REPORTS

OF THE

SUPREME COURT

OF

CANADA.

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1905.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Henri Elzéar Taschereau, Knight, C. J.

The Hon. Robert Sedgewick J.

" Désiré Girouard J.

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

" Wallace Nesbitt J.

" Albert Clements Killam J.

" John Idington J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Fitzpatrick, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Rodolphe Lemieux, K.C.

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 34 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Coote v. *Borland* (35 Can. S. C. R. 282). Leave to appeal to Privy Council refused with costs; 5th July, 1905.

Dominion Cartridge Co. v. *McArthur* (31 Can. S. C. R. 392). Appeal allowed with costs; judgment of the Supreme Court of Canada reversed and judment of the Court of King's Bench restored; 11th Nov. 1904; ([1905] A. C. 72.).

Ewing v. *Dominion Bank* (35 Can. S. C. R. 133). Leave to appeal to the Privy Council refused with costs; 26th July, 1904; ([1904] A. C. 806).

Gaynor and Green v. *The United States of America* (36 Can. S. C. R. 247). Petition for leave to appeal to the Privy Council abandoned; application dismissed with costs; 26th July, 1905.

Imperial Book Co. v. *Black* (35 Can. S. C. R. 488). Leave to appeal to Privy Council refused with costs; 24th May, 1905.

The King v. *The "Kitty D"* (34 Can. S. C. R. 673) Leave granted for appeal to the Privy Council; 8th Feb. 1905; (xliv Can. Gaz. 472).

Kirkpatrick v. *McNamee* (36 Can. S. C. R. 152). Leave to appeal to the Privy Council refused; 4th Aug. 1905.

Liscombe Falls Gold Mining Co. v. *Bishop* (35 Can. S. C. R 539). Leave to appeal to Privy Council refused; 17th May, 1905.

McNeil v. *Cullen* (35 Can. S. C. R. 510). Leave to appeal to Privy Council refused; 18th July, 1905.

Montreal, City of v. *Cantin* (35 Can. S. C. R. 223). Leave to appeal to the Privy Council granted; 26th July, 1905.

Sunday Observance Legislation, Reference in re, (35 Can. S. C. R. 581). Leave to appeal to Privy Council refused; 26th July, 1905.

Williams v. *The Grand Trunk Railway Co.* (36 Can. S. C. R. 321). Leave to appeal to the Privy Council refused; 2nd Aug. 1905.

MEMORANDA.

On the sixth day of February, 1905, the Honourable Albert Clements Killam, one the Puisné Judges of the Supreme Court of Canada, resigned that office upon appointment as Chief Commissioner of the Board of Railway Commissioners for Canada.

On the tenth day of February, 1905, the Honourable John Idington, of the City of Toronto, in the Province of Ontario, one of the Justices of the High Court of Justice for Ontario, was appointed a Puisné Judge of the Supreme Court of Canada in the room and stead of the Honourable Albert Clements Killam resigned.

ERRATA AND ADDENDA.

Errors and omissions in cases cited, have been corrected in the table of cases cited.

Page 49, add foot-note reference to report in court below, as follows ,—" (1) Q. R. 13 K. B. 256."

Page 98, add foot-note reference to report in court below, as follows ; " (1) 37 N. S. Rep. 1."

Pages 206 and 207. In side-notes for "Rousseau' read "Brosseau".

Page 256, add foot-note reference to report in court below, as follows ;—" (*a*) Q. R. 13 K. B. 448."

Page 284, line 28, for "*falso*" read "*falsa*".

Page 298, line 3, for " casual " read " causal ".

Page 337, line 5, from bottom, for " (8) " read " (7) ".

Page 494, add foot-note reference to report in court below, as follows ;—" (1) 37 N. S. Rep. 115 ".

Page 527, line 27, for " 160 " read " 163 ".

Page 701, in second side-note, for " 1905 " read " 1904 ".

Pages 702-704, in side-notes, for " 1905 " read " 1904 ".

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OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

GONZALVE DESAULNIERS *et al* (OPPOSANTS) ..... } APPELLANTS;

AND

LOUIS PAYETTE *et al* (PLAINTIFFS)...RESPONDENTS.

AND

LA COMPAGNIE DE L'OPÉRA COMIQUE DE MONTRÉAL... } DEFENDANTS.

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*May 5, 6.

*May 16.

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

Opposition afin de charge—Order for security—Interlocutory judgment—Res judicata—Subsequent final order—Revision of merits on appeal—Practice.

An order requiring opposants *afin de charge* to furnish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor was held to be interlocutory and non-appealable (33 Can. S.C.R. 340). Subsequently, upon default to furnish such security, the

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* PRESENT :—Sir Elzear Taschereau C.J. and Sedgewick, Girouard Davies and Nesbitt JJ.

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opposition was dismissed. On appeal from the judgment of the Court of King's Bench affirming the order for the dismissal of the opposition ;—

Held, that, under the circumstances, the order dismissing the opposition was the only one which could be properly made, and that the merits of the former order could not be reviewed on appeal from the final judgment.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming an order of the Superior Court, District of Montreal, dismissing the appellants opposition with costs.

The appellants filed an opposition *afin de charge* to the seizure and sale of the property of the defendant under execution at the instance of the respondents and, upon such opposition, an order was made (1) requiring the opposants to furnish security that the lands seized, if sold by the sheriff subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On an appeal, it was held that this order was merely an interlocutory proceeding and not appealable to the Supreme Court of Canada (2). The opposants failed to furnish the necessary security and, upon the plaintiff's motion, the Superior Court, consequently, dismissed the opposition with costs. The Court of King's Bench, appeal side, affirmed the dismissal of the opposition and the opposants sought an appeal to the Supreme Court of Canada upon the merits of both orders.

Macmaster K.C. and *Lemieux K.C.* for the appellants (*Desaulniers K.C.* with them). The proceedings were irregular and to the prejudice of the opposants. The provisions of the Code of Civil Procedure were disregarded or misapplied in such a manner as to deprive the opposants of their right to have the lands sold subject to their lease-charge. There should have been

(1) Q. R. 12 K. B. 445. (2) 33 Can. S. C. R. 340.

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an adjudication upon the validity of the charge before imposing, upon the opposants, the duty of furnishing security. Arts. 724,726 C. P. Q.; art. 2073 C. C.; *Bastien* v. *Desjardins* (1) per Lacoste C.J. The proper procedure would have been according to the provisions of arts. 644 *et seq.*, 731 and 732 C. P. Q. and arts 1663 and 2128 C. C. We refer to *Lachaine* v. *Desjardins* (2); per Mathieu J.; *North British & Mercantile Ins. Co.* v. *Marsan dit Lapierre* (3) per Davidson J.; arts. 716 to 726 C. P. Q. and arts. 2058 and 2065 C. C.

Angers K.C. and *DeLormier K.C.* for the respondents. The opposants had both actual and constructive notice of our priority of registration and have suffered no wrong. The present appeal can be asserted only from the last judgment. The interlocutory order became *chose jugée* and it is impossible, now, to raise objections to it. 2 Boncet, des Jugements, 151; *Toussignant* v. *County of Nicolet* (4); *North British & Mercantile Insurance Co.* v. *Marsan dit Lapierre* (3).

Art. 726 C. P. Q. does not apply to this proceeding; it is ruled by arts. 3 and 651 C. P. Q. On matters of procedure the decisions of the provincial courts ought not to be disturbed. The charge could not be admitted and security asked for at the same time.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This appeal must, in my opinion, be dismissed.

The judgment of 30th September, 1902, ordering the appellants to give security, having been affirmed by the Court of Appeal, the Superior Court, upon the appellants' faillure to give the security so ordered, when the case came up *de novo* upon the respondents'

(1) Q. R. 11 K. B. 428.
(2) 11 Q. P. R. 15.
(3) 1 Q. P. R. 30.
(4) 32 Can. S. C. R. 353.

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motion to consequently dismiss the appellants' opposition, was bound to grant the said motion as it did on the 19th of May, 1903. And, likewise, when the case came up again before the Court of Appeal, that court could not but hold, as it did by the judgment now appealed from, that the Superior Court had committed no error when it had simply acted in accordance with the judgment rendered upon the first appeal.

Now, if the Court of Appeal has rendered the judgment that it had in law to give, the appellants' attempt to shew error in that judgment necessarily fails, and if there is no error in it they cannot expect us to reverse it. They seem to be under the impression that, because the first judgment ordering them to give security, was not appealable to this court, *Desaulniers* v. *Payette* (1), they can now ask us, upon this appeal from the last judgment, to review that first judgment. But that cannot be. As we have often said, an interlocutory judgment that cannot be appealed from is *res judicata*. But it is not merely because a judgment is *res judicata* that it is appealable, as the appellants would contend.

The policy of the statute is, as a general rule, to allow but one appeal in each case, and that only from the final judgment (2). The rules of the Code of Civil procedure, upon appeals from the Superior Court to the Court of King's Bench, have no application to appeals from the Court of King's Bench to this court. The judgment in this case ordering security to be given was not a final judgment and we could not entertain that appeal therefrom that was brought by the appellants. The last one, now appealed from, dismissing appellants' opposition upon their refusal to give such security, is a final judgment and we have jurisdiction over this appeal therefrom, but we must

(1) 33 Can. S. C. R. 340. (2) R. S. C. c. 135, s. 24*e*.

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dismiss the appeal because the judgment is the only one that the court *a quo* could, in law, possibly give. *Shaw* v. *St. Louis* (1). *The Ontario and Quebec Railway Co.* v. *Marcheterre* (2).

Appeal dismissed with costs.

Solicitor for the appellants: *Gonzalve Desaulniers.*

Solicitors for the respondents: *DeLorimier & Godin.*

1904

*May 6.
*May 16.

LOUIS G. LAPOINTE (PLAINTIFF)...APPELLANT;

AND

THE MONTREAL POLICE BENEVOLENT AND PENSION SOCIETY (DEFENDANTS).....RESPONDENTS.

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

Appeal—Jurisdiction—Life pension—Amount in controversy—Actuaries tables.

The action was for $62.50, the first monthly instalment of a life pension, at the rate $750 per annum claimed by the plaintiff, for a declaration that he was entitled to such annual pension from the society, payable by equal monthly instalments of $62.50 each, during the remainder of his life, and for a condemnation against the society for such payment during his lifetime. On a motion to quash the appeal, the appellant filed affidavits shewing that, according to the mortality tables, used by assurance actuaries, upon the plaintiff's average expectation of life, the cost of an annuity equal to the pension claimed would be over $7,000.

Held, following *Rodier* v. *Lapierre* (21 Can. S. C. R. 69); *Macdonald* v. *Galivan* (28 Can. S. C. R. 258;) *La Banque du Peuple* v. *Trottier*

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 8 Can. S. C. R. 385. (2) 17 Can. S. C. R. 141.

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LAPOINTE v. MONTREAL POLICE BENEVOLENT AND PENSION SOCIETY.

(28 Can. S. C. R. 422) ; *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) and *Talbot* v. *Guilmartin* (30 Can. S. C. R. 482), that the only amount in controversy was the amount of the first monthly instalment of $62.50 demanded, and consequently, that the Supreme Court of Canada had no jurisdiction to hear the appeal.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The circumstances under which the appeal was sought by the plaintiff and the questions raised on the motion are stated by His Lordship the Chief Justice in the judgment now reported.

Belcourt K. C. for the motion.

Beaudin K. C. contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The motion to quash this appeal for want of jurisdiction must be allowed.

The appeal is by the plaintiff from a judgment of the Court of King's Bench dismissing his action by which he claimed from the society, respondent, a life pension of seven hundred and fifty dollars per annum, payable at the rate of sixty-two dollars and fifty cents per month. His statement alleges, in substance, that as a member of the Montreal Police Force he has been a member of the respondent benefit society since its incorporation until the thirty-first of March, 1902; that his resignation was accepted to date from the first of April, 1902; that he has paid his contributions up to the thirty-first of March, 1902 ; that, according to the by-laws and rules of the society, he then became entitled to a life pension of sixty-two dollars and fifty cents per month, but that the society refused to admit his claim and to inscribe him on its list of pensioners. His conclusions are :

Pourquoi le demandeur conclut à ce que la défenderesse soit condamnée à payer au demandeur la somme de soixante-deux piastres et cinquante cents pour la pension due du premier avril au trente avril, (1902) ; à ce que par le jugement à intervenir il soit de plus déclaré que le demandeur à le droit d'être reconnu comme pensionnaire de la défenderesse et d'être inscrit sur la liste des dits pensionnaires aux termes de l'article 33 des règlements, comme ayant droit sa vie durant à une somme de $62.50 ; et à ce qu'ordre soit donné à la défenderesse d'inscrire le dit démandeur sur la dite liste sous toutes peines que de droit ; à ce que par le jugement à intervenir, la défenderesse soit de plus condamnée à payer au dit demandeur la dite somme de $62.50 durant la vie du demandeur, et ce au fur et à mesure que la dite pension deviendra échue ; le premier paiement devant se faire le premier juin prochain et ainsi continuer de mois en mois durant la vie du dit demandeur.

Under the authority of *Rodier* v. *Lapierre* (1) ; *Macdonald* v. *Galivan* (2) ; *La Banque du Peuple* v. *Trottier* (3) ; *O'Dell* v. *Gregory* (4) ; *Talbot* v. *Guilmartin* (5) ; and numerous other cases in the same sense, the case is clearly not appealable.

Mr. Beaudin, in support of the right to appeal, whilst conceding that, under the authorities, he could not invoke the future rights of the appellant, yet contended that the case is appealable upon the ground that the matter in controversy exceeds two thousand dollars in value, the conclusions of the action, as he argued, asking that the appellant be inscribed on the respondents' list of pensioners and the assurance companies' mortality tables shewing that, at his age, as appears by affidavits produced, the cost of an annuity equal to what would be his pension would be over seven thousand dollars. But that contention cannot prevail. The assurance tables are not guides for us in the matter of ascertaining the pecuniary value of the demand. That value is a contingent one depending

(1) 21 Can. S. C. R. 69.
(2) 28 Can. S. C. R. 258.
(3) 28 Can. S. C. R. 422.
(4) 24 Can. S. C. R. 661.
(5) 30 Can. S. C. R. 482.

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The Chief Justice.

upon his life and has not the certainty required to give us jurisdiction.

The motion to quash is granted and the appeal is quashed with costs as if quashed on motion *in limine*.

Appeal quashed with costs.

Solicitors for the appellant: *Beaudin, Cardinal, Loranger & St. Germain.*

Solicitors for the respondents: *Leblanc & Brossard.*

1904

*May 6.

*May 16.

OVIDE DUFRESNE AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

THOMAS E. FEE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Appeal—Jurisdiction—Amount in controversy on appeal—Retraxit.

The judgment appealed from condemned the defendants to pay $775.40, balance of the amount demanded less $1,524.60 which had been realized on a conservatory sale of a cargo of lumber made by consent of the parties pending the suit and for which credit was given to the defendants.

Held, that as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, there was jurisdiction in the Supreme Court of Canada to entertain an appeal. *Joyce* v. *Hart* (1 Can. S. C. R. 321); *Levi* v. *Reed* (6 Can. S. C. R. 482); *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59), and *Kunkel* v. *Brown* (99 Fed. Rep. 593) refer-

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red to. *Cowen* v. *Evans* (22 Can. S. C. R. 328); *Cowen* v. *Evans*; *Mitchell* v. *Trenholme*; *Mills* v. *Limoges*; *Montreal Street Railway Co.* v. *Carrière* (22 Can. S. C. R. 331, 333, 334 and 335, *note*); *Lachance* v. *Société de Prêt et des Placements* (26 Can. S. C. R. 200), and *Beauchemin* v. *Armstrong* (34 Can. S. C. R. 285) distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action for a balance of $775.40, after deduction, from the amount of the *demande*, of $1,524.60 which had been realised upon a conservatory sale pending suit.

The action was for $2,300, the price of a cargo of lumber shipped by the plaintiffs to the defendants and delivered at the St. Gabriel Lock, in Montreal, on barges, but which the defendants refused to receive under their contract. After the action had been instituted, by the consent of the parties and to save expense, the plaintiffs sold the lumber in dispute for $1,524.60 and gave credit for that amount on account of the sum claimed by the action. The Superior Court dismissed the action with costs, but, on appeal by the plaintiffs, that decision was reversed by the judgment now appealed from and judgment was ordered to be entered in favour of the plaintiffs, after deduction of the $1,524.60, for the balance of the amount claimed with costs.

Buchan K.C. for the motion. The amount remitted for cash received on the conservatory sale constituted a retraxit leaving only the balance of the original demand in controversy between the parties, a sum less than that required to give this court jurisdiction to hear an appeal. *Lachance* v. *La Société de Prêts et de Placements* (1); *Cowen* v. *Evans* (2); *Beauchemin* v.

(1) 26 Can. S. C. R. 200.

(2) 22 Can S. C. R. 328.

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Armstrong (1). The circumstances take this case out of the technical rule, because the plaintiffs and defendants acquiesced in the conservatory sale and the credit given and, consequently, the amount of the *demande* was actually reduced before the trial.

Bisaillon K.C. contra. The consent was made "without prejudice to any of the rights of either of the parties" as a conservatory measure; no retraxit was filed; no reduction of the *demande* was effected, and, in the trial court, the plaintiffs' action was dismissed. There is, in effect, no modification of the amount in dispute, no difference between what the plaintiffs demanded by the action originally and what they have recovered. This case is governed by the decisions since the amendment of the Supreme Court Act in 1891, including *Coghlin* v. *La Fonderie de Joliette* (2), and *The Citizens Light and Power Co* v. *The Town of Saint Louis* (3). The cases in point are collected under the heading "Controversy Involved" in Coutlee's Digest, pp. 48 to 69.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is a case where the amount demanded by the declaration and the amount recovered are different. Now, the amount demanded was over $2,000. And the fact that the amount recovered and now in controversy upon the appeal is less than the appealable amount, cannot, under the amendment of 1891 to section 29 of the Supreme Court Act, affect our jurisdiction. *Joyce* v. *Hart* (4); *Levi* v. *Reed* (5); *Laberge* v. *The Equitable Assurance Society* (6); *Kunkil* v. *Brown* (7).

(1) 34 Can. S. C. R. 285.
(2) 34 Can. S. C. R. 153.
(3) 34 Can. S. C. R. 495.
(4) 1 Can. S. C. R. 321.
(5) 6 Can. S. C. R. 482.
(6) 24 Can. S. C. R. 59.
(7) 99 Fed. Rep. 593.

The cases of *Cowen* v. *Evans* (1); *Cowen* v. *Evans*; *Michell* v. *Trenholme*; *Mills* v. *Limoges*; *The Montreal Street Railway Co.* v. *Carrière* (2), relied upon by the respondents, in support of their motion, were governed by the law as it stood before that amendment. In *Lachance* v. *La Société de Prêts et de Placements* (3), the appeal was quashed because the appellants' interest did not amount to $2,000, and it was not a case where there was a difference between the amount claimed and the amount recovered.

The case of *Beauchemin* v. *Armstrong* (4) also invoked by the respondents, is clearly not in point. There, subsection 4 of section 29 did not apply because it was not a case where there was a difference between the amount demanded and the amount recovered, costs not forming part of the amount so as to affect our jurisdiction where the right to appeal is dependent upon the amount in dispute under that subsection.

The motion to quash is dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants: *Bisaillon & Brossard*,

Solicitor for the respondents: *J. S. Buchan.*

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(1) 22 Can. S. C. R. 328.
(2) 22 Can. S. C. R. 331, 333, 334 and 335 (*note*).
(3) 26 Can. S. C. R. 200.
(4) 34 Can. S. C. R. 285.

1904

*May 16.
*May 18.

MICHAEL CONNOLLY (PLAINTIFF)...APPELLANT,

AND

THE BAIE DES CHALEURS RAILWAY COMPANY (DEFENDANTS.)

AND

EDGAR N. ARMSTRONG (INTERVENANT)..... RESPONDENT.

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

Appeal—Jurisdiction—Interlocutory proceeding—Final judgment.

There is no appeal to the Supreme Court of Canada from a judgment on a petition for leave to intervene in a cause, the proceeding being merely interlocutory in its nature. *Hamel* v. *Hamel* (26 Can. S. C. R. 17) followed.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and granting the prayer of the respondent's petition to be allowed to intervene in the cause.

The respondent applied by petition to the Superior Court for leave to intervene in the suit pending between the plaintiff and the defendants for the purpose of protecting certain rights claimed by him which might be affected by the judgment in the principal action. The petition was refused by the Superior Court but, on appeal, this decision was reversed by the Court of King's Bench and an order made permitting the respondent to intervene as prayed in his petition for the purpose of maintaining the rights claimed by him and reserving the question as to costs

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until the final judgment upon the merits of the intervention.

T. Chasé Casgrain K.C. for the motion. The judgment is interlocutory only and does not adjudicate upon the matters in controversy. *Hamel* v. *Hamel* (1).

Perron contra. The new Code of Civil Procedure for the Province of Quebec has amended the law as it existed when the decision in *Hamel* v. *Hamel* (1) was given. Under the present procedure, the judgment now appealed from is a final judgment as to the right to intervene. Compare arts. 154 and 158 of the old Code of Procedure and the provisions of arts. 220 to 224 of the new Code. This intervention is a new proceeding under the new Code. The reasons given in the Court of King's Bench are equivalent to a final judgment on the merits of the intervention. *Shaw* v. *St. Louis* (2); *Baptist* v. *Baptist* (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—All that is demanded by the conclusions of the intervention is the permission to be allowed to intervene. That is, consequently, all that the court could grant and all that the judgment *a quo* does grant, reserving the question of costs till the final judgments on the merits. That is clearly an interlocutory judgment and the appeal must be quashed as prayed for by the motion. *Hamel* v. *Hamel* (1).

Appeal quashed with costs.

Solicitors for the appellant: *Archer, Perron & Taschereau.*

Solicitors for the respondent: *McGibbon, Casgrain, Mitchell & Surveyer.*

(1) 26 Can. S. C. R. 17. (2) 8 Can. S. C. R. 385.
(3) 21 Can. S. C. R. 425.

1904
*May 11.
*May 23.

BENONI GERVAIS AND OTHERS, (DEFENDANTS AND INTERVENANTS). } APPELLANTS ;

AND

MARY JANE McCARTHY, (PLAINTIFF) ..... } RESPONDENT.

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

Principal and agent—Satisfaction and discharge—Payment in advance—Custody of deeds—Notarial profession in Quebec—Art. 3665 *R. S. Q.—Attorney in fact—Implied mandate—Evidence—Parol—Commencement of proof in writing—Art.* 1233 *C. C.—Admissions—Art.* 316 *C. P. Q.—Practice—Adduction of evidence—Objections to testimony—Rule of public order.*

A notary public, in the Province of Quebec, has not any actual or ostensible authority to receive moneys invested for his clients under instruments executed before him and remaining in his custody as a member of the notarial profession of that province.

Admissions made to the effect that a notary had invested moneys and collected interest on loans for the plaintiff do not constitute evidence of agency on the part of the notary, nor could they amount to a commencement of proof in writing as required by art. 1233 of the Civil Code, read in connection with art. 316 of the Code of Civil Procedure, to permit the adduction of parol testimony as to the authorization of the notary to receive payment of the capital so invested or as to the re-payment thereof alleged to have been made to him as the mandatary of the creditor.

The prohibition of parol testimony, in certain cases, by the Civil Code is not a rule of public order which must be judicially noticed, and, where such evidence has been improperly admitted at the trial without objection, the adverse party cannot take objection to the irregularity on appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the

*PRESENT :—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

1904

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Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The action by the plaintiff was for the amount of a debt due under a deed of obligation and hypothec executed in her favour by a former owner of the lands affected by the deed and for a declaration of the hypothecary charge thereby created in her favour to secure the debt. The deed had been executed before Maître Bastien, Notary Public, in 1893, for $3,500, the amount of a loan made through his ministry with interest at the rate of 6 per cent per annum, payable semi-annually, and remained in his custody as a member of the notarial profession of the Province of Quebec, under the provisions of the Revised Statutes of Quebec, articles 3660 to 36 5. The property, subsequently, passed through various hands until it was purchased by one of the defendants. In January, 1901, the action was brought by the plaintiff for the full amount of the loan and a portion of the interest accrued. On dilatory exception the vendors were called into the suit, *en garantie* and *en arrière garantie*, and, thereupon, the appellant, Gervais, intervened as *arrière-garant*, alleging payment of the amount of principal and interest on the 8th of July, 1897, producing, at the same time, an authentic copy of deed of discharge of the mortgage purporting to be signed by the plaintiff and executed before said Bastien as a notary-public. The plaintiff denied her signature to the discharge and took proceedings by improbation to have the discharge declared false, forged and null and alleging, further, that she had never received the money and that the debt had never been satisfied by payment or otherwise nor any acquittance given therefor.

The defendant did not contest the *moyens de faux*, but they were contested by the intervenant who alleged, in substance, that Bastien was the son-in-law of the

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plaintiff, with whom he resided; that he was her confidential adviser and counsellor; administered her affairs; loaned her capital, including the amount of the obligation in question; received her revenues and interest, including the interest on the amount of the loan in dispute; gave all the necessary receipts and discharges with her assent, express and implied, and that, for ten years preceeding his death, Bastien had been her agent for all such purposes with her express and tacit authorization.

On issue joined, on the contestation, the Superior Court, on 21st March, 1902, maintained the plaintiff's action and the inscription *en faux*, set aside the discharge as false and dismissed the intervention. An appeal to the Court of King's Bench was dismissed by the judgment now appealed from.

The evidence shewed that Bastien was residing, not with the plaintiff, but in the City of Montreal, at the time of the alleged discharge of the mortgage, and, shortly before his death, which occured in November, 1899, he confessed that he had received the money in question and forged the discharge. At the time the money was paid to Bastien by a brother notary named Houlé, in July, 1897, the principal secured by the mortgage was not due, the term having, then, several years still to run. The circumstances under which Bastien had been acting for the plaintiff as her notary and, occasionally, as the collector of rents and interest falling due, from time to time, are shewn by quotations from the evidence in the judgments now reported, which also state the questions raised on the appeal.

Beaudin K. C. and *Gervais K. C.* for the appellants. The evidence adduced establishes that Bastien had the plaintiff's mandate to receive the principal secured by the mortgage in question. He had from time to time received the instalments of interest as they fell

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due and was held out to the public generally as the plaintiff's attorney in fact, the collector of her rents, interest and revenues and the general manager of her business affairs, for many years anterior to and at the time of the payment as well as for several years after the payment had been made and the mortgage satisfied. It is usual and customary, in the Province of Quebec, that the instrumenting notary, who has the custody of the securities for loans made through his ministration, receives the interest and principal of loans made for his clients. Plaintiff admits, in her evidence, that he was authorized to draw all her moneys and reimburse them to her. The plaintiff is responsible for the fraud and forgery of her agent. Arts. 1728 to 1731 C. C.; *Banque Nationale* v. *Banque de la Cité* (1); Pand Fr. vo. " Faux Incident " no. 708 ;. The payment was valid under art. 1144 C. C., although the discharge might be, as a fact, a forgery. The written discharge is a mere formality for the purposes of registration and radiation of the mortgage; the actual payment was a satisfaction of the debt.

Tacit mandate may be proved by parol testimony. The judge of the Superior Court, at the trial, properly admitted such testimony and there was no objection thereto made by the plaintiff's counsel. *Leroux* v. *Monnier* (2); *Michel* v. *Gastineau* (3); see also, notes of Labbé, S. V. '76, 1, 401-402. The provisions of the Code as to the admission of parol testimony are not rules of public order and, consequently, the court cannot of its own motion raise such objections on behalf of interested parties. There has been, by plaintiff's admissions, a commencement of proof in writing; art. 316 C.P.Q.; and the parol testimony was regularly admitted under any circumstances. *Schwersenski* v. *Vineberg* (4);

(1) 17 L. C. Jur. 197.
(2) S. V. '90, 1, 325.
(3) S. V. '44, 1, 321.
(4) 19 Can. S. C. R. 243.

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Williams v. *Wilcox* (1); *Bain* v. *Whitehaven & Furness Junction Railway Co.* (2); *Macdougall* v. *Knight* (3); *Guerin* v. *Fox* (4); *Low* v. *Gemley* (5); Fuzier-Herman, Art. 1341, no. 53; Duranton, t. 13, no. 308; Carrée & Chauveau, Procédure Civille, *n.* 976; Bonnier, édition Larnaude, no. 177; Bioche, Dictionnaire de Procédure vo. Enquête, no. 42; Thomine-Desmazures, t. I, no. 295; Delamarre (LePoitvin), Contrat de Commission, t. II, no. 292; Colmet de Santerre, t. 5, no. 325, bis 11.

We contend, therefore, that the judgments of both courts below are against the evidence, and in opposition to the declared law and the constant jurisprudence on the subject matter in dispute.

Lafleur K.C. and *Ferguson* for the respondent. There is no evidence to shew that, in any case, there was authority given to Bastien to receive or grant acquittances for capital sums invested. Most certainly he had no authority to withdraw investments before maturity of the loans. Plaintiff's evidence clearly shews that the greatest authority ever given to Bastien was to receive rents and instalments of interest falling due from time to time and, further, it appears that the rents and interest invariably reached the hands of the plaintiff up to the time of Bastien's death. Nothing occurred to create suspicion or give her warning of the fraud he had committed. Neither the mortgagor nor his representatives nor the notary Houlé, who is alleged to have made the payment, thought it necessary to advise the plaintiff that such a payment had been made. If any such payment was made to Bastien then he became the agent of the

(1) 8 A. & E. 314.
(2) 3 H. L. Cas. 1.
(3) 14 App. Cas. 194.
(4) Q. R. 15 S. C. 199.
(5) 18 Can. S. C. R. 685.

party who made the payment for the purpose of transmitting the funds to the plaintiff. Consequently, the party who so constituted him the agent to make such payment to the plaintiff must suffer the loss resulting from his fraud. The good faith of the plaintiff throughout is abundantly manifest. There is no question as to credibility involved in the appreciation of the evidence. The character of Bastien as a notary cannot, alone, give rise to any presumption as to a tacit mandate and there is no proof to substantiate any assent by the plaintiff. The payment was not made to Bastien as a mandatary with authority to receive it, but he was trusted by the notary Houlé to hand it to the plaintiff and obtain the necessary discharge from her, personally, in order the mortgage might be discharged and radiated by registration. *Henderson* v. *Boivin* (1); *Low* v. *Bain* (2); 7 Toullier, Obligations, no. 19; 12 Duranton no. 38; Pothier, Obligations, no 510; Colmet de Senterre, vol. 5, no. 178 *bis* II; S.V. '92, 1, 325, note 5; S.V. 1902, 1,188; S.V. '31, 1, 281–282; Dalloz aine, vo. "Obligations" p. 751; Fuzier-Herman, art. 1139, no. 29; 17 Laurent, no. 526-531; Fuzier-Herman, art. 1239, nn. 23,27,33,34,48,52; *Webster* v. *Dufresne* (3); Am. & Eng. Encycl. of Law, vol. 1, p. 937 and p. 1026 and authorities there cited.

The capital was payable at the domicile of the plaintiff, not at the residence of Bastien where it is alleged to have been made. The mandate must be strictly interpreted; art. 1704 C.C.; 27 Laurent no. 438; and at the time of the alleged payment the capital was not yet due. Even if it might be inferred that there was some sort of general mandate, these peculiar

(1) Q. R. 4 Q. B. 247. (2) 31 L. C. Jur. 289.
(3) 31 L. C. Jur. 100.

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circumstances would prevent any presumption of authority on the part of Bastien to receive the money for the plaintiff at a place where it was not payable according to the terms of the mortgage and before maturity. 27 Laurent no. 419; *Browne* v. *Watmore* (1) *Préfontaine* v. *Boisvert* (2); *Latour* v. *Desmarteau* (3); Recueil de Gaz. de Trib. (1902) 1re. Semestre, partie 4, p. 110, vo. "Mandat", Gaz. 21 Dec. 1901.

The indorsed cheque can be of no avail as proof or commencement of proof against the plaintiff. It was the act of Bastien alone. Neither this indorsement nor the plaintiff's evidence can amount to a commencement of proof in writing sufficient to admit parol testimony under the provisions of the Civil Code, art. 1234. Neither can the forged discharge avail for that purpose; *Durocher* v. *Durocher* (4). The provisions of the Code excluding parol testimony except in the cases mentioned in the article referred to are regulations of public order and, even in the absence of objection, must be judicially noticed by the courts. See authorities cited in Fuzier-Herman under art. 1341, no 39 and 9 Toullier, no. 36; 41 Larombière, art. 1347 no. 1, art. 1341, nn. 1 and 2; 19 Laurent, nos. 397, 398; 30 Demolombe, nn. 213-217; Marcadé, art. 1348, no. 8; 8 Aubry & Rau, (4ed) sec. 761, p. 293; Pas. '80, 2, 94; Gaud Pasic. 1842, 2, 45; Bioche, vo. "Enquête" no. 43; Carré-Chauveau, Quest no. 976, p 499; Thomine Desmozures, no. 295, p. 436; S.V. '93, 1, 285. A new trial cannot be granted on the ground of improper admission or rejection of evidence; art. 500 C.C.; *The Glannibanta* (5); *Dempster* v. *Lewis* (6). The courts

(1) Q. R. 3 Q. B. 18.
(2) 1 Q. L. R. 60.
(3) Q. R. 12 S. C. 11.
(4) 27 Can. S. C. R. 363.
(5) 1 P. D. 283.
(6) 33 Can. S. C. R. 292.

must reject illegal or inadmissible evidence, even if secondary, whether or not it is objected to. *Paige* v. *Ponton* (1); Phipson on Evidence, p. 10; *Jacker* v. *International Cable Co.* (2); *Miller* v. *Babu Madho Das* (3); *Power* v. *Griffin* (4) at page 42.

LE JUGE EN CHEF.—La cour supérieure a décidé que Bastien était autorisé à recevoir le paiement en question pour la demanderesse, mais que, vû qu'il n'y a pas au dossier de preuve légale qu'il l'ait reçu, l'intervention devait être rejetée. C'était décider que Bastien était autorisé à recevoir un paiement qu'il n'a pas reçu; car s'il n'est pas prouvé légalement qu'il l'a reçu, c'est tout comme s'il n'y en avait aucune preuve quelconque.

Les considérants de la cour d'appel se lisent comme suit:

Considérant qu'il n'appert pas de la preuve faite que le nommé Bastien, notaire, auquel les appelants allèguent dans leur réponse à la requête en faux avoir payé le montant de la dite obligation ait jamais été autorisé par l'intimé à recevoir ce paiement pour elle et d'en donner quittance:

Considérant que la preuve faite à l'appui de cette allégation de paiement par les appelants au dit Bastien, est contraire à la loi, et à l'article 1233 du code civil, et qu'il n'appert pas que l'intimée en ne s'objectant pas à cette preuve ait renoncé à son droit de faire telle objection au cours du procès; confirme le dispositif * * *

La cour d'appel a donc décidé avec la cour supérieure;—1. qu'il n'y a pas de preuve légale du paiement à Bastien; et 2., contrairement à la cour supérieure, que Bastien n'était pas autorisé à recevoir le paiement qu'il n'a pas reçu ou dont il n'y a pas de preuve légale.

L'un ou l'autre de ces considérants était suffisant pour rejeter l'appel du jugement de la cour supérieure.

(1) 26 L. C. Jur. 155.
(2) 5 Times L. R. 13.
(3) L. R. 23 Ind. App. 106.
(4) 33 Can. S. C. R. 39.

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Et nous nous serions abstenus de décider inutilement que Bastien était ou n'était pas l'agent de la demanderesse, si nous avions pu admettre avec la cour d'appel qu'il n'y a pas au dossier de preuve légale du paiement que l'intervenant allègue lui avoir été fait comme agent de la demanderesse. Mais le devoir nous incombe de décider qu'il y a erreur dans le motif basé sur ce que la prohibition de la preuve testimoniale décrétée par l'article 1233 du code civil est d'ordre public. La question est controversée. Les autorités d'un côté et de l'autre sont nombreuses. On les trouve, compilées dans Sirey, Code Annoté, (ed. 1901), sous l'art. 1341. On peut y ajouter, *Thwaites* v. *Coulthurst* (1); *Guerin* v. *Fox* (2); *Schwersenski* v. *Vineberg* (3); Dall. 93, 1, 445; et la note de l'arrêtiste, S. V. 93, 1, 285, et la note de l'arrêtiste, S. V. 43, 1, 403; S. V. 79, 1, 213, et l'annotation.

Nous sommes aussi d'avis qu'une partie qui assiste à une enquête et n'objecte pas à une preuve illégale offerte par la partie adverse ne peut ensuite se prévaloir de l'illégalité de cette preuve. Si l'objection eut été prise lorsque la preuve a été offerte, il est possible qu'un commencement de preuve par écrit (4), une preuve écrite complète peut-être, eût pu être fait. Mais tendre un piège à son adversaire, éviter soigneusement de le mettre sur ses gardes, afin d'invoquer contre lui plus tard une telle illégalité quand il ne lui sera plus possible d'y remédier, ou afin de permettre à la cour de le faire d'office, comme a été fait par la cour supérieure dans l'instance, c'est ce qui ne pourrait être permis. Il serait oiseux de répéter ici les arguments en faveur du point de vue que nous décidons être la loi sur les deux branches de la

(1) 3 Q. L. R. 104.
(2) Q. R. 15 S. C. 199.
(3) 19 Can. S. C. R. 243.
(4) Art. 316 C. P. Q.

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question. Il me suffit de référer aux commentateurs cités au Code-Sirey sous l'article précité.

Nous sommes donc d'avis que le paiement à Bastien est clairement et légalement prouvé.

En étant venus à cette conclusion, il nous faut adjuger sur l'autre motif du jugement de la cour d'appel, celui basé sur le défaut de pouvoir chez Bastien de recevoir ce paiement. Sur ce point, nous sommes d'avis qu'il n'y a pas erreur dans ce jugement. Bastien a agi sans autorisation. Le dispositif en sera donc confirmé. Mon collègue Monsieur le Juge Girouard dira les raisons de la cour sur cette partie de la cause. Nous y concourons tous sans réserve.

L'appel est rejeté avec dépens.

