consider.

The practice of this court is against interfering with the quantum of damages which, although undoubtedly large in this case, is not so unreasonable that it cannot be upheld.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Borland & McIntyre.*
Solicitors for the respondent: *G. H. Yule.*

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(1) 62 Can. S.C.R. 134. (2) 38 Can. S.C.R. 94.
(3) [1923] S.C.R. 397, at p. 408.

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accident is to be in lieu of any action against an employer and the Compensation Board has exclusive jurisdiction to determine all matters arising under the part of the Act containing such provision.]—*Held*, Duff J. dissenting, that where such an action is brought the court is free, if not obliged, *proprio motu* if want of jurisdiction is not pleaded, to take cognizance of the provisions of the Act and stay the proceeding until the right to maintain it is determined by the board.—*Per* Duff J. The question whether or not the plaintiff can maintain his action must be raised by way of defence or exception. If the defendant does not plead it or does not ask for a stay he is bound by the judgment given.—The court in an action by a workman will not take cognizance of a decision of the board that the plaintiff's injury did not result from "accident" and did not entitle him to compensation under the Act when such decision is given on an *ex parte* application in the ordinary course and not under sec. 15. Evidence of such decision, if admitted, would not be conclusive. Idington and Duff JJ. *contra.*—Where in such an action the defendant submits to the trial judge the question of the right to maintain it and does so in the belief that the court has jurisdiction to deal with such question the decision of the trial judge is not that of a quasi-arbitrator and so non-appealable as it would be if the issue was submitted with knowledge of the lack of jurisdiction and the parties assent to the judge acting virtually as an arbitrator. DOMINION CANNERS *v.* COSTANZA..... **46**

2——*Action to set aside judgment—Statement of claim—Allegation of perjury—New evidence.*] In an ac ion to set aside a judgment obtained in the same court, the statement of claim merely alleged that the judgment "was obtained by the false and untrue statements made by the defendant" on material matters of fact at the former trial. In dismissing the action, the trial judge said "that to hear evidence would only leave me in the position that the judge was in when he tried the first action." Counsel for the appellant in this court declined to give any assurance, or even to state, that any evidence materially different from that given at the original trial would or could be adduced. The trial judge dismissed the action and the Appellate Division affirmed his judgment.]—*Held* Duff J. dissenting, that a new trial should be refused.—*Per* Davies C.J. and Anglin J. The dismissal of the action may be regarded as equivalent in effect to an order perpetually staying it as frivolous and vexatious and an abuse of the process of the court, which under the circumstances, should not be interfered with.—*Per* Idington and Brodeur JJ. The statement of claim does not sufficiently disclose a cause of action. Duff J. *contra.*—*Per* Idington J. The trial judge rightly refused to rehear substantially the same evidence and to review the judgment rendered upon it at the former trial.—*Per* Idington and Brodeur JJ. The sufficiency of the allegations in a statement of claim is a matter of practice and procedure and the jurisprudence of this court is not to interfere in such matters.—*Per* Duff J. (dissenting). Where the plaintiff's statement of claim sufficiently alleges a cause of action and the plaintiff appears at the trial ready to proceed with his evidence in support of his claim, the trial judge could not properly dismiss the action except upon some admission on behalf of the plaintiff shewing his claim to be unfounded or unenforceable. To dismiss the action as an abuse of the process without hearing the evidence in such circumstances would be unprecedented and contrary to the course of the court. The trial judge did not so proceed but dismissed the action on the ground that the statement of claim shewed no cause of action, and as he erred in this, there should be a new trial.—*Per* Mignault J. When it became evident to the trial judge at the second trial that no other evidence than that offered at the former trial would be tendered he was justified in dismissing the action.—Judgment of the Appellate Division ([1922] 1 W.W.R. 1208) affirmed, Duff J. dissenting. MACDONALD *v.* PIER **107**

3 —— *Contract — Agreement — Breach — Party wall—Narrowing of wall contrary to agreement—Proper remedy—Injunction —Specific performance.*] A party wall agreement between appellant and respondent provided that respondent might build the wall two feet or more in thickness, half on each property, the middle line to coincide with the boundary line. The respondent built a wall the foundation, basement and first story of which were in accordance with the agreement but he narrowed the second story by four inches on his own side of the wall, and the third story by a further four inches, keeping the wall on the outside (appellant's side) perpendicular. After it had been erected for some years and formed a wall of respondent's building, the appellant, alleging he had recently discovered the breach of agreement, sued for a mandatory injunction to compel the respondent to pull down that part of the wall not erected in compliance with the agreement and for specific performance of same.—*Held*, that these facts did not constitute merely a breach