GIROUARD J.—En commençant les quelques observations que je me propose de faire, il n'est pas sans à propos de reproduire ce que dit Laurent au tome 17e. n. 531:

Le notaire a-t-il mandat tacite de recevoir le paiement au nom de de son client ? En droit, la question n'est guère douteuse ; si elle a donné lieu à de nombreux procès, c'est par suite de l'imprudence des débiteurs. Ils s'imaginent que le notaire qui vend a aussi le droit de toucher le prix ; en réalité, le notaire ne fait que prêter son ministère pour la vente, c'est le vendeur qui seul a qualité de toucher le prix, ou le mandataire à qui il a donné pouvoir de recevoir pour lui (art. 1239). En fait, ces débats deviennent tous les jours plus fréquents : depuis que les notaires deviennent banquiers, spéculateurs, agioteurs, les faillites abondent ; et le débiteur qui a payé irrégulièrement entre les mains du notaire, obligé de payer une seconde fois à son vendeur, en est réduit à se présenter à la faillite comme créancier de celui qui a trompé sa confiance.

Les notaires de la province de Québec sont meilleurs que ceux dont parle Laurent, les notaires de France et de Belgique. Rarement ils faillissent au devoir et à la probité, dans les grandes villes quelquefois, à la campagne presque jamais. Leur ambition suprême, c'est de devenir non pas banquier, mais régistrateur

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ou protonotaire. Cependant, lorsqu'il arrive des défaillances et des défalcations, ce sont toujours des désastres pour un grand nombre. Le public s'imagine que l'étude du notaire instrumentant est un bureau officiel des consignations. Il découvre son erreur, mais trop tard. Il est bon de rappeler d'abord ce que la loi entend par notaire. "Les notaires", dit l'article 3607 des Statuts Revisés de Québec,

> sont des officiers publics dont la principale fonction est de rédiger et recevoir des actes et contrats auxquels les parties doivent ou veulent faire donner le caractère d'authenticité.

C'est la définition du droit français, 19 Laurent, n. 102 ; Gilbert sur Sirey, art. 1317,

Fuzier-Herman et Baudry-Lacantinerie ont résumé la doctrine et la jurisprudence française sur le sujet ; on y trouvera une liste complète des autorités et il est remarquable qu'elles sont presqu'unanimes en faveur du créancier et contre le débiteur. Il n'est donc pas sans intérêt de noter ici ce qu'ils enseignent et là-dessus il me suffira de citer l'un de ces jurisconsultes, Baudry-Lacantinerie, Obl., (éd 1902), nn. 1441, 1442 :

> 1441. Il n'est pas contestable, (dit-il) que les notaires n'ont pas en cette seule qualité, pouvoir de toucher ce qui est dû à leurs clients.
>
> Ainsi le notaire qui passe un acte de vente n'a pas par cela seul mandat de toucher le prix au nom du vendeur. Il en est ainsi même lorsque l'acte de vente porte que le prix sera payé en l'étude du notaire. Cette indication n'a pas d'autre but que de déterminer le lieu où le paiement doit être fait. Cela suffit d'ailleurs pour qu'elle ait sa raison d'être, car elle peut donner plus de facilités au débiteur pour payer ou au créancier pour recevoir.
>
> Mais rien ne s'oppose à ce qu'on donne à un notaire, comme à toute autre personne, le mandat de toucher, soit exprès, soit tacite. Seulement, pour qu'un notaire soit considéré comme constitué mandataire à cet effet, il faut qu'il n'y ait aucun doute sur la volonté des parties à cet égard.
>
> Quelquefois, dans la pratique, le débiteur apporte les fonds au notaire qui se charge de les transmettre au créancier. En pareil cas, c'est le débiteur qui donne un mandat tacite au notaire. Il s'ensuit

que, si ce dernier tombe en déconfiture avant que les fonds soient aux mains du créancier, la perte est pour le débiteur.....

1442. Le mandat de vendre ne renferme pas celui de recevoir le paiement du prix, car on doit interpréter les mandats strictement.

En note, l'éminent commentateur ajoute :

Il en est de même lorsqu'un acte de vente ou d'adjudication devant notaire renferme, outre cette stipulation que le prix sera payé en l'étude de notaire, une élection de domicile faite par le vendeur dans cette étude pour l'exécution de l'acte. Civ. cass., 23 nov. 1830 ; S. V. 31, 1, 153, Dall. Rép. Alph. vo. Oblig. n. 1713 ; 1o—Req., 10 déc. 1889 ; S. V. 90, 1, 244 ; Dall. 91, 1, 136,—V. aussi Req. 25 janv. 1893 ; S. V. 94, 1, 186, Dall. 91, 1, 183.—Jugé également que, lorsqu'il s'agit d'actes d'obligations, la stipulation que le paiement aura lieu dans l'étude du notaire ne suppose pas que celui-ci a reçu le mandat tacite de toucher. Douai, 29 nov. 1849, précité,—Bordeaux, 11 juill. 1859, S. V. 60, 2, 92 ; Dall. 60. 2, 23.—Lyon, 16 fév. 1860, S. V. 61, 2, 607 ; Dall. 60, 2, 78.—Trib. civ. Lyon, 19 juill. 1895, Monit., Lyon, 11, nov., 1895 (dans l'espèce il y avait eu élection de domicile dans l'étude). Trib. civ. Narbonne, 22 mars, 1898, Loi, 14 mai, 1898. Le fait qu'au moment où le paiement a eu lieu le notaire avait en ses mains la grosse du titre n'implique pas davantage le mandat de recevoir le paiement. Douai, 29 nov. 1849, précité.

La jurisprudence de la province de Québec n'offre pas de nombreux exemples de vols ou d'escroqueries pratiqués par des notaires sur leurs clients ; cependant dans les quelques causes qui y ont été décidées, les tribunaux semblent avoir appliqué les mêmes principes. *Low* v. *Bain*, en appel, 1886, (1) ; *Webster* v. *Dufresne*, (2) en appel, 1887, *Cloran* v. *McClanaghan* (3) C. S. 1885 ; *Lauriault* v. *Lapointe* (4) C. S. 1899 ; Beauchamp, Code Annoté, art. 1144.

Maintenant, quels sont les faits dans l'espèce qui nous occupent ? Bien entendu, le notaire n'était pas porteur d'une procuration notariée ou même écrite. Aucun écrit de la demanderesse ne constate la position de Bastien, si ce n'est qu'il était son notaire et avait

(1) 31 L. C. Jur. 289.
(2) 15 R. L. 210 ; 31 L. C. Jur. 100.
(3) M. L. R. 1 S. C. 331.
(4) 5 Rev. de Jur. 433.

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passé l'hypothèque en question et une prolongation du terme de paiement, toutes deux signées par la demanderesse. Avant de recourir à la preuve testimoniale, il fallut donc l'examiner, afin d'obtenir au moins un commencement de preuve par écrit. Elle fut soumise à un examen sévère et très long, non seulement dans cette instance mais d'autres causes; elle fut appelée à expliquer ses réponses données à différentes époques, entre d'autres parties et apparemment sur des contestations différentes. Elle fut examinée et ré-examinée, transquestionnée à plusieurs reprises par plusieurs avocats se relevant tour à tour, jusqu'à tel point que son avocat dût protester, mais sans succès, sur la réouverture de l'enquête, "*after being closed and resumed and closed again*," pour me servir de ses expressions. Ses deux dépositions couvrent 78 pages du dossier imprimé. Il n'est pas surprenant que la pauvre femme, harcelée et torturée—le mot n'est pas exagéré, elle fut même interrogée sans raison sur sa vie privée—et d'ailleurs malade et souffrante, ait eu des moments de faiblesse, de mauvaise humeur, d'impatience et même d'indignation, ait répondu quelque fois avec hésitation ou après des arrêts prolongés, et donné des réponses vives, irréfléchies ou confuses sur des circonstances plus ou mois pertinentes et étrangères, ou même sur sa position légale avec son notaire. Ce résultat n'aide l'appelant en aucune façon à établir le commencement de preuve par écrit qui doit se trouver dans ses réponses écrites et non ailleurs, pas même dans le ton ou la manière de les donner, particulièrement lorsqu'il n'y a pas d'autre preuve à invoquer et qu'il n'y a pas mauvaise foi. Il ne s'agit pas en effet de la crédibilité du témoin comparé à un autre témoin que l'on oppose. Il n'y a pas d'autre témoin qui la contredise. Ses réponses se soutiennent; elles sont généralement catégoriques et

précises ; pas une seule n'a été rejetée en vertu des articles 366 et 368 du Code de Procédure Civile ; enfin, elle affirme cent fois que Bastien n'était que son notaire, sans autorisation pour recevoir ses capitaux. Cette preuve, qui est d'ailleurs indivisible aux termes de l'article 1243 du Code Civil, amendé en 1897 par 60 Vict. ch. 50, ne peut servir de commencement de preuve par écrit. Elle établit tout le contraire.

Le juge de première instance constate dans le texte de son jugement

que la demanderesse a admis devant le tribunal que le dit notaire Bastien avait droit de retirer ses capitaux placés par son entremise, ainsi que les intérêts,

sans indiquer où se trouve cette admission. La minorité de la cour d'appel attache de l'importance à ce considérant de la cour supérieure, "qui a vu l'intimée et l'a entendue rendre son témoignage." Dans les circonstances ce fait n'a aucune importance, comme nous l'avons déjà observé. Aussi, la majorité de la cour d'appel est arrivée à une autre conclusion, et nous acceptons son jugement sur ce point :

Considérant qu'il n'apparaît pas de la preuve faite que le nommé Chs. Eug. Bastien, notaire, auquel les appelants allèguent dans leur réponse à la requête en faux, avoir payé le montant de la dite obligation, ait jamais été autorisé par l'intimée à recevoir ce paiement pour elle et d'en donner quittance.

L'appelant invoque des réponses comme les suivantes pour établir le paiement de la somme payée avec l'autorisation de l'intimée :

Q. He was authorised to get the money provided he reimbursed you ?

A. Yes, like every notary.

Q. He was authorised to get all the money you had ?

A. I gave him no authorisation at all, I lent him the money and I expected to get it back when I asked for it.

C'est une simple opinion légale qu'elle exprime sur la nature de ses relations avec son notaire. L'acte

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d'obligation démontre que l'argent fut prêté non pas au notaire, mais à Lavigne, l'auteur de l'appelant.

Et ailleurs :

Q. Provided Bastien had been honest throughout his life, all the payments made to him for you would be good payments ?

A. Well, I suppose so, if he were honest.

Q. Provided Bastien would have given you back the money, it would have been a straight forward payment, and a good valid payment ?

A. Yes, I suppose so, as far as I understand the business.

C'est encore une opinion qu'elle exprime, et elle avait raison. La remise de l'argent à la demanderesse aurait en effet été un paiement effectif, non seulement en affaires, mais en droit, autorisé ou non, aux termes de l'article 1144 du Code Civil. Partout ailleurs, elle ne cesse de répéter que Bastien était simplement son notaire et qu'il n'a jamais eu pouvoir de sa part de retirer ses capitaux. Presqu'au moment même où elle donnait l'appréciation de sa position en affaires, "*as I understand the business*," elle répondait fermement :

A. He was my notary, and did what a notary does under the circumstances, and no more or less.

Nous sommes d'avis que non seulement ses dépositions ne nous fournissent pas une preuve complète du paiement et du pouvoir du notaire de le recevoir, comme l'affirment les juges dissidents, mais qu'elles sont insuffisantes même pour établir un commencement de preuve par écrit. L'endossement du chèque par Bastien peut bien faire un commencement de preuve par écrit du paiement contre lui ou ses héritiers, mais non contre la demanderesse, qui nie son autorité de recevoir le capital de cette obligation ou de toute autre obligation et jusqu'au moment de sa mort ignorait le fait même du paiement. Si l'autorisation était établie, cet endossement servirait probablement de commencement de preuve par écrit du paiement contre elle.

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La preuve au dossier a soulevé devant les tribunaux inférieurs quelques questions de procédure inportantes en pratique qui sont discutées par mon savant collègue le juge en chef et au sujet desquelles je n'entends pas dire autre chose que je concours entièrement dans son opinion.

Mais supposons qu'il y ait commencement de preuve par écrit et du paiement de l'hypothèque et du pouvoir du notaire, cette preuve a-t-elle été complétée? La demanderesse le nie et il n'y a pas un seul témoin qui la contredise sur ce point. Tout ce qui est prouvé c'est que le notaire, comme il arrive souvent, sinon presque toujours dans de pareils cas, était chargé par la demanderesse de lui trouver des placements, de passer ses obligations en son nom, d'en recevoir les intérêts et même de recevoir par occasion les loyers apportés à son bureau pour elle; c'est dans ce sens qu'il était son homme d'affaires et non autrement. Ces pouvoirs n'impliquent pas celui de recevoir les capitaux et la demanderesse jure qu'elle n'a lui jamais donné ce pouvoir. Jamais il n'a reçu les capitaux prêtés, à sa connaissance du moins. Peut-on dire que c'est la preuve qu'exige Baudry-Lacantinerie, savoir, "qu'il n'y ait aucun doute sur la volonté des parties à cet égard?" Mais il y a plus. Il y a preuve écrite, authentique et incontestable qui corrobore parfaitement les dires de la demanderesse sous serment.

D'abord, ce qui s'est passé lors du paiement fait par Gervais démontre clairement que le débiteur, Gervais, agissant par son notaire Houlé, considérait la demaderesse comme seule capable de recevoir et de donner quittance. C'est cette quittance qu'il exigea et ce n'est qu'après son enregistrement que l'argent fut déposé entre les mains de Bastien, qui se chargea pour lui de le remettre à la demanderesse. S'il fût agent dans cette affaire, ce fut de Gervais, qui, par l'entre-

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mise de Houlé, l'a chargé de remettre les deniers à la demanderesse. Le notaire Houlé explique le paiement comme suit :

Q. Pourquoi avez-vous remis ce chèque à M. Bastien ?

R. C'est parce que je ne pouvais pas voir Mme. McCarthy.

Q. Pourquoi ne pouviez-vous pas la voir ?

R. J'ai été au bureau de M. Bastien et M. Bastien m'a dit que Mme. McCarthy était malade et que je pouvais payer, qu'il était son chargé d'affaires.

Objecté à cette preuve comme illégale.

Objection maintenue.

Q. A qui avez-vous remis ce chèque ?—R.—A M. Bastien, le notaire.

Q. Pourquoi avez-vous remis ce chèque au notaire Bastien ?—R. Parce que j'étais sous l'impression, moi, qu'il était son chargé d'affaires.

Et plus loin il ajoute :

R. D'après M. Bastien, Mme. McCarthy était malade, j'ai cru qu'il serait plus facile de voir M. Bastien. Je ne connaissais pas M. Bastien comme un fausseur, moi :—Je le connaissais comme correct honnête homme.

Le notaire Houlé a été la victime d'une trop grande confiance dans l'honneur professionnel de son confrère et c'est son client qui doit souffrir la perte résultant de son imprudence et non la demanderesse. Il ne songea même pas à endosser le chèque *payable à l'ordre de la demanderesse* ou à la notifier du dépôt de ce paiement que le notaire s'appropria, tout en continuant de lui solder les intérêts jusqu'à près de sa mort survenue presque subitement une couple d'années plus tard.

Enfin, elle fut si particulière dans cette transaction qu'elle stipula dans l'acte d'obligation que la somme prêtée serait remboursable " en sa demeure ", et non en l'étude du notaire.

N'oublions pas encore que le paiement fut fait avant l'expiration du délai, qui dans un cas comme celui-ci existe non seulement en faveur du débiteur, mais aussi en faveur du créancier, vu le taux d'intérêt, 6 par 100, taux qu'il n'était pas toujours facile d'obtenir. Cela

est si vrai que dans l'espèce, le remboursement fut fait en grande partie par un nouvel emprunt à 5½ pour cent au Crédit Foncier.

Bastien, eût-il un pouvoir général de reçevoir les capitaux de la demanderesse, n'aurait pu sans autorisation spéciale reçevoir ce paiement par anticipation. Il n'est que juste que le dommage, causé par un paiement, ni convenu, ni autorisé ou ratifié, tombe sur la partie en faute.

Pour ces raisons, je suis d'avis de renvoyer l'appel avec dépens.

DAVIES.—I am of the opinion, for the reasons given by Mr. Justice Girouard, that this appeal should be dismissed.

NESBITT J.—The main point argued was, as to the right of Bastien to bind the plaintiff, assuming the receipt by him of the money.

Articles 1727, 1730, 1731 C. C. seem to express the law as it has long been settled under English law, and in the United States. See Story on Agency, s. 443. But these must be read in this case with articles 1144, 1152, 1163 and 1703 C. C. the latter of which seems to concisely state the result of the cases under English law. The stipulation of time in a mortgage must, I think, from our knowledge of affairs, be said to be in favour of the creditor. Bonds, debentures and mortgages for long terms are always sought for by lenders as more valuable than those for short periods, and Parliament has interfered in favour of mortgagors by giving them the privilege of paying off after five years where a longer term is fixed by the mortgage. (R. S. C. ch. 127, sec. 7.)

In this case the time for payment of the principal had not expired, and I find the strongest expression

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used by the plaintiff as to the right to receive moneys, in her evidence.

Q. I am speaking of the old loans made through Bastien. Supposing I paid the interest to Bastien was it a good payment ?

A. How was it a good payment ?

Q. Bastien was authorised to receive your interest ?

A. *I suppose so. He was a notary.*

Q. Suppose I borrowed five thousand dollars from you, and the deed had been passed by Bastien, and supposing I wanted to pay my interest, I would be properly advised to go to Bastien and get a receipt from Bastien ? It was good ?

A. Well, we all supposed he was good at the time.

Q. Provided Bastien had been honest throughout his life, all the payments made to him for you would be good payments ?

A. Well, I suppose so, if he were honest.

Q. Provided Bastien would have given you back the money it would have been a straightforward payment, and a good solid payment ?

A. Yes, I suppose so, as far as I understand business.

Q. Because it was understood he was to draw those moneys !

A. And pay it immediately to me.

Q. *He was authorized to draw those moneys provided he paid them to you ?*

A. Yes.

Q. Provided he reimbursed you right away, or as soon as possible, he was authorised to do that, and draw the money for you ?

A. *Well, he was authorised to get the money for me and pay me.*

Q. He was authorised to get the money provided he reimbursed it to you at once ?

A. *Yes, I suppose so.*

which seems to me to fall within the very language of an old case of *Sir John Wolstenholm* v. *Davies* (1), bearing in mind the duties of a scrivener as they are explained, in 1850, in *Wilkenson* v. *Candlish* (2), from which it would appear Bastien in no sense occupied the position of a scrivener as spoken of in that case, but rather that of solicitors in the later cases, being a person in the possession of the mortgage and accustomed to collect the interest.

(1) Freemn 289 ; 2 Eq. Cas. Abr. 709.

(2) 5 Ex. 91 at p. 97.

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The mortgage here was not due; it affected land, and for its effectual discharge not only is payment of money an essential, but a discharge of the mortgage should be obtained for the purposes of registration. This the notary sought to do, and obtained a forged discharge. It is an unfortunate case, but the loss has been solely caused by the notary's misplaced trust in a brother notary by handing him cash and a cheque indorsed in blank, and trusting to the forged discharge. I find no evidence which under the decided English cases is sufficient to establish express authority to receive capital, and for the reasons I have indicated the language of article 1730 C.C. appears to require certainly as full authority in such a case. The leaving of the mortgage with the notary seems to be of even less importance in the Province of Quebec than leaving it with a solicitor in Ontario or England.

The admissions of the plaintiff cannot, I think, be divided under article 1243 C.C., and she most strenuously denied any authority whatever in Bastien to collect the principal before maturity except upon the condition that he handed it to her. She would be bound in similar case by any one else who might have carried the money to her.

I refer, in addition to the articles of the Code mentioned above, which seem to be drawn from the rules laid down in Story, to the following cases: *Gillen* v. *Roman Catholic Episcopal Corp. of Kingston* (1); *McMullen* v. *Polley* (2); *In re Tracy* (3); *Greenwood* v. *Commercial Bank of Canada* (4); *Withington* v. *Tate* (5); *Gordon* v. *James* (6); *Palmer* v. *Winstanley* (7).

(1) 7 O. R. 146.
(2) 12 O. R. 702.
(3) 21 Ont. App. R. 454.
(4) 14 Gr. 40.
(5) 4 Ch. App. 288.
(6) 30 Ch. D. 249.
(7) 23 U. C. C. P. 586.

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KILLAM J.—I agree, upon the grounds stated by my brother Girouard, that the notary had neither actual authority to receive the mortgage money nor ostensible authority under art. 1730 of the Civil Code.

I express no opinion respecting the sufficiency of the evidence of payment to the notary.

Appeal dismissed with costs.

Solicitors for the appellants; *Rainville, Archambault, Gervais & Rainville.*

Solicitor for the respondent; *J. M. Ferguson.*

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK (DEFENDANTS)..... . ..... } APPELLANTS;

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*May 3.
*May 23.

AND

HENRY COSGROVE BELLEW (PLAINTIFF)..... .. .. } RESPONDENT.

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

Life insurance—War risk—Service in South Africa—Extra premium—Special condition—Consideration for premium.

Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war." Each policy also provided that the assured "has hereby consent to engage in military service in South Africa in the army of Great Britain any restriction in the policy contract notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased and an action was brought against the company for return of the extra premium on the ground that the insured had never been soldiers of the army of Great Britain in time of war.

Held, Girouard and Davies JJ. dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid was a sufficient consideration for the extra premium and it could not be recovered back.

Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone.

APPEAL from a decision of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court at Montreal in favour of the plaintiff.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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The plaintiff, Bellew, is an insurance broker in Montreal and in May, 1902, by arrangement with the defendants, he went to Halifax to endeavour to receive applications for insurance from the members of the fourth contingent which was about to be sent to South Africa He effected insurance on the lives of 235 officers and men all the policies, aggregating $251,000, being issued by the defendant company. Each policy contained the following provisions:

"The renewal contract of assurance defined upon the third page hereof shall be indisputable after one year from the date of entry upon the same, for the amount due, provided the premiums are duly paid as set forth in the renewal agreement; *except that military or naval service in time of war without a permit are risks not assumed by the society at any time*, further than that the reserve on this assurance only, will be due and payable in case of death from such service.

"A. I hereby agree on behalf of myself and of any person who shall have any claim or any interest in any policy issued under this application as follows: First, that I will not within two years from the date of policy to be issued under this application, travel or reside in any part of the torrid zone or north of the parallel of sixty degrees north latitude.

"It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of a soldier in army of Great Britain in time of war.

"This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

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"It is understood and agreed, in connection with policy No. ——for $ ——, dated May 12th, 1902, of Form 507 A, and issued on the life of that, in consideration of written application therefor, and also of the payment of an annual 'extra premium' of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding."

The following facts were admitted:

1. The military corps in question in this case sailed for South Africa from Halifax in three detachments, on the 8th, 16th and 23rd May, 1902.

2. On May 29th, 1902, a cessation of hostilities took place between the British forces and the armies of the Transvaal Republic and Orange Free State, and on June 1st, 1902, a treaty of peace was signed, terminating the war.

3. The soldiers of the Fourth Contingent in question in this case reached South Africa after such declaration of peace and the cessation of hostilities.

4. The soldiers of the Fourth Contingent in question sailed from South Africa on their way home on or about July the 1st, 1902.

As the company refused to issue the policies until the premiums were paid the plaintiff advanced the money for the purpose taking assignments from the insured of their pay from the Department of Militia to the extent of the sums paid. As the contingent did not reach South Africa before the war ended the department refused to honour the assignments so far as the extra premium was concerned and the plaintiff brought action against the company for the amount of such premiums, $6,275.

The Superior Court held that the insured were never members of the army of Great Britain in time of

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war and gave judgment for the plaintiff, which was affirmed by the Court of King's Bench. The company then appealed to this court.

Greenshields K.C. and *Laflamme K.C.* for the appellants. The risk attached when the contingent left Halifax. See Marshall on Insurance, vol. 2, p. 673 Emérigon Traité des Assurances, vol. 1, pp. 62, 67.

There was a reasonable cause for payment of the extra premium and it cannot be recovered back.

Ryan and *Garneau* for the respondent. The company was subjected to neither liability nor risk so that the extra premium was paid without consideration. Am. & Eng. Ency of Law, (2 ed.) vol. 16, p. 954.

THE CHIEF JUSTICE and SEDGEWICK J. concurred in the judgment allowing the appeal.

GIROUARD J. concurred in the dissenting opinion of Mr. Justice Davies.

DAVIES J. (dissenting). I agree with the conclusions reached by the Court of King's Bench and substantially with the reasons therefor given by Mr. Justice Blanchet.

The appellant agreed to insure the lives of as many of the men comprising the Fourth Canadian Contingent of militia and volunteers then at Halifax *en route* to South Africa to join the army of Great Britain there as would make the necessary application and pass the proper examinations.

The respondent who was an insurance broker was authorized by the company to proceed to Halifax and effect the insurances, provided he secured 200 out of the 2000 members of the contingent, and an annual extra premium of $25 per $1,000 for the war risk.

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The policies were issued in the company's ordinary form of twenty annual payments of $24.78 "whole life" and with a stipulation that "*military or naval service in time of war without* a permit were risks not assumed by the society at any time."

As the object and intention of the society and of the men insuring were clearly to cover the risks incident to the contemplated service of the latter in the army of Great Britain, in South Africa, against the forces of the then Transvaal Republic and Orange Free State with which Great Britain was at war, and as the condition of the ordinary policy prohibited such service, an extra premium of $25 on each $1,000 insured was exacted and the following two clauses either pasted or written on the policies:

It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the Assured shall be that of soldier in army of Great Britain in time of war.

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

New York, N.Y., May 12th, 1902.

WM. E. STEVENS,
Secretary.

THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK,
346 BROADWAY, N.Y.

It is understood and agreed in connection with policy No. 127,805 for $1,000.00 dated May 12th, 1902, of Form 507 A. and issued on the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25.00, the Assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding.

WM. E. STEVENS,
Secretary.

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Now bearing in mind that military or naval service was not *per se* prohibited by the original policy but only "in time of war" it is clear that the extra risk the society was insuring against and receiving the extra premium for was a "war risk" and that such war risk was limited to service by the assured "in the army of Great Britain in South Africa" and was renewable while the war thus going on lasted. It was not necessary for the assured to pay any extra premium in order to serve in the army of Great Britain in South Africa or elsewhere in time of peace. The policy did not prevent an assured from doing that. The extra risk assured by the company and paid for by the assured obviously was the risk attached or incident to service in the army of Great Britain in South Africa in time of war.

An ingenious argument was advanced that the extra war premium was really paid on the ordinary life policy the risk on which had attached and in order to obtain a consent, waiver or permission from the company to the assured to engage in the South African war as a soldier of the British Army. But looking at all the circumstances it appears to me that this war risk was a new substantive risk for which a new agreement was entered into and a new premium paid. The fact of it being indorsed upon the life policy did not matter. To my mind it was just as if a new war risk policy was issued. The risk under the new agreement had not attached and did not attach till the conditions specially mentioned in it had come into existence, namely, until the assured had become a soldier in the army of Great Britain in South Africa in a time of war.

The whole case, in my judgment, turns upon the proper construction of the policy and the two memo-

randa indorsed upon it relating to the extra risk assumed.

No evidence of any kind was offered as to the members of this Canadian contingent being or forming in any way part of the "army of Great Britain" before they arrived in South Africa. Nor do I think it would have availed the appellant had he given such evidence because the attaching of the risk and its location were fixed and determined by the contract to commence in South Africa.

The war was at an end before and when the Contingent arrived in South Africa. Hostilities there had ceased. Peace had been proclaimed and the special conditions under which and under which alone the extra risk was to arise never existed. If the assured ever was a soldier of or in the army of Great Britain in South Africa it was during a time of peace and not of war, a time and condition which neither called for nor justified an extra premium. If the contingent had arrived in South Africa one day before the cessation of hostilities and the evidence had shown it had been received or drafted into Great Britain's army there the risk would have attached and the premium could not of course be recovered back. But never having attached and it not being possible that it could have attached during the year I am of opinion that it can be recovered back.

Mr. Greenshields submitted that it was reasonable to argue the premium had been paid in part for permission to cross the torrid zone, a prohibited area, by the terms of the policy. At first I felt inclined to yield to that argument, but I think on more reflection and examination of the policy that the language of the new agreement referring to and defining the extra risk controls that restriction in the original policy and shews just the extent of the war risk which the

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company was accepting and for which the assured was paying. The prohibition invoked was inconsistent with the new agreement and does not apply to it and must be read and construed as applicable only to the ordinary life policy under which the ordinary life risks were incurred, the ordinary premium paid and the customary prohibitions agreed to. On the other points I agree also with the judgment of Mr. Justice Blanchet.

NESBITT J.—I was of the opinion that this appeal should be dismissed, but reflection has convinced me that it should be allowed. It is clear law that where the risk does not attach, or where by reason of the parties not being *ad idem* there is no contract, the moneys paid for premiums are recoverable. See Porter on Insurance, 3rd edition, 90 to 92, and cases there collected. Also *Fowler* v. *Scottish Equitable Life Ins. Soc.* (1); and *Foster* v. *Mutual Reserve Fund Life Assoc.* (2).

It is equally clear, in the case of a life policy, that where the risk has attached, or the premium begun to be earned for any space of time, the annual premium paid in advance is not recoverable. In this case the policy, issued upon what is known as the flat rate, provided that the insurance should not go into effect until the first premium had been paid, and that all premiums were due and payable in advance, and it also provided that should the insurance cease or become void by the violation of any stipulation or agreement, all payments made or accepted should be retained by the society.

Another clause provided for indisputability of the renewal contract of assurance after one year from the date of entry upon the same, provided the premiums were paid, "except that military or naval service in

(1) 4 Jur. N S. 1169. (2) 19 Times L. R. 342.

time of war without a permit are risks not assumed by the society at any time."

Another clause provided that the application should be made a part of the contract, and the application contained the following:

I hereby agree on behalf of myself and of any person who shall have any claim or any interest in any policy issued under this application as follows:—First: That I will not within two years from the date of policy to be issued under this application, travel or reside in any part of the torrid zone or north of the parallel of sixty degrees north latitude.

Had this policy been issued in that form, I think that, upon the insured embarking at Halifax, as a member of the fourth contingent, intending to take part in the war then pending in South Africa, if he had died after entering the torrid zone on the voyage, or if he had been killed by the ship being attacked by any Boers who might have escaped, or if the assured had died of disease contracted on the transport, which is one of the chief causes of risk in war time, the policy would have been voided.

It has been held, however, by the courts below and was argued here, that the further contract of insurance, known as the war risk, removed these obstacles to the right to recover under such circumstances. Such further contract is shown by the two following indorsements:

1. It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of *an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war.*

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the premium receipt.

2. It is understood and agreed, in connection with Policy No. 127,-805 for $1,000 dated May 12th, 1902, of Form 507A, and issued on

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the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding.

It has been held that the indorsement No. 2, by its very terms, involved the idea that the parties had waived the "travel limit" clause as it must be assumed that the parties contemplated the journey to South Africa in order that the limited war risk should attach. The parties were, in my view, contracting on the basis of the fourth contingent being, once they embarked from Halifax, no longer militia but soldiers of Great Britain intended for hostile operations in South Africa, and I think that the $25 extra money was paid to cover the risk attaching to them as members of such fourth contingent in war time renewable each year no matter how long the war lasted, provided that as such soldiers they participated in hostilities in South Africa. One of the chief risks of war, as I have said, is the risk of disease in transportation to the seat of war or to the actual place of hostilities. The company also agreed on receipt of the $25 to insure the applicant as a war risk for the then current year, and to continue such insurance from year to year as long as the war might last and this was the consideration for the $25 paid. The applicant, the moment he paid his extra $25 and received his policy with this indorsation, clearly had a right, if the war continued for any number of years, to pay from year to year his extra $25, being engaged as a combatant in South Africa during the time, a right which had not previously existed. I think, bearing in mind what the flat rate covered and the added risks occurring after the embarkation from Halifax when in point of time a state of war existed, and the further right of com-

pelling a renewal war risk, that some consideration was given by the company for the additional premium and that but for this further bargain the applicant would not have been protected during the voyage and, therefore, he cannot recover the $25 so paid.

KILLAM J.—In my opinion this appeal should be allowed.

The claim is for the return of money as having been paid upon a consideration which has failed. The position taken in the courts below was that the extra premiums were paid only for the risk of military service in South Africa, in the army of Great Britain, in time of war, and that as, upon the arrival of the assured soldiers in South Africa and during their stay there, the contemplated state of war did not exist, the risk never attached and the consideration for the extra premium had failed.

While, undoubtedly, the only war which was contemplated as the one in which the assured were to be engaged was the existing war between Great Britain and the Republics of the Transvaal and the Orange Free State in South Africa, the provisions respecting the extra premiums were not so limited. The judgments have not proceeded upon any claim that the policies differed from the terms of the agreements upon which the premiums were paid. No such contention has been raised before us. The argument proceeded solely upon the interpretation of the policies.

The company insisted upon payment of the premiums before issuing the policies. In order to determine whether the considerations for the two classes of premiums were severable, and what they were, we must examine each policy as a whole. We should read with the ordinary form of policy, containing the provision that "military or naval service in time of

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war without a permit are risks not assured by the society at any time," the clauses indorsed or annexed as follows:

It is understood and agreed that this policy is issued and accepted upon the additional condition of a further payment of an extra annual premium of twenty-five dollars whenever and as long as the occupation of the assured shall be that of soldier in army of Great Britain in time of war.

This extra premium shall be payable at the time, in the manner, and subject to the conditions specified in this policy for premiums and their payment, and shall be embodied in the regular statutory premium notice and in the regular premium receipt.

It is understood and agreed, in connection with Policy No. 127805 for $1,000, dated May 12th, 1902, of Form 507 A, and issued on the life of Herbert Crawley Dickey, that, in consideration of written application therefor, and also of the payment of an annual "extra premium" of $25, the assured has hereby consent to engage in military service in South Africa in the army of Great Britain, any restrictions in the policy contract to the contrary notwithstanding.

When the policies issued it was uncertain what would be the duration of the then existing war. It might continue for years; it might end, as it did, without the insured incurring any real risk incident to actual participation in it.

Further, the stipulations for the extra risk were not limited to the war then in progress. The consent was

to engage in military service in South Africa in the army of Great Britain

and this was expressed to be given in consideration of an "*annual* extra premium of $25." The provision for an "extra annual premium" was that it was to be paid

whenever and as long as the occupation of the assured shall be that of a soldier in army of Great Britain in time of war.

The policy was one under which the assured was to be covered so long as his occupation should be that of a soldier in the army of Great Britain in time of war, provided he should keep up the payment of the extra premiums.

The company incurred the risk of a continuance of the existing war for years, and it incurred the risk of Great Britain becoming engaged in other wars and of the assured participating in them as a soldier in the British army. Whether this risk was to be limited to South Africa only is not now important.

It cannot, I think, be properly said that the consideration upon which the extra premiums were paid wholly failed. As the company incurred the risks and bound itself to their continuance so long as the extra premiums should be paid, it was entitled to the benefit of the cessation of the existing war.

It appears to me that the judgment in favour of the plaintiff should be set aside and the action dismissed, with costs here and in all courts.

Appeal allowed with costs. *

Solicitors for the appellants: *Greenshields, Greenshields, Heniker & Mitchell.*

Solicitors for the respondent: *Jacobs & Garneau.*

*Leave to appeal to the Privy Council was refused (xliii, Can. Gaz. 376).

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*May 9.
*May 25.

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (DEFENDANTS)..... ..... } APPELLANTS;

AND

THE CHATEAUGUAY AND NORTHERN RAILWAY COMPANY (PLAINTIFFS)..... } RESPONDENTS.

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

Construction of railway—Injunction—Interested party—Public corporations—Franchises in public interest—Lapse of chartered powers—"Railway" or "tramway"—Agreement as to local territory—Invalid contract—Public policy—Dominion Railway Act—Work for general advantage of Canada—Quebec Railway Act—Quebec Municipal Code—Limitation of powers.

An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy and cannot be enforced by the courts.

Per Sedgewick and Killam JJ.—A company having power to construct a railway within the limits of the municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of article 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter.

Per Girouard and Davies JJ. -A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter and which does not own a railway line

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ. (*Note.* The Chief Justice took no part in the decision of the court.)

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within the limits of a municipality where such powers were granted has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with powers to construct railways and tramways, has allowed its powers as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of article 479 of the Quebec Municipal Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, confirming the *dispositif* of the judgment of the Superior Court, District of Montreal, (Pagnuello J.) which maintained the plaintiff's action and made absolute the injunction restraining the defendants perpetually from constructing the tramway in question in the suit.

The action was for an injunction to restrain the defendants from constructing a tramway being built by them on a highway between the City of Montreal and a point in the Parish of Longue Pointe, and for damages. The grounds of action were:

1. That the plaintiffs and defendants had, on 6th February, 1899, entered into an agreement, that they would abstain from constructing lines of their respective railways in each other's local territory and that the attempted construction of the railway or tramway in question within the limits of the Parish of Longue Pointe was in violation of this agreement;

2. That the defendant company had not power to construct the railway in question, as any powers it may have had for that purpose had lapsed under the provisions of section 89 of the Dominion Railway Act, under which the defendants had been placed by a Dominion statute, 57 & 58 Vict. ch. 84, declaring their undertaking to be a work for the general advantage of Canada; and,

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3. That the defendants had not complied with the provisions of the Dominion Railway Act as to the deposit of plans and were constructing the railway along an existing highway without leave from the Railway Committee of the Privy Council.

The defence was that the alleged agreement was invalid; that the tramway was being constructed under the authority of a municipal by-law and with the permission of the turnpike company which owned the highway; that the provisions of sections 89, 131 and 138 of "The Railway Act" were not applicable to tramways; that the plaintiffs had sold their line of railway so far as it had been constructed and had lost their charter, rights and powers by non-user and, consequently, had no interest sufficient to maintain their action.

The judgment of the Superior Court maintained the plaintiffs' action in all respects, made absolute the interim injunction which had been issued and condemned the defendants to pay plaintiffs the sum of $500 for damages assessed by the trial judge. On appeal to the Court of King's Bench, appeal side, the *dispositif* of the Superior Court judgment was confirmed for the sole reasons that it was considered that the plaintiffs had established a sufficient status and interest to sustain their action and that, at the date of the action, the defendants had, by limitation of time, lost their statutory right to construct a new line of tramway such as they had commenced in the municipality of Longue Pointe.

Macmaster K.C. and *Campbell K.C.* for the appellants. The legislation specially affecting the rights and powers of the appellants consists of the Quebec statutes 48 Vict. ch. 74; 49 Vict. ch. 85; 51 Vict. ch. 65 and the Dominion Act,—57 & 58 Vict. ch. 84, besides the Dominion and the Provincial Railway

Acts and the Municipal Code. The company have power to construct railways and tramways in the Island of Montreal and it is submitted that, as regards tramways, the provisions as to limitation of time in the "Railway Act" do not apply. There are many distinctions to be drawn between railways and tramways, and provisions necessary and applicable to one would be quite out of place in respect to the other. See definitions of "tramway" in the Encyclopædia Britannica and Standard Dictionary, also Larousse, Dictionnaire, *vo.* "Tramway"; *Matson* v. *Baird & Co.* (1).

It is submitted that the intention of the Legislature was to confer upon the company the power to build one or more railways direct from the centre of the city towards adjacent municipalities that could not easily be reached by the Montreal Street Railway, but that in those cases where the municipalities could be reached by extension of the Montreal Railway Company's system, then the appellants could construct a tramway. Powers to build a railway or to build a tramway are given in the statute in the alternative, and the two words have a distinct and different meaning. The ordinary policy which limits the time for the construction of a railway is due to the fact that railways have powers of expropriation and to cross or use highways by authority of the Railway Committee of the Privy Council; but, in the case of tramways, this policy is not applicable, because a tramway, in using the streets, does so under the control of the local authorities and upon terms dictated by them. The Railway Act defines "railway" in sec. 2, sub-sec. (*q*) —to mean "any railway which the company has authority to construct or operate, and includes all stations, depots, wharves, property and all works con-

(1) 3 App. Cas. 1082.

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nected therewith, etc.", whilst sub-sec. (*w*) defines "undertaking" as meaning "the railways and works of whatever description which the company has authority to construct or operate." If "railway" as defined includes or is equivalent to "tramway," even when the powers are given to a company in the alternative, then "railway" must read as having the same meaning consistently throughout the Act and such a reading would be inconsistent. For instance, if section 307 applies to tramways, nearly every tramway in Canada must have been a Dominion railway, and the extensions made from time to time under contracts with municipalities would have been illegal unless the tramways had had their charters extended by Parliament The provisions relating to fares, tickets, traffic arrangements, servants and tolls would all apply to tramways if the word "railway" is equivalent to "tramway." The result would upset existing practices. See *dicta* in the case of *The Toronto Railway Co.* v. *The Queen* (1), and the express reservation made by the Privy Council in the same case (2).

Except upon the construction that their tramways are railways within the meaning of the Railway Act it cannot be argued that the appellants' power to build tramways has expired for there is no time limited for the construction of tramways.

On the other hand the respondents' powers for the construction of new lines of railway expired under the provision of the Quebec statutes, 58 Vict. ch. 64, sec. 29 and 62 Vict. ch. 75, sec 6; they have sold the whole of their constructed line and have no interest to maintain the injunction and no business interest to be protected.

The respondents were not serving the Parish of Longue Pointe as part of their local territory and the

(1) 25 Can. S. C. R. 24. (2) [1896] A. C. 551 at p. 557.

construction of the tramway in question is not a violation of the agreement as to invasion of territory. Under any circumstances the appellants, as an existing corporation, could construct the tramway under the provisions of Art. 479 of the Municipal Code and any agreement to the contrary would be *ultra vires* and invalid as against public policy. It is not possible to construe the contract as enabling the respondents to exclude others from Longue Pointe while not building itself in that municipality and not seeking traffic there. The clear intention in giving the two companies power to construct over the same territory was to ensure to such territory the advantages of tramway connection with Montreal; and while it might not be the policy that both should construct to the same point or in the same districts, it certainly was not the policy that the two companies enjoying those powers might by agreement between themselves exclude any locality from the advantages of connection with either of them.

As to damages none were proved and no details could be given. Strictly speaking the plaintiffs could not by any possibility sustain damage owing to the presence on the Longue Pointe road of ties and rails the property of the appellants. The construction had only been commenced for a day when they took their action. Nothing but the actual operation of the railway could cause any damage to anybody and as this had not taken place there could be no damage.

Lafleur K.C. and *Beaudin K.C.* (*Lemieux K.C.* with them) for the respondents. The statute 62 Vict. ch. 75 (Que.) was assented to on the 10th of March, 1899, and it recognized the contract invoked by the plaintiffs dated 6th February, 1899. It is in evidence that this contract was passed as the result of opposition which the appellants made to the

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proposed amendments to the respondents' charter granting extended powers, and that, as the result of a compromise, the agreement was embodied in the form of a contract, and the plaintiffs became bound by the statute not to establish, build or operate branches in territory in which appellants had built their electric railway, so long as the latter should not extend its line into the limits of Maisonneuve, Longue Pointe, Pointe-aux-Trembles and Rivière des Prairies. The contract on the part of the appellants recites this clause of the statute, and then sets forth that "The Chateauguay & Northern Railway Company undertakes not to construct its line on the territory of the party of the second part (The Park and Island Railway Company), and the said party of the second part undertakes not to construct its line on the territory of the party of the first part." There is evidence to the effect that the territory of the respondents included, at that time, the municipalities of Maisonneuve, Longue Pointe, Pointe-aux-Trembles and Rivière des Prairies, they having there constructed their line of railway, while the appellants' territory was included in the line from the City of Montreal to Sault au Recollet, Cartierville and Lachine. The breach of this contract is sufficient cause for the injunction and for damages. As the appellants are subject to the Dominion Railway Act and have not complied with the provisions of its sections 89, 131 and 138, they have no power to construct the tramway in question, nor to enter into any agreement in respect to it. The Municipal Code cannot help them for they are governed entirely by the Railway Act and, consequently, they have no statutory authority and their works are an intrusion upon and an obstruction of the highway. The respondents hold lands and are rate-

payers in the municipality and are entitled to the injunction against an improper use of the highway and to protect their business interests being interfered with by a rival company in the manner complained of.

The judgment was delivered on the 25th of May, 1904, all the judges who heard the arguments being present except His Lordship the Chief Justice, who took no part in the judgment rendered.

SEDGEWICK J.—I concur in the judgment allowing the appeal with costs, for the reasons stated by His Lordship Mr. Justice Killam.

GIROUARD J.—I concur in the judgment allowing the appeal with costs, for the reasons stated by His Lordship Mr. Justice Davies.

DAVIES J.—In this case I am of the opinion that the appeal must be allowed on the ground that the respondents (plaintiffs) had not at the date of their present action sufficient legal interest to entitle them to the injunction prayed. The trial judge, under a mistaken idea as to the meaning of the amendment in the plaintiffs' charter extending the time for the construction of the railway it was authorized to build, held that the plaintiffs' powers existed at the time of the commencement of the action. The Court of King's Bench while pointing out his error and holding that the plaintiffs' power of construction had ceased and that the company had previously sold the portion of the railway constructed by it going from Maisonneuve, a suburb of Montreal, to Bout de l'Isle, comprising thirteen miles of road, held, nevertheless, that there was no positive proof that these thirteen miles constituted all the plaintiffs' constructed line and that the court should therefore assume that the plaintiffs had

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sufficient legal interest to bring and maintain the action. I cannot accede to this conclusion.

That the company's powers of construction had expired is admitted; that the portion of the line they had constructed was sold and disposed of by them is proved and not challenged; and the defendant company in its pleadings expressly stated that at the time of the institution of the action, and for more than two years previously, the plaintiff company had no railway or works. The plaintiff company did not answer this allegation and did not attempt to prove that at the time of the institution of the action they had any railway or works. It is true that the Montreal Terminal Railway Company, to whom the plaintiff company had sold its constructed line of railway, had, in June, 1902, before the plaintiffs' powers of construction had expired, conveyed back to the plaintiffs certain lands upon which a railway might be built from Bout de l'Isle to the City of Montreal. But, as a matter of fact, that plaintiff company had allowed its chartered powers of constructing a railway to expire, and the mere possession of several pieces of land a long way off from the tramway, the construction of which was sought to be enjoined, but without any power of railway construction, would not of itself constitute such a legal interest as would be necessary to enable it to maintain such an action as this. The question is not whether the corporate existence of the plaintiff company had ceased, but whether their chartered powers of constructing railways or other works having ceased, their interest to oppose the construction by another company of such railways had not ceased, and, in my opinion, as they had sold and parted with all the line of railway they had constructed and gave no evidence of the possession of any property which the contemplated construction of the railway by appellant com-

pany would necessarily injure, I do not think they could maintain this action.

This conclusion, if correct, would dispose of the appeal and make it unnecessary to say anything upon the very important questions raised at the hearing, first, as to what was the legal effect of the agreement made between the companies whereby the appellant company contracted not to build a railway in certain parts of the Island of Montreal designated as "the territory" of the respondents; and, secondly, whether the chartered powers of the appellant company had expired and whether they were bound by the provisions of the Dominion Railway Act. But there are good reasons why the other important points should be dealt with and disposed of. And, right at the threshold of the first question upon the agreement, I desire to say that I entertain grave doubts whether it is not void for uncertainty. It speaks of the "territory" of the plaintiffs and the defendants but does not describe nor define what is meant by territory. It is quite admitted that the words do not cover all of the territory across or over which the companies respectively had chartered powers to build railways, and I doubt whether it would be possible to determine from the agreement itself what was meant or to admit oral evidence which would explain it.

Passing by that objection, however, I am of the opinion that the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced because it is against public policy. If enforceable it practically amounts to an amendment and limitation of the chartered powers granted to the company by Parliament. Who can tell whether Parliament would have granted the

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limited powers only had they been asked or would have agreed to pass an amending Act limiting these powers or the areas within which they were exercisible as the agreement contemplated? Of course if it is lawful for a company possessing special statutory powers to bind themselves for a consideration not to exercise them in part they can do so in whole. The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament. If the principle is once conceded that chartered companies which have obtained powers from Parliament, presumably for the public good, can by contract with a rival company, or with others, limit themselves and their successors not to use those powers in whole or in part, the most serious consequences might result and the chief object of Parliament in chartering companies authorized to construct railways in certain sections of country or to promote legitimate rivalry and competition in such construction, might be defeated. The stronger company could in all cases buy up the weaker and a premium would be given to the creation of what are called, at the present time, "Trusts". I do not think the courts should lend their aid in any way to defeat the policy and object of Parliament with regard to the powers it has conceded to companies, even if the officials for the time being controlling those companies should agree to a limitation of their powers, and the then existing shareholders confirm the agreement.

The question has already been discussed by the House of Lords in the case of *Ayr Harbour Trustees* v

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Oswald (1), where it was decided that an agreement by a public body not to use their special powers was invalid, and this whether the body be one which is seeking to make a profit for shareholders or a body of trustees acting solely for the public good.

In that case Lord Blackburn says:

I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (2), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Railway Co.* (3).

In the United States similar conclusions have been reached by the courts. In *Chicago Gas Light Co.* v. *Peoples' Gas Light Co.*, (4) a contract by a corporation, authorized to manufacture and sell illuminating gas in a city, to discontinue such manufacture was held *ultra vires* and void; similarly held in *Re Appeal of Scranton Electric Light and Heat Co.* (5).

Then as to the powers of the appellant company under its charter to construct the road under the Municipal Act. The original charter obtained by it from the Quebec Legislature was superseded by the later charter obtained by it from the Parliament of Canada, 57 & 58 Vict., ch. 84. In this last Dominion charter the defendant company is declared to be a body

(1) 8 App. Cas. 623.
(2) L. R. 1 H. L. 254.
(3) 11 Ch. D. 611.
(4) 2 Am. St. R. 124; 121 Ill. 530.
(5) 9 Am. St. R. 79; 122 Pa. St. R. 154.

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corporate within the jurisdiction of the Parliament of Canada. The *undertaking* of the company is declared to be a work for the general advantage of Canada, and the Railway Act of Canada is made to apply to the company *and its undertaking* instead of the Acts of the Province of Quebec and the Railway Act of Quebec. Nothing is said expressly as to the time within which its chartered powers are to be exercised, but as the "Railway Act" of the Dominion was expressly made applicable to it, we turn to the latter Act and find section 89 expressly prescribing that if the railway authorized by any special Act is not finished and put in operation seven years from the passing of such special Act, then the powers granted by such Act or by the Railway Act shall cease *and be null and void as represents so much of the railway as then remains uncompleted.*

It is therefore perfectly clear to me that these chartered powers terminated on the 23rd July, 1901, and that at the time the company began the construction of what is called the tramway under contract with the Municipality of Longue Pointe acting under the Quebec Municipal Act, its powers of construction were utterly at an end, so far at any rate as the new proposed work was concerned.

The only answer attempted to be made to this argument was that the work the appellant company proposed to build was a tramway and not a railway, and this because it was to be built on a highway and not through the lands of private persons. But without entering upon these fine distinctions between railways and tramways I think the answer is a simple one.

Both by their Provincial and by their Dominion charters the company defendant were authorized to construct and operate railways or tramways from certain points in the City of Montreal to the various

municipalities situated on the Island of Montreal. They could do either one thing or the other, or both, but whatever mode of construction they adopted was by the Act 57 & 58 Vict. ch. 84, declared to be a work for the general advantage of Canada, and subject to the provisions of the Railway Act. It would be preposterous to suggest that if the defendants called their works of construction a railway they would be obliged to complete it within the seven years prescribed by the Railway Act, whereas if they called it a tramway they could construct it at any time that might suit their convenience.

The learned judges of the court of appeal in dealing with the attempted distinction have come to the conclusion that it cannot have the effect of relieving the defendants from the limitations and subsequent disabilities resulting from section 89 of the Railway Act, and I fully concur in that conclusion.

In the result, therefore, I am of the opinion that the appellants' powers of construction having expired it was not competent for them to enter into any agreement with the municipalities for the construction of a tramway so called under the Municipal Act; and that as they had chosen to seek powers from the Parliament of Canada and obtained them on the condition and basis that their undertaking was a work for the general advantage of Canada and to be subject to the provisions of the Railway Act of Canada instead of the Acts of the Province of Quebec, any work they undertook pursuant to the powers by that special Act given must have been completed subject to all the provisions of the Railway Act which were applicable to the undertaking.

I do not think, however, their agreement not to exercise their chartered powers can be invoked as ground for obtaining an injunction, such agreement being in derogation of their chartered powers; but as

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I am also of opinion that the respondent company had not the interest necessary to maintain the action, the appeal should in my opinion be allowed, the injunction dissolved, and the action dismissed.

KILLAM J.—I agree with my brother Davies in thinking that the contract upon which the plaintiff company relies is one which should not be enforced by the courts. In *Doane* v. *Chicago City Ry. Co.* (1), Gray J. laid down a principle, which I conceive to be sound,

> that an agreement by a corporation exercising a franchise for the public convenience, that it will not exercise it where the convenience may be thereby promoted, is invalid.

In that case an agreement by a street railway company with a private individual that it would not construct more than a single line of railway upon a certain street was held to be unenforceable. The principle is supported by *Thomas* v. *The West Jersey Railroad Co.* (2); *Gibbs* v. *The Consolidated Gas Co. of Baltimore* (3); and *Central Transportation Co.* v. *Pullman's Palace Car Co.* (4), as well as by the cases to which my brother Davies has referred.

Before the passing of the Act of the Quebec Legislature, 62 Vict. c. 75, containing the prohibition against the Chateauguay Company building in municipalities in which the Park and Island Company had built so long as the latter should not extend its lines into the municipality of Longue Pointe and other municipalities, the Parliament of Canada had passed the Act 57 & 58 Vict. c. 84, declaring the undertaking of the Park and Island Company to be a work for the general advantage of Canada and the company a body corporate and politic within the legislative authority

(1) 51 Ill. App. 353.
(2) 101 U. S. R. 71.
(3) 130 U. S. R. 396.
(4) 139 U. S. R. 24.

of the Parliament of Canada, and expressly authorizing the company to construct railways or tramways from the City of Montreal to the various municipalities in the island of Montreal.

It seems impossible, then, for either company to rely upon the Quebec Act, 62 Vict. c. 75, as impliedly sanctioning an agreement on the part of the Park and Island Company to abandon any of its corporate powers.

The Park and Island Company was proceeding with the construction of a tramway authorized by the municipal authority under the powers given by the Municipal Code, Art. 479. The municipality did not attempt to exercise the extended powers given by the Act 63 Vict. c. 61. It appears to me that the direction in that statute to give the preference to the Chateauguay and Northern Railway Co. or another specified company applied only to the arrangement authorized by the Act, and in no way limited the power of the municipality under the Municipal Code.

I am also of opinion that it is not open to the Chateauguay and Northern Railway Company to raise any objection to the status or corporate powers of the body authorized by the municipality to construct such a work, or to set up its non-fulfilment of the conditions prescribed by the Railway Act of Canada. By art. 479 of the Municipal Code, a municipal council may authorize an incorporated company, a natural person, or a firm, to construct and operate tramways in the municipality, and, for this purpose, to lay its rails on and run its cars over the public highways. As the Chateauguay and Northern Railway Company had no exclusive or preferential rights in these respects, and no interest which could entitle it to object to the municipal council conferring these powers upon natural persons or partnerships, it could

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have no right to question the corporate powers of another corporation with which the council might choose to deal or the fulfilment by the latter corporation of conditions precedent required by its charter.

If for any reason the work of the Park and Island Railway Company will constitute an unlawful erection or obstruction upon the highway, the Chateauguay and Northern Railway Company is not shewn to have such an interest in the highway, or to have suffered, or to be likely to suffer such damage by its obstruction as to warrant it in maintaining the action.

In the view which I take, the expiration of the period with in which the Chateauguay and Northern Railway Company should have completed its works and its want of present ownership of a railway are not important as affecting the result of this case.

Whatever railways, or powers to construct railways or tramways, the Chateauguay and Northern Railway Company may possess, it does not appear to me that the Park and Island Company has done or threatens anything which is or would be a violation of any legal right of the Chateauguay and Northern Railway Company.

I would allow the appeal, and dismiss the action with costs in all courts.

Appeal allowed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondents: *Lafleur, MacDougall & Macfarlane.*

MARGARET NIGHTINGALE (PLAINTIFF)..... ..... } APPELLANT ;

AND

THE UNION COLLIERY COMPANY OF BRITISH COLUMBIA (DEFENDANTS)..... } RESPONDENTS.

1904
*May. 27-30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Dangerous way—Operation of railway—Defective bridge—Gratuitous passengers—Liability of carrier for damages.

In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. [*Moffatt* v. *Bateman* (L. R. 3 P. C. 115) followed. *Harris* v. *Perry & Co.* ([1903] 2 K. B. 219) distinguished.]

Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger.

Judgment appealed from, (9 B. C. Rep. 453) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia (1) *in banco*, reversing the judgment at the trial and ordering judgment to be entered for the defendants with costs,

The company owns and operates a railway on its own lands on the Island of Vancouver between Cumberland, in the Comox district, and Union wharf, on the sea shore, about ten miles distant. The railway was carried across the Trent river, about seven miles from Cumberland, by a bridge which broke as the train (on

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 9 B. C. Rep. 453.

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which deceased, Richard Nightingale, was travelling) was passing over it and he was killed. The deceased had a contract with the company for repairing this bridge by adding two additional piers and, at the time of the accident, some of his workmen were engaged upon the contract. Deceased was then residing at Cumberland and could have reached the works by a passenger train or by the highway, but he entered the cab of the locomotive engine which was hauling a freight train towards the bridge in order to visit his work there. There was no conductor on this train and the engine driver had no authority to carry passengers and had been instructed that he should not allow persons to travel on his train without special permission from competent authority. It appeared, however, that, from time to time, the company's officers and servants and other persons authorized by the manager and master-mechanic were in the habit of travelling by this train. The death of deceased occurred at the time of the accident, on 17th August, 1893, in respect of which the company was, in another case, (1) indicted and convicted for breach of duty in omitting, without lawful excuse, to maintain the bridge in proper condition to avoid danger to human life.

The action was brought by the plaintiff as administratrix of the deceased, for her benefit, as his widow, and for the benefit of her infant children under the "Families Compensation Act" (2), and the liability of the defendants, at common law, was also relied upon. At the trial, before Mr. Justice Irving with a special jury, judgment was entered for the plaintiff upon the findings of the jury. By the judgment now appealed from, (3) the judgment at the trial was set

(1) *Union Colliery Co.* v. *The Queen* 7. B. C. Rep. 247; 31 Can. S. C. R. 81.

(2) R. S. B. C. ch. 58.

(3) 9 B. C. Rep. 453.

aside by the Supreme Court of British Columbia, *in banco*.

J. Lorne McDougall for the appellant.

Luxton, for the respondents, was not called upon for any argument.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated by Nesbitt J.

DAVIES J.—I concur in the result of the judgment dismissing the appeal with costs.

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

The highest that the position of the deceased can be put is that he was riding on the engine in question by tacit permission. The rule laid down in *Moffatt* v. *Bateman* (1) is that, in case of a gratuitous passenger, gross negligence must be shewn, and there cannot be any pretence that the evidence in this case fulfils that description. The driver in the *Bateman Case* (1) was the defendant himself and the plaintiff was with him at the defendant's express request.

The recent case of *Harris* v. *Perry & Co.* (2) was pressed upon us as extending the rule laid down in *Gautret* v. *Egerton* (3). We do not think that the case can be so viewed. That case simply decided that the leaving of a loaded truck upon the tracks was in the nature of a trap or was equivalent to such an act of wrongdoing as to amount to gross negligence. If the case is assumed to be a departure from the law, as previously laid down, we would not follow it. We

(1) L. R. 3 P. C. 115. (2) [1903] 2 K. B. 219.
(3) L. R. 2 C. P. 371.

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think the doctrine of liability sufficiently extended already in the case of bare licensees.

We agree in the judgment of the court below. The opinions of the Chief Justice and Mr. Justice Martin contain a very valuable collection of the authorities.

The appeal is dismissed with costs.

KILLAM J. concurred in the judgment for the reasons stated by Nesbitt J.

Appeal dismissed with costs.

Solicitor for the appellant: *D. G. Macdonell.*

Solicitors for the respondents: *Pooley, Luxton & Pooley.*

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*May 10.
*May 23.

THE CENTRAL VERMONT RAILWAY COMPANY (DEFENDANTS).... } APPELLANTS;

AND

JACQUES FRANCHÈRE (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW AT THE CITY OF MONTREAL.

Railways—Negligence—Free pass—Consideration for transportation—Misdirection — Findings of jury—New trial — Excessive damages — Art. 503 *C. P. Q.*

Where there was misdirection as to the assessment of damages merely and it appeared to the court that the damages assessed by the jury were grossly excessive, the Supreme Court of Canada made a special order, applying the principle of article 503 of the Code of Civil Procedure, directing that the appeal should be allowed and a new trial had to assess damages, unless the plaintiff consented that the damages should be reduced to an amount mentioned.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

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APPEAL from the judgment of the Superior Court, sitting in review at Montreal, affirming the judgment in favour of the plaintiff entered by Curran J. on the verdict of the jury at the trial.

The circumstances under which the action was brought and the questions in issue on this appeal are stated in the judgments reported.

Lafleur K. C, for the appellants, cited *Brasell* v. *Grand Trunk Railway Co.* (1); *Grand Trunk Railway Co.* v. *Miller* (2); *Cowans* v. *Marshall* (3); and *The Glengoil Steamship Co.* v. *Pilkington* (4).

R. C. Smith K. C. and *R. A. E. Greenshields K. C.* for the respondent referred to *Beaudry* v. *Starnes* (5); *McRae* v. *The Canadian Pacific Railway Co.* (6) at page 144; *Crepeau* v. *Julien* (7); *Thibault* v. *Poitras* (8); *Kane* v. *Mitchell Transp. Co.* (9) at page 69; 20 Laurent No. 524; Sirey, Code Civ. Ann., arts. 1382, 1383, nn. 686, 702, 703; *Goodhue* v. *The Grand Trunk Railway Co.* (10); *Canada Shipping Co.* v. *The Mail Printing & Publishing Co.* (11); *Baillie* v. *Provincial Insurance Co. of Canada* (12); and *Laflamme* v. *The Mail Printing Co.* (13).

THE CHIEF JUSTICE concurred in the judgment ordering a new trial for the purpose merely of assessing damages, unless the plaintiff consented to accept a judgment for $2,500.

SEDGEWICK J.—I agree in the result of the judgment for the reasons stated by my brother Killam.

(1) Q. R. 11 S. C. 150.
(2) 34 Can. S. C. R. 45.
(3) 28 Can. S. C. R. 161.
(4) 28 Can. S. C. R. 146.
(5) Q. R. 2 S. C. 396.
(6) M. L. R. 4 Q. B. 140.
(7) Q. R. 12 S. C. 308.
(8) Q. R. 13 S. C. 481.
(9) 90 Hun. 65.
(10) M. L. R. 3 S. C. 114.
(11) M. L. R. 3 S. C. 23; M. L. R. 4 Q. B. 225.
(12) 21 L. C. Jur. 274.
(13) M. L. R. 4 Q. B. 84.

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GIROUARD J.—I concur in the opinion of Mr. Justice Killam.

NESBITT J.—The plaintiff sues, under article 1056 of the Civil Code, to recover damages for the death of his son, which occurred on the 28th January, 1903.

The plaintiff's declaration contained two paragraphs, as follows:

3. That the accident in question was due to the *gross fault and culpable negligence of the company defendant and its employees and servants:*

4. That owing to *improper couplings, the car in which the deceased* was riding became *detached and uncoupled from the rest of* the train while the train was going at a high rate of speed, and the officials and employees of the company-defendant in charge of said train, *took no precaution to avoid said car from running into the forepart of the train* on which collision occurred, and owing to the shock resulting therefrom the deceased was thrown down and killed.

On the 12th May, 1903, counsel for both parties agreed on the following facts to be submitted to the jury and by them answered in the cause, subject to the right to object:

1. Was J. Arthur Franchère on the 28th day of January a passenger on a train owned and operated by the defendant and running between the City of Montreal and the Village of Marieville?—Yes.

2. Did the said J. Arthur Franchère meet with an accident on the said date?—Yes.

3. Did the said J. Arthur Franchère receive injuries by the said accident, which resulted in his death?—Yes.

4. Was the accident due to the fault and negligence of the company defendant, its servants or employees?—Yes.

5. Were the couplings between the cars of the said train improper and defective?—Yes.

6. Were the brakes on said train in working order?—No.

7. Was the bell cord on said train in proper working order?—No.

8. Was the said J. Arthur Franchère the son of the plaintiff?—Yes.

9. Was the said J. Arthur Franchère the main support of the said plaintiff and his wife, the mother of the said J. Arthur Franchère?—Yes.

10. Was the said J. Arthur Franchère travelling at the time of the said accident on a free pass containing the following condition?—Yes.

"The person accepting this free pass, in consideration thereof, assumes all risk of accident and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise for any injury to the person or for any loss or injury to the property of the passenger using it. If presented by any one other than the person named hereon, or if an alteration, addition or erasure is made upon this pass, it is void, and conductors will take it up and collect fare.

"The right to cancel this pass at any time is reserved by the company."

11. Was said condition accepted by the said Franchère?—No.

12. Was said pass issued for value received by the defendant or its *auteurs*?—Yes.

13. Was the said J. Arthur Franchère at the time of the accident riding in the baggage car of the said train?—Yes.

14. Was it against the rules of the said company to ride in a baggage car?—No.

15. Did the said plaintiff suffer damage by reason of the death of the said J. Arthur Franchère, and if so, to what amount?—Yes ($5,000), five thousand dollars. Unanimous on all questions.

At the trial, which took place on the 11th June, 1903, the jury answered the questions as above indicated, and the trial judge thereupon entered judgment for the plaintiff for the sum found by the jury.

The defendant appealed to the Court of Review which affirmed, without stating any reasons, the judgment of the trial judge.

The defendant now appeals here taking exception to questions 6 and 7 on the ground that the plaintiff's declaration contained no suggestion of any negligence as to the questions inquired into by questions 6 and 7, and claiming that the whole case of the plaintiff was that the accident had been caused through the fault of the company and its employees * * * * *

1. Owing to improper couplings; and,

2. Because the officials in charge of the train took no precaution to prevent the car which had been detached from running into the forepart of the train.

The defendant claims that the assignment of facts was fixed before the case came on for trial subject to

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the right of the parties to move before the judge to strike out, add to, or amend any of the facts so assigned as provided by article 427 of the Code of Civil Procedure. The defendant admitted negligence under question 5, and the importance of eliminating questions 6 and 7 and the answers thereto is that the negligence found would bring it under section 243 of the Railway Act of 1888 and within the provision entitling a party to recover notwithstanding any agreement to the contrary. I am inclined to think that the appellant should have required particulars under clause 3 of the declaration and that not having appealed from the assignment of facts is not entitled to invoke article 427 to claim the right to object to evidence being offered of the negligence found in answers to the questions 6 and 7. In any event on a new trial the plaintiff could and would no doubt amend his declaration to which the defendant would be entitled to plead, and on such new trial evidence could be gone into of the negligence so found.

The appellant also objects to the misdirection of the learned trial judge on the question of the measure of damages and in directing the jury as to the acceptance of the condition on the back of the pass by the deceased. The learned judge read the document which is in the following terms:

Cette vente est faite en consideration du droit, par les présentes accordé au dit Jacques Franchère et à son épouse, leur vie durant ou la vie durant de l'un d'eux, de voyager, gratis (sans payer) sur tout le parcours du dit chemin, tant et aussi souvent et longuement qu'il leur sera loisible, sans charge extra pour leurs paquets et bagages ordinaires, et dans les chars que les dits Jacques Franchère et son épouse choisiront ou choisira, pour leur plaisir ou utilité. Tel privilège et droit de passage gratis étant transférable par les privilégiés à deux des enfants des dits J. Franchère et son épouse, la vie durant de ces derniers ou de l'un d'eux.

A l'effet du privilège présentement accordé, la dite compagnie devra livrer aux dits Jacques Franchère et son épouse tous papiers, billets de passage ou tickets nécessaires.

Which I translate textually as follows:—

"This sale is made in consideration of the right by these presents granted to the said Jacques Franchère and to his wife during their life or the life of either of them, to travel free (without payment) on the whole length of the said road, as much and so often and at such length as will be possible to them, without any extra charge for their bundles and ordinary baggage and in the cars that the said Jacques Franchère and his said wife will choose, for their pleasure or use. Such privilege and the right of free passage being transferable by the persons to whom the privilege is given to two of the children of the said J. Franchère and his wife, during the life of the latter or of either of them.

"For the effect of the privilege now granted, the said company should deliver to the said Jacques Franchère and his wife all papers, passenger notes or necessary tickets."

It was argued that the deceased could have presented this deed and demanded his free passage on the train, and that he in no sense came within the cases establishing that a person travelling on a free pass issued with such a condition as is contained on the back of the pass in this case was not entitled to recover from the railway company for the negligence of its servants. In the case of transportation issued strictly under the document in the case of either Jacques Franchère or his wife that would be so, but as I read the document it is an agreement to give free passage to Jacques Franchère and his wife or to any two of their children whom they substitute in their place. If that is the proper construction, then,

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if the railway company issue the pass to five persons, that is three of the family of Jacques and Mrs. Franchère, then, surely they can say that as they are giving something not called for by the deed, something that is merely gratuitous, that as to the three persons to whom they are extending the gratuity the considerations relative to an ordinary free pass would apply. I would think it clear, too, that even the parties entitled under the deed could agree with the railway company that, if the railway company would do something over and beyond that which was required by the deed, they, on their part, would, in consideration of such "extra" upon the part of the railway company, agree to limit or release the liability of the railway company to themselves. I should think that that must be clearly the case and that therefore a very serious question arose, and that as to at least three of the parties this was a free pass, and that as to the other two, namely, the persons mentioned in the deed, they had a perfect right to agree with the railway company that if the railway company would carry three other members of the family also free, that all five would agree to make no claim against the railway company for negligence resulting in their injury. I need only refer to the cases collected in *Provident Life Society of New York* v. *Mowat* (1) to shew that any person receiving a pass, such as was issued in this case, with the conditions indorsed on the back of it, and having same in possession from year to year, would be presumed to have consented to the conditions. See also *Robertson* v. *Grand Trunk Railway Co.* (2). I therefore think that upon this branch of the case the learned trial judge clearly misdirected the jury, and that any finding of non-acceptance would be against the weight of evidence and the proper con-

(1) 32 Can. S. C. R. 147. (2) 24 Can. S. C. R. 611.

clusions to be drawn that the verdict must be set aside.

On the question of the assessment of damages the effect of the charge of the learned trial judge is best shewn by the following language :

You have had before you here an expert who comes and tells you that the cost of an annuity is $683 for $100 a year to a man of the age of the old gentleman who is now the plaintiff before you. He is supposed according to the tables of mortality, to live for seven and a half years. It will be for you to say what annuity he is entitled to from all the evidence you have heard. That is to say, as regards his own support and that of his wife ; I want to eliminate from this the support of Mr. Bouthillier and of any other person who may be in that house.

By restricting yourselves to the strict line of your duty taking into consideration what this old gentleman and his wife were entitled to under the circumstances I have mentioned to you, *you will reach the conclusion that—if they should get anything—they should get an annuity of four hundred or five hundred or six hundred dollars a year, whatever amount you think in your consciences that this young man could have paid.* That is what you have to do, and it is upon the basis of that amount that your verdict must be reached.

This direction is, I think, clearly erroneous. I think that it should have been pointed out to the jury that they must consider the circumstance also that the son was running behind in his payments to creditors ; that he might be cut off by disease or accident at any moment, when the payments to the father would cease. I cannot do better than cite from the language of Mr. Justice Brett.

To the best of my belief, the invariable direction to juries, from the time of the cases I have cited until now, has been " that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider *under all the circumstances a fair compensation.*" I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount, which would be an equivalent for the pecuniary injury, would be injust. Founding my opinion on that conviction, on the declaration of it by Parke J., and on the ordinary direction of judges, which directions have not been

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for years challenged, I conclude that the direction that I have enunciated is the legal, and only legal, direction. A direction which *leaves it open* to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron. *Rowley* v. *London & N. W. Ry Co.* (1).

This case has been adopted by the Court of Appeal in England on the 30th of last month in *Johnston* v. *Great Western Railway Company* (2).

The appellants also objected to the learned trial judge telling the jury that they were entitled to consider the needs of the plaintiff's wife during the lifetime of the plaintiff. The action was taken only for the plaintiff and not in a representative capacity, and I think, under the Code, damages recoverable are the same as under Lord Campbell's Act, and I entirely agree with the rules laid down by my brother Killam when Chief Justice of Manitoba in a case of *Davidson* v. *Stuart* (3). The cases are there fully considered and referred to and I adopt the conclusions he arrives at in that case and I think all that the jury were entitled to consider in this case were the reasonable pecuniary benefits to be derived by the father himself.

The verdict itself is evidence that the jury utterly failed to appreciate the proper measure of damages. They have given a present cash sum for a larger amount than could be suggested was likely to be contributed from year to year during the balance of the life time of the father. If the jury were to give a sum which at present expended would produce as a certainty at the present time the sum mentioned as usually contributed by the son it would, in my judgment,

(1) L. R. 8 Ex. 221. (2) [1904] W. N. 92.
(3) 14 Man. L. R. 74 ; 34 Can. S. C. R. 215.

under the doctrine of *Rowley's Case* (1) be too large. not being under all the circumstances a fair compensation taking into consideration the chances of the support being out off by accident or death or other causes at any time ; but to give at least double such a fixed amount, as they have done in this case, stamps the verdict as one which must have been given under a misapprehension of the proper measure of damages to be adopted. It is very difficult under Lord Campbell's Act to get a jury to understand that they cannot give solatium for wounded feelings, etc., but that their verdict must only be for such a sum as there is reasonable proof of a reasonable expectation of a pecuniary benefit.

I think the appeal should be allowed with costs and a new trial directed.

KILLAM J.—At the trial counsel for the company moved to have certain questions which had been assigned to be submitted to the jury struck out, and the refusal of the trial judge to strike out the 6th and 7th questions has been urged as one ground for granting a new trial. Art. 498 of the Code of Civil Procedure makes the insufficiency or defectiveness of the assignment of facts a ground for granting a new trial; but by art. 499,

> the defects in the assignment of facts must be such as to prevent a trial of the material issues.

As the declaration did contain a general allegation of negligence and as the defendants pleaded to the declaration, assented to the assignment of facts, subject to revision by the trial judge, and went down to trial without previously raising any objection, it does not appear to me that the trial judge was absolutely bound to strike out those questions or the Court of

(1) L. R. 8 Ex. 221.

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Review to disturb the judgment on the ground of his refusal to do so, or of the reference to the jury of the questions objected to.

In view however, of the findings of negligence in the answer to the 6th and 7th questions, the direction respecting the acceptance of the pass appears unimportant. These findings are not challenged otherwise than by the objection just mentioned, and it is not disputed that the defects came within the provisions of section 243 of the Railway Act of Canada, 51 Vict. ch 29, noncompliance with which renders the company liable, notwithstanding any agreement to the contrary. The evidence seems to me to have amply warranted the finding of the jury that the pass was issued for value, and we need not consider the application of the section to the case of a person riding by mere license of the company, without consideration.

It does not appear to me to have been erroneous to receive evidence of the mother's chance of life. The jury would have the right to take into account the probable effect of the mother's life and the father's liability to maintain her upon the action of the deceased in making contributions to his father if he had not been killed.

I entirely agree, however, that the direction to the jury upon the question of damages was erroneous upon the other ground pointed out by my brother Nesbitt. But, as the only question upon which there was any error was a question of damages, I think that justice would be done by refusing to allow the appeal if the plaintiff will consent to a reasonable reduction of damages.

By article 500 of the Code of Civil Procedure;

A new trial is not granted on the ground of misdirection * * * unless some substantial prejudice has been thereby occasioned; and if

it appears that such prejudice affects a part only of the matter in controversy, the court may direct a new trial as to such issues only.

And by article 503;

If the amount awarded by the verdict is grossly excessive, the court may refuse a new trial, provided that the plaintiff agrees that it be reduced to an amount which the court considers not excessive

in this case, say $2,500.

While the latter article was probably intended to apply only to cases in which the jury has been properly directed, yet I think that its spirit may be applied in dealing with an application for a new trial on the ground of a misdirection as to damages, and the new trial refused, if in that way the "prejudice" can be removed.

Appeal allowed with costs.

Solicitors for the appellants: *Lafleur, MacDougall & Macfarlane.*

Solicitors for the respondents: *Greenshields, Greenshields, Heneker & Mitchell.*

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*Feb. 19, 23, 24.

*April 27.