STATUTE—*Continued.*

but one commissioner so elected may superintend work in progress and employ workmen for that purpose." Three commissioners were elected for the parish, one of whom refused to act and another tendered his resignation which was accepted by the third. Work having been done on the marsh lands the single commissioner made a rate for payment of the cost by the several districts. In an action for moneys due in respect to such work.—*Held*, reversing the judgment of the Appeal Division (45 N.B. Rept. 90), Idington and Brodeur JJ. dissenting, that the one commissioner, though constituting the board for other purposes, had no authority to make such rate as he could not be a majority of the commissioners which was necessary under section 18 to do so.]—*Per* Anglin J. It is doubtful that the third commissioner had authority to accept the resignation of his colleague and if not there were two on the board and the rate was not made by a majority. McCLELAN *v.* DOWNEY..... **522**

9 —— *Assessment — Annual income of bank—Validating Act—Appeal.*]—*Held*, per Idington and Brodeur JJ., Anglin J. *contra*, than an Act of the legislature validating assessment roll for 1921 and omitting the provision in former Acts of the kind that it would not apply to pending cases, takes away the bank's right to appeal in this case which was pending when the Act came into force. ROYAL BANK OF CANADA *v.* TOWN OF GLACE BAY..... **524**

10——*Company—Bills and notes—Rural telephone company—Power to make promissory notes—"The Rural Telephone Act," Sask.* 1912-13, *c.* 33, *s.* 43; 1918-19, *c.* 46, *s.* 48; *R.S.S.* 1920, *c.* 96—*"The Companies Act," (Sask.)* 1917, *c.* 34, *s.* 42 (3); *R.S.S.* 1920, *c.* 76, *s.* 14; *R.S.S.* 1922, *c.* 76.] The respondent company was organized under the provisions of the "Rural Telephone Act" and, pursuant to those provisions, was duly registered and incorporated under the Saskatchewan "Companies Act."—*Held*, that the respondent company had no power to make a promissory note under the provisions of the "Rural Telephone Act."—*Held*, also, Idington J. dissenting, that it has no such power under section 14 of the "Companies Act."—*Per* Idington, Brodeur and Mignault JJ. Section 14 applies to the respondent company. Duff J. *contra* Davies C.J. and Anglin J. expressing no opinion, although Anglin J. *semble* in the affirmative.—*Held*, Idington J. dissenting, that, on the assumption that section 14 did apply, there is nothing in it to extend the limited and clearly defined powers of the respondent company

STATUTE—*Continued.*

under "The Rural Telephone Act."—*Per* Davies C.J. and Mignault J. The word "capacities" in the second part of section 14 does not mean "powers."—*Per* Duff J. The effect of section 14 as regards the extraprovincial capacities of companies to which it applies is to establish as a rule of construction the rule laid down by Blackburn J. in the *Ashbury Company's Case* (L.R. 7 H.L. 653) but held by the House of Lords in that case not to be applicable to companies incorporated under "The Companies Act" of 1862, the rule being that companies affected by it have *prima facie* all the capacities of a natural person but subject to all restrictions created expressly or by necessary implication by any statutory enactment by which such companies are governed. Section 14 does not apply to companies incorporated for the purpose of working a rural telephone system under "The Rural Telephone Act," since the memorandum of association of such a company must be read as incorporating the restrictions upon the capacities of such a company to be found in "The Rural Telephone Act" which by necessary implication exclude the operation of section 14 in relation to such companies.—*Per* Anglin J. Under the provisions of "The Rural Telephone Act," the respondent company already possessed for the purposes for which it was incorporated all "actual powers and rights" and the fullest "capacity" which the legislature could bestow. (*Honsberger* v. *Weyburn Townsite Co.*, 59 Can. S.C.R. 281); and section 14 did not add anything to such "capacity."—*Per* Idington J. (dissenting). The corporate powers and capacity of the respondent company rest upon "The Companies Act" entirely, and section 14 impliedly gives to it the capacity and power to make promissory notes.—Judgment of the Court of Appeal ([1922] 2 W.W.R. 1211) affirmed, Idington J. dissenting. CANADIAN BANK OF COMMERCE *v.* CUDWORTH RURAL TELEPHONE CO..... **618**

11——*Construction—Will—Specific devise of land—Effect of subsequent sale—Proceeds falling into residue—"Land Titles Act" (Alta.)* [1906] *c.* 24, *s.* 41—*"An Act respecting the transfer and descent of land," (Alta.)* [1906] *c.* 19, *s.* 2.] Where a testator in his will makes a specific devise of land but subsequently sells same under agreement for sale, the devise is rendered inoperative; the devisee is not entitled to any part of the unpaid purchase money, which falls into residue.—*Per* Davies C J and Idington, Duff, Anglin and Mignault JJ This effect is not altered by the provisions of sect. 2 of c. 19 of "The Transfer and Descent of Land Act," (Alta.) [1906] which assimilate the