JOHN MILLER (DEFENDANT).....APPELLANT;

AND

GEORGE ROBERTSON (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE JUDGE IN EQUITY OF NEW BRUNSWICK.

Court of equity—Title to land—Declaratory decree—Cloud on title—Injunction—New grounds of appeal.

A Court of Equity will not grant a decree confirming the title to land claimed by possession under the statute of limitations nor restrain by injunction a person from selling land of another.

The Chief Justice took no part in the judgment on the merits and Sedgewick J. dissented from the judgment of the majority of the court.

Per Taschereau C.J. Where leave to appeal *per saltum* has been granted on the ground that the court of last resort in the province had already decided the questions in issue the appellant should not be allowed to advance new grounds to support his appeal.

APPEAL, *per saltum*, from a decision of the Judge in Equity of New Brunswick in favour of the plaintiff and maintaining an injunction to restrain defendant from selling the land claimed by plaintiff.

The bill in this case prayed for a decree declaring the rights and title of the plaintiff in and to certain land in Bathurst, N.B., and for an injunction to restrain defendant from advertising for sale or selling said land. Defendant had advertised a sale and a temporary injunction was granted, and the Judge in Equity ordered the title to be tried out in an action of ejectment which was done and resulted in a verdict for the plaintiff. Defendant then moved before the

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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Supreme Court of the Province for judgment or a new trial both of which were refused The Judge in Equity then made the final decree declaring the plaintiff owner in fee of the land.

The Supreme Court of New Brunswick having decided the issues on the motion for a new trial defendant was granted leave to appeal *per saltum.*

Gormully K.C. and *Fred. Taylor* for the appellant. The decree granting the perpetual injunction is not warranted either in fact or in law. The onus of establishing adverse possession is on the party alleging it and the adverse possession must be clearly proved. The evidence of adverse possession must be clear, and mere unconnected acts of trespass are entirely insufficient for title to be barred by the Statute of Limitations. *Handley* v. *Archibald* (1); *Sherren* v. *Pearson* (2); *McConaghy* v. *Denmark* (3); *Poignand* v. *Smith* (4); *Doe d. Des Barres* v. *White* (5); *Proprietors of Kennebeck Purchase* v. *Springer* (6); *Griffith* v. *Brown* (7); *Pike* v. *Robertson* (8). The authorities are that for title to a town lot to be barred by adverse possession, the evidence of unquestionable acts of ownership must be particularly clear; *Bowen* v. *Guild*, (9); some jurisdictions even hold that the lot must be built on or fenced in: *Garrett* v. *Belmont Land Co.* (10). The circumstances of the present case shew that this lot, on the sea-shore, was practically used by the public as part of the street, and unless there were some buildings or improvements of a more or less permanent character thereon, or some cultivation of the soil, it is evident that there could not be

(1) 30 Can. S. C. R. 130.
(2) 14 Can. S. C. R. 581.
(3) 4 Can. S. C. R. 609.
(4) 8 Pick. 272.
(5) 1 Kerr (N. B.) 595.
(6) 4 Mass. 415.
(7) 5 Ont. App. R. 303.
(8) 79 Mo., 615.
(9) 130 Mass., 121.
(10) 94 Tenn., 459.

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that exclusive and notorious adverse occupancy which the law requires. The doctrine of adverse possession is to be construed strictly and cannot be made out by inference but only by clear and positive proof. It also appears that the plaintiff and his grantors had no adverse possession of the lot between high and low water-mark. While the tide was in, this portion of the lot was an open highway for the general public. Therefore the plaintiffs' possession could not be of that continuous character which is required to bar title by adverse possession: *Mayor of St. John* v. *Littlehale* (1). The court, at the trial of ejectment, misdirected the jury; (a) As to what constituted a title; (b) By telling the jury that it did not appear that the defendant was in actual possession of the lot; (c) By directing the jury that acts of possession would be sufficient if they are acts done on the land which a man would be apt to do if he in fact owned it; and (d) By directing the jury that the evidence shewed that the possession of the plaintiff and his grantors in this case was not interrupted.

The findings of the jury do not authorize entering a verdict for the plaintiff and the learned judge was in error in so ordering. The findings are merely that the plaintiff and his grantors had been in actual and open possession of the lot from 1876 until the present time and, during that time, exercised acts of ownership over it. Even admitting these findings to be supported by the evidence, the facts so found are not sufficient to constitute title under the Statute of Limitations. The leading text writers establish that, to bar title by adverse possession under the Statute of Limitations, there must be an actual occupancy, clear, definite, positive and notorious. It must be continous, adverse and exclusive during the whole period

(1) 5 Allen (N. B.) 121.

prescribed by the statute and with and intention to claim title to the land occupied. Washburn, Real Property, (4 ed. vol. 3 p. 489: Angell, Limitations, (6 ed.) p. 410 ; Adams, Ejectment, (4 Am. ed.) p. 579.

In the present case there was no finding that this possession of the plaintiff and his grantors was adverse, continuous, actual, exclusive and under a claim of ownership—all of which are necessary for the statute to apply. Nor was the attention of the jury called to these as requisite. Indeed, there could have been no such finding by the jury on the evidence. Consequently the plaintiff's case was not made out. *Ward* v. *Cochran* (1) ; *McConaghy* v. *Denmark* (2) ; *Sherren* v. *Pearson* (3) ; *Doe d. Shepherd* v. *Bayley* (4) ; *Young et al.* v. *Elliott et al.* (5) ; *Taylor* v. *Horde* (6) ; and note in 2 Smith's Leading Cases (11 ed.) 648.

The issue at law directed by the court was not carried out by the plaintiff in the spirit of the order, as, in his bill, the plaintiff claimed a documentary title and tried the issue on a claim by adverse possession.

The bill is without equity and the Court of Equity had no jurisdiction over the matter. Indeed, it is very doubtful under what head of equity jurisprudence the plaintiff attempted to bring himself. He alleges that the defendant Miller had instructed the defendant Kerr to sell the water lot and that he verily believes that the said defendants are maliciously endeavouring to annoy him and to cast a cloud upon his title. There is no allegation in the bill that it is probable that the defendants would sell the water lot or make any conveyance thereof ; nor does the plaintiff allege that he believes that they will do so unless enjoined, but we are left with the bald statement that Miller has in-

(1) 150 U. S. R., 597.
(2) 4 Can. S. C. R. 609.
(3) 14 Can. S. C. R. 581.
(4) 10 U. C. Q. B., 310.
(5) 23 U. C. Q. B., 420.
(6) 1 Burr. 60.

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structed Kerr to sell the lot. Even assuming that the sale would be an irretrievably ruinous matter as regards the plaintiff and his claim to the water lot, there are no allegations that such danger is of such imminent and probable nature as to warrant a recourse to a Court of Equity in aid of a legal right. *Fletcher* v. *Bealey* (1).

The bill prays an injunction restraining the defendants from casting a hypothetical cloud on the plaintiff's title to the lot. As regards casting a cloud on the title, the plaintiff, in his ejectment proceedings, admitted that he had no documentary title to the land, and in his proceedings as well as in the statement of claim on which they were based, contended that he was entitled thereto absolutely by reason of adverse possession for the statutory period. Accordingly, as the plaintiff had no title to the lot in question, any basis for a bill in equity to remove a cloud on title, or to prevent a cloud on title, is absolutely wanting. Even assuming that a court of quity would interfere under any circumstances, the plaintiff, in effect, by his own statement, had no title to be clouded.

In the second place, no precedent can be found where a bill in equity has been allowed against a party claiming a legal title to real property merely because of such claim being made. The rule stated by Page-Wood, V. C., in *Talbot* v. *Hope Scott* (2) is that the court cannot interfere with a legal title of any description unless there be some equity by which it can affect the conscience of the defendant. As the plaintiff's right is one clearly triable at law, there is no ground for a court of equity interfering. *Earl of Bath* v. *Sherwin* (3).

(1) 28 Ch. D. 688. (2) 4 K. & J. 96.
(3) 4 Brown's Parl. Cas. 373.

The decision in the present case, if correct, would establish that a party can force another to contest, in equity, a legal right at a time that is entirely in his own discretion. No precedent can be found for such a doctrine. *Best* v. *Drake* (1).

Here there had been no previous verdict; but, on the other hand, the plaintiff had brought an action against the defendant Kerr and discontinued, paying defendant's costs—precisely the reverse of *Best* v. *Drake* (1); and yet, in *Best* v. *Drake* (1), the Court of Chancery held that it had no jurisdiction This is a fundamental principle of equity; *Brooking* v. *Maudslay Son & Field* (2).

Then, the issue ordered was futile; *Browne* v. *Smith* (3); and the form of the decree is wrong, and in this case a bill *quia timet* cannot lie. We also refer to *Hayward* v. *Dimsdale* (4); *White* v. *Mellin* (5); *Bonnard* v. *Perryman* (6); *Ansdell* v. *Ansdell* (7); *Shepherdson* v. *McCullough* (8); *Harris* v. *Mudie* (9) at page 422; *Ontario Industrial Loan Co.* v. *Lindsey* (10); *Buchanan* v. *Campbell* (11); and *Truesdell* v. *Cook* (12).

Teed K. C. for the respondent. The substantial question is, who had the better title or right to the bank or shore lot? The question of title was litigated and tried as between the appellant and respondent in the action of ejectment and found in favour of the respondent, that finding was confirmed by the Supreme Court of New Brunswick *en banc*, and the question was thereby *res judicata* as between the parties. If the appellant was dissatisfied therewith he should have appealed to this court from the decision on the eject-

(1) 11 Hare, 369.
(2) 38 Ch. D. 636.
(3) 5 Jur. 1195.
(4) 17 Ves. 111.
(5) [1895] A. C. 154.
(6) [1891] 2 Ch. 269.
(7) 4 My. & Cr. 449.
(8) 46 U. C. Q. B. 573 at p. 597.
(9) 7 Ont. App. R. 414.
(10) 3 O. R. 66; 4 O. R. 473.
(11) 14 Gr. 163.
(12) 18 Gr. 532.

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ment, and not having done so, he is precluded from questioning or impugning it on this appeal.

When the matter came before the judge in equity upon the hearing, when the decree in equity appealed from was pronounced, he was bound by the decision of the full court in the ejectment action that the title was in the respondent, and was bound to follow that decision, and make a decree in accordance therewith. The Supreme Court is the court of appeal from the Equity Court, and how could the judge in equity, upon the same identical questions both of law and fact, declare that this decision given on the same case and questions by his immediate court of appeal was bad and wrong, and how could he make a decree contrary thereto? The judge in equity was bound by the decision of his immediate court of appeal, and therefore his decision is right, or at all events it does not lie in the mouth of the appellant to say it is wrong. Under the old English chancery practice, an issue or action at law tried by order out of chancery was not determined by a court binding upon chancery, and therein lies the distinction between that practice and the practice in the present case. How could the judge in equity under the facts and evidence before him, decree that the title was other than in respondent. The practice as laid down in Daniel and in Smith on Chancery Practice is, that upon the suit coming on for hearing on further directions, after the trial of an action or issue at law, the only evidence of title offered is the postea in such action or issue. There was nothing before the judge in equity to shew that it was erroneous.

This appeal is taken from the decree in equity only, and not from the decision in the ejectment action. Such last mentioned decision, therefore, stands unimpeached and that decision, being the judgment of a

superior court, and the final court of appeal for the province, cannot be attacked collaterally in this appeal but is final and conclusive until directly appealed from and reversed.

The respondent further contends that the decision in the ejecment action, and the decree appealed from, based thereon, are correct;—(a) Because under the evidence on the trial, the respondent made out a full and complete title by possession for over twenty-five years by himself and those under whom he claimed, and, therefore, was entitled to recover; and—(b) That even if the respondent had not made out a possession for twenty years, he at all events, proved a possession prior to that of the appellant and is entitled to recover. Prior possession, though less than twenty years, is sufficient to recover against one without title. *Asher* v. *Whitlock* (1).

The order of the Equity Court under which the action of ejectment was brought directed the bringing of that action to try the title, and in no event should the case be tested by the old rules relating to the trial of ejectments whereby it was urged or held that a plaintiff in ejectment must fail if the legal title was shewn outstanding in some one else. The respondent submits that the legal title, in whomsoever vested, was extinguished by the possession of the respondent, and those under whom he claimed. The meaning of the decree directing the action of ejectment was to try which of the claimants had the better right to the land in dispute. The appellant proved no title or right of any kind whatsoever to the lot in question; no pretence of proof of possessory title; no proof of documentary title from any one that ever owned or possessed it. The bill has equity in substantially alleging that the defendants had put a cloud upon the title. For

(1) L. R. 1 Q. B. 1.

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this there is no remedy at law and recourse must be had to a court of equity. The practice in New Brunswick is to order an issue in ejectment to inform the conscience if the Court of Equity. This was the old English practice. See remarks of Eldon L. J. in *Pemberton* v. *Pemberton* (1).

THE CHIEF JUSTICE (dissenting).—In this case I understand that we are all of opinion that upon all the points of law or of fact taken in the courts below the appeal should be dismissed. But the majority of the court are of opinion that we should allow the appeal upon a ground admittedly never taken in the courts below. Now, this is an appeal *per saltum* granted by the registrar though strenuously opposed by the respondent. In my opinion, under such circumstances, no new point of law is open to the appellant. We should not so easily give to an appellant the right to constitute this court a court of first instance. It is rather singular, not to say more, for an appellant to obtain leave to appeal *per saltum* upon the ground that the provincial court of sppeal has passed upon the points involved, and subsequently to be allowed to raise a new point in this court.

I do not take part in this judgment.

SEDGEWICK J., also dissented from the judgment of the majority of the court.

The judgment of the majority of the court was delivered by :

NESBITT J.—This action was begun by a bill in equity the plaintiff seeking to have the defendant restrained by an injunction from advertising for sale, or selling, or conveying, or professing or pretending

(1) 13 Ves. 290 at p. 297.

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to sell or convey a certain water lot in the Town of Bathurst and also praying for a decree declaring his rights in and title to said lot. Subsequently an order was made for the plaintiff to bring ejectment against the defendant. Ejectment was according brought and a verdict was rendered in favour of the plaintiff, and the record is indorsed stating that the jury had found that the plaintiff, on the 5th July, 1901, was and still is in possession of the land as in the writ alleged. Afterwards, the Judge in Equity, no counsel appearing for the defendant, granted a decree the material part of which is as follows :

Whereupon, and on hearing the plaintiff's bill, *the record and postea in the ejectment suit read,* and what was alleged by the said counsel for plaintiff, it is now declared that the plaintiff, George Robertson, *is absolutely entitled in fee simple to the water lot or shore lot situate in front of the Robertson Hotel, in the Town of Bathurst, in the County of Gloucester, and hereinbefore and in the plaintiff's bill mentioned, and it is ordered that the defendants John Kerr and John Miller mentioned, and each of them be and they and each of them are hereby perpetually enjoined and restrained henceforth altogether and absolutely from advertising for sale or conveying or professing or pretending to sell, assign or convey the said water lot or shore lot.*

An appeal was allowed *per saltum* to this court. I I do not think that we are at liberty to discuss the evidence at the trial or to consider whether the charge of the learned trial judge and the finding of the jury was correct ; and I think, therefore, the point shortly turns on whether or not the bill was demurrable for want of equity.

That objection to the making of a decree could be taken on that ground at the hearing, notwithstanding that the defendants had answered and had not demurred, is clear. See *Jones* v. *Davids* (1) ; *Hollingsworth* v. *Shakeshaft* (2) ; *Webb* v. *England* (3) ; *Ernest* v. *Weiss* (4) ; *Morocco Land and Trading Co.* v. *Fry*

(1) 4 Russ. 277.
(2) 14 Beav. 492.
(3) 29 Beav. 44.
(4) 1 N. R. 6.

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(1). In some of these cases costs were refused on a dismissal of the bill at the hearing, upon the ground that the defendant could have raised the defence by demurrer. Substantially what is in dispute is the title to the lot in question, across the road from the hotel of the plaintiff, which the plaintiff claimed to have obtained a title to by various acts of possession and for the purposes of this judgment he must be presumed to have obtained such title, although if we were at liberty to discuss the evidence I think a very different result would follow. The defendant, Miller, also claimed to be the owner and issued the following advertisement :

> I will sell at public auction in front of the Telegraph Office in Bathurst, on Saturday, January 27th, at eleven o'clock a.m., the water lot owned by the late William End fronting on Water Street, in five lots forty feet each in breadth. Terms ten per cent of purchase money to be paid at sale, balance on delivery of deed, about ten days afterwards.
>
> N.B.—The sale of the above named lot was postponed last August on account of Mr George Robertson bringing a suit in the Supreme Court claiming title. He has discontinued his suit and paid costs.
>
> (Signed) JOHN KERR, *Auctioner.*
>
> BATHURST, 19th January, 1900.

Whereupon the plaintiff filed his bill in equity as I have before stated. I can find no authority for the interference of the Court of Equity in such a case. A most interesting discussion of when the court will interfere on behalf of a plaintiff in possession against a defendant not in possession and claiming possession and threatening to come upon the estate is shewn in the case of *Lowndes* v. *Bettle* (2), where Vice Cancellor Kindersley reviews all the authorities. I find no case that goes further than that case, and in the United States it seems there is no general rule that can be relied on as determining what constitutes such a cloud

(1) 11 Jur. N. S. 76. (2) 10 Jur. N.S. 226.

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on a title as would authorize the interference of the Court of Equity for its prevention. Generally an action at law or a suit in equity will not be entertained unless there is an actual disturbance of right. Exceptions to this rule are and have been long recognized in a Court of Equity, and the jurisdiction of that court is often exercised to prevent as well as to redress injury. A mere fear of suit, or that any one merely questions one's title, or even asserts a hostile title, will not justify the court in intervening and cause litigation which might not otherwise arise. A sale of the land of the true owner as the property of a mere stranger with whom he is not connected from whom he does not mediately or immediately trace title cannot cast a cloud on his title. See *Armstrong* v. *Sanford* (1); *Montgomery* v. *McEwen* (2); *Pixley* v. *Huggins* (3); *Welch* v. *May* (4). In Ontario, Sir Henry Strong, then Vice Chancellor, in *Truesdell* v. *Cook* (5), said as follows:

I am of opinion that in a proper case where the plaintiff having a legal title has done all he can to assert his title at law, a bill may be maintained in this court to compel the delivering up of a deed which appears to be void at law, provided it is a registered instrument. I find no authority for saying that the existence of an unregistered deed, passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner that there would be a great want of remedy if this court could not decree cancellation in such a case.

No higher authority than the learned Vice Chancellor upon equitable doctrines can be cited in this country. See also *Ontario Industrial Loan and Investment Company* v. *Lindsey et al.* (6).

In New Brunswick the doctrine that conveyances of land in the actual adverse possession of another are

(1) 7 Minn. 49 at p. 53.
(2) 9 Minn. 103 at p. 107.
(3) 15 Cal. 127 at p. 133.
(4) 14 Wis. 200.
(5) 18 Gr. 532.
(6) 4 O. R. 473.

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void is still in force. Upon the allegations of the bill any conveyances which the defendant Miller might make would be void as against the plaintiff.

While I agree that the Court of Equity will always mould its decrees to meet changing circumstances, I think we should not bring the court into the reproach that equity was measured by the length of the chancellor's foot by departing from apparently well settled doctrines. I agree with the view expressed by my brother Sedgewick that the court will always leave the right open for interference in any case where it is deemed necessary in the interest of justice to prevent the placing of a cloud on a title of any one, but I do not think this case calls for the intervention of the court.

The appeal should be allowed and the plaintiff's bill of complaint dismissed, but without any costs of the suit or of the appeal, as the defendants did not raise the objection to the maintenance of the suit either by demurrer or at the hearing or otherwise in the court below.

Appeal allowed with costs.

Solicitor for the appellant: *Geo. G. Gilbert.*

Solicitor for the respondent: *M. G. Teed.*

THE S. MORGAN SMITH COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE SISSIBOO PULP AND PAPER COMPANY (DEFENDANTS)..... } RESPONDENTS.

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*May 16, 17.

*June 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mechanics' lien—Machinery furnished—R. S. N. S. (1900) *c.* 171 *ss.* 6 *and* 8—*Contract price.*

Under the Mechanics' Lien Act of Nova Scotia R. S. N. S. (1900) ch. 171 a lien for machinery for a mill does not attach until it is delivered and if the contractor for building the mill has then been fully paid there is nothing upon which the lien can operate as by sec. 6 of the Act the owner cannot be liable for a sum greater than that due to the contractor.

B., holder of more than half the stock of a pulp company for which he had paid by cheque, and also a director, offered to sell to the company land, build a mill and furnish working capital on receipt of all the bond issue and cash on hand. The offer was accepted and all the stock, issued as fully paid up was deposited with a trust company and the cash, his own cheque and the price of five shares, given to B. The stock was sold and, from the proceeds, the land was paid for, the working capital promised given to the company and the balance paid to B. from time to time, as the mill was constructed. The machinery was supplied by an American company but when it was delivered all the money had been paid out as above.

Held, affirming the judgment appealed from (36 N. S. Rep. 348) that as all the money had been paid before delivery the company was not liable under the Mechanics' Lien Act to pay for the machinery.

Held also, that sec. 8 of the Act which requires the owner to retain 15 per cent of the contract price until the work is completed did not apply as no price for building the mill was specified but the price was associated with other considerations from which it could not be separated.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the plaintiffs.

The respondent company was incorporated on the 11th March, 1898, by chapter 135 of the Nova Scotia Acts of that year, for the purpose of manufacturing pulp wood, with a capital of $550,000, divided into 5,500 shares of $100 each, with power to issue bonds not to exceed in the whole the amount of the issued stock of the company. The first meeting of the provisional directors of the company was held on the 28th September, 1898. At this time the stock list consisted of Mr. Burrill's subscription for 2,745 shares, and four additional shares which had been subscribed by other persons; one share was later on subscribed for by one of the appellants, who became a director of the respondent company. These shares were subsequently paid in full, amounting to $500. Nothing beyond this was ever paid by any one. Burrill deposited with the company his cheque for $68,625 as a payment in respect of the shares for which he had subscribed, but the cheque was never paid, nor intended to be paid, and was deposited, as Burrill says, to make the company's position legal. The company was prohibited, by section 16 of its charter, from commencing operations until half the capital stock had been subscribed and 25 per cent of such subscriptions paid up. At the first meeting of the provisional directors, held on the 28th September, 1898, Burrill, who was a director of the respondent company, made a proposition to sell the company certain lands and properties, to build and equip a pulp mill, and to pay to the company $55,000 as working capital, in consideration of receiving the company's whole bond issue, amounting to $250,000, the balance

(1) 36 N. S. Rep. 348.

of the company's stock, viz., 5,495 shares (including the stock for which he had subscribed), to be issued as fully paid, and the money in the treasury of the company, $69,125, being his own cheque and the $500 paid for the five shares already mentioned. This offer the provisional directors accepted, on the 29th September, 1898. At the time Burrill did not own the lands and property which be offered to sell to the respondent company; he merely held options entitling him to purchase the same.

Nothing further was done until the 17th of September, 1899, when a meeting of the shareholders of the company was held at Montreal, at which the agreement between Burrill and the provisional directors was ratified, bonds to the extent of $250,000 and the balance of the stock was delivered to the National Trust Company, and Burrill was paid the money in the treasury of the company, amounting to $69,125, consisting of his own cheque for $68,625 and the $500 which had been paid for five shares. The bonds were sold, and realized $237,000, and, 2,500 shares were also sold for 15 per cent of their face value. In all from the sale of bonds and stock $274,000 was realized, less some commission paid to brokers.

The property was conveyed to the company by deed dated the 7th October, 1899. The property was paid for out of the moneys realized from the sale of the bonds and stock, and the respondent company was paid the $55,000 as working capital. The pulp mill had still to be built and equipped with the best modern and improved machinery, according to Burrill's contract with the company. After payment by the Trust Company for the property conveyed to the respondent company, and after providing the working capital of $55,000, there still remained with the Trust Company, in December, 1899, a balance of $72,113.47. This

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money was paid out to Burrill from time to time as the construction of the mill progressed, on the certificate of Faulkner, who had been appointed inspector of the work by the respondent company, the first payment being one of $10,000 made on the 31st December, 1898.

On the 11th May, 1900, Burrill made a contract with the appellants for the supply of the machinery for the mill. On the 23rd of November, 1899, the Trust Company made its last payment to Burrill, thereby exhausting the $72,113.47. The mill was not then finished, as Faulkner, the inspector, knew.

On the 23rd of November, 1900, the plaintiffs shipped the machinery, which reached Weymouth on the 25th December, 1900. The plaintiffs began to instal the machinery on the 14th January, 1901, and finished installation on the 28th February, 1901. The respondents received from the plaintiffs notice of the completion of the contract on the 11th March, 1901. The plaintiffs filed a lien on the 28th March, 1901 and began this action on the 23th May, 1901.

The action was tried before Mr. Justice Meagher who held that plaintiffs were entitled to a lien for $18,000 the price of the machinery with interest. This the full court reversed and dismissed the action.

Pelton K.C. and *R. V. Sinclair* for the appellants.

H. A. Lovett and *F. H. Bell* for the respondents.

The judgment of the court was delivered by:

NESBITT J.—The facts are very fully stated in the judgment of Mr. Justice Graham in the court below.

The case may be disposed of upon one short ground, namely, that section 8 of the Mechanics' Lien Act is not applicable to such a transaction.

Assuming, but without deciding, that, in a case of this kind, a lien could be acquired as against the

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defendant company for materials, etc., supplied to Burrill, yet, by section 6 of the Act, R. S. N. S, 1900, ch. 171,

> except as in this chapter is otherwise provided, a lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

The plaintiffs acquired no lien by their contract with Burrill. No lien could attach until the machinery was actually furnished or the work done. Long before that the full consideration had been paid. The only ground upon which the plaintiffs can hope to maintain a lien as against the defendant company would be that section 8 of the Act applies, and we think that that section does not by its terms apply to a case where there was no price specified or capable of being ascertained for the erection of the building, but the contract price of the building was blended with considerations for other matters from which it could not be separated. And we adopt the reasoning of the cases in Massachusetts referred to in the judgment below, to which may be added *Ellenwood* v. *Burgess* (1); *Angier* v. *Bay State Distilling Company* (2).

We think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Sandford H. Pelton.*

Solicitor for the respondents: *W. H. Covert.*

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(1) 144 Mass. 534-541.

(2) 178 Mass. 163.

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May 17, 18.
*June 8.

THE DOMINION IRON AND STEEL COMPANY (PLAINTIFFS)..... } APPELLANT;

AND

JOHN McDONALD (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assessment and taxes—Exemption—Railways—R. S. N. S. (1900) *c.* 73—*Imposition of tax—Date—Municipal Act—R. S. N. S.* (1900) *c.* 70.

Sec. 3 of R. S. N. S. (1900) ch. 73 (Assessment Act) exempted from taxation "the road, rolling stock * * used exclusively for the purpose of any railway, either in course of construction or in operation, *exempted* under the authority of any Act passed by the legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation but all former assessment Acts were repealed by these Revised Statutes so that it was not "exempted" when the latter came into force. By 2 Ed. 7., ch. 25, assented to on March 27th 1902, the word "exempted" was struck out of the above clause and in May, 1902 the appellants were included in the assessment roll for that year for taxation on their railway.

Held, by Taschereau C. J., that under the above recited clause the railway was exempt from taxation.

Held, by Sedgewick, Davies, Nesbitt and Killam JJ. that if the railway could be taxed under the Assessment Act of 1900 the rate was not authorized until the amending Act of 1902 by which it was exempt had come into force and no valid tax was, therefore, imposed.

APPEAL from a decision of the Supreme Court of Nova Scotia in favour of the defendant on a case stated between the parties.

The following is the case stated for the opinion of the court.

"1. The plaintiff is a body corporate, whose chief place of business is at Sydney, in the County of Cape Breton.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

The plaintiff is and was, at all times hereinafter referred to, the lessee of certain property belonging to the Dominion Coal Company, Limited, a certain other body corporate, doing business in the County of Cape Breton. Such property, of which the plaintiff is and was lessee as aforesaid, included the road, rolling stock, bed, track, wharves, station houses, buildings and other plant of or used in connection with that certain railway system owned by the said Dominion Coal Company, Limited, and known as the Sydney and Louisburg Railway, the same being hereinafter referred to as "the property." The property is and was used exclusively for railway purposes, namely, for the purpose principally of carrying coal from mines of said Dominion Coal Company, Limited, leased to plaintiff, and also of carrying passengers and freight by railway and the operating of a railway between Sydney and Louisburg, and the same is wholly situate within the county of Cape Breton aforesaid, and is and was used exclusively for railway purposes, and is and was in operation under the authority of an Act of the Legislature passed by the province of Nova Scotia and has been so used and operated under the authority of said Act since a date prior to the first day of January, 1901.

"2. That previous to the coming into force of the Revised Statutes of Nova Scotia, 1900, the property was exempt from taxation by virtue of chapter 44 of the statutes of Nova Scotia for the year 1892, and chapter 5 of the statutes of Nova Scotia for the year 1895. Said chapter 44 of the Acts of 1892 was repealed by said chapter 5 of the Acts of 1895, and said chapter 5 of the Acts of Nova Scotia, 1895, was repealed immediately upon the coming into force of the Revised Statutes of Nova Scotia, 1900, hereinafter referred to.

"3. That under and by virtue of the provisions of chapter 73 of the Revised Statutes, 1900, the assessors

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for the districts of the municipality of the county of Cape Breton, within which the property was situate, assessed the respective portions of the same respectively situated within the said respective districts, and prepared and completed the assessment rolls respectively for the said respective districts in the form prescribed and pursuant to the provisions of said chapter, and duly signed said respective assessment rolls after having first duly attached to each roll the certificate required by said chapter to be made by said assessors, and prior to the 15th day of November, 1901, and within the time limited by said statute, duly forwarded and returned to the clerk of the Municipality of the County of Cape Breton aforesaid, said assessment rolls for the said several districts. The plaintiff in and by said assessment rolls was assessed in respect of the property in said several districts in the following amounts, as follows, namely :

District.	Amount of Assessment on "The Property"
Old Bridgeport	$ 300,000
Hillside	15,000
Louisburg	16,000
Bridgeport	6,000
Port Morien	48,000
Catalone	16,500
Sydney Forks	18,000
Lingan and Victoria Mines	18,000
Bateston	24,000
	$ 461,500

"4. Forthwith upon the completion of the said assessment rolls, the assessors of said districts duly gave notice of the assessment in accordance with the requirements and provisions of section 16 of said chapter 73.

"5. That on or before the 4th Tuesday of December, 1901, the assessment roll for each polling district in the said municipality of the county of Cape Breton,

was duly revised and corrected by the Board of Revision and Appeal for said municipality and a true copy of such assessment roll for each of said districts as aforesaid was duly transmitted by the said clerk of the municipality to the assessors for each of such districts, who did forthwith post up the same in some public and conspicuous place within each of such districts in pursuance with requirements of section 34 of said chapter 73.

" 6. No appeal was asserted from the said assessments of " the property " or from any part thereof by the plaintiff or by the Dominion Coal Company, Limited, or by any person or persons whomsoever. The court for the hearing of appeals from the assessments duly met for the hearing of such appeals in the County Court House, at Sydney, in the county of Cape Breton on the fourth Tuesday of January, 1902, and all appeals were duly heard, and all reductions and increases of assessments rendered necessary by the decision of the said court as well as all transfers of assessments from one person to another, and all other necessary changes, corrections, alterations and additions made by said court were duly written or minuted upon the assessment roll by the said municipal clerk in red ink in pursuance of the requirements of said section 48 of chapter 73.

" 7. The assessment roll as finally passed by the said court was duly certified by the said clerk of the said municipality as so passed in pursuance of the provisions of section 61 of said chapter 73, and the said assessment roll as finally passed and certified as aforesaid was by the said clerk of the municipality laid before the Municipal Council for the said municipality at its next regular meeting, which meeting took place at Sydney aforesaid, commencing on Tuesday, the 6th day of May, 1902, and was the first annual meeting

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held by the said Municipal Council after the completion of said assessment roll as aforesaid.

"8. The said Municipal Council at said meeting duly made estimates of all sums which were required for the lawful purposes of the municipality for the then current year, making due allowance in such estimates for the abatements, losses and expenses which may occur in the collection of the taxes, and for taxes which may not be collected or collectable; and at said meeting, the said Municipal Council did duly authorize the levying and collection of a rate of so much on the dollar on the assessed value of the property and income assessed in the assessment roll as the Council deemed sufficient to raise the sum required to defray the expenses of the said municipality for the then current year including any deficiency from any preceding year pursuant to the requirements of section 125 of chapter 70 of the Revised Statutes, 1900. The rate so authorized as aforesaid was——— on the dollar.

"9. The clerk of the said municipality as soon after the first day of April as the provisions of chapter 73 permitted, determined from the said assessment roll the municipal rate and poor rate, and did prepare a collection roll for each district in each municipality in pursuance of the requirements of section 71 of the said chaptre 73. The following are true and correct extracts from such collection rolls as aforesaid, and contain all matters relating to the property:

Name of District.	Valuation.	Percentage for Municipal Rate.	Amount of Municipal Rate.	Per centage of Poor Rate.	Amount of Poor Rate.	Total Amount of Municipal and Poor Rate.
	$	$	$	$	$	$
Old Bridgeport.	30,000	2 40	720.00	.21	63.00	783.00
Hillside	15,000	2.04	306.00	none.	none.	306.00
Louisburg	16,000	2.10	336.00	2.07	11.20	347.20
Bridgeport.....	6,000	2.20	132.00	.35	21.00	153.00
Port Morien ...	48,000	2.08	1000.00	none.	none.	1000.00
Catalone.....	16,500	2.00	330.00	none.	none.	330.00
Sydney Forks..	18,000	2 00	360.00	.42	75.60	435.60
Lingan and Victoria Mines..	18,000	2.08	374.40	.40	72 00	446.40
Bateston.....	24,000	2.00	480.00	.06	14.40	294.40
Totals $461,500		--	$4639.20	—	$257.20	$ 4926.40

"10. The said chapter 73 of the Revised Statutes, 1900, is a revision, classification and consolidation of said chapter 5 of the statutes of Nova Scotia for the year 1895, and such revision, classification and consolidation are contained in the report of the commissioners appointed to revise, classify and consolidate the public general statutes of Nova Scotia. Such report of the said commissioners was made in writing and not printed, and did not and does not contain in section 4, subsection (p), of said chapter 73, so revised, classified and consolidated as aforesaid, the word "exempted." The said word was, however, written in lead pencil in the margin of the said report opposite said subsection with a mark of interrogation after it, by some person unknown, and not by any of the commissioners appointed to revise the said statutes. The said word "exempted" was not inserted in said report by any alteration or amendment made by said commissioners, but the said word "exempted" was printed erroneously and accidently.

"11. The Revised Statutes of Nova Scotia, 1900, were duly brought into force on the first day of February, 1901, by virtue of a proclamation of the Lieutenant-Governor of Nova Scotia in Council, duly made and dated the 24th day of December, 1900, under and by virtue of the provisions of chapter 44 of the Acts of the Province of Nova Scotia for the year 1900.

"12. The whole of the said report of said commissioners was printed pursuant to section 2 of said chapter 44 of the Acts of Nova Scotia for the year 1900; also the Acts and parts of Acts referred to in section 2 were incorporated with the chapters referred to in said section, and the amendments of said section referred to were made therein, and the schedule "A" referred to in said section amended accordingly. A printed roll of said chapters and amended schedule referred to in

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section 5 of said chapter 44 was duly attested under the signature of the Lieutenant-Governor and countersigned by the Provincial Secretary and deposited in the office of the Provincial Secretary pursuant to the provisions of section 5 of chapter 44, and after such deposit as aforesaid the Governor in Council duly made a proclamation hereinbefore referred to, which is contained in pages 3 to 5, inclusive, of volume 1 of the Revised Statutes of Nova Scotia, 1900, and is hereby referred to by the parties hereto and made a part of this case. The said printed roll contained said chapter 73; but sub-section (p) of section 4 thereof contained the following word, "exempted," as will appear on reference to said chapter at page 621 of volume 1 of the said Revised Statutes, and the said chapter 73 as printed in said Revised Statutes is a true and correct copy of the roll so printed and deposited as aforesaid.

"13. By chapter 25 of the Acts of the Province of Nova Scotia for the year 1902, it is enacted that the said word "exempted" be stricken out of the said sub-section (p) of section 4 of the said chapter 73 of the Revised Statutes of 1900, and said chapter 25 was passed on the 27th day of March, 1902.

"14. On the 17th of January, 1903, the solicitor for the Municipality of the county of Cape Breton received from the solicitors of the Dominion Iron & Steel Co. the following letter:

"The Dominion Coal Company, Limited, has authorized us to state that, upon being shown the records of the various sections, that assessment was actually made af the right of way of the Sydney and Louisburg Railway, it will pay the amount assessed.

"In other words, if it is clear that the amount you state was actually assessed, the Company will give you a cheque immediately.

"It desires at the same time to point out that this county is the only county in the province to take advantage of what was well known to the whole country to be simply a slip of the Commissioners—a slip which was rectified at the next session of the House—and it also desires to state that in its opinion an unfair advantage has been taken of what is well known to the whole of Nova Scotia, including the Warden and Councillors of this county, as simply a printer's error.'

"And on the 14th of February, 1903, the solicitor of the said Municipality of the county of Cape Breton received from the solicitors of the Dominion Iron and Steel Co., the following letter:

"Re county assessment against Coal Company. Referring to the recent letter which I sent you, stating that the Dominion Coal Company would pay the amount of the claim of Cape Breton county for taxes. You remember that the Warden stated that he took the responsibility of saying that there was no mistake in having the word 'exempted' inserted in the clause (p) of section 4, chapter 73 R. S. I had reason to believe that there was a mistake, but I had nothing official, and I supposed that the Warden had received something official when he stated publicly that there was no mistake.

"Now I find that his authority was some legal gentleman in Halifax, who examined the original draft for him.

"I have a letter from Mr. F. H. Bell, one of the commissioners, who revised the statutes, and I enclose a copy of this letter. I am advised that Judge Graham, Hon. A. Drysdale and Mr. F. T. Congdon and Mr. A. A. McKay, will all subscribe to the statement contained therein.

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"We, therefore, shall be obliged to ask the warden to recall this statement, which he made in public, and we are also obliged to recall the letter which we wrote to you.

"We shall be happy to agree on a case immediately to be submitted to the courts, if you care to follow the line we intended some time ago.

"Or you might formally seize an engine and we will replevy. Of course, if you propose to seize the engine, you will give us notice a few days ahead, so we can be ready with our bond to replevy the engine.'

"15. The engine, for the recovery of which this action has been brought, was duly seized and levied upon under a warrant of distress issued against the plaintiff and directed to the defendant, a collector, commanding him to levy upon the goods of the plaintiff a certain sum, and the said engine, at the time of such levy, was the property of the plaintiff. The said warrant was issued in respect of rates and taxes upon 'the property' for the year 1902, the liability for the payment of which is denied by the plaintiff.

"The question for the opinion of the court is whether 'the property' is exempted from taxation imposed under said assessment hereinbefore set out.

"If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff against the defendant for a declaration that the plaintiff is entitled to possession of the said engine, and for plaintiff's costs of the action, including the costs of this special case to be taxed.

"If the court shall be of the opinion in the negative, then judgment shall be entered for the defendant against the plaintiff directing a return of the said engine to the defendant, the same having been seized

by the sheriff of the County of Cape Breton under an order of replevin issued herein for the sum of $4,926.40 and for the defendant's costs of this action, including the costs of this special case, to be taxed.

" Dated at Sydney, this 2nd day of Nov., 1902.

W. H. COVERT,
Solicitor for plaintiff company.

W. CROWE,
Solicitor for defendant."

The Supreme Court of Nova Scotia held that the question of law submitted should be answered in the negative and that the property of the plaintiffs mentioned in the first paragraph of the special case was not exempted from taxation under the assessment set out therein. The plaintiffs appealed to this court.

Lovett for the appellants. The history of the Assessment Act may be inquired into. *United States* v. *Union Pacific Railroad Co.* (1); *Church of the Holy Trinity* v. *United States* (2).

The assessment roll may be looked at to see if the Act as printed agrees with it. *Taff Vale Railway Co.* v. *Davis & Sons* (3); *Carter* v. *Molson* (4).

The history of the Act shows that it was never intended to tax railways, and the construction put upon it by the court below would render the clause meaningless. *Curtis* v. *Stovin* (5).

Assuming that the railway could be taxed, the tax was not imposed until the assessment roll was made up; *Nicholls* v. *Cumming* (6); *City of London* v. *Watt & Sons* (7); and when that was done the Act of 1902 was in force and the railway was exempt.

(1) 91 U. S. R. 72 at p. 79.
(2) 143 U. S. R. 457 at pp. 463-5.
(3) [1894] 1 Q. B. 43 at p. 51.
(4) 8 App. Cas. 530.
(5) 22 Q. B. D. 513.
(6) 1 Can. S. C. R. 395 at p. 411.
(7) 22 Can. S. C. R. 300.

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Borden K.C. for the respondent. The printed roll is made the original by R. S. N. S. (1900) ch. 44 sec. 5.

A mistake cannot be imputed to the legislature. *Richards* v. *McBride* (1); *Commissioners of Income Tax* v. *Pemsel* (2).

Exempting Acts are to be strictly construed as involving taxation on the rest of the community. Maxwell on Statutes (3 ed.) p. 303. *The People* v. *Commissioners of Taxes* (3); *Henderson* v. *Township of Stisted* (4).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed with costs and that judgment should be entered for appellants upon their action upon the ground that sec. 4 (p) of ch. 73 R. S. N. S. read in the light of the history of the legislation on the subject, exempts the engine in question from taxation.

SEDGEWICK, DAVIES and KILLAM JJ. concurred in the opinion of Mr. Justice Nesbitt.

NESBITT J.—I do not think it necessary to deal with any of the interesting questions raised by the appellant other than the short point that, assuming the legislation in question valid and the property liable to taxation from 1st February, 1901, to 27th March, 1902, the tax rate never was authorized until 6th May, after the Act had been passed exempting the property from taxation, and therefore no valid tax was imposed. There is no doubt that the Act passed on the 27th March, 1902, speaks only as to the future.

The judgment in the court below, after setting out

(1) 8 Q. B. D. 119.
(2) [1891] A. C. 531 at p. 549.
(3) 26 N. Y. 163.
(4) 17 O. R. 673.

sections 61-62 of the Assessment Act, failed to notice that by section 128 of the Municipal Act, being chapter 70 of the Revised Statutes of Nova Scotia, 1900, it is provided as follows:

(1) The assessment roll for the municipality certified by the clerk shall be laid before the council at the first annual meeting after its completion.

(2) The council shall make estimates of all sums which are required for the lawful purposes of the municipality for the then current year, making due allowance in such estimates for the abatement, losses and expenses which may occur in the collection of the taxes and for taxes which may not be collected or collectable; *and the council shall authorize the levying and collection of a rate or rates of so much on the dollar on the assessed value of the property and income assessed in the roll as the council deems sufficient* to raise the sum required to defray the expenses of the municipality for the then current year, including any deficiency from any preceding year. 1895, c. 3, s. 63, part.

And we think that, until this section was complied with, the liability was not fixed. The saving clause, section 10 of the Interpretation Act, cannot, therefore, be appealed to, and I think that the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Covert.*

Solicitor for the respondent: *W. Crowe.*

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*May 25, 26.
*June 8.

EDMOND LETOURNEAU AND JOSEPH BERNIER (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES EUGENE CARBONNEAU AND BELINDA ANN CARBONNEAU (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Mistake—Misrepresentation — Lay agreement — Mortgage — Execution of documents by illiterate persons—Evidence.

The plaintiffs leased mining rights under lay agreement to the defendants providing for division of profits and payment of an existing debt and for advances to be made out of the clean-ups on dates therein mentioned, a mortgage to be given on the dumps to secure the advances. Owing to some inaccuracy in the lay agreement a new lay agreement was executed at the same time as the mortgage. The mortgage provided for payments at earlier dates than the lay agreement, and was not read over to the defendants, who were unable to read and had requested that it should be read over to them. In an action on the mortgage evidence was given that a document signed on that date was represented to be in terms similar to the lay agreement as first drawn but it might, possibly, have been the new lay agreement that was thus spoken of, and it appeared that, although the defendants became aware of the difference in the terms of payment mentioned in the mortgage and complained of this to the plaintiffs' agent, they continued to work on the lay, assuming that the altered terms of payment would not be insisted upon.

Held, reversing the judgment appealed from, Sedgewick and Killam JJ. dissenting, that there was not sufficient evidence of acquiescence in the altered terms of payment and that, as the evidence shewed that defendants were illiterate and the mortgage had not been read over to them on request, and they had been misled as to its contents, they could not be bound by its altered provisions as to the payments.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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APPEAL from the judgment of the Territorial Court of Yukon Territory *in banco*, affirming the judgment of Craig J., at the trial by which the plaintiffs' action was maintained and the counter-claim of the defendants dismissed with costs.

The circumstances of the case and the questions at issue on the appeal are stated in the above head-note and the judgments now reported.

Noel K.C. for the appellants.

Aylesworth K.C. for the respondents.

SEDGEWICK J. (dissenting).—For the reasons stated in the written judgment of my brother Killam, I am of opinion that this appeal should be dismissed with costs.

GIROUARD and DAVIES JJ. concurred in the judgment allowing the appeal with costs for the reasons stated by Nesbitt J.

NESBITT J. The authorities are clear that where a party executing a document cannot read or write except to sign his name, even when the document is in his own language, it is held not to be executed where there is either, (*a*) a request that the document shall be read by the party putting it forward, which is refused, or (*b*) where it is mis-read, or (*c*) where the contents are misrepresented.

In this case I have read the evidence relating to the execution of the mortgage several times and my mind is irresistibly drawn to the conclusion that the mortgage, differing as it does in the most material particular from the lay agreement, was not explained, as to that particular, to the defendants, but, on the contrary, it was represented to them, and they believed, that it

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complied with the terms of the lay agreement. I am greatly influenced in coming to this conclusion by the evidence of Mr. Gosselin, the agent of the plaintiffs, who says that there was no idea of receiving payment except out of the clean-ups from the dumps, and that the agreement as to payment under such circumstances at a date when it was, practically, physically impossible that the payment could have been made from the clean-ups, was the first one of the kind he had ever seen in the territory.

It is further to be observed that the lay agreement provided specifically, first, for the retention, absolutely, of fifty per cent of the product of each wash-up, and, secondly, for the retention, out of the fifty per cent, (*a*) of the then existing indebtedness, and (*b*) any further indebtedness from the defendants to the plaintiffs for future supplies. It was urged that in December the defendants became aware of the terms of the mortgage and, subsequently, went on and received supplies under its terms, and, therefore, must be held to have ratified it or to have acquiesced in its provisions. The defendants both swear that when the terms of payment, the first day of May, first came to their knowledge, they declined to go on with the work, and said they would have to throw up the whole job, but that Mr. Gosselin, the plaintiffs' agent, stated that the plaintiffs would not insist upon such a term and induced them to go on with their work, and I think that the language of Lord Chancellor, in *Morse* v. *Royal* (1) is applicable. In that case the Lord Chancellor said:—

As to the doctrine of confirmation, it stands upon several authorities; where a man having been defrauded, with complete knowledge chooses to come again in contact with the person who defrauded him; abandons his right to abrogate the contract; and enters into a plain, distinct transaction of confirmation. But when the original fraud is clearly established by circumstances not liable to doubt, a confirmation

(1) 12 Ves. 355 at p. 373.

of such a transaction is so inconsistent with justice, so unnatural, so likely to be connected with fraud that it ought to be watched with the utmost strictness ; as an act, done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which, in justice, ought never to have taken place.

We think that there was an agreement to give a mortgage to secure the further advances, but there was no bargain for an alteration of the terms of payment provided for in the lay agreement, and we think it would follow that, under the taking of accounts prayed for by the counter-claim, the plaintiffs on the argument were now entitled to payment for large advances, and we refer the whole question of taking accounts and the claim for damages under the counter-claim back to be tried and disposed of by the courts below. All costs of the previous trial and of the proceedings in the court below and in this court of the appellants, defendants, to be payable forthwith out of the moneys in court with power to either party to apply with reference to such moneys and full power of amendment to dispose of all questions which may arise out of the counter-claim,

I would refer to *Thoroughgood's Case* (1); *Rex* v. *Longhor* (2); *Owens* v. *Thomas* (3); *Murray* v. *Jenkins* (4); Addison on Contracts, (9 ed.) 114 and following; and to *Jones Stacker Co.* v. *Green* (5).

KILLAM J. (dissenting).—This is an appeal from a judgment of the Territorial Court of the Yukon Territory. The action was brought upon a mortgage of chattels, for the appointment of a receiver and manager of a mining claim and chattel property connected therewith, and for payment of the mortgage moneys in the manner claimed by the plaintiffs. The plain-

(1) 1 Co. 444.
(2) 1 Nev. & M. (M.C.) 128.
(3) 6 U. C. C. P. 383.
(4) 28 Can. S. C. R. 565.
(5) 14 Man. L. R. 61.

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tiffs, a husband and wife, had a mining claim in the Yukon Territory; they entered into an agreement with the defendants, Letourneau and Bernier, by which the latter were to work the claim for a certain time upon shares. To give effect to their arrangement the parties entered into an agreement in writing, called in the case a "lay" agreement. By this document the plaintiffs leased the mining claim to the defendants from the 10th day of September, 1901, until and including the 1st day of September, 1902. The document required the defendants to pay over to the plaintiffs all gold as fast as it was realized from the claim, and the lessors were to retain one half of the gross amount and pay the remainder to the defendants. It was also provided that the defendants should purchase certain machinery from the plaintiffs, to be paid for by the retention of the amount of the purchase money out of the defendants' share of the gold that had been paid over to the plaintiffs. It was also provided that the plaintiffs should have the right to retain out of the defendants' share of the gold sufficient to repay to the plaintiffs the sum of $40,000, being the amount of the defendants' indebtedness to the plaintiffs for certain groceries, provisions and supplies. It was further provided that the plaintiffs should also have a right to retain out of the defendants' share of the gold to be extracted during the wash-ups during the spring of the year 1900, or such other wash-ups as might take place during the year, sufficient gold to reimburse the plaintiffs for all debts for supplies to be thereafter furnished by the plaintiffs to the defendants. At or about the same time at which this agreement was made, the plaintiffs claimed that the defendants executed an indenture of mortgage by which, after reciting that the defendants had applied to the plaintiffs for advances of goods and supplies to enable

them to carry out the terms of their lay agreement, and that the plaintiffs, on the faith of the security given or to be given by the mortgage, had agreed to provide such advances of goods and supplies, provided that they should not be bound to advance in all more than $20,000 in value, and provided that the terms of credit for any such goods should not in any case extend beyond the first day of May, 1902, the defendants mortgaged to the plaintiffs all of the defendants' share in and to the dump and dumps extracted during the life of the lay agreement, and the gold and gold dust extracted from such dump or dumps, and all gold and gold dust to be extracted from the claim in any manner whatever during the terms of the lay agreement, and also all groceries, provisions, fixtures, machinery, etc., on the claim, to secure payment of all moneys which should become payable by the defendants to the plaintiffs on or before the first day of May, 1902, with certain interest.

By the original statement of defence the defendants alleged that it was agreed between the plaintiffs and the defendants that all the money due on the mortgage was to be paid after each clean-up, until the full debt should be satisfied, during the continuance of the lay agreement, and the defendants put in a counterclaim alleging that they mortgaged all their interests in the claim and in the dumps thereon to secure future advances from the plaintiffs, and that by a subsequent agreement the amount due under the mortgage should be paid after each clean-up until the full mortgage money was satisfied, and that the lay agreement would end on the first day of September, 1902, and the mortgage would become due on that date. Subsequently the defendants put in an amended statement of defence and counterclaim by which they set up that on the 28th September, 1901, it was agreed between the

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plaintiffs and the defendants that the defendants were to give a mortgage on the dump or dumps to be extracted under their agreement, and on all gold or gold dust to be extracted therefrom, and all the groceries, supplies, machinery, etc., for the sum of $20,000, to secure all or any advances made by the plaintiffs to the defendants, the mortgage to be payable out of the proceeds of the lay agreement coming from each wash-up, and the mortgage to become due and payable on the first September, 1902; that the plaintiffs were authorized to draw up a mortgage upon those terms, and the plaintiffs did draw and produce to the defendants for their signature a form of mortgage pretending that it contained the terms of the agreement just alleged, and that it was payable as so agreed, and falsely represented to the defendants that the mortgage was only payable from their share of the proceeds of the claim as washed up by them and would not be due until the first September, 1902, and that the defendants need not read the paper as it only contained the terms of such agreement, and the defendants relied upon the false representations made by the plaintiffs as to the terms of such mortgage, and signed it, having full trust and confidence in the plaintiffs, which was the mortgage now sued on.

The defendant (Bernier) gave evidence which, upon its face, very fully bore out the allegations of this amended statement of defence. Apparently he meant to swear that the particular document which embodied the mortgage was signed by the defendants upon the representation that it contained only similar terms to those of the lay agreement, and that Mr. Carbonneau induced them to sign it without having it read to them, claiming to be in a hurry.

Letourneau gave evidence of having been induced to sign some document on the representation that it

was in terms similar to those of the lay agreement. He, Letourneau, said that he first heard of the mortgage in question in December, 1901, and that he did not know until December that there was a mortgage.

It is clear, upon the evidence, that after one document had been drawn up and signed as embodying the lay agreement, another document was drawn up and signed by the parties which was either a copy of the original or varied slightly therefrom.

Upon Letourneau's evidence, it is quite open to believe that the document to which he refers as having been signed by him upon the representation that it was similar to the lay agreement, was this second agreement. Both Letourneau and Bernier were illiterate men whose native language was French, but who, to some extent, understood English, though unable to read it. One cannot rely, under these circumstances, with any great confidence upon the accuracy of statements by either of them that the document which they signed upon the representation that it embodied the same terms as the first lay agreement, was the mortgage rather than the second copy of the lay agreement.

Mrs. Carbonneau gave evidence of a preliminary discussion before the documents were signed, in which the mortgage was distinctly agreed upon, and in which it was agreed that it should be made payable at any rate before the first day of August, 1902.

Bernier does not deny that there was to be a mortgage.

Upon all the evidence, it seems very clear that the hypothesis that the defendants were induced to sign a mortgage, not knowing that it was such, but on the faith of the representation that it was a copy of the lay agreement and believing that it was a lay agreement only, is not open. Gosselin, who acted as book-keeper

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and agent of the plaintiffs, gave some evidence which seems to me to be rather confused. The learned judge who tried the cause said that he placed very great weight upon Gosselin's evidence, that he seemed to be the only witness who was at all clear. I am not able to place so great reliance upon Mr. Gosselin's evidence. He did speak of the signing of the second lay agreement and admitted that there was at that time a representation that it was similar to the former one; but he said, also, that Carbonneau explained that there were the two documents, the lay agreement and the mortgage. He also said that he did not pay very particular attention to what occurred.

If the evidence of the defendants as to the alleged misrepresentation which induced them to sign the mortgage were clear and upon its face reliable, I would think that Mr. Gosselin's evidence went a long way to corroborate it. But, upon the evidence as a whole, I am not satisfied that any such representation was made with reference to the mortgage, or that the defendants were misled into signing a mortgage upon different terms from those understood by them to be contained in the document. It is true that it could not have been expected at the time that, before the first May, 1902, sufficient would be realized out of the claim to pay these additional advances; but still it was competent to the plaintiffs to refuse those advances except upon the terms that the amounts therefor were to be deemed payable on the first day of May so as to enable the plaintiffs to enforce the security if circumstances should appear to render it advisable. Certainly, a misunderstanding in this respect might easily have occurred between the parties, or the defendants might easily have been induced to sign a document embodying these terms without having really agreed to them. But the execution of the do-

cument was *primâ facie* proved by proof of the defendants' signatures, which are admitted by them, and I am unable to find sufficient in the evidence to warrant the inference that the defendants were misled or executed a document embodying different terms from those which they understood it to embody.

The defendants claim that, in December, 1901, or January, 1902, they learned of the contents of the instrument of mortgage and, as soon thereafter as possible, made objection to Gosselin respecting the terms of payment, claiming that the money was only to be paid as realized out of the claim. Gosselin does not dispute this absolutely; he admits that there was some question raised by the defendants, though he does not remember exactly what it was. He, however, gave them certain assurances, as they say, which induced them to go on as before.

Possibly, if there had been misrepresentation, the continuance of the defendants under the circumstances would not be sufficient to prevent their now disputing the mortgage.

The Carbonneaus left the Yukon Territory in October, 1901; they returned about the middle of April, 1902, and had conversations with the defendants between that time and the commencement of this action, on or about the 27th May, 1902. Both the plaintiffs deny that, before the commencement of the action, they heard of any complaint respecting the terms of payment of the mortgage, and the defendants did not pretend that they made any such complaint to them. It must be assumed, then, that no such complaint was made, which strengthens my distrust of the defence, as does, also, the course of the pleading.

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I think, therefore, that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellants : *Noel, Noel & Ledieu.*

Solicitors for the respondants : *M. J. A. Ackman.*

WILLIAM C. CLARK (PLAINTIFF).....APPELLANT;

AND

THE CITY OF VANCOUVER (DEFENDANT) ..... } RESPONDENT.

1904

*May 26.

*June. 8.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Title to land—Conveyance upon conditions—Public park—Trust—Forfeiture—Assignment of reversionary interest—Decree in favour of assignee—Champertous agreement.

C. conveyed lands to the city for the purposes of a park or public recreation place with conditions prohibiting their use for certain specified purposes and, within a time limited, that the city should clear the land of stumps and roots, plough, level and harrow the same according to the natural contour of the ground, seed it down, build a road to it and "maintain the same in such fit, proper and good condition, as aforesaid". In an action by the assignee of C. for a declaration that the city held the lands in trust and for re-conveyance of the same to him, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, "virgin forest," but that the remainder had been cleared and made fit for "ordinary athletics, Scotch athletics" although not suitable for games or sports requiring "nice" level ground. It appeared, also, that the road had been built but that, as population did not increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, they had not been used and had become somewhat covered with undergrowth of chaparal and bracken.

Held, Sedgewick J. dissenting, affirming the judgment appealed from, that there was no such breach of the trusts as could warrant a declaration of forfeiture under the provisoes of the deed of conveyance.

Per Killam J.—Had there been a breach of trust, the resulting forfeiture could have been decreed in favour of the assignee of the grantor.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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APPEAL from the judgment of the Supreme Court of British Columbia, *in banco*, (1) affirming the judgment of Mr. Justice Martin, at the trial, dismissing the plaintiff's action with costs.

The questions in issue on this appeal are stated in the judgments now reported.

Travers Lewis and *Smellie* for the appellant.

Chrysler K C. and *Hammersley K.C.* for the respondent.

SEDGEWICK J. (dissenting). — I dissent from the judgment of the majority of the court on the ground that the evidence discloses a breach of the conditions upon which the land to be used as a park was conveyed to the city. The city held the land subject to these conditions and, the breach having been committed, it continued to hold the land in trust for the grantor and is obliged to re-convey it to him or his assigns.

GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—This was an action brought by one Clark against the City of Vancouver claiming a declaration that the defendant held certain lands in trust for him and should convey the same to him.

The plaintiff claimed as the assignee of his uncle, one E. J. Clark, who had conveyed the lands in the year 1889 to the city in fee simple "as and for the purpose of a park or public recreation place."

The clauses of the deed containing the trusts upon which the lands were to be held and upon which the plaintiff claimed to have the lands re-conveyed to him were as follows:

1. That the said lands forever hereafter, while the same shall remain vested in the said corporation, its successors and limited assigns upon

(1) 10 B. C. Rep. 31.

trust as aforesaid, shall be used continuously and only as and for the purpose of a park or public recreation place, and that games and athletic sports of all kinds may be permitted thereon, and also the holding of fairs, industrial and horticultural displays, exhibitions of natural products, manufactures, machinery or works of art, or for any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

2. Provided nevertheless and it is hereby agreed and declared that nothing herein contained shall authorize the use by the said corporation, its successors or limited assigns, of the said lands for the purpose of a general market for the sale of any horses, cattle, sheep, swine, or other animals, nor for the purpose of a general market for the sale of produce, fish or other commodities, for the purpose of any manufactory, or manufacturer's business, nor for any purpose, object matter or thing whatsoever, which would, could or might cause a nuisance to either the public generally or to any person or persons resident for the time being in the vicinity of the said lands and premises.

3. And upon further trust and condition that the said corporation, its successors or limited assigns, shall within twelve months from the first day of January, A.D. 1890, clear off stumps, roots, and plough, harrow and level off same, according to the natural contour of said ground, and seed down same, and shall and will within twenty-four months from the said first day of January, A.D. 1890, build a road leading to said ground and shall forever thereafter, while the said lands and premises shall remain vested in the said corporation, its successors or limited assigns, upon trust as aforesaid, maintain the same in such fit, proper and good condition as aforesaid, according to the true intent and meaning of these presents.

Much learning was displayed in the argument at bar as to the right of the plaintiff, as assignee of the grantor, E. J. Clark, to maintain this action even if there had been such a breach of the trusts or conditions of the deed to the city as would work a forfeiture of the estate of the latter, and the judgment of the majority of the Supreme Court of British Columbia was based upon that ground. The counsel for the City of Vancouver also contended before us that the plaintiffs' assignment was void as contravening the law against champerty. I do not, however, find it necessary to consider either of these grounds of defence

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as I fully agree with the main conclusion reached by the learned trial judge, Mr. Justice Martin, that the action should be dismissed for want of merits.

The trial seems to have proceeded and much of the evidence to have been given under a misapprehension of the true meaning of the deed of conveyance from Clark to the city, a misapprehension which the learned trial judge himself seems partly to have shared and which was adopted by the counsel for the appellant in the argument at bar. That misapprehension was that the trust deed required the lands to be prepared and levelled so as to be suitable for all athletic sports and that the *whole of it* had necessarily to be cleared of the trees growing thereon.

A reference, however, to the terms of the trust will shew that its main purpose was to provide "a park or public recreation place" for the citizens of Vancouver, and that while the second clause prohibited *general markets* for the sale of animals or produce from being held, or the user of the park for the purposes of a manufacturing business or other uses which might cause a nuisance, games and athletic sports of all kinds and the holding of fairs, industrial and horticultural displays and exhibitions, etc., *were expressly mentioned as "to be permitted"* as also

any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

The main object and purpose of the grounds, however, were the providing "a park or public recreation place" for the citizens and a very wide discretion was necessarily vested in the city as to the purposes for which they would allow the park to be used. These facts need only be stated to shew how absurd was the contention that it was the duty of the corporation to denude the place of all trees and to remove all traces of the virgin forest. As a matter of fact the evidence

shewed that at a cost of some $5,000 the corporation had, within the time specified in the trust deed, caused a road to built to the park and five-sixths of the ground, which was very gravelly, to be "cleared, grubbed, harrowed and seeded down" and "the large stones, the boulders, all taken off." Either through a mistake as to the boundaries or from what I would call the exercise of a prudent and well grounded judgment, the remaining one-sixth of the grounds were allowed to remain in its original condition as "virgin forest." I am at a loss to understand how the grounds could fairly and reasonably be said to have been maintained as a park or place of "public recreation" if it had been entirely denuded of trees. I think the proportion left as virgin forest a reasonable and proper one and that no just construction of the trust deed required this forest to be entirely destroyed.

The evidence of Tracy, the city engineer, and of Fraser, the contractor, shews that as to the rest of the ground

> all the trees and stumps and everything had been taken off it (and) that it was cleared down to the natural grade or contour of the ground,

that there are no hollows or abrupt lumps on it and that, owing to its "natural contour" or slope, the ground while suitable for "ordinary athletics, Scotch athletics" was not suitable for cricket or games requiring a nice level and could only be made so at enormous expense which of course the city was not bound to incur. Fraser also proved the making, opening and grading of a road to the park from the city, one and a quarter miles in length as required by the trust deed.

Population has not grown up around or in the neighbourhood of the park, and there being no demand for the grounds for athletic or exhibition purposes, they have been allowed to remain as they were

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"cleared, grubbed, harrowed and seeded down" until they have been covered with a growth of bracken which it would take a couple of days to remove.

To hold that this is a breach of the trusts of the deed from which a declaration of forfeiture should be made would be to my mind unjust and contrary alike to the language and intent of the deed.

The donor, Mr. Clark, at or about the time he gave the park to the city being the owner of a large tract of land of which the six acres given for a park formed a small part, duly registered a plan of his estate showing the park grounds and afterwards sold and disposed of all his other lands surrounding the park to third parties, all the sales having been made with reference to that registered plan. He refused to pay and has never paid any part of the $1,000 which under the terms of his deed he agreed to pay to the city towards the expenditure it was obliged to incur on the ground or pretext that the city had not carried out the trusts of the deed, and now he or his nephew, the assignee, claims that the park itself has been forfeited to him under a strict and, as I think, improper construction of the terms of his trust deed. I think the evidence shews that the city has at a very large expenditure substantially fulfilled its trust, and while the growth of population has unfortunately not met the expectation of either party a careful perusal of the evidence has convinced me that the merits of the case are all with the defendant and that the appeal should be dismissed with costs.

NESBITT J. also concurred in the dismissal of the appeal.

KILLAM J.—It appears to me that the learned judges in British Columbia erred in treating this case as one in which there was a question of a condition broken.

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The conveyance was to the "corporation, their successors and limited assigns," with *habendum* to

> the said corporation, their successors and limited assigns, to and for their sole and only use forever, *subject nevertheless* to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown and particularly subject nevertheless also to the trusts, provisoes, conditions and agreements hereinafter declared and contained, concerning the same, that is to say : etc. etc.

None of the subsequent clauses provide for the determination of the estate thus conveyed, except by reconveyance. But, in certain events, the corporation was to hold the property in trust for the grantor in fee and to reconvey to him, his heirs or assigns. The word "limited" before "assigns" seems meaningless. The legal estate passed absolutely to the corporation, with a trust to arise upon a contingency and an agreement to convey to the *cestui que trust*. I cannot appreciate the difficulty in the way of the enforcement of the trust and of the agreement, by a court of equity, in favour of a transferee, if they are such as would have been enforced in favour of the original grantor. The doctrine of the invalidity of conveyances of lands in adverse possession of another and the statute, 32 H. VIII. c. 34, can have no application to such a transaction. The question whether, upon its terms and in view of the surrounding circumstances, the conveyance to the plaintiff would be held invalid in equity as being champertous or as savouring of champerty, is entirely different.

As the city accepted the conveyance and expended a large sum upon the property, and as the claim is one, in effect if not in form, of a forfeiture, the case should be treated strictly. The plaintiff should be confined to the allegations in the statement of claim, and strict proof should be required of him.

The following were among "the trusts, provisoes, conditions and agreements" of the conveyance:

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1. That the said lands forever hereafter, while the same shall remain vested in the said corporation, its successors and limited assigns, upon trust as aforesaid, shall be used continuously and only as and for the purpose of a park or public recreation place, and that games and athletic sports of all kinds may be permitted thereon, and also the holding of fairs, industrial and horticultural displays, exhibitions of natural products, manufactures, machinery or works of art, or for any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

Par. 2 prohibited the use of the property for certain specified purposes.

Par. 3. And upon the further trust and condition that the said corporation, its successors or limited assigns shall, within 12 months from the first day of January, A.D. 1890, clear of stumps, roots and plough, harrow and level off same according to the natural contour of said ground, and seed down same, and shall and will, within twenty-four months from the said first day of January, A.D. 1890, build a road leading to said ground, and shall forever thereafter, while the said lands and premises shall remain vested in the said corporation, its successors or limited assigns, upon trust as aforesaid, maintain the same in such fit, proper and good condition as aforesaid, according to the true intent and meaning of these presents.

The clause relied on as providing for the arising of the trust in favour of the grantor and the right to a reconveyance was as follows:

PROVIDED always and it is hereby declared that the grant and conveyance hereby made is so made upon the express trust and confidence that in the event of the said corporation, its successors and limited assigns, failing to comply with the trusts and provisions expressed and contained in the third paragraph hereof within the period thereby limited for that purpose or in case of their due compliance therewith then afterwards in the event of any breach, non-performance or non-observance of any of the trusts and conditions herein contained for the space of twelve months and notwithstanding any prior breach or breaches for the space of twelve months of any of the trusts and provisions on the part of the said corporation, their successors or limited assigns, to be by them observed and performed which may have been overlooked or waived by the said grantor, his heirs or assigns, then and immediately thereafter the said corporation, its successors and limited assigns, shall hold the said lands and premises in trust for the said grantor, his heirs and assigns and to be reconveyed to him and

them accordingly, but neither of the parties hereto, nor their heirs, successors or assigns shall have any claim against the other of them for any loss, costs, damages or expenses arising out of the trusts provisoes and conditions herein contained or in respect of any matter or thing arising out of the premises.

The allegations in the statement of claim of the circumstances entitling the plaintiff to be treated as a *cestui que trust* and to have the land conveyed to him were as follows:

4. The defendants failed to perform the trusts and conditions following, namely: The defendants did not, within twelve months from the first day of January, 1890, clear the said hereditaments of stumps and roots and did not plough, level and harrow the same according to the natural contour of the ground and did not seed down the same, and did not, within twenty-four months from the said first day of January, 1890, build a road leading to the said hereditaments, and if they did build a road they did not maintain same according to the true intent and meaning of the condition in that behalf.

These are limited to non-performance of the stipulation for clearing the land of stumps and roots, and ploughing, levelling, harrowing and seeding it within the prescribed time, and to an alleged failure to build and maintain the road provided for. As counsel for the plaintiff interprets the third paragraph the maintenance of the road was not stipulated for. And I agree with this view. The words "maintain the same," as counsel admits, did not relate to the roads, but to the lands.

This consideration, however, appears unimportant, as I am of opinion that it is not sufficiently shewn that the corporation did not, within the meaning of the deed, clear the land of stumps and roots, or plough, harrow, level off or seed the same within the prescribed period, or build or maintain the required road.

The onus was upon the plaintiff to make clear and strict proof in some of these respects.

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I cannot think that, in requiring the land to be cleared of stumps and roots, the grantor intended that all trees were to be cut down. Ornamental trees are properly considered to be appropriate, and even necessary, in a public park. It appears to me that the corporation could properly have preserved such trees as might be considered fitted for the purpose.

And it seems impossible to believe that the grantor intended that every square inch of the property should be ploughed, harrowed and sown. Flower beds, ornamental shrubs, walks, rockeries, grottoes, arbours, would be appropriate and customary. Some of the purposes for which the land could be used would involve the erection of buildings or structures more or less substantial.

Further, some portion or portions of the property might be appropriately kept in its wild state. If suitable portions existed this would constitute an attraction and be of benefit for the purposes of an ornamental park or public resort.

It was not made incumbent upon the corporation to put the property in a fit condition for being the scene of every kind of game or athletic sport. These were merely specified purposes for which the corporation was authorized to use the property. This was not obligatory, any more than the use of the land for fairs, exhibitions, or other particular public purposes. All of this was left to the discretion of the corporation, the grantor giving merely general indications of his objects and desires.

It was shewn in evidence that the corporation did clear, level (so far as the ground permitted), plough, harrow and sow nearly all of the land. It left some portion or portions wholly or almost wholly untouched, principally a triangular piece in one corner.

The plaintiff's surveyor estimated the uncleared portion at 1.256 acres out of 6.858, or between a fifth and a sixth of the whole. Of an area, specified to be 1.123 acres, he said:

That has has never been cleared at all; it is virgin forest, as it has originally grown; fir, cedar and other timber.

The surveyor admitted that there was a difficulty about the lines in the locality and that he could not be sure that his survey was absolutely accurate. Some of his evidence was as follows:

Q. Will you guarantee your surveys correct?

A. No, I guarantee nothing in 264 A, but I can arrive at a close approximation.

Q. Therefore you cannot guarantee the line being out a few yards distance, or not?

A. No, I do not propose to guarantee any survey in 264 A, with absolute accuracy, but a close approximation I can give.

I add the following extract from the evidence of the city engineer:

Q. You know this Clark's Park, don't you?

A. I know the place.

Q. Look at that plan. Does that show fairly how much has been cleared, and how much has not?

A. I think that is about it, as near as I can tell; the surveys are very indefinite; in that district, I could not say positively; I have gone over it and that is very nearly——

The only description of the uncleared portion which the evidence affords is that it is "virgin forest," whether ornamental or appropriate to be thus left, whether containing stumps and roots, other than those of growing trees, we do not know. Having reference to the difficulty in the surveys we cannot be certain of the exact proportion so left.

In my opinion the evidence is too meagre to warrant a finding that the corporation failed to fulfil the terms of the conveyance, according to a reasonable interpretation of them. Much had to be left to the

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discretion of the civic authorities in designing the park, and it does not appear that it was not put in a condition which would have been warranted in the exercise of that discretion.

Subsequent lack of care in the maintenance of the park was not alleged in the statement of claim, and should not, I think, be considered upon this evidence.

I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wilson, Senkler & Bloomfield.*

Solicitors for the respondent: *Hamersley & Godfrey.*

WILLIAM EWING AND J. H. DAVIDSON (DEFENDANTS)..... } APPELLANTS;

AND

THE DOMINION BANK (PLAINTIFFS) ..... } RESPONDENTS.

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*May 31.
June 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Estoppel—Forgery—Promissory note—Discount—Duty to notify holder.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co., for $2,000 would fall due at that bank on a date named and asking them to provide for it. The name of E. & Co. had been forged to said note which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees.

Held, affirming the judgment of the Court of Appeal (7 Ont. L. R. 90). Sedgewick and Nesbitt JJ. dissenting, that on receipt of said notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note and not doing so they were afterwards estopped from denying their signature thereto.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiffs.

The facts of the case are stated in the judgment of the Court of Appeal delivered by Mr. Justice Osler as follows:

"The plaintiffs are indorsees of a promissory note for $2,000, dated 14th August, 1900, purporting to be made by the defendants, payable four months after date to the order of the Thomas Phosphate Company, and indorsed by them to the plaintiffs.

* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 7 Ont. L. R. 90.

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"The defendants deny the making of the note and allege that if it purports to be signed by them the signature is a forgery.

"The plaintiffs reply that, even if the signature is a forgery, the defendants are estopped from denying that it is in fact their signature.

"The facts may be very briefly stated.

"One Wallace was the manager of, and perhaps interested in, a business carried on by Walter C. Bonnell under the name of the Thomas Phosphate Company, which previous to the 14th August, 1900, had done some banking business with the plaintiffs. On the 15th August, Wallace procured the note now sued on to be discounted by the bank for the Phosphate Company and the proceeds were placed to the company's credit. On the 15th and 16th August checks were issued by the company against the proceeds of the deposit and other small deposits, payment of which left a balance to their credit at the close of business on the 15th of $1,611.55; on the 16th of $1,355, and on the 17th of $84.

"On the 15th the bank sent a memo. to the defendants, who reside in Montreal, in the following terms: 'Toronto, August 15th, 1900. You will please take notice that your note for $2,000, to the Thomas Phosphate Company falls due at this bank on the 17th December, 1900, and you are requested to provide for the same. A. P., Assistant Manager. To Messrs. Ewing & Co., Montreal.'

"This was received by the defendants on the 16th August. To the bank they made no response and took no notice of the memo., but between themselves and Wallace an active correspondence by telegram and letter was kept up, beginning on the 16th August and ending on the 5th of December; on the defendants' side at first asking for an explanation 'before

advising the bank,' and then urgently insisting on the note being taken up; while Wallace's letters are filled with the usual regrets and excuses for his conduct, and vain promises to settle the note and relieve the defendants' anxiety.

"The defendants appreciated the gravity of the situation, warning Wallace by telegram and letter on the 16th August that 'the Phosphate Company have no note of ours,' and that 'before advising the bank of this thought it better for you that we should ask you what it means,' and that 'we have to act promptly and to advise the bank at once to save ourselves.' On the 21st, that 'the only way out of it is for you to take it—the note—up, and that at once,' and that 'contrary to advice received we have held off for a day before notifying the bank.' On the 23rd, that 'our lawyers told us distinctly that we ought at once to advise the bank, in fact to do so the night we wrote to you We are now going against their advice. For God's sake fix it at once, else we don't know how the thing will end.' And on the 25th in a similar strain, repeating the warning they had received from the lawyers and adding, 'what can we do? We want to protect ourselves. So far we have only been protecting you, and to-morrow we must know something definite, as we cannot longer run the risk we are doing.' On the 22nd October: 'By our silence we may now be responsible, but this responsibility we should certainly dispute, and you know the only way we could dispute it—but it would be a vile job.' On the 4th December the plaintiffs wrote defendants a formal letter advising them that they were the holders of a note made by them dated 14th August, 1900, and payable at their branch office on the 17th instant, and requesting defendants to provide for the same. The defendants wrote to Wallace on the 5th December

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enclosing a copy of this letter, 'which we certainly cannot let go unanswered. We have protected you as long as was possible, but must now protect ourselves. We have decided, however, not to reply to this till Monday the 10th instant, thus giving you as long a time as possible, but on that day unless, &c., we will certainly write the bank denying the note.'

"On the 10th they did so and advised Wallace, 'We have replied to the bank that we have not given such a note.'

"The bank manager said that the note came into the bank's possession on the 14th August, 1900; the discount was not agreed upon till the 15th; that Wallace, *i.e.*, the Phosphate Company, was at once entitled to draw against the proceeds which were placed to his credit before the memo. of the 15th was sent to the defendants; the bank did not treat that as a letter to which they required or expected an answer before giving credit; they sent the letter of the 4th December in consequence of Bonnell having come in and asked them to find out if the note was all right. If they had received on the 17th August such a letter as the defendant wrote them on the 10th December they would have refused to do 'any further business with the account.'

"He said that Wallace had left the country 'about the time the note matured,' but whether before or after he did not know. The action was not brought until the 23rd of November, 1901.

"The learned trial judge found that the note was a forgery by Wallace, but that the defendants were estopped by their conduct from setting this up, and he gave judgment against them for the full amount of the note."

The Court of Appeal affirmed said judgment and the defendants appealed to this court.

H. S. Osler K.C. for the appellants. When the notice was received on August 16th, the appellants were under no legal obligation to notify the bank as they then could only suspect forgery. When they knew it for a fact the proceeds had all been paid out and the bank was not prejudiced by their silence, Bigelow on Estoppel (5 ed.) p. 595 : *Viele* v. *Judson* (1) ; *McKenzie* v. *British Linen Co.* (2).

Aylesworth K.C. and *Milliken* for the respondents, referred to *Richardson* v. *Dunn* (3) ; *Wiedemann* v. *Walpole* (4).

SEDGEWICK J. (dissenting)—On Thursday, 16th August, 1900, Ewing & Co. (a Montreal firm), received through the post office from a Toronto bank, a notification as follows :

TORONTO, Aug. 15, 1900.

You will please take notice that your note for $2,000, to the Thomas Phosphate Co. falls due at this bank on the 17th December, 1900, and you are requested to provide for the same.

A P., Asst. Mgr.

The firm had not made any such note, had not authorized it, knew nothing of it, and had no connection or dealings with the Thomas Phosphate Company ; and the question presented for decision is : What legal duty towards the bank was imposed upon Ewing & Co., by the receipt of the notification ?

It is contended that the firm ought immediately to have correctly conceived the whole Toronto situation, —to have divined that the bank had discounted the note (although all they were told was that it was *payable* at the bank) ; to have surmised that although the note had been acquired by the bank yet that some of the proceeds were still in hand ; and to have infer-

(1) 82 N. Y. 32.
(2) 6 App. Cas. 82.
(3) 1 G. & D. 417.
(4) [1891] 2 Q. B. 534.

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red that an immediate letter or telegram to the bank would enable it to retain some of the money.

Upon such fact and assumption is based the assertion of a legal duty to send the letter or telegram, and a breach of that duty has by the judgment appealed from been declared to have the same effect as if Ewing & Co. had actually signed the note.

It is not proved that a letter would have been of any service to the bank. Ewing & Co. received the notification on Thursday, but at what hour of the day I do not know. Mr. Pepler (the bank officer) says that he would "reasonably have expected an answer to his notification on the morning of Friday", but he evidently assumes (1) the infallibility of the course of post, (2) prompt delivery at the Montreal end, and (3) the continued presence in their office of one or both of the members of the Ewing & Co. firm. From a question put to the witness by counsel for the bank I would gather that under certain circumstances a letter mailed in Montreal would not "in course of post" arrive in Toronto until the second day thereafter.

We do not know at what hour the mail ought to have arrived in Montreal; at what hour it did arrive; at what hour the notification was received at the office of Ewing & Co., or at what hour it was opened and read. We are uninformed, too, as to the time of day at which the Montreal mail for Toronto closed. And we are therefore unaware of the amount of time which the firm had within which to determine its course of action with reference to circumstances so unusual as to be outside the experience of almost every business man.

I am not prepared to say that a merchant must be held (by estoppel) to have signed a promissory note, merely because seeing amongst his letters a notification of a transaction with which he has nothing to

do, he does not instantly withdraw attention from his own affairs, no matter how pressing they may be, estimate correctly the danger that somebody else may be in, and fly to the rescue. It has been urged that as a letter might have been too late to save the bank, Ewing & Co. should have sent a telegram, and we have been invited to declare the law to be that without knowing the existence of any pressing necessity for electrical activity, without even knowing that the bank owned the note, Ewing & Co. must pay it because they did not send a telegram, the cost of which the bank would probably have refused to provide had the necessity for it not been apparent to them, that is had the circumstances been at all less peculiar than they happened to be.

Moreover, although Mr. Pepler tells us that he would have expected an answer on Friday morning, he does not say at what hour, and 11 o'clock might have been too late to be of any use to him or his bank. Four cheques of the Phosphate Company's were paid on that day, and the first of them completely exhausted the discount of this note.

I find it, therefore, impossible to say that Ewing & Co. neglected the performance of any duty; or that if they had, even within a few hours, replied to the bank's notification, the reply would have been of any avail to the bank.

For the present I express no opinion upon the question of duty to make any reply whatever to such a notification as we have here; but I desire to say that I am not satisfied that any such duty exists. If it does, then a breach of it would result not only in estoppel, but (in the alternative) in an affirmative action for damages for breach of the duty, and such an action has never yet been heard of.

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What precisely is this duty to warn of impending danger? I am not under a legal obligation to tell a man that his house is on fire, or that there is gunpowder in a keg upon which he is knocking out his pipe ashes; I am not bound to tell him that there is a gold mine on the farm which he is selling to me at a farm price; or that the machinery which he is bargaining for will not do the work which he expects of it. I am under no duty to tell a banker that the note which he is discounting is a forgery, if my name does not appear upon it. And I am not convinced that the law is otherwise, or that there is any good reason why it should be otherwise, merely because it is my signature and not that of some other person which has been forged. No doubt the remedy by estoppel would be available against me in the latter case and not in the former, but I am not speaking now of remedy, but of legal duty to warn against danger or damage, and I see as much duty in the one case as in the other.

There is this distinction between the two cases (and in my view the confusion in the law arises from its neglect) that when it is my signature that is on the note my conduct may amount to an *adoption* of it, (I would not say a ratification, but an adoption of it,) whereas such a contention would be almost impossible (as against me) were the signature that of some one else.

I would suggest, therefore, omission (in such cases as that in hand) of the idea of duty and fix the attention upon the question of adoption, as in the case of adoption by a company of an agreement made in its name but prior to its incorporation. And I would scrutinize the proved conduct with a view of ascertaining, not whether there has been a breach of admittedly very ill-defined duty, but whether there has been an adoption of the signature.

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The more satisfactory of the cases in which estoppel to deny signature has been affirmed will yield the same result by the method which I suggest, and there is here and there in the authorities a recurrence to adoption as the true effective principle. For example —Lord Colonsay said in *Boyd* v. *Union Bank* (1) (quoted) in *McKenzie* v. *British Linen Co.* (2),

> when a party is shewn a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that *adoption*. That principle might apply even though he was not shewn the bill which is the subject of discussion.

See also pp. 92, 99, 109, 110 of the *McKenzie Case*, (2) where the same principle is appealed to; although I must say that the whole case does not leave an impression of any very clear appreciation of the distinction between estoppel, ratification, and adoption.

In the present case I see nothing which can be construed into adoption. Clearly Ewing & Co. had no intention of becoming liable on the note, although they seem to have had grave doubts as to what the law would make of the matter. And it is equally clear that the bank did not rely upon the adoption, but upon the genuiness of the signature.

Although, therefore, I would allow the appeal altogether yet I think it proper to add that in no case would I agree that the bank should recover from Ewing & Co. more than it had lost through the firm's neglect.

Admitting, for the moment, the existence of duty to repudiate, the damages for breach of that duty are surely the amount which the bank lost by the absence of the repudiation. But it is said that because the bank sued upon the note and succeeds upon the breach of duty, it is very much better off than if it had sued

(1) 17 Ct. of Sess. (2 Ser.) 159. (2) 6 App. Cas. 82 at p. 111.

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directly for the breach of duty. I cannot agree to that. (I refer to Ewart on Estoppel ch. 16, where the subject is treated at length). The bank admits that $645, out of the $2,000, was gone before they could, by the first possible mail, have received warning from Montreal, but nevertheless they have recovered against Ewing & Co. that amount as well as the remaining $1,355.

Upon the same principle if they had only lost one dollar through Ewing & Co. they would have made them pay the other $1,999.

Judgment for the whole sum would have been quite unobjectionable if Ewing & Co. had adopted the signature: but it cannot be right when their liability proceeds upon breach of duty.

It is said, with a show of reason, that the whole amount ought to be adjudged because the holding is that Ewing & Co. are estopped from denying that the note is theirs; that it is therefore theirs; and that they must of course pay it. Estoppel is always based upon change of position, and I do not see why it should be enforced further than necessary to re-establish the *status quo ante*. Estoppel shuts out the truth in order to do justice. Beyond that it should not go. In some cases no doubt, the previous situation cannot be reproduced, for example where the estoppel effects change of ownership in property. Even in these the law may eventually work out some method of making legal awards correspond to damage done. But there can be no difficulty in such cases as the present, nor any necessity for adding to legal anomalies one which would declare that the amount to which a plaintiff shall be entitled depends entirely upon the form of his pleading: Sue upon a note, when your real cause of action is breach of duty to warn of danger, and you will get $2,000.00. But sue

for the breach of duty directly, and you will get $1,355.00 only.

Lord Lyndhurst in *Hume* v. *Bolland* (1) at page 138 said:

> If your situation is not altered you cannot maintain an action. If it is altered must not the amount of dmages to be recovered depend upon the extent to which it is altered ?

Any other doctrine would be anomalous and mischievous. (See the question discussed in Ewart on Estoppel, pp. 194-5)

I think the appeal should be allowed and the action dismissed with costs.

GIROUARD J.—We have given to this case all the attention which its importance demanded. It was fully discussed and the written opinions pro and con were duly considered. It has no precedent in this country and it can hardly be said that the few decisions rendered abroad are exactly in point. They are fully reviewed by my learned colleagues, and in the few remarks I propose to make I do not intend to refer to them. The question involved is one altogether of law. The fact that we have not been able to give an unanimous assent to the judgment of the two courts below shows that it is not free from difficulty.

Speaking for myself, I cannot satisfy my mind that when a business man, familiar with banking operations, their meaning and scope, is informed, according to banking usages, that his name is being used as maker of a note in a bank, evidently for cash credit either already made or to be made, he is under no obligation to reply promptly, at least within a reasonable time, that it is used without his authority, or even that it is a forgery. It is argued that there is no business relation between him and the bank to create

(1) 1 Cr. & M. 130.

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such a duty. I believe, on the contrary, that business relation exists, created without his knowledge, it is true, by force of circumstances, but the introduction of his name, even if unwarranted or forged, brought him into contact with the bank and created business relationship which can end only by repudiation or payment in due time. In such a case every merchant or business man owes some duty to his fellow members of the commercial community. Is he not under obligation to cause no damage by his fault or negligence, either by acts of commission or omission? I have always been under the impression that this elementary principle was held sound in every country, in England as well as everywhere else. I cannot conceive that the appellants ought not to be punished for the omission to do something which a fair and reasonable man, guided by those considerations which regulate the conduct of commercial and even ordinary human affairs, would do. This punishment may in some cases, and always in countries governed by the civil law, consist only in the payment of damages, but according to English law forms an estoppel, which prevents the wrongdoer from disputing his liability for the full amount of the claim, for he is presumed to have acquiesced in it. The rule may look harsh and arbitrary, but I must confess that it is highly moral and eminently healthful and salutary. The appellants at least have no excuse for complaining of the severity of this law. They knew that their duty was to give a prompt reply, namely, on the 16th August, and I should say both by letter and by telegraph or telephone, even if it would cost them a few cents, for the law does not take notice of trifles. *De minimis not curat lex.* The evidence shows that if they had done so, the loss would have been only partial. Not only were they in fault for not answering the

bank, but also, and perhaps more so, for concealing what they knew of the forgery. Their lawyer advised them at the very first to repudiate their signature. They themselves, by telegraph and letter, informed the forger on the 16th of August that they would act at once. They did not do so for a few months; they kept silence with the bank till a few days before the maturity of the note Why they broke it at such a late hour, when nothing could be done by the bank to protect its position, it is impossible to imagine, if the contention of the appellants be correct that there was no duty for them to speak. They had some reason to expect that the forger would be able to make the loss good; the Thomas Phosphate Company might materialize and come to his assistance, and consequently they limited their exertions to save him, if possible; but, as is usual in similar cases, they were doomed to disappointment and became the victims of their misplaced confidence and exaggerated kindness. They must suffer for the consequences of their conduct, which amounts to fraud in law, for their inaction or action—either word meets the case—is a fraud in law. With the judges of the two courts below, the majority of this court have come to the conclusion that they are estopped from setting up the forgery of their signature, and that they must pay the full amount of the note.

DAVIES J.—I would have been well content to rest my judgment in this appeal upon the able and clear reasons given by Osler J. in delivering the judgment of the Court of Appeal from which the appeal is taken. As, however, there is a difference of opinion amongst the members of this court I have thought it well to add a few observations of my own. The facts of the case are not in dispute and are stated by Osler J. as follows:

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One Wallace was the manager of, and perhaps interested in, a business carried on by Walter C. Bonnell under the name of the Thomas Phosphate Company, which, previous to the 14th August, 1900, had done some banking business with the plaintiffs. On the 15th August, Wallace procured the note now sued on to be discounted by the bank for the Phosphate Company and the proceeds were placed to the company's credit. On the 15th and 16th August checks were issued by the company against the proceeds of the deposit and other small deposits, payment of which left a balance to their credit at the close of business on the 15th of $1,611.55 ; on the 16th of $1,355, and on the 17th of $84.

On the 15th the bank sent a memo. to the defendants, who reside in Montreal, in the following terms; "Toronto, August 15th, 1900. You will please take notice that your note for $2,000 to the Thomas Phosphate Company, falls due at this bank on the 17th December, 1900, and you are requested to provide for the same. A. P. Assistant Manager. To Messrs. Ewing & Co., Montreal."

This was received by the defendants on the 16th August. To the bank they made no response, but between themselves and Wallace an active correspondence by telegram and letter was kept up, beginning on the 16th August and ending on the 5th of December ; on the defendants' side at first asking for an explanation "before advising bank" and then urgently insisting on the note being taken up ; while Wallace's letters are filled with the usual regrets and excuses for his conduct, and vain promises to settle the note and relieve the defendants' anxiety.

On these facts two questions arise ; first, was there any imperative duty on the part of the appellants, Ewing & Co., on the morning of the 16th August, when they received the above letter or notice from the bank, to at once notify the bank that the note was not genuine? And, if not, did such imperative duty arise at any time afterwards, and, if so, when ? The appellants strongly contend that at no time did such imperative duty arise but that if they were wrong and it did arise it did not do so until after the 20th or 21st August when they had a personal interview with Wallace who then practically confessed the forgery to them. I am quite at a loss to follow the reasoning which, assuming the duty to exist at all, would postpone it

till the 20th or afterwards. It seems to me that if there is a duty at all that duty arose immediately on receipt of the notice from the bank of the 15th August. If, under the circumstances, there was any room for reasonable doubt as to the genuineness of the signature, or any reason to believe that a mistake had been made in the notice which inquiries would clear up, the appellants would have been entitled to the necessary time to make proper inquiries. But it does not appear to me that any such doubts or room for doubts existed. Both William Ewing and James H. Davidson, the only members of the firm of Ewing & Co., were examined at the trial and they both state that they neither of them ever authorized any other person to sign the firm's name to any note; that they never used or gave any accommodation paper in their business or signed any blank notes, and that the note in question was a forgery. They knew they had never given or authorized the giving of such a note as the bank had advised them of, and the only reason given for not immediately notifying the bank was that given by Mr. Ewing, that he thought it might be a draft made on them and not a note. I cannot myself accept this as the true explanation. The notice says nothing about a draft and does not use any language from which a business man could fairly believe a draft was intended. If it was a mere draft that was intended and not an acceptance of a draft, a notice would not have been sent by the bank but the draft itself would have been forwarded for acceptance. The appellants knew it could not be an acceptance any more than a note for they had never signed nor authorized the signing of either, and the fact that in the telegram sent by them that day to Wallace, the managing clerk of the Phosphate Company, and also in the letter confirming that telegram, they make no reference to any draft or to the pos-

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sibility of there having been any such mistake made' but speak of the document held by the bank as a *note*, and repudiate the fact that the Phosphate Company held any note of theirs, satisfies me that they were not under any doubts or delusions on the subject at all. However, be that as it may, they got a telegraphic answer from Wallace that evening at 6.14 p.m., which could leave no possible doubt in their minds that the document was a note and not a draft, and that it was in the hands of the bank and was, as they knew, a forgery. Assuming for the sake of argument that Ewing & Co. were justified in waiting till they had received Wallace's answer, they knew on its receipt that the bank, respondent, was in possession of a note of theirs which they must have known was forged for $2,000, and which they had been formally "requested to provide for" at maturity. A whole day had been lost in making a useless inquiry. But even assuming that the duty to notify the bank of the forgery did not arise until the receipt of Wallace's telegram, what was to have prevented this notice being then sent either by telephone or telegraph. The counsel for the appellant contended that assuming the duty existed or arose on the receipt of the telegram from Wallace, it would have been discharged by the writing of a letter in the ordinary course of mail on the following day the 17th, which could not if written and posted in business hours reach its destination until the 18th when it would be useless as all the proceeds arising from the discount of the forged note had then been paid out by the bank. But I cannot accept any such proposition as that put forward by the appellants' counsel. Given the existence of an imperative duty; given the fact that it did not arise till after the receipt of Wallace's telegram, after business hours on the evening of the 16th; I ask on what principle can it be

discharged or fulfilled by mail alone. Is there any magic in the "mail" which makes it alone the proper vehicle for transmitting business information? Is there any reason why, the ordinary mail or post having been missed, resort should not be had to the telegraph or in some circumstances the telephone? Between the cities of Montreal and Toronto there existed telephonic and telegraphic communication as well as mail. Is it to be held by the courts that in the present day, where such a proportion of business is carried on by means of the telephone and telegraph, that, in a matter of urgency and moment involving some thousands of dollars, and where a few hours delay might be fatal, resort must not be had to one or other of the speedier methods of communication but must be confined to the mail alone? Is it reasonable that business customs and habits in a matter of this kind should be ignored? I do not think so and am satisfied that if the imperative duty existed at all it should have been discharged on receipt of the bank notice and if delay was sought to get information from the suspected forger then, at the expiration of that delay, notice should have been given to the bank, either by telephone or telegraph, which would have reached them on the morning of the 17th and while the larger part of the proceeds of the note were still lying in the bank and subject to its control.

Mr. H. S. Osler, in his argument for the appellant, laid much stress upon the form and character of the notice sent by the bank to Ewing & Co. and urged that too much importance had been attributed to it by the Court of Appeal. I pass by all technical criticism as to its form and looking at its substance I find it furnishes Ewing & Co. with all possible information they could require as to date, amount, due date, payee, maker, etc., of the note, winding up with a request that they should provide for the same.

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Nothing is wanting to inform them that a note professing to be theirs was in the hands of the bank and was being treated by them in the ordinary business way as a genuine note, and that the bank looked to them for payment. They knew it was a forgery. As between them and the bank their knowledge was exclusive. Instead of imparting it to the bank on receipt of its letter or notice they enter into prolonged telegraphic, written and personal communications with the forger lasting up to within a few days of the note falling due, when, in reply to the usual notice requesting payment, they, for the first time, repudiate the note. From their silence after the first notice sent them the bank naturally assumed the genuineness of the note and acting on that very natural assumption paid out the larger portion of the proceeds of the discount of the note, all of which would have been saved to them had Ewing & Co. on the 16th, or on the beginning of the business hours of the 17th, given them the information they should have given.

Again it is said that this is a suit to prevent a man from speaking the truth and to compel him to pay a note he never made nor authorized. But the answer is simple. The very basis of the doctrine of estoppel is that a man may by his representations or by his silence or his conduct towards his fellow man, if followed by the latter's consequent loss, prevent himself from setting up that to be true which he had induced another to believe was false or *vice versâ*. There would be no wrong in compelling a man to pay a note he had never signed or authorized if he by his representations, or silence, or conduct had led another to part with his money in the belief that the note was genuine.

Then comes the important question whether there was any duty in the matter at all on the part of

Ewing & Co. to give information to the bank of the forgery when they received the notice of the 15th August. It is argued that as there was no business relationship existing between the bank and Ewing & Co. at the time such as that between a bank and one of its ordinary depositors or customers so there was no duty to respond to the bank's notice. It is true that such a relationship did exist between the parties in the case of the *Leather Manufacturers' Bank* v. *Morgan* (1). In that case it was laid down by the Supreme Court of the United States that where cheques had been drawn by the plaintiff, a customer in the bank, and after having been fraudulently altered had been paid by the bank and charged up against the plaintiff, if the alterations might have been discovered by the latter by the examination of his pass book and advised of in time to enable the bank to take certain action which might have prevented it sustaining loss and this had not been done he would be estopped from claiming for the sums paid out on the altered cheques. The basis on which the doctrine of estoppel rests is discussed in this case at great length and the rule laid down by Parke B. in *Freeman* v. *Cooke* (2), approved of, namely that

> if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth ; and *conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.*

Both parties profess to rely upon this rule in this case though I cannot find that any one of the limitations mentioned in it express or suggest the existence of the relationship of banker and customer or similar relationship as necessary to create the duty the

(1) 117 U. S. R. 96. (2) 2 Ex. 654 at p. 663.

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neglect of which imposes the liability. It speaks of a *neglect of duty cast upon a person by the usage of trade or otherwise to disclose the truth.* I fail to appreciate the argument which would confine this duty to cases where such relationships already exist as those between banker and customer or seller and buyer. It does seem to me that in a country like Canada where such a large proportion of its business is carried on by credit evidenced by drafts and notes which are discounted by one or other of the chartered banks of the country the usages of trade which create the duty apply to all persons engaged in trade who are notified of the holding by one of these banks of a note or draft professing to be theirs. I cannot believe that such a duty would exist as between the bank and Ewing & Co. if the latter was a regular customer of the former and would not exist otherwise. It seems to me the duty naturally arises out of the usages of trade as they exist. Banks do not confine their discounts to those of their own customers only. It is known to every one engaged in trade that a large part of the bank's business consists in the discounting for its customers of commercial paper professing to be that of other merchants or traders. And when a business man receives such a notice from a bank as Ewing & Co. did in this case, if such notice contains information of a forgery and fraud being practised upon a bank, in the unauthorized use of the name of the person or persons notified, the latter are bound by every principle of justice and right dealing between man and man, and in accordance with the usages of trade, within reasonable time to give the bank notice of the fraud. Any other rule would seem to me to be fraught with grave danger; would generate want of confidence in the ordinary business relations of life and would offer a premium upon gross business negligence. I think

Lord Campbell has expressed the true rule to be followed in *Cairncross* v. *Lorimer* (1), at p. 830, in the following terms:

I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it been done by his previous license.

Reason and common sense would convince me, if positive authority was wanting, that as between commercial men and banks or other kindred institutions there exists duties with respect to business notices and conditions which have no application to, and are not governed necessarily by, the principles and rules which control in the cases of other letters and notices on private or personal subjects. An example of such letters is to be found in the case of *Wiedemann* v. *Walpole* (2). But the law which justifies and approves of a man ignoring impertinent or threatening letters relating to his private life or moral character, to which he is under no moral or legal obligation to give any answer, necessarily adopts a different rule with respect to ordinary business letters on business matters. Mere silence *per se* on the part of one who should speak is not, I grant, sufficient as an admission or adoption of liability or as an estoppel to prevent him denying his signature. But such silence coupled with material loss or prejudice to the person who should have been informed and which prompt and reasonable information would have prevented will so operate. Such a person under such conditions comes within the rule that where a man has kept silent when he ought to have spoken he will not be permitted to speak when he ought to keep silent.

(1) 3 Macq. H. L. 827.

(2) [1891] 2 Q. B. 534.

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The case of *McKenzie* v. *British Linen Co.* (1) is one where no previous direct business relationship existed between the parties and has been appealed to by both parties as authority for their respective contentions. The actual decision in that case was that McKenzie, who had been sued as an indorser of a note on which his name had been forged, was not liable, though he had remained silent for a fortnight after he had received notice of his name being on the note. But the reason of the House of Lords for so holding was, that the position of the bank was in no way prejudiced or altered during the time McKenzie had remained silent. I think it is quite clear that in the judgment of all of the law lords who delivered opinions in that case that had the position of the bank been materially prejudiced or injured during the time of McKenzie's silence he would have been held estopped from denying his signature and liable to the bank. The language of Lord Watson, at page 109 seems very clear. He says:

> It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information.

The reasoning adopted by all of these Law Lords in coming to the conclusion they did in that case convinces me first, that in all such cases the imperative duty of promptly giving notice and repudiating a liability wrongly attempted to be placed upon a man does arise whenever he is informed of the facts; secondly, that failure to discharge it will not necessarily involve

(1) 6 App. Cas. 82.

liability unless there is also proved the material prejudice which compliance with the duty might have prevented; and thirdly, that where both conditions co-exist, namely, the silence of the person whose duty it is to speak and the material loss or prejudice of the bank or person who should have been notified which might or would have been averted had the notice been promptly given, then the party neglecting his duty is estopped from denying his signature and his liability follows. The extent of that liability has been determined by the Judicial Committee in *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (1) as not limited to the actual amount of the loss sustained by the holder of the note but to entitle him to have his plea of estoppel sustained to its full extent. By this decision we are bound however strong the argument may be as to limiting the amount recoverable to the actual loss sustained through the neglect of the party to give the bank notice of the forgery. This case is also most important as determining that the material loss or injury which the bank or holder of the note sued on must shew he has sustained need not necessarily be shewn to be the direct and necessary consequence of the defendant's act or silence. The Judicial Committee there determines, p. 270, that

> if by keeping silence and allowing the forger to escape from the colony and the jurisdiction of its courts the appellant had violated his duty to the bank, these circumstances would in themselves have been sufficient to shew prejudice entitling the bank to have their plea of estoppel sustained to its full extent.

There silence of the person whose duty it was to speak and the loss which might arise to the bank by reason of the forger's escape had no necessary relation or connection. The escape of the one party was not a

(1) [1896] A. C. 257, at p. 270.

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necessary consequence of the silence of the other, and yet the Judicial Committee maintained the liability arising from estoppel. Here it is argued that there is no necessary relation or connection between the silence of Ewing & Co. and the paying out of the $1,300 or $1,400 on the 17th. And yet if they had broken their silence and discharged their duty the bank would not have lost the money. I can see no distinction between losing the money in the one case and losing the opportunity of taking proceedings against the forger either civilly or criminally or both in the other. The loss in either case could hardly be said to be the direct and necessary result of the neglect of duty of the defendants. The most that can be said is that if the duty had been discharged the loss would or might have been prevented or averted.

I think the appeal must be dismissed with costs.

NESBITT J. (dissenting).—The question which the court is here to decide is one of very great importance, and it is this, whether a person is to be liable to pay a note which he never signed. The facts are practically undisputed. The bank has its head office in Toronto. One Bonnell carried on business in Toronto under the name of the Thomas Phosphate Company. A clerk called Wallace, in the employ of Bonnell, forged the name of the defendants, William Ewing & Co., doing business in Montreal, Quebec, to a promissory note for the sum of $2,000 and discounted it with the bank in Toronto. Wallace had formerly had business relations with the firm of Ewing & Co., and had been discussing with them the formation of a company to take over the assets and good-will of the Thomas Phosphate Company, he, Wallace, hoping to obtain a substantial share of stock in the new company. As I gather from the evidence Ewing & Co. had declined to take stock

in the proposed company. On the 15th August the note was discounted at the bank, and the transaction is best stated in the language of the manager:

Q. The moment you as manager on the 15th agreed with Wallace to discount the note, Wallace could draw against it?—A. Yes.

Q. So that he was entitled to draw against the note. That is to say, credit was given to him on that cheque so that he might draw against that note before this notice, exhibit 2, was sent out by the bank?—A. Yes, before it would leave our office.

Q. The discount having gone to his credit?—A. Having gone to his credit.

Q. That exhibit 2 you do not treat in any way as a letter in respect of which you wait for an answer before taking any step?—A. No.

Q. It is simply a notice?—A. Simply a notice.

Q. And you did not wait for an answer before giving credit?—A. No.

Q. You did not communicate with Ewing & Co. before discounting the note?—A. No.

The notice referred to is in the following language:

DOMINION BANK,

TORONTO, Aug. 15th, 1900.

You will please take notice that your note for $2,000 to the Thomas Phosphate Co. falls due at this bank on the 17th Dec., 1900 and you are requested to provide for the same.

To Messrs. WM. EWING & Co., Montreal.

A. P., Asst. Mgr.

On the morning of the 16th August, 1900, Ewing & Co. received by mail this slip and being aware that no note had been given to the Phosphate Company by way of accommodation or otherwise and knowing that Mr. Wallace was connected with the Phosphate Company telegraphed him asking him for an explanation. The telegram is in the following terms:

G. N. W. Tel. Co., MONTREAL, Aug. 16th, 1900.

T. C. WALLACE,

Board of Trade, Toronto.

Phosphate Company have no note of ours and before advising bank thought best ask you what it means remember have to act promptly, writing

WILLIAM EWING & CO.

To which Wallace answered as follows:

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G. N. W. T. Co. 16th August, 1900.

To Mr. EWING, from Boston, Mass.

Telegram in reference to note just received here. I am coming Montreal and will explain why bank has it. Kindly await my return from New York.

T. C. WALLACE.

This telegram was sent from Boston and is marked as not having been delivered in Montreal until 6.40 p.m. on the 16th, and Wallace did not arrive in New York until Sunday, the 19th, when he confessed that the note was a forgery. Wallace threw himself upon the mercy of Ewing & Co. at that time and induced them not to notify the bank, and the bank never were notified until the 10th December, a week before the note fell due, when, in answer to a letter dated December 4th which is in the following terms:

DOMINION BANK.

TORONTO, December 4th, 1900.

Messrs WILLIAM EWING & Co.

Montreal P. Q.

DEAR SIRS,—I beg to advise you that we are the holders of a note made by you, dated 14th August, 1900, at four months, in favour of the Thomas Phosphate Co., for $2,000, which is payable at this office on the 17th instant, and shall oblige if you will kindly provide for the same.

Yours truly,

A. PEPLER,

Register. *Assistant Manager,*

they replied as follows:

MONTREAL, December 10th, 1900.

DOMINION BANK,

Toronto,

GENTLEMEN,—We have your letter referring to a note for $2,000 in favour of the Thomas Phosphate Company falling due on the 17th inst, and we beg to inform you that we have not issued the note described.

Yours truly,

To the Manager. (Signed) WILLIAM EWING & Co.

Wallace remained in the country for a week or two after the maturity of the note and then went to the

United States. There seems to be no question raised that the bank had plenty of opportunity after it obtained knowledge of the forgery to have had him arrested before leaving the country if they desired to do so. The trial judge and the Court of Appeal have held the defendants estopped on the ground that they were under a legal duty to immediately communicate with the bank upon receipt of the slip and that their silence until a week before the maturity of the note operated as an estoppel. The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. Mr. Bigelow in his work on Estoppel, 5 ed. speaking of estoppel arising from silence says :—

In like manner, it is settled law that standing by in silence will not bar a man from asserting a title of record in the public registry or other like office, so long as no act is done to mislead the other party ; there is no duty to speak in such a case. Thus, a patentee is not bound to warn others whom he may see buying an article which is an infringement on his patent ; and this even when he urges the persons to buy his own article in preference as something better. And of course there can be no duty to speak without a knowledge of the existence of one's own rights, or of the action about to be taken. Nor can pure silence (i. e. silence without fraud) operate as an estoppel to assert one's rights over property when the party supposed to be estopped was at the time in possession, for the possession is notice. If it be a case of property sold, the person assuming the right to sell should ordinarily at least have the property in hand.

These and many other cases to the same effect proceed upon the ground, of course, that the silence of the party supposed to be estopped to assert his rights was no breach of duty to the person who asserted the estoppel. The latter had not in contemplation of law been misled by the former's silence. It follows that it is not enough to raise an estoppel that there was an opportunity to speak which was not embraced, there must have been an imperative duty to speak. Nor is any duty generated by *the mere fact that a man is aware that some one may act to his prejudice if the true state of thing is not disclosed.* To use an apt illustration of one of the judges, a man may become apprised of the fact that his name has been forged to a negotiable instrument, and so become aware that some one may be led to purchase the paper by supposing the signature to be genuine, and yet he is not bound to

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proceed against the forger or to take any steps to protect the interests of others whose claims he may know nothing of. So long as he is not brought into contact with the *person about to act* and does not know who that person may be, he is under no obligation to seek him out, or to stop a transaction *which is not due to his own conduct, as the natural and obvious result of it;* if the party is present at the time of the transaction it *may* be necessary for him to speak, if speaking would probably prevent the action about to be taken ; if absent, his silence (or other conduct) must at least be of a nature to have an obvious and direct tendency to *cause* the omission or the step taken. Only thus can a duty to speak arise.

In this case it is to be observed that there is no pretence upon the part of the manager of the bank that he relied upon anything in the representation by defendants that the note was genuine. He distinctly avers that the slip was not intended as an inquiry as to the genuineness of the note, and also avers that he did not expect an answer to the slip, so that the bank so far as the discount itself of the note is concerned were not misled into such discount by the silence, and it remains to be seen whether the silence of Ewing & Co. misled them to their prejudice in any action which they took after the sending of the slip. The manager had put the proceeds to the credit of the Phosphate Company to be chequed out in the ordinary course and regardless of the sending of the slip and the receipt of any answer to it, and, as I have said, it is not pretended that the paying out of the money subsequently in any sense was affected by not receiving an answer to the slip or a notice from Ewing & Co. as to whether the note was genuine or not. It remains to be seen, then, whether Ewing & Co. were under any legal duty to communicate with the bank either upon receipt of the notice or at any time before the demand was made upon them by the bank as holders of the note for payment on the 4th December, 1900.

In the consideration of the question aid will be derived from the examination of some of the cases in which the doctrine of estoppel by silence has been defined and applied. As stated by Lord Ardmillan in *Warden* v. *British Linen Co* (1):

If a party be sued on such a bill, and do not defend himself, that affords a strong presumption of adoption. If he be charged on the bill and do not resist, that is stronger still. If there be an express demand for payment of the bill and no answer is given ; *if the bill be shewn and the* party *do not deny his acceptance.* * * *
I see no case in which silence was construed into adoption, where there *was no charge, or action, or demand for payment,* no question *directly put as to the genuineness of the subscription, no shewing of the bill.* * * *

And in 1880 the New York Court of Appeals in the case of *Viele* v. *Judson* (2), in dealing with the doctrine of silence, after citing *Pickard* v. *Sears* (3) and reviewing a number of English and American cases says :

These cases, and those of similar character, have been recently reviewed in this court and do not need a detailed examination. In all of them the silence operated as a fraud *and actually itself misled.* In all there was both the specific opportunity and apparent duty to speak. And in all *the party maintaining silence knew that some one was relying upon that silence and either acting or about to act as he would not have done had the truth been told. These elements are essential to create a duty to speak.*

A great number of cases are reviewed in *Leather Manufacturers' Bank* v. *Morgan*, (4). At page 108 the court says :

"The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." *Morgan* v. *Railroad Co.* (5) In *Continental Bank* v. *Bank of the Commonwealth* (6), it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration, or doing an act to mislead the one who is induced to rely

(1) 1 Ct. of Sess. Cas. (3 ser.) 402, at p. 405.
(2) 82 N. Y. 32.
(3) 6 A. & E. 469.
(4) 117 U. S. R. 96.
(5) 96 U. S. R. 720.
(6) 50 N. Y. 575,583.

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upon it. "Indeed, (said Folger, J.), it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose."

And again on page 115, speaking of the prejudice, the court says:

As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it.

The two recent leading cases in England are *McKenzie* v. *British Linen Co.* (1), and *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (2). In the *McKenzie Case* (1) Lord Blackburn, dealing with the judgment of the Lord President of the court below, after pointing out that he agreed with the language of the Lord President so far as the ratification was concerned, when he comes to deal with the question of estoppel by silence says:

But when Lord Deas says: "In cases of this kind where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbour to think that his signature is genuine to his neighbour's loss," he goes further than I am inclined to follow in the words "by not saying and doing something." And when he says, "there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill," I not only doubt his position that there was a legal duty then to have informed the bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before McKenzie, with the utmost diligence, could have informed the bank that the first was forged. It would be a quite different thing if it were proved that McKenzie knew that the bank had put the second bill with his name on it to Fraser's credit, *and knew that at the time when he had reason to believe that he would* be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that McKenzie for Fraser's sake thus ratified Fraser's act for a time; *and a ratification for a time*

(1) 6 App. Cas. 82. (2) [1896] A. C. 257.

would, I think, in point of law operate as a ratification altogether. But if McKenzie (as his case is) first knew that the bank had taken the second bill in the face of his forged signature on receiving the intimation of the 19th of July, he knew that the bank were not going to give further credit to Fraser on the faith of that signature, and that all the mischief was already done. I cannot think that even if McKenzie *had gone so far in his endeavours to shield* Fraser from the *consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice,* that would bar him from averring against the bank that the signature was not his.

And Lord Watson in dealing with the Scotch cases expressly adopts the decision in *Warden* v. *British Linen Co.* (1) to which I have referred, and points out that mere silence of the defendants in reference to a letter addressed to them by the bank and informing them of the existence of the bill before it was due did not create any estoppel, and he proceeds to say:

> None of these decisions appear to me to give the least support to the doctrine that mere silence after intimation or even after demand for payment of the forged bill necessarily implies adoption of a bill by one whose subscriptions to the bill are a forgery,

and, as I understand, the court distinctly affirmed the doctrine that silence, after mere intimation of the existence of a forged bill, did not, unless there were other circumstances, as I have pointed out, create an estoppel, and even with these circumstances in existence there was no estoppel unless there was prejudice arising to the estoppel asserter.

I think that in this case there could not be said to be any duty created by the mere intimation which was given by the slip; no question was asked nor was there anything in it which would indicate that the bank were likely to be prejudiced by silence other than the probability of arresting the forger. I think if the bank had written asking for information or in any way intimating that the proceeds were not already paid out, or if Ewing & Co. had any reason to know that the proceeds were not already paid out, that a duty would have arisen, but I adopt the language of Mr. Bigelow

(1) 1 Ct. of Sess. Cas. (3 ser.) 402.

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nor is any duty generated by the mere fact that a man is aware that some one may act to his prejudice if the true state of things is not disclosed.

I think it was incumbent upon the bank now asserting the estoppel to have given some reason to Ewing & Co. to suppose that they would be prejudiced by their silence. I adopt the language of the Lord President in the *Warden Case* (1).

> I can find no instance of the plea of adoption being sustained where there had not been a demand made on the party charged for payment, nor any in which mere silence, apart from any other evidence, was held equivalent to adoption. I think the rule of adoption has gone as far as it should go and that this is not a case for extending it.

I think that, in any event, until the interview on Sunday 19th Ewing & Co. were not bound to assume a crime had been committed and that their explanation which was adopted by the Court of Appeal that, although they knew that they had not made a note, the slip by mistake or error on the part of the clerk in the bank might refer to an advice of a draft intended to be drawn upon them was reasonable and they were not bound to suppose a crime had been committed; and Wallace's telegram would certainly lead them to suppose he had a reasonable explanation and that they were justified in waiting until Sunday the 19th, and at that time any telegram or other notice at the bank would have been quite ineffective. It was not pretended that the bank was in any worse position as to arrest by not receiving notice until the 10th December.

I refer also to the definition of estoppel and the necessity for a person asserting it to bring himself within the strict doctrine of it to *The Peoples' Bank of Halifax* v. *Estey* (2). It seems to me that even the extreme altruistic view referred to by Mr. Ewart in his work on Estoppel, page 38, does not justify acourt in making

(1) 1 Ct. of Sess. Cas. (3 Ser.) 402. (2) 34 Can. S. C. R. 429.

a man pay a note which he did not sign when the person who discounted the note relied entirely for the genuineness of the signature upon the representation of the party discounting it and did not communicate, in any way intending or relying upon such communication, with the party sought to be charged.

I would allow the appeal with costs.

KILLAM J.—In my opinion this appeal should be dismissed.

For the reasons so well stated by Mr. Justice Osler the case appears to me to come directly within the principle upon which silence under certain circumstances gives rise to an estoppel.

It was not a case in which the defendants had merely learned of the existence of a note on which their signature had been placed without authority, and had cause to apprehend only that some unknown person might possibly advance money without notice of the falsity of the signature, which is the case put in Mr. Bigelow's work.

The bank directly notified them that their note would fall due at its office on a certain date and requested them to provide for the same. This distinctly implied that the bank had an interest, either of its own or on behalf of some one else, in the payment of the note and in its genuineness.

While there was no intimation that the bank had acquired or was proposing to acquire the note for value, the defendants, as men of business, would know that the bank might have discounted the note and have the proceeds still at the customer's credit, or that it might make advances upon it. They would know that an immediate repudiation would enable the bank to withhold payment of any portion of the proceeds not actually paid out or of any sums not already ad-

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vanced. They knew that they had made no such note, that they had given no authority for the signature. They could at once repudiate it, and they did so in their telegram to Mr. Wallace. No further information was necessary for that purpose.

While the bank manager placed the proceeds to the credit of the customer without inquiry, and took no precaution against their being paid out before he could hear from the defendants, the bank did act upon the defendants' silence in the sense that it did what, it should properly be inferred, it would not have done if the defendants had at once denied the signature; it allowed the balance of the proceeds to be withdrawn.

The decision in *McKenzie* v. *British Linen Co* (1), proceeded distinctly upon the view that all the mischief was done before either bill could have been repudiated. But I think that sufficient appears to show that the learned Lords would have been of the opposite opinion if the proceeds had remained at the customer's credit sufficiently long to have enabled the repudiation to be communicated before their withdrawal. Lord Selborne, L.C., said, (p. 92):—

> There is no principle on which the appellant's mere silence for a fortnight, *during which the position of the respondents was in no way altered or prejudiced,* can be held to be an admission or adoption of liability, or to estop him from now denying it.

Lord Blackburn said (p. 101):—

> Certainly I think that his not telling the bank on the 15th of July nor till the 29th of July that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, *the bank neither gave fresh credit in the interval nor lost any remedy which if the information had been given earlier they might have made available.*

And Lord Watson said (p. 109):—

> It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by *until he saw that the position of the bank was altered for the worse.*

(1) 6 App. Cas. 82.

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In the interests of business morality, I think that the conclusion of the Court of Appeal upon this point should be supported. It is well warranted by the doctrines laid down in *Freeman* v. *Cooke* (1). It does not appear to me to be opposed to any previous judicial decision or even to judicial opinion directly applicable.

As the appellant's counsel has expressly abstained from questioning the conclusion that the estoppel, if existing, must apply to the full amount of the note, I say nothing upon that point.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the respondents: *Mulock, Mulock, Thomson & Lee.*

(1) 2 Ex. 654.

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*May 18.
*June 8.

SOPHIA KNOCK (PLAINTIFF).....APPELLANT;

AND

D. M. OWEN AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Solicitor and client—Costs — Confession of judgment — Agreement with counsel—Overcharge.

A solicitor may take security from a client for costs incurred though the relationship between them has not been terminated and the costs not taxed but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.

A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel only part of which was paid to him.

Held, that though the arrangement was improper it did not vitiate the judgment entered on the confession but the amount not paid to counsel should be deducted therefrom.

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

In 1895, the respondent, Joseph Knock, commenced an action against the appellant in the Supreme Court of Nova Scotia. The other respondents who compose the firm of Messrs. Owen & Ruggles, were retained, and acted throughout as his solicitors.

Upon the trial of said cause judgment was given in favour of the plaintiff, which was affirmed upon appeal

*PRESENT:— Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

to the Supreme Court of Nova Scotia *in banco*. From that judgment an appeal was taken by the present plaintiff to the Supreme Court of Canada, which said appeal came on for argument on the 4th and 5th days of May, 1897, and judgment was delivered by the said Supreme Court of Canada, on the 10th day of November, 1897, reversing the decisions below, and dismissing the action with costs (1).

On December 2nd, 1897, an order embodying said decision was granted, and the costs on appeal to the Supreme Court of Canada were taxed. On December 6th and 10th, 1897, the present plaintiff's costs of action and of appeal to the Supreme Court of Nova Scotia *in banco*, were taxed. On January 4th, 1898, judgment was entered at Lunenburg for the present plaintiff against the said Joseph Knock for the sum of $804.14, and said judgment was recorded in the registry deeds for the County of Lunenburg, on January 7th, 1898.

On or about the 13th day of November, 1897, the said Joseph Knock confessed judgment in the Supreme Court of Nova Scotia to the said Owen & Ruggles, for the sum of $860 debt and $16 costs, and said judgment was entered for $876 in the prothonotary's office at Lunenburg, on November, 13th, 1897, and recorded in the said registry of deeds, on November 19th, 1897. On or about November 20th, 1897, the said Joseph Knock confessed a second judgment to the said Owen & Ruggles, in the Supreme Court, for the sum of $100, which judgment was entered in the prothonotary's office at Lunenburg, on November 20th, 1897, and recorded in said registry of deeds on December 2nd, 1897. On or about the 27th day of January, 1898, the said Joseph Knock assigned all his real estate, being the same as bound by said judgments and personal

(1) 27 Can. S. C. R. 664.

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property, except such as was exempt from execution to the said appellant, in trust for the payment of her said judgment debt, as provided by the Collection Act, 1894.

After said judgments had been obtained by the said Owen & Ruggles, and after the same had been recorded for upwards of one year, the said Owen & Ruggles issued executions thereupon under which executions the sheriff for the County of Lunenburg sold the real estate of the said Joseph Knock at public auction to the said Owen & Ruggles and conveyed the same to them by the usual sheriff's deed.

Counsel was employed by the said Owen & Ruggles for the said Joseph Knock, in said suit, the total amount of whose account was $371.80. The said Owen & Ruggles included in said judgment the said account as the amount paid by them to said counsel. As a matter of fact, said Ruggles admits that they had only paid said counsel $100.80, and they subsequently settled with him by paying $75 cash, and a contra account of $16.31, in all, $91.31.

Mr. Ruggles, in his evidence, seeks to explain this by stating that he had a continuing arrangement with the counsel he employed to the following effect: "I had an arrangement with Mr. Harrington when I left his office about costs, agency costs. He was to divide his charges with me according to the circumstances of the case. I was to explain the case to him, and he was to make a reasonable allowance to me." Joseph Knock knew nothing of this arrangement. Mr. Ruggles transacted the most of the business between Owen & Ruggles and the said Joseph Knock.

Wade K.C. for the appellant. A retainer makes an entire contract determinable only by mutual agreement or performance of the whole services. Until the relationship of solicitor and client ceases the former

can recover nothing for his services. *Holman* v. *Loynes* (1); *Harris* v. *Osbourn* (2).

If the judgment is bad in part it is bad *in toto*. *Martin* v. *McAlpine* (3); *Ley* v. *Madill* (4); *Freeman* v. *Pope* (5).

Borden K.C. for the respondent cited *Ex parte Hemming* (6).

The Chief Justice and Girouard and Nesbitt JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—The plaintiff who was a judgment creditor of one Joseph Knock, and also his general assignee, under The Collection Act, 1894, brought this action to set aside two prior judgments given by Joseph Knock and the sheriff's sale and deed thereunder. These judgments had been given by Joseph Knock to his solicitors, the other respondents, Owen & Ruggles, as security for the payment of the amount of the latters' costs in defending a law suit brought against Knock, and which had gone through many stages until finally disposed of by this court on appeal, *Knock* v. *Knock* (7). The grounds upon which the judgments were attacked were that they were given fraudulently and for the purpose of hindering and delaying the respondent Knock's creditors. There was an alternative claim that the judgments should be reduced.

The learned trial judge found as facts that the amount charged for the services rendered was not unreasonable; also that Knock was fairly used and his interests sufficiently guarded for the circumstances of the case; also that the judgments were given *bonâ fide* and not for the purpose of retaining any benefit for

(1) 4 DeG. M. & G. 270.
(2) 2 Cr. & M. 629.
(3) 8 Ont. App. R. 675.
(4) 1 U. C. Q. R. 546.
(5) 5 Ch. App. 538.
(6) 28 L. T. O. S. 144.
(7) 27 Can. S. C. R. 664.

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the debtor. The Supreme Court of Nova Scotia on appeal, in a majority judgment, sustained the trial judge's findings, saying:

> The learned judge finds that there is no evidence of gross error or charges amounting to imposition or fraud or under pressure, and nothing has been pointed out to us to lead to a contrary conclusion.

Under these findings it would require strong evidence in a case of this kind, which depends almost entirely upon questions of fact, for us to allow the appeal and set aside the security attacked. Mr. Wade, during the course of the argument, admitted that the judgment he was attacking did not cover any future costs, but even if it did the authorities show it would still stand good for those already incurred and for which it was given. *Holdsworth* v. *Wakeman* (1); *Re Whitcombe* (2).

The observations of the Master of the Rolls in this latter case are so applicable to the appeal now under consideration that I quote them:

> I must remark on the great danger which solicitors incur when they enter into such arrangements with their clients. An agreement like this between a solicitor and client for taking a fixed sum in satisfaction of all demands for costs, is an agreement which may be perfectly good; but this court, for the protection of parties, looks at every transaction of this kind with great suspicion. The matter may turn out to be perfectly fair and right; still it exposes the conduct of the solicitor to suspicion, and naturally awakens the vigilance and jealousy of this court, seeing that one party has all the knowledge, and the other is in ignorance. But it is not because the transaction may be opened that, therefore, it is to be considered as open upon an occasion on which the court is exercising a jurisdiction in which it cannot set aside the transaction.

The circumstances in this case were not free from suspicion and the flat contradictions given by both Knock and Ruggles at the trial to the sworn evidence given by them before the commissioner, McGuire, seem fully to justify the severe strictures passed upon

(1) 1 Dowl. 532. (2) 8 Beav. 140.

them by Mr. Justice Meagher in his dissenting judgment. But none of these suspicious circumstances, nor all of them combined, were strong enough to convince the trial judge or the Supreme Court of Nova Scotia of the existence of such fraud or gross error as would vitate the entire transaction and upon the whole case, notwithstanding the able argument addressed to us, I am not convinced that the judgment of the court below should be reversed.

On the other branch of the case I am satisfied, however, that the judgment attacked should be reduced by the difference between the amount charged as paid to Mr. Harrington, the counsel in the cause. and the amount actually paid. This reduction does not necessarily involve any finding of fraud against the solicitors. At the time the bill of costs was being made up or shortly before Mr. Harrington was applied to for the amount of his charges. He gave them and as given they were charged in the bill $371.10. Subsequently Mr. Ruggles settled with him by paying $191.31, leaving a sum charged against Knock, which was never paid, of $180.59. Ruggles refused to make the necessary reduction of the judgment by this amount, on the grounds that his firm either had a right to retain any deductions made by counsel from his bill on general principles, or that such right existed under a special agreement existing between Mr. Harrington and Mr. Ruggles, as to agency costs. I am, however, perfectly clear that this agreement as to agency costs, which is quite a common one and quite defensible, can have no relation whatever to counsel fees such as those of Mr. Harrington, and if it had it is equally clear it never would receive the sanction of this court. The relations existing between solicitor and client are peculiarly sacred. The latter has a right to receive from the former not only his best judgment and skill, but the strictest integrity and

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the most scrupulous good faith in dealing with his clients' rights and business. It would be intolerable that a solicitor could charge and exact payment from his client of a larger sum of money as paid to counsel retained to advocate that client's interests than was actually paid or be permitted to retain money actually his client's and coming into his hands by way of reductions made in the charges of counsel or otherwise. This court, I take it, will be astute to see that under no possible guise or contrivance will any such a breach of the trust which a client is compelled to place in his solicitor be permitted. I adopt the language used by the Lord Chancellor in delivering the judgment of the House of Lords in *Tyrrell* v. *Bank of London* (1):

> My lords, there is no relation known to society, or the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honest observance, than the relation between solicitor and client; * * * a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled.

I am willing to admit that in this case the original charge was not fraudulently made and that the subsequent refusal to allow his client the reductions which Mr. Harrington subsequently made in his charges was based upon a mistake as to his duties and rights as a solicitor.

In the result I am of opinion that the appeal should be allowed to this extent that the judgments of the respondents Owen & Ruggles against Joseph Knock should be reduced by the amount of the overcharge of $189.50 with interest if any charged but, under the circumstances, as neither party has been fully successful, without costs.

(1) 10 H. L. Cas. 26, at p. 44.

The form of the order will be to set aside altogether the second judgment for $100 and to reduce the first judgment by the remaining $80.59.

KILLAM J.—It appears to me immaterial whether or not the relation of solicitor and client was formally terminated between the defendants Owen & Ruggles and the defendant Joseph Knock before the giving of the confessions of judgment.

Admitting that the solicitors were not then in a position to sue, they had performed valuable services and paid out money for their client, who could at any time waive further services and bind himself by an agreement to pay for what had been done. And there was a sufficient consideration to prevent the first confession of judgment being held void as being devised to delay, hinder or defraud the creditors of Joseph Knock. I have nothing to add upon these points to what has been so well said by Graham and Townshend JJ. in the court below.

The trial judge expressed himself as

> satisfied that Knock was fairly used and that his interests were sufficiently guarded for the circumstances of the case.

He further said,

> In my opinion there was valuable and adequate consideration for the confession of judgment in each case. I am satisfied that they were *bonâ fide* and not for the purpose of retaining any benefit for the debtor.

And, in reference to the claim for a taxation of the costs, the learned judge said,

> on this branch of the case she stands in no better position than Joseph Knock. He was offered the privilege of taxing the costs and waived it. There was no pressure and I cannot say that he was overcharged.

And, further,

> I think the amounts charged for services were not unreasonable, as costs are now taxed by the taxing authorities.

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And,

In the plaintiff's written argument no point is made that Knock was overcharged.

The majority of the Supreme Court of Nova Scotia, sitting in appeal, adopted these findings and opinions. Under ordinary circumstances, then, it would not seem proper for this court to go behind them and examine into the reasonableness of the charges, a task for which we cannot be nearly so well fitted as the learned judges in Nova Scotia.

But one point that has been raised involves a question of principle which renders it proper for our earnest consideration. The solicitors are shewn to have included, in making up their costs, the full amount of an account rendered to them by a firm of barristers and solicitors in Halifax for counsel fees both in the Supreme Court of Nova Scotia and in the Supreme Court of Canada, as well as for services as agents in Halifax.

In making up the costs for the purpose of obtaining the confessions of judgment, Mr. Ruggles procured, by telephone, a statement of the amount charged by the Halifax firm, and included it in his claim for costs. After the giving of the confessions the account was rendered, amounting to $371.80, of which $100 had been paid. This, according to Mr. Ruggles' recollection, was about the amount given him by telephone. Subsequently, Mr. Ruggles and Mr. Harrington agreed upon a settlement of the account, by which Ruggles paid $75.00 and set off a contra account which appears to have amounted to $19.21. Thus, upon my reading of the evidence, the utmost which Messrs Owen and Ruggles can claim to have paid to the Harrington firm was $194.21

Mr. Ruggles' evidence, in explanation of this transaction, is thus reported:

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I had an arrangement with Mr. Harrington, when I left his office, about costs. Agency costs. He was to divide his charges with me according to the circumstances of the case. I was to explain the case to him and he was to make a reasonable allowance to me. I suppose he lived up to that in this case.

It is a well known practice, as between solicitors in different places, that a rebate, usually of one half, is made upon charges for services performed by one on behalf of the other, and the law allows the latter to charge the full amount of the fees as against the client. Usually the fees are small and regulated by a tariff, and the services are such as might be performed for the solicitor by another person, sometimes a clerk or another solicitor, sometimes one unconnected with the legal profession. Counsel fees are for personal services, and large as compared with solicitors' fees. The client is interested in having the intervention of a solicitor to advise in selecting the counsel and in settling the fee. If the solicitor is to have the advantage of every reduction upon the fee as first charged the interests of the client will have little protection.

Undoubtedly, the circumstances differ greatly in the various provinces of Canada from those existing in England. Mr. Justice Graham has pointed out some differences in respect of Nova Scotia. In Ontario, Harrison C.J., in *Robertson* v. *Furness* (1), and Boyd C., in *Armour* v. *Kilmer* (2), pointed out other such differences, many of which were applicable to other portions of Canada. Both practice and statute may give rise to such.

In England one person cannot be at once solicitor and barrister. For professional reasons the solicitor cannot be allowed to share a barrister's fee, which must be treated by the solicitor as a disbursement to be charged for only at the amount actually paid.

(1) 43 U. C. Q. B. 143. (2) 28 O. R. 618.

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In most, I believe in all, the provinces of Canada, solicitors may be barristers, and, by partnership with other barristers, these may share the counsel fees of one member of the firm, and the client retaining them must take the consequences.

In this case the counsel on both sides are members of the Nova Scotia bar of long standing. One asserts and the other denies that it is a recognized practice with city counsel to divide their fees with country barristers and solicitors. Nothing in the opinions expressed in this case by the learned judges of Nova Scotia indicates that any of them recognized such a practice as actually prevailing. I cannot find that any express reference to the point was made by Graham J. Townshend J. merely said:

> I know of no reason why such an arrangement may not be made, provided no unjust advantage is taken of the client in doing so.

Weatherbe J. said:

> Only the amount charged in the bill of counsel at Halifax has been demanded of Knock. At least, I think, if this was contended as sufficient to vitiate the transaction, evidence should have been furnished to convince the trial judge that that claim of counsel could not be enforced. There is nothing to show it may not be enforced. I think the trial judge was bound to assume it could be enforced.

Meagher J., however, said:

> The inclusion of a sum which was neither due nor payable, and which was included so as to give the defendants (solicitors) a gain or profit from their client, beyond their fair professional remuneration, being fraudulent, both as against Knock, who was left in ignorance of the fact, and especially as against the plaintiff, vitiates the judgment entirely under the statute.

And, again:

> So far, too, as the judgment included a sum for the services of Halifax counsel, in excess of what was paid or payable, it was fraudulent on the part of Ruggles, the party who claims under it.

Possibly, if there were a well known practice in the profession in Nova Scotia, recognized and counte-

nanced by the courts, to allow one barrister and solicitor the benefit of agency terms as to the counsel fee of another barrister retained by the former for a client, we might feel bound to recognize and countenance it too, but when neither of the judges supporting the transaction suggests this, and the judge disapproving of the transaction does not indicate that he has heard of such, it seems impossible for this court to assume its existence.

The circumstance that admission to practice in one branch of the profession is in Nova Scotia an admission to practice in the other branch also, does not appear to me to distinguish the position from that in a province where it is merely admissible and customary to admit the same person to practice in both branches. "The Barristers and Solicitors Act," R.S.N.S. (1900), ch. 164, recognizes a distinction between barristers and solicitors, and I can find nothing in that statute involving the application of a rule different from that which should prevail in Ontario.

In my experience in practice, both in Ontario and in Manitoba, an attorney or solicitor, upon taxation of a bill of costs, was required to prove actual payment of counsel fees charged, unless he or his partner had acted as counsel. Whether that practice is now rigidly adhered to in either province, I am unable to say; but I feel that I can say, with confidence, that in neither would the sharing of counsel fees, contended for in this case, be countenanced. I can see no greater reason for countenancing it in Nova Scotia.

Here $112.80, out of the amount of Mr. Harrington's account, were for disbursements, leaving only $259 in which the solicitors could seek to share, since any deduction for an excessive charge of disbursements would clearly be for the client's benefit. Taking it, then, most favourably for the solicitors, they seek

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to charge $259 as paid for professional services o others when they have paid only about one-third thereof. Undoubtedly a number of items in the account were for purely solicitor's work, in the fees for which the defendant solicitors would be entitled to share. Still it is very evident that there was a large overcharge to the client.

I am unable, however, to agree with the view of Meagher J. that, on this ground, the first confession of judgment should be treated as fraudulent and void as against the creditors of Joseph Knock. He certainly is not shewn to have intentionally given a confession of judgment for a larger sum than he owed.

Ruggles made up his bill, apparently, upon the basis of the statement by the telephone. He did not then know what reduction would be made. He was probably entitled to some without allowing it to his client. But having afterwards settled as he did, he was bound to give credit to his client for a considerable sum, and a court of equity would, I think, compel him to give this credit upon the judgment in favour of the present plaintiff.

For myself I would like to see the cause referred back for taxation of the costs, both because we cannot, in my opinion, properly determine the extent of the reduction which should be made, and because the circumstance of this overcharge appears to me to throw doubt upon the whole charge, and on other grounds, but as the majority of the court are of opinion to the contrary, it seems unnecessary for me to lengthen my remarks by further discussing this part of the case.

I think that it sufficiently appears that there must be such a reduction; that the full amount of the second judgment must be taken as improperly charged, and the difference of amount in other respects seems of no practical importance. I, therefore, concur in the setting

aside of the second judgment, and do not dissent from the reduction of the first.

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Appeal dismissed without costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitor for the respondent: *W. H. Owen.*

GIBSON *v.* NELSON.

1902

*Nov. 26,27.
*Dec. 9.

Foreclosure of mortgage—Redemption—Assignment pending suit—Practice —Procedure in court below—Costs.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the judgment at the trial and dismissing the plaintiff's action with costs.

This action was one of several suits affecting the title to certain lands under circumstances which are fully stated by Mr. Justice Moss at pages 500–504 of the report above cited.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, refused to interfere with the decision of the provincial court on matters of procedure, but, under the special circumstances of the case, the court dismissed the appeal without costs.

Appeal dismissed without costs

Aylesworth K.C. for the appellant.

Iddington K.C. for the respondent.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Mills JJ.

(1) 2 Ont. L. R. 500.

1903

*June 3.
*June 8.

POWER v. THE ATTORNEY-GENERAL FOR NOVA SCOTIA.

Will—Discretion of executors—Withholding income—Reasonable time—Failure of object of devise—Cy-pres—Costs.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banco* (1), affirming the decision of Townshend J., which declared that the direction in the will of the late Patrick Power to apply a portion of the income of the residue of his estate for the introduction and support of Jesuit Fathers in the City of Halifax was inexpedient and impracticable and could not now be accomplished and ordered such unapplied revenue, with the accumulations thereof, to be applied to charitable purposes having regard to the will and that the defendants should formulate a scheme to that effect, such scheme to be submitted to the court within three months from the date of the decree.

The action was brought by the Attorney-General for Nova Scotia, on the relation of the Roman Catholic Episcopal Corporation of Halifax, against the executors and trustees under the will for inquiry and account in respect to the estate, a decree that the income of the residue should be applied to charitable purposes and for the settlement of a scheme for its disposition and the application *cy-pres* of such portion of the income as could not be applied in the particular mode directed by the will, with such further directions as might be necessary. The devise in question is set out at pages 527 to 529 of the above cited report.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 35 N. S. Rep. 526.

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The appeal was asserted by the executors and trustees against the judgment of the court below in favour of the contentions of the plaintiff.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, made an order varying the decree appealed from by striking out the introductory paragraph so as, in effect, to declare the direction in the will at present impracticable and adjudging that the unapplied income of the residue should, from and after a date named, be applied semi-annually by the defendants to the promotion and support, in the City of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church, and in such manner and in such proportions as the executors, in their discretion, might think proper in accordance with the terms of the will and the powers thereby conferred upon them. And the court reserved further directions, with leave to either party to apply to the court below and ordered the costs of all parties to be paid out of the funds of the estate in the hands of the defendants.

Newcombe K.C. and *Power* for the appellants.

Borden K.C. and *Chisholm* for the respondents.

1903

*Nov. 2.
*Nov. 10.

GOOLD BICYCLE COMPANY v. LAISHLEY.

Special leave to appeal—Matter in controversy—Assessment of damages —Costs.

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Ferguson (2), and ordering judgment to be entered in favour of the plaintiff for damages, assessed at $1,000, with costs.

The action was brought to recover damages for wrongful dismissal. The plaintiff had been employed as the company's selling agent and was entitled to receive a fixed salary and also a commission on his sales. Before the expiration of the term he was dismissed without cause, after sales to a large amount had been, up to that time, effected by him. On the hearing of the appeal in the court below, the main question was whether or not, in estimating the damages to which the plaintiff was entitled, an allowance should be made for his commissions upon prospective sales. The judgment appealed from (1) held that, in estimating the damages, the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term should be taken into consideration.

The company sought special leave to appeal, as the judgment was for $1,000 only, exclusive of the costs, on the ground of hardship, as the costs had accumulated until they exceeded $2,000, and also that the damages had been assessed by mere guess

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 6 Ont. L. R. 319. (2) 4 Ont. L. R. 310.

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and were not justified by any reasonable calculation warranted by the circumstances of the case.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the applications with costs.

Motion dismissed with costs.

H. S. Osler K.C. for the motion.

Watson K.C. contra.

CONWAY v. BROOKMAN.

Title to land—Trespass—Right of action—Fences—Enclosure—Possession.

1903

*Dec. 3.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *in banco* (1), affirming the judgment of Mr. Justice Meagher at the trial by which the plaintiff's action was maintained with costs.

The action was for trespass but the question in dispute was, in reality, the title to the lands. The judgment appealed from decided that the mere enclosure of the land of another, by the proprietor of the adjoining land, by putting up a fence for the purpose of protecting the lands of both parties against incursions of cattle, such fencing being made by mutual consent and arrangement to that end, could not have the effect of dispossessing the actual owner of the land enclosed, nor prevent him from maintaining an action for trespass against an intruder thereon or to prevent any one using his land for purposes other than those for which it had been enclosed.

After hearing counsel for the parties the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Russell K.C. for the appellant.

W. B. A. Ritchie K.C. for the respondent.

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

(1) 35 N. S. Rep. 462.

1904

*May 20.
*June 8.

CONNOLLY v. THE CITY OF SAINT JOHN.

Contract—Implied covenant—Damages—New trial.

APPEAL from the judgment of the Supreme Court of New Brunswick, *in banco* (1), setting aside the judgment entered upon the verdict at the trial and ordering a new trial.

The plaintiff entered into a contract with the city for three hundred and thirty hours dredging and for so much longer as the city might require by notice at the end of that period, to be paid for at a stated rate subject to deductions for time that the dredge was unable to work by reason of injury to the plant or machinery and interruptions caused by the state of the weather. Delays were caused on account of the water being too deep at high tides for the dredge to work but, although both parties were aware that this interference would occur at high tides at the time the contract was made, there was no provision made for any allowance or deduction on that account. The judgment appealed from held that a verdict for the plaintiff, returned on the construction that there was an implied covenant that the city should pay for the time lost by reason of the high tides was erroneous and, consequently, set it aside and ordered a new trial.

After hearing counsel for the parties the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Aylesworth K.C. for the appellant

Skinner K.C. for the respondent.

*PRESENT :—Sir Elzéar Taschereau, C. J. and Sedgewick, Girouard, Davies and Killam JJ.

(1) 36 N. B. Rep. 411.

MARIA HOLSTEN AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

GEORGE R. R. COCKBURN DEFENDANT) ..... } RESPONDENT.

1904
*Feb. 3,

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Security for costs—Waiver—Consent.

The case on appeal to the Supreme Court of Canada cannot be filed unless security for the costs of the appeal is furnished as required by sec. 46 of the Act. The giving of such security cannot be waived by the respondent nor can the amount fixed by the Act be reduced by his consent.

THE CASE ON APPEAL in the above cause when transmitted by the Registrar of the Court of Appeal for Ontario contained an order made by a judge of that court approving of the bond for security for costs in the sum of two hundred and fifty dollars and stating that counsel for respondent had consented to that amount. The Registrar of the Supreme Court refused to accept the case and referred the matter to the Chief Justice who approved of the order refusing to receive the case and gave the following ruling as to the practice:—

THE CHIEF JUSTICE.—Though it would seem that, as a general rule, the giving of security is an enactment in favour of the adverse party, and that, consequently, the adverse party may waive it expressly or impliedly, yet, under the Supreme Court Act, that is not so. Under sections 40, 43 and 46, the case is taken out of the jurisdiction of the provincial court only by

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the approval of the security. It is only by that act that the Supreme Court of Canada acquires jurisdiction. That is why rule 6 requires that the case should contain a certificate that the security has been given. *Fraser* v. *Abbott* (1); *In re Cahan* (2); *Whitman* v. *The Union Bank* (3), might perhaps be read as opposed to that view. But, to my mind, the statute is clear, and the clerk of the provincial court has no authority whatever, as a general rule, to certify a case (sec. 44, rule 1), when no security has been given. Our registrar should, therefore, refuse to receive such a case. Under rules 5 and 44, also, the security must be required. And the security, of course, must be as required by the statute.

(1) Cass. Dig. 695; Cout. Dig. 111.

(2) 21 Can. S. C. R. 100.

(3) 16 Can. S. C. R. 410.

EX PARTE, WILLIAM SMITHEMAN.

1904

*June 22.

ON APPLICATION, IN CHAMBERS, FOR A WRIT OF HABEAS CORPUS.

Commitment—Imprisonment in penitentiary—Form of warrant—Venue—Commencement of sentence.

The certified copy of sentence is sufficient warrant for the imprisonment of a convict in the penitentiary and it is not necessary that it should contain every essential averment of a formal conviction.

Where the venue is mentioned in the margin of a commitment, in the case of an offence which does not require local description, it is not necessary that the warrant should describe the place where the offence was committed.

A warrant of commitment need not state the time from which the term of imprisonment shall begin to run, as, under the seventh subsection of section 955 of the Criminal Code, terms of imprisonment commence on and from the day of the passing of the sentence.

APPLICATION by motion before Davies J., in chambers, for a writ of habeas corpus to inquire into the cause of imprisonment of William Smitheman in the Penitentiary at Dorchester in the Province of New Brunswick, on a conviction by His Honour William B. Wallace, judge of the County Court Judges' Criminal Court in and for the Metropolitan County of Halifax, District No. 1, in the Province of Nova Scotia, under the provisions of part 54 of the Criminal Code, 1892, for the Speedy Trial of Indictable Offences.

The circumstances under which the application was made are stated in the judgment reported.

Power for the application, *ex parte*.

DAVIES J.—A motion was made before me at chambers for the discharge from custody of the prisoner

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Davies J.

Smitheman, now serving a term of imprisonment in the Penitentiary at Dorchester N.B., for "unlawfully inflicting grievous bodily harm upon Fong Lem." The motion was made pursuant to an order of my brother Killam of the third of June instant setting down for hearing by a judge of this court in chambers a motion for the discharge of Smitheman from custody under a writ of habeas corpus which he ordered to be issued. The grounds upon which Mr. Power sought to sustain his motion were two and were each based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judges' Criminal Court, at Halifax, N.S., returned by the warden of the Dorchester Penitentiary with the return to the writ of habeas corpus as the authority under which he detained and held Smitheman;—

1. That this warrant did not contain any allegation of *the place* where the prisoner committed the offence for which he was convicted and imprisoned; and

2. That no time was stated in the warrant of commitment from which the imprisonment was to run.

With respect to the last objection, it is sufficient to refer to section 955 (7) of the Criminal Code which prescribes that the term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of the passing of the sentence, which day the commitment in question shewed to have been the fifth day of May, 1904.

With regard to the only other objection to the validity of the commitment, namely, the absence of any specific allegation of the place where the offence was committed, it is to be observed that the County Court Judges Criminal Court for the County of Halifax, District No. I, when exercising criminal jurisdiction under the provisions of part 54 of the Criminal

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Code, intituled, "Speedy Trials of Indictable Offences" is declared, by section 764, to be a court of record, and sub-section two enacts that

> the record in any such case shall be filed among the records of the court over which the judge presides and as part of such records.

The jurisdiction of this criminal court is, by section 640, made, as regards the place of the commission of the offence, co-extensive with the Province of Nova Scotia and extends, by section 539, over all indictable offences excepting those specially reserved for the exclusive jurisdiction of the superior courts of criminal jurisdiction which do not include the offence of which this prisoner was convicted. As regards "place," therefore, the jurisdiction of the court is not what is known as a limited one.

The general rule, no doubt, with regard to inferior courts is that stated in Paley on Convictions, (5 ed.) p. 204, that

> on the ground that the magistrate's jurisdiction is limited in local extent the place where the offence was committed should be stated in the conviction.

But I am not prepared to hold that such rule would necessarily apply to a court having criminal jurisdiction co-extensive, as regards place, with the Supreme Court of the province. The same rule formerly prevailed with regard to the venue in indictments. But now, by section 609 of the Code,

> it shall not be necessary to state any venue in the body of the indictment and the district, county or place named in the margin thereof shall be the venue for all the facts stated in the body of the indictment but, if local descripti n is required, such local description shall be given in the body thereof.

This is not an offence requiring a local description and, therefore, if the question whether there was or was not a valid conviction in this case was before me, it would become necessary to determine whether this

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section 609 applied to the proceedings in this prosecution. In an ordinary indictment, the absence of the place in the body of the indictment would be immaterial, being covered by that named in the margin. It would be curious, if by a technical limitation of the meaning of the word "indictment" to the proceedings of the Supreme Court of the province, this remedial section of the Code should not be held applicable to the proceedings of the County Court Judge's Criminal Court. Subsection "*l*" of the Interpretation Act, sec. 3 of the Code, says:—

> The expressions "indictment" and "count" respectively include information and presentment as well as indictment and also any plea, replication or other pleading *and any record.*

I think, therefore, that the enactments of the Code are sufficient to meet this case where, even if the place was absent from the body of the record of the conviction, it would be covered by that named in the margin, viz. "County of Halifax".

In this view, I am strengthened by the forms or examples of the manner of stating offences given in the Code. Section 982 declares that these forms shall be deemed good, valid and sufficient in law. The form adopted in the case before me seems to have followed one of the examples given in the Schedule "F.F." to the Code, (f.). See also (M.M.)

But, apart from that, I am not satisfied that the document authorising the prisoner's detention in the penitentiary need necessarily contain every essential averment of a formal conviction. Section 42 of chapter 182 of the Revised Statutes of Canada, prescribes that the sheriff or other officer may convey the convict sentenced to the penitentiary and deliver him to the warden

> without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried and certified by a judge or by the clerk or acting clerk of such court.

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I would greatly doubt that a "copy of the sentence" must contain all the averments essential to the validity of an indictment or conviction.

This document, certified by the warden as his authority for Smitheman's detention, is sufficient, in my opinion, and the motion for the prisoner's discharge is refused.

Application refused.

1904

*Oct. 4, 5.
*Oct. 6.

ADÈLE PREVOST AND OTHERS.....APPELLANTS;

AND

BERTHE RHÉA PREVOST AND OTHERS .... } RESPONDENTS.

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

Right of appeal—Interest of appellant—Parties to action—Art. 77 C. P. Q. —Sale of substituted lands—Will—Prohibition against alienation—Arts. 252, 953a, 968 et seq. C. C.—Res judicata.

Where a person who might have an eventual interest in substituted lands has not been called to the family council nor made a party in the Superior Court on proceedings for authority to sell the lands, the order authorizing the sale is, as to him, *res inter alios acta* does not prejudice his rights and, therefore, he cannot maintain an appeal therefrom.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming an order made by Mr. Justice Doherty, in the Superior Court, District of Montreal, authorizing the sale of substituted lands under the provisions of Article 953*a* of the Civil Code of Lower Canada.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard Davies and Nesbitt JJ.

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PREVOST v. PREVOST.

In December, 1844, the late Amable Prevost (who died in 1872), made his last will and a codicil thereto whereby he bequeathed the usufruct of all his estate, real and personal, to his wife and children, and then the ownership to his grandchildren whom he instituted his universal legatees, and he directed that in case all his children should die without issue before their mother, then his estate should go to other beneficiaries named. He also declared, as express and absolute conditions of the legacy of the usufruct, that the revenues should be an alimentary pension, exempt from seizure, and that the real estate should pass to his grandchildren in its natural state and, consequently, that it should not be alienable by any authority or under any pretext whatever, even for their greater advantage. He also provided that his grandchildren could not sell, alienate or hypothecate their shares or rights in his estate before the expiration of the term of the usufruct, nor of the shares in such usufruct belonging to their fathers or mothers. Finally, in case all his children should die without issue before the death of his wife, then that his wife, during widowhood, should have the usufruct of all his said estate with remainder as provided in the will.

Eleven years after the death of the testator his children, interpreting the will as creating seven distinct substitutions, *i. e.*, seven separate transmissions, executed a deed of partition of the property, and since then (April, 1883), have each had separate enjoyment of the shares that fell to them respectively. Subsequently, this partition was declared valid by an Act of the Quebec legislature, 60 Vict. ch. 95, which declared it final and definitive and that the legatees, *grevés de substitution*, were and had always been sole proprietors of the shares of the estate that had fallen to them respectively, subject to a reversionary charge, on their

decease, to their children conformably to the dispositions of the will and codicil. On submission of the question to the court a judgment, in December, 1897, declared the deed of partition final and definitive.

Under the deed of partition the lands now in question fell to the lot of the respondent, Berthe Rhéa Prévost (Mrs. Berthelot), an institute under the substitution, and to her children as substitutes. An offer for the purchase of said property having been received, she joined with the curator and George Berthelot, the only substitute then of the age of majority, in an application by petition to the Superior Court, at Montreal, to have a family council assembled to advise on the subject matter of the petition and to have the sale of the land authorized in the usual manner, under the provisions of Act 953*a* C. C. The family council, with the exception of Dr. A. Brodeur an uncle by marriage (the husband of the appellant, Adèle Prévost), agreed that in the interest of both institute and substitutes the proposed sale should be authorized, and the sale was authorized accordingly.

Adèle Prévost, a sister of the petitioner, was not a party to the application and was not called to the family council, nor did she intervene, oppose or otherwise contest the proceedings except by filing a memorandum of the objections made by her husband at the family council. These objections were in effect that the price offered was too low, that it was not advisable to make the sale at the price offered and that there was express prohibition against alienation declared by the will. However, as one of the *grevés de substitution* under the will, and claiming to have an interest in a possible reversion, she appealed from the judge's order to the Court of King's Bench. The respondents moved for the dismissal of the appeal on the grounds that the appellant was not

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a party in the Superior Court nor could she have the necessary interest in the property (Art. 77 C. P. Q.) to entitle her to bring the appeal, and also contested the appeal on the merits.

By the judgment now appealed from the Court of King's Bench, holding that the appellant had the necessary capacity and an interest sufficient to entitle her to bring the appeal, dismissed the motion with costs, but, on the merits, affirmed the order of the Superior Court and dismissed the appeal with costs.

Brosseau K.C. for the appellants. As a daughter of the testator, Adèle Prevost (Mrs. Brodeur) has a contingent interest in the whole estate, *grevè de substitution*, in the event of none of the substitutes surviving. Under the new rule as to right of action, art. 77 C.P.Q., this eventual interest is sufficient to give her the right of appeal from the order for sale. The petition was *ex parte* and Mrs. Brodeur, being merely an aunt of the substitutes, could not be summoned on the family council, art. 252 C. C. However, her interests in the estate and the provisions of her father's will against alienation were protected by law (arts. 968 *et seq.* C.C.) and by the objections to the advice of the family council filed by her husband.

Lafleur K.C. appeared for the respondents but was not called upon by the court.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—We are of opinion that this appeal should be dismissed simply upon the ground that as the appellant was not a party to the case in which the judgment ordering the sale of the property in question was rendered, she cannot be prejudiced thereby, and should therefore not have been admitted by the Court of King's Bench to appeal from it. Even

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assuming that she has an eventual right in this property, without deciding anything on the point, the judgment of the Superior Court *inter alios* cannot affect that right. For this reason we hold that the *dispositif* of the judgment of the Court of Appeal dismissing her appeal is right, without adjudicating upon the judgment of the Superior Court.

Appeal dismissed with costs.

Solicitors for the appellants: *Brosseau, Lajoie, Lacoste & Quigley.*

Solicitor for the respondents: *Lafleur, McDougall & Macfarlane.*

LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY (DEFENDANT) ..... APPELLANTS;

AND

HENRIETTA MARSH (PLAINTIFF) ..... RESPONDENT.

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*Oct. 21.

*Oct. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—60 & 61 V. c. 34, sec. 1 (D.)

Special leave to appeal from a judgment of the Court of Appeal for Ontario (60 & 61 Vict. c. 34, sec. 1 (D)) may be granted in cases involving matters of public interest, important questions of law, construction of imperial or Dominion statutes, a conflict between Dominion and provincial authority, or questions of law applicable to the whole Dominion.

If a case is of great public interest and raises important questions of law leave will not be granted if the judgment complained of is plainly right.

MOTION for leave to appeal from a decision of the Court of Appeal for Ontario sustaining a verdict for the plaintiff at the trial awarding her $1000 damages.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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LAKE ERIE AND DETROIT RIVER RWAY. CO. v. MARSH.

The plaintiff's husband was killed by a train of the defendant company at a highway crossing in the City of London. At the trial of her action for compensation for his death the jury found no contributory negligence on the part of deceased, and found negligence in defendant causing the accident which negligence consisted in non-ringing of the bell and want of a watchman at the crossing and an automatic bell. The plaintiff obtained a verdict for $1000 which was not sufficient to give an appeal *de plano*.

Riddell K.C. for motion. This case is of great importance to railway companies and to the whole public. The jury has usurped the functions of the Board of Railway Commissioners in holding the lack of an automatic bell or a watchman at the crossing, which are not required by statute, to be negligence.

Faules contra. This case is of no more public importance than was *Fisher* v. *Fisher* (1).

SEDGEWICK and GIROUARD JJ. were of opinion that the motion should be refused for the reasons stated by Nesbitt J.

DAVIES J.—While concurring generally in the judgment prepared by Mr. Justice Nesbitt dismissing this application for special leave to appeal, I do not wish to express any opinion whatever as to the conclusion this court would reach on an application for leave where the question was raised "Whether an engine and tender running reversely had other duties to perform than those imposed by the Railway Act." I have seen no reason to qualify the observations I made in the case of *The Grand Trunk Railway Co.* v. *McKay* (2) with respect to the decision of this court

(1) 28 Can. S. C. R. 494. (2) 34 Can. S. C. R. 81.

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LAKE ERIE AND DETROIT RIVER RWAY. CO. v. MARSH.

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in *The Lake Erie and Detroit River Railway Co.* v. *Barclay* (1).

NESBITT J.—This is a motion for special leave to appeal. We are of opinion that special leave should not be granted in this case.

The action was one for negligence, tried by a jury, and the plaintiff recovered a verdict for $1,000. A perusal of the case shows that there was evidence of statutory negligence in failing to ring the bell of the engine, which the jury found to have caused the accident. They also found against the defence of contributory negligence. There were added, too, findings of the necessity of further precautions which we think were surplusage and cannot on a fair reading be treated as part of the negligence but for which the accident would not have happened; and, therefore, no questions such as were raised in *The Grand Trunk Railway Co.* v. *McKay* (2) were in our opinion involved.

Nor does the case raise the important question of the duty of a traveller to observe the precautions of looking and listening, on approaching a crossing, since the trial judge expressly charged that such was the duty of the plaintiff and the plaintiff swore to the observance of the duty.

Whether this court would have come to the same conclusion as the jury is not the question. In applications to this court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not

(1) 30 Can. S. C. R. 360. (2) 34 Can. S. C. R. 81.

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necessarily be subject to future qualification, and any attempt to formulate any such rule might, therefore, prove misleading. The court may indicate certain particulars the absence of which will have a strong influence in inducing it to refuse leave, but it by no means follows that leave will be given in all cases where these features occur. If a case is of great public interest and raises important questions of law and, yet, the judgment is plainly right, no leave should be granted. See "*Daily Telegraph*" *Newspaper Co.* v. *McLaughlin* (1).

Where, however, the case involves matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted. Such cases, as we understand, came peculiarly within the purview of this court which was established, as far as possible, to be a guide to provincial courts in questions likely to arise throughout the Dominion. We think it was the intention of the framers of the Act creating this court that a tribunal should be established to speak with authority for the Dominion as a whole and, as far as possible, to establish a uniform jurisprudence, especially within matters falling within section 91 of the B. N. A. Act, where the legislation is for the Dominion as a whole, or, as I have said, where purely provincial legislation may be of general interest throughout the Dominion.

Had this case involved a discussion of any special section of the Railway Act and the powers of the railway committee, as suggested, we think it would have been a case for leave; had there been any such general question in dispute, as the undoubted duty of a traveller to observe care in approaching a railway cross-

(1) 20 Times L. R. 674.

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ing, or the question of whether or not an engine and tender running reversely were bound to observe other duties and obligations than those imposed by the Railway Act, a case for leave might have been made out. But we think that no such questions were really involved, as the case was wholly disposed of by answers finding statutory negligence and against contributory negligence, with evidence which must have gone to the jury on each branch, findings that we cannot think should be disturbed.

The motion is therefore dismissed with costs.

KILLAM J. also concurred with Nesbitt J.

Motion dismissed with costs.

Solicitor for the appellants: *J. H. Coburn.*

Solicitor for the respondent: *John F. Faulds.*

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*Oct. 7.

*Oct. 26.

THE ROYAL ELECTRIC COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JOSEPH PAQUETTE (PLAINTIFF)..... RESPONDENT.

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

Negligence—Employer and employee—Disobedience of orders—Dangerous way, works and appliances.

Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, an employee who disobeys such orders and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see that the orders were not disobeyed. *Lamoureux* v. *Fournier dit Larose* (33 Can. S. C. R. 675) discussed and distinguished.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review at Montreal, by which the judgment at the trial in favour of the defendants was reversed and the plaintiff's action was maintained and judgment for damages, assessed at $750, with costs, was ordered to be entered in his favour.

The facts of the case and questions in issue on this appeal are stated in the judgment now reported.

R. Taschereau for the appellants.

Bisaillon K.C. for the respondent.

The judgment of the court was delivered by:

DAVIES J.—We are all of opinion that this appeal should be allowed and the judgment of the trial judge dismissing the action restored.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

The question is really one more of fact than of law. The action was brought against the company by one of its employees for damages sustained by him in consequence of the alleged negligent unloading of a car-load of large posts, thirty or forty feet in length, from a railway flat-car. The plaintiff was on top of the posts on the car for the purpose of cutting the wires which, for the purpose of holding the load firmly on the car, were fastened from three upright stakes on one side of the car to corresponding stakes on the other side. The negligence charged in the first instance was the cutting of the stakes too soon by the defendant's foreman or those acting under him while the plaintiff was at his work on the top of the posts, in consequence of which the posts rolled off carrying the plaintiff with them.

The evidence, as is generally the case in actions of this kind, was conflicting but the trial judge accepted the testimony of the witnesses for the defence that the plaintiff was warned to come down from his place of danger but persisted in remaining, saying that there was no danger, or words to that effect, and actually himself giving orders to one of the workmen to cut away the last retaining stake. Some five or six witnesses testify to these facts and we see no reason whatever to differ from the learned trial judge who accepted and acted upon their testimony.

The plaintiff, himself, was the author of his own injuries and by his own orders, neglect and carelessness brought them upon himself.

The judgment appealed from was attempted to be supported on the ground that the ropes used to break the fall of the posts from the car were old and rotten and not fit for the purpose. But, apart from the fact that this is not charged in the plaintiff's statement of claim as the negligence which caused or contributed to the

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plaintiff's injuries and is evidently an afterthought, we are clearly of the opinion that it was not the character of the ropes which either caused or contributed to the plaintiff's injuries, but his own conduct in persisting in remaining upon the load of posts after the wires had been cut, contrary to his orders, and himself directing the cutting away of the last retaining stake and so causing the load of posts to roll to the ground.

The case of *Lamoureux* v. *Fournier* (1) was cited by the respondent's counsel as authority for the proposition that the foreman was bound, in any case, to see that his orders to the plaintiff to come down were obeyed. But if the plaintiff chose to disobey them and himself bring about the accident which caused his injuries, he surely cannot hold the company liable. There were no reasons given for the judgment of this court in the case cited. It turned almost altogether upon questions of fact. The ground upon which we affirmed the judgment in that case was that the fall of the scaffold which caused the death of the plaintiff's husband was caused by its being overloaded with stone and that the appellant, whose duty it was to see that the scaffold was not overloaded, altogether neglected that duty, in consequence of which neglect the accident took place. The short note of the case in the Supreme Court Reports (1), does not shew the ground of our decision. We did not intend to affirm or approve of the principle of law stated in the head-note of the report of the case in the Quebec Reports (2), copied into the note of the decision of this court on the appeal, even if the language of that head-note is justified by the reasons given by the Court of Review,

(1) 33 Can. S. C. R. 675. (2) Q. R. 21 S. C. 9.

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which I doubt. However, no such law was laid down by this court.

The appeal will be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Préfontaine, Archer, Perron & Taschereau.*

Solicitor for the respondent: *Bisaillon & Brossard.*

CASIMIR BROSSEAU ET AL.....APPELLANTS;

AND

JOSEPH DORÉ ET AL.....RESPONDENT.

1904

*Oct. 10, 11.

*Oct. 26.

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

Will—Construction of residuary clause—Power of selection—Discretion of trustees—Vagueness or uncertainty—Designated class of beneficiaries.

A devise in a will directing the distribution of the residue of the testator's estate among his brothers and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned. *McGibbon* v. *Abbott* (10 App. Cas. 653) followed; *Ross* v. *Ross* (25 Can. S. C. R. 307) referred to.

APPEAL from the judgments of the Court of King's Bench, appeal side, on an appeal and cross-appeal from the judgments of the Superior Court, sitting in review, at Montreal, whereby, the Court of King's Bench, in effect, affirmed the judgments of the Court

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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of Review, reversing the decisions of the trial judge in actions instituted for the purpose of recovering moneys belonging to the estate of a deceased testator and the distributon of the same.

There were several actions taken in connection with the matters in dispute between the parties which are fully discussed in the judgments of all the courts below, but, as the present appeal involved merely the construction of one of the clauses of the bill, no further reference to the circumstances is necessary than that contained in the judgment now reported.

Mignault K.C. for the appellants.

R. C Smith K.C., and *Gustave Lamothe K.C.* (*J. Adam K.C.* with them) for the respondents.

The judgment of the court was delivered by:—

GIROUARD J.—Le 1er octobre, 1900, le docteur Alfred S. Brosseau de Montréal, fit son testament dans lequel se trouve la clause suivante:—

Et si après avoir fait instruire mes neveux et nièces, comme susdit, il reste un surplus, je veux que ce surplus soit distribué à mes frères et sœurs ou neveux et nièces qui en auront le plus de besoin, à la discrétion des dits Casimir Brosseau, Joseph Doré et Louis Brosseau.

Il s'agit de savoir si cette disposition est valide.

Depuis la décision du conseil privé dans la cause de *McGibbon* v. *Abbott*, (1885) (1), cette question, qui divise les commentateurs français, n'est plus susceptible même d'un doute dans la province de Québec.

Comme je comprends le jugement dans *Ross* v. *Ross*, (1893) (2), la jurisprudence de notre cour est au même effet. Le testateur peut conférer le pouvoir d'élire, pourvu que les bénéficiaires soient suffisamment indiqués. Le sont-ils? Les héritiers à élire sont clairement désignés; ce sont les frères et sœurs ou ses neveux et nièces

(1) 10 App. Cas. 653. (2) 25 Can. S. C. R. 307.

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qui en auront le plus besoin, à la discrétion des dits Casimir Brosseau, Joseph Doré et Louis Brosseau,

c'est-à-dire, que les élus seront les frères et sœurs, neveux et nièces qu'ils choisiront de bonne foi comme en ayant le plus besoin, et c'est précisement ce qui a été fait dans l'espèce. Eux-mêmes peuvent bénéficier s'ils se trouvent dans la classe des éligibles. Les mots "qui en auront le plus besoin" constituent une direction pour faire la distribution ; ils ne sont pas aussi vagues que les mots "parents pauvres", ou "les plus pauvres", dans *Ross* v. *Ross* (1), et le fussent-ils, le pouvoir d'élire reste intact et complet.

J'adopte entièrement la manière de voir de M. le juge Lavergne et de M. le juge Hall, et, pour ces raisons, je suis d'avis de renvoyer l'appel avec dépens

Appeal dismissed with costs.

Solicitors for the appellants ; *Pelletier & Letourneau.*

Solicitor for the respondents ; *Joseph Adam.*

(1) 25 Can. S. C. R. 307.

1904

*Oct. 5.
*Oct. 31.

THE VICTORIA-MONTREAL FIRE INSURANCE COMPANY (DEFENDANTS)..... APPELLANTS;

AND

THE HOME INSURANCE COMPANY OF NEW YORK PLAINTIFFS)..... RESPONDENTS,

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Fire insurance — Contract of re-insurance — Trade custom — Conditions — "Rider" to policy—Limitation of actions—Commencement of prescription—Art. 2236 C. C.

A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" attached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured.

Held, reversing the judgment appealed from, Girouard and Nesbitt JJ. dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider agreement as to claims for re-insurance and, consequently, that the action for recovery of the amount of the re insurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment by Trenholme J. at the trial, in the Superior Court, District of Montreal, which maintained the action with costs.

*PRESENT :—Sir Elzéar Taschereau, C. J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

The circumstances of the case and questions at issue on this appeal are stated in the judgments now reported.

J. E. Martin K.C. and *Howard* for the appellants, referred to *Prevost* v. *The Scottish Union and National Ins. Co.* (1) and cases there cited; *Cornell* v. *The Liverpool and London Fire and Life Ins. Co.* (2); *Allen* v. *The Merchants Marine Ins. Co.* (3); *Liverpool and London and Globe Ins. Co.* v. *The Agricultural Savings and Loan Co.* (4); *Provincial Ins. Co.* v. *Ætna Ins. Co.* (5); *Schroeder* v. *The Merchants' and Mechanics' Ins. Co.* (6); *Atlas Mutual Ins. Co.* v. *Downing* (7): *New York Bowery Fire Ins. Co.* v. *New York Fire Ins. Co.* (8); Wood on Fire Insurance, page 623; Poujet, pp. 607, 611; and Porter on Insurance (4 ed.) p. 299.

Lafleur K.C. and *Macdougall* for the respondents. The "rider" contains the whole contract and expresses the intention of the parties and the nature and scope of their agreement. This is not an insurance of property but merely re-insurance of a liability incurred under the terms set out in the form of the main policy. The conditions of that policy clearly apply only to the insurances on property and are incompatible with a contract such as the "rider" discloses. We must eliminate all incongruous and inappropriate clauses and, as no liability can arise until the re-insured company suffers loss by being forced to make payments upon adjustment of losses on their risks. The debt due by the re-insuring company does not become exigible until ten days after proof of such payments and, consequently, prescription cannot commence to run until the latter date, Art.

(1) Q. R. 14 S. C. 203.
(2) 14 L. C. Jur. 256.
(3) M. L. R. 3 Q. B. 293; 15 Can. S. C. R. 488.
(4) 33 Can. S. C. R. 94.
(5) 16 U. C. Q. B. 135.
(6) 12 Ins. L. J. 9.
(7) 12 Pa. S. C. 305.
(8) 17 Wend. 359.

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2236 C. C. None but the statutory limitation provided by Art. 2260 C. C. can apply in this case. We refer to *The Fire Insurance Association* v. *The Canada Fire and Marine Ins. Co.* (1) *per* Haggarty C.J. at pages 489-490; *Jackson* v. *St. Paul Fire and Marine Ins. Co.* (2); *The Manufacturers Fire and Marine Ins. Co.* v. *Western Assurance Co.* (3); *Faneuil Hall Ins. Co.* v. *Liverpool and London and Globe Ins. Co.* (4); *Imperial Fire Ins. Co. of London* v. *Home Ins. Co. of New Orleans* (5); *Insurance Company of the State of New York* v. *Associated Manufacturers' Mut. Fire Ins. Corporation* (6); *Alker* v *Rhoads* (7).

THE CHIEF JUSTICE:—"In consideration of the stipulations herein contained," the policy upon which the respondents' action is based was issued.

One of these stipulations reads as follows:—

No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity *unless commenced within twelve months next after the fire.*

That is plain enough. However, the respondents contend that there is no contractual limitation of time whatever against any action under this policy. It is not true, they say, that it was issued in consideration of the stipulations therein contained, and that stipulation as to limitation of action must be read out of it because, they argue, it is provided therein that liability for re-insurance is to be as specifically agreed upon in the rider attached to it, and the provision as to limitation of action not being repeated in specific terms in that rider, it does not form part of the contract of re-insurance.

(1) 2 O. R. 481.
(2) 99 N. Y. 124.
(3) 145 Mass. 419.
(4) 153 Mass. 63.
(5) 68 Fed. Rep. 698.
(6) 70 N. Y. App. 69.
(7) 73 N. Y. App. 158.

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In my opinion that contention is untenable. It is merely the extent and terms of the re-insurer's liability that must be specifically agreed upon by the rider. All the other conditions of the policy not incompatible with the contract of re-insurance must be given effect to. It is not because there are other stipulations in the policy that are incompatible with those of the rider that every stipulation thereof must be read out of it. The policy and the rider together, one as much as the other, contain the contract between the parties. There is not necessarily incompatibility between the stipulation as to limitation of action and any of the specific agreements as to the re-insurance. It may often happen that the loss is adjusted and paid within a short time after the fire, yet the respondents would contend that the right of action against the re-insurers would, notwithstanding the stipulation, exist in that case as long as not barred by statutory limitation. That cannot be, in my opinion. That such a limitation of action might occasionally, under certain circumstances, operate injuriously against the re-insured was a good reason not to stipulate it, not at all a reason for asking the court to read it out of the contract. They cannot have intended to stipulate it, or it is by inadvertence that it is in the policy, they would argue. That may be But they must be told that stipulations in a contract cannot be ignored simply because they lead to consequences that the parties did not contemplate. That is the law of Canada, whatever it may be in the foreign country whereto the respondents have had to look for decisions in support of their case.

And insurance companies are not at liberty to invoke their loose and careless ways of drafting their re-insurance policies that we have been told of at the hearing as a reason to be admitted in contending that

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they do not mean what they stipulate in clear and unambiguous terms.

The judgment appealed from holds that there was no limitation of action whatever stipulated by the policy If that were so, this would be the first insurance policy that has ever been before us in which there is no such stipulation.

I would allow the appeal, and dismiss the action with costs in all the courts.

SEDGWICK J. concurred in the judgment allowing the appeal with costs.

GIROUARD J. (dissenting):—I do not intend to go over the facts of the case; they are fully set out in the opinions of my colleagues, and moreover they are not disputed. No doubt the parties agreed by the printed form of policy that no suit or action on the policy should be sustainable

unless commenced within twelve months after the fire

but by the rider or latest agreement annexed, the claim is made subject to many new conditions usually stipulated in a contract of re-insurance which had to be accomplished before a claim could be made against the re-insuring company, and finally it is declared in the rider that

the loss, if any, is payable ten days after presentation of proofs of payment

The conditions in the printed form are applicable in so far as they are not inconsistent with those in the so-called rider, and when so inconsistent the rider should govern. I look therefore upon this addition as a modification to the contractual prescription stipulated in the printed form. Till ten days after the presentation of the proofs of payment, the respondents were in the absolute impossibility of moving against the appellants.

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Contra non valentem agere nulla currit praescriptio. This is the principle laid down in art. 2232 C. C. applicable to conventional as well as legal prescriptions. Fuzier-Herman Code Annoté, art. 2245, n, 106; art. 2248, n. 58. Prescription commenced to run only "ten days after" presentation of proofs of payment." *Denison* v. *The Masons' Fraternal Accident Association* (1), in 1891, at page 297.

The payment of the loss by respondents was made by them in April, 1901, and on the 31st of May following the proofs of payment were duly presented to the appellants. The loss due by them became, therefore, payable ten days after, namely, on the 10th June, 1901. The action was taken on the 17th of June 1901, within the time provided by both the printed policy and the rider.

To conclude, by interpreting the clauses of the contract so as to give effect to all, I have come to the conclusion that the plea of prescription is unfounded and that the appeal should be dismissed with costs

DAVIES J.:—The sole question for our decision is whether or not a clause in the policy prescribing any suit or action upon it for the recovery of any claim "unless commenced within twelve months next after the fire" can be eliminated as not being part of the contract between the parties. The respondent successfully contended in the courts below that this could be done on the ground that the contract was one of re-insurance only and the prescriptive clause in question was altogether inapplicable to it. I have not been able to reach that conclusion or to decide that this or any court can eliminate from a contract any of its provisions except those plainly and palpably inapplicable to the contract made or inconsistent with other provisions of the same contract.

Now there is nothing in a prescriptive clause plainly or palpably inapplicable to a re-insurance contract.

(1) 59 N. Y. App. Div. 294.

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Nor in the contract before us is that clause inconsistent with any other provision or stipulation of the contract. In fact, *primâ facie* and as between two insurance companies, some such clause would seem to be just as applicable to the re-insurance contract as it would to an original insurance contract between an owner or mortgagee and an insurance company.

The special limitation of "twelve months next after the fire" inserted in the policy as the period within which an action must be brought upon the policy may be a harsh and unjust one and capable under certain contingencies of depriving the party insured of the indemnity he thought he had assured to him. But the same may be said with great, if not with equal force of the same clause in any ordinary policy of insurance. It may at times and under certain contingencies operate in ordinary cases most harshly and cruelly and yet no one would for a moment suggest that the courts could avoid giving effect to the clause.

In my opinion, therefore, before we attempt to read such a clause out of the contract we must be fully convinced that it is quite inapplicable to the real contract entered into and was never intended by the parties for that reason to form any part of it or that it is inconsistent with other express stipulations of the policy.

Now what are the facts here? The forms of the defendant company ordinarily used for insurance purposes are used between the two companies to express the re-insurance contract. That these forms are intended so to be used is apparent from their language. The words "liability for re-insurance shall be as specifically agreed hereon" form part of the printed form. The specific matters agreed to on the re-insurance were set out fully on what is called a "rider" pasted upon or attached to the policy above and before the usual and ordinary conditions and are headed "Re-Insurance Home Insurance

Company of New York". As might be expected these special stipulations relate to the amount insured, the property the re-insurance covers, the losses which must be sustained by fire before any liability attached under the policy and other analogous clauses. They also fixed the notice required to cancel the policy and provided for the inspection of all papers touching any claim made under the contract. There was also inserted the usual clause in re-insurance contracts making the policy subject to the "same risks, conditions, valuations, privileges, mode of settlement and assessments as are or may be assumed or adopted by the Home Insurance Company, and covers such property as may be protected by the said company . . . . . and the *loss, if any, is payable ten days after presentation of proof of payment.*

As a good deal was attempted to be made of these words which I have italicized, I pause here to consider whether they in any way conflict or are at variance with the twelve months' prescription. For myself I read both clauses together and find nothing antagonistic in them. One defines with certainty the day when the loss, if any, becomes payable, namely, ten days after presentation of proof of payment by the company insured, the other clause fixes a date after which no action can be brought to recover the loss payable. But, it is argued, there may be such delays in proving and adjusting the original loss that the whole twelve months after the fire will have elapsed before the Home Company could pay, and in such a case, as the loss was not payable till ten days after presentation of proofs of payment, the prescriptive period being passed, no action could be brought at all, or to put it the other way the right to bring the action might not arise until the period which extinguished the right had elapsed. Just so. Such a contingency

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might possible arise. But if the company by its own contract created such a possible disability on itself it has only itself to blame. Such a result would not justify a court in cutting the gordian knot and granting relief by altering the contract.

Returning to our examination of the policy we find that after the special stipulations above referred to relating to re-insurance had been inserted the usual and ordinary clauses in customary use followed including the one in question reading as follows:

> No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

This again was followed by another clause declaring

> this policy is made and accepted subject to the foregoing stipulations and conditions.

The time limit for bringing the action is one of those stipulations and conditions. If it was irreconcilable with any special stipulation inserted respecting re-insurance the court would have to reconcile them, and if that could only be done by striking the clause out or declaring it plainly and palpably inapplicable, such a result might be defended. But as I cannot find any such conditions of irreconcilability exist I must only construe the contract with the clause in. Remaining there it can have but one meaning and that is fatal to the maintenance of the action.

The appeal should be allowed with costs in all the courts.

NESBITT J. (dissenting):—The plaintiffs' action is based on a policy of re-insurance issued by the company on the 29th of December, 1899, by which it re-insured for the term of one year and to the extent of $10,000 the liability of the Home Insurance Company,

under policies issued through its railway department covering railway property situated in the United States of America, Canada and Mexico.

In order that any liability should attach under the terms of the policy it was agreed that any railway company insured by the Home Insurance Company, either directly or as re-insurance of another company, must suffer by one fire a loss exceeding $50,000, and that by such fire the Home Insurance Company must also have sustained an insurance loss in excess of $5,000, after proper allowance for all other re-insurance applicable to the same.

On the 26th of April, during the currency of this policy, the "Hull fire" occurred and by it the Canadian Pacific Railway Company suffered a large loss. The railway company were directly insured by the Western Assurance Company of Canada, under a policy issued on the 20th. April, 1899. Twenty per cent of the liability of the Western Assurance Company under this policy was re-insured by the Home Insurance Company under a policy dated the 10th. April, 1899, and the Home Insurance Company, in its turn, re-insured a portion of its liability under the policy referred to. The liability of the Western Assurance Company was finally settled and paid on the 16th. March, 1901, and the Home Insurance Company immediately paid their proportion of the loss, and on the 21st. May, 1901, made a claim upon the Victoria Fire Insurance Company for a sum which was subsequently fixed as the sum of $3,727 60, and the question to be decided in this case is as to the application of a limitation clause which appears in a printed portion of the defendants' policy in the following terms:—

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all foregoing requirements, nor unless commenced within twelve months next after the fire.

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The trial judge and the Court of Review have both held this condition inapplicable to the contract of re-insurance. The contract was entered into apparently by the defendant company using one of their ordinary printed blank forms changing the words "does insure" in the second line of the policy, to the words "does re-insure" and by adding a number of conditions applicable to a contract of re-insurance in a type-written "rider" attached to the printed form.

This course was probably taken because an examination of the American authorities indicates that such a course of action is customary, and apparently this blank printed form has, by reason of its use for such purposes, had inserted in it the printed words "liability for re-insurance to be as specifically agreed hereon"; language, so far as I can see, entirely inapplicable to the ordinary contract of insurance which contemplates an insurance upon specific property in which the assured has an interest and in which, in case of a loss, he is required to make proofs of loss by fire and submit his claim to arbitrators if required and fulfil many other conditions in no respect applicable to a case such as this where the insurance is not upon any specific property in any specific place, but is an insurance *of the liability* of the Home Insurance Company under their railway policies, provided the originally insured railway company suffered by one fire a loss exceeding $50,000, and that the Home Insurance Company itself sustained a loss in excess of $5,000 in respect of such fire, after proper allowance made for all other re-insurance applicable to the loss and with the specific "rider-agreement" as between the Home Insurance Company and the Victoria Fire Insurance Company:—

This policy is subject to and liable for the same risks, conditions, valuations, privileges, *mode of settlement*, indorsements and assignments as are or may be assumed or adopted by the Home Insurance Com-

pany, and covers such property as may be protected by the said company, and the loss, if any, is payable ten days after presentation of proofs of payment.

The manifest purpose and spirit of this contract is that, except for the purpose of receiving certain notice from the Home Insurance Company, the Victoria Fire Insurance Company are in no way interested in the adjustment of the loss nor can they be called upon to make a payment until after all disputes have been settled by litigation or otherwise ended and the claim has been paid by the Home Insurance Company for the space of ten days.

I have pointed out that the Home Insurance Company must have paid a considerable sum before any liability at all attaches on the re-insurance contract. I think the limitation clause which provides that no action shall be maintained after one year from the date of the fire is wholly inapplicable to such a contract and covenant for payment, and would provide for prescription running when no claim was running. I think the period of ordinary commercial prescription would apply ten days after the payment by the Home Insurance Company as under similar conditions six years have been held the prescriptive time applicable in the United States. Article 2236 of the Civil Code provides:—

> Prescription of personal actions does not run with respect to debts depending on a condition, until such condition happens.

The condition in this case was the payment by the plaintiffs, and, until ten days thereafter, no debt arose. The American authorities, both state and federal, are uniform in dealing with precisely similar questions, and it is scarcely credible to me that the parties to this contract were not well aware of what seems to be the uniform practice. Although the American cases are not authorities in our courts the opinion and reasoning

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of the learned judges of courts in the United States, especially in insurance cases, have always been regarded with respectful consideration in this court and in England as affording valuable assistance, and I think we cannot do better than adopt them in this case. I would refer to the following cases upon the point under consideration:—*Consolidated Real Estate and Fire Insurance Company of Baltimore* v. *Cashow* (1874), (1); *Jackson* v. *St. Paul F. & M. Insurance Company* (1885), (2); *Manufacturers' Fire & Marine Ins. Co.* v. *Western Assurance Company* (1888), (3); *Faneuil Hall Insurance Company* v. *Liverpool & London & Globe Insurance Company* (1891), (4); *Imperial Fire Insurance Company of London* v. *Home Insurance Company of New Orleans* (1895), (5); *Alker* v. *Rhoads* (1902), (6); *Insurance Company of the State of New York* v. *Associated Manufacturers' Mutual Insurance Corporation* (1902), (7).

In the report in 145 Mass. the court said:

> The contract entered into by the defendant with the plaintiff differed materially from an ordinary contract to insure a general owner against damage to his property by fire. While in a sense it was an insurance upon property, it was strictly a contract of indemnity against risk under another contract which has been entered into by the assured. The assured was not the owner of the property at risk, and had no relation to it except as insurer under the original policy. In that relation it had an insurable interest in it, and could enter into any proper contract for the protection of that interest. *Eastern Railroad Co.* v. *Relief Fire Ins. Co.* (8). But, manifestly, many provisions appropriate to an ordinary agreement with the owner of property for the insurance of it could have no proper application to the agreement made by these parties.
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> * * * * * * *
>
> It appears upon inspection of the defendant's policy, and is agreed by the parties, that it was prepared upon a printed blank,

(1) 41 Md. 59.
(2) 99 N. Y. 124.
(3) 145 Mass. 419.
(4) 153 Mass. 63.
(5) 68 Fed. 698.
(6) 73 App. Div. N.Y. 158.
(7) 70 App. Div. 69.
(8) 98 Mass. 420.

commonly used in writing policies to insure against loss upon property by the owners of it.

* * * * * * *

It is often doubtful how far provisions which relate to the conduct of an assured person as general owner of that which is the subject of the contract should be given effect, in a policy to indemnify against a risk which the assured has taken upon the property of another. That can only be determined in a given case by a careful scrutiny of the different parts of the writing to ascertain its meaning. Whenever words are found in a contract which can have no proper application to the subject to which it relates, they cannot be regarded; and, not infrequently, the careless use of printed blanks compels recognition of this rule. The policy in this case contained many provisions which were originally intended to regulate the conduct of an owner in relation to his property before and after a possible fire.

As I have pointed out, the provision making the policy subject to and liable to the same risks, etc., and making the loss payable only ten days after proof of payment by the Home Insurance Company, coupled with the provision that liability for re-insurance shall be as specifically agreed hereon, rendered nugatory many printed portions of the policy. In the language of the case cited

these are special and peculiar partaining directly to the subject matter of the contract and control those parts of the policy which are inconsistent with it.

In Ontario it has been held in *Citizens Ins Co.* v. *Parsons* (1881), (1), that the statutory conditions are applicable to every contract of insurance the subject matter of which is situated in Ontario. And it was argued in the *Fire Insurance Association* v. *Canada Fire & Marine Insurance Co.* (1883), (2), that, therefore, the statutory conditions must be read into a contract of re-insurance. But it was held that the statutory conditions would be meaningless as applied to the contract of re-insurance, a holding which

(1) 7 App. Cas. 96.

(2) 2 O. R. 481 at p. 491.

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is applicable to this case, and although it was urged upon the argument that the parties had seen fit to make these conditions part of their contract of insurance, so in the case referred to it was argued that the statute had made practically similar additions applicable without the consent of the parties to the contract of insurance in that case. The cases are all reviewed and it is pointed out that owing to the decisions a clause such as I have indicated is now always inserted in re-insurance contracts by which the re-insuring company bind themselves to allow the insuring company to make a settlement, and the re-insuring company to be bound by such settlement and adjustment, and so the usual conditions cannot form part of the contract. It is plain that the plaintiffs were not to send in proofs, furnish certificates, etc., and it is to my mind equally clear that the parties agreed that the time for prescription should not begin until ten days after payment by the insuring company.

It is admitted that many of the conditions are wholly inapplicable to and cannot form part of the contract made by the parties. Why? Because they are senseless and repugnant to the bargain. Is it not then the duty of the court to go over the language and see if the same can be harmonized and read into the admitted bargain? In the case of this particular condition, the early part is wholly senseless applied to the bargain here but clearly applicable to an ordinary risk. Why then emasculate the condition and divorce part of it from its context and read in a different bargain and one with which the condition as a whole can have no relation?

I would affirm the judgment of the court below and dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McLennan & Howard.*

Solicitors for the respondents: *Lafleur, Macdougall & Macfarlane.*

THE CITY OF MONTREAL (PLAINTIFF) ..... } APPELLANT;

AND

JAMES B. CANTIN AND OTHERS (OPPOSANTS) ..... } RESPONDENTS.

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*Oct. 12.

*Oct. 31.

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

Municipal corporation—Assessment and taxes—Contestation of roll—Limitation of actions—Interruption of prescription—Suspensive condition—Construction of statute—52 V. c. 79 (Q.)—62 V. c. 58, s. 408 (Q.)—Collection of taxes—Art. 2236 C.C.

The prescription of three years in respect of taxes provided by the Montreal City Charter, 52 Vict. ch. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes became due and exigible, and the prescription is not suspended nor interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed.

Judgment appealed from affirmed, Girouard and Nesbitt JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

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respondent's opposition to annul the seizure of their lands in the City of Montreal in execution on levy of taxes imposed thereon for ordinary rates and a special assessment.

The material facts of the case are fully stated in the opinions of their Lordships on this appeal.

Atwater K.C. and *Ethier K C.* for the appellant. The prescription could not run against the city while the validity of the tax was being contested in court. Art. 2236 C.C. The city was prevented taking action during the pendency of the litigation; *contra non valentem agere nulla currit præscriptio.* See *City of Montreal* v. *Montreal Land and Loan Co.* (1) per Blanchet J.; Dalloz, 1858, 1, 414; 1862, 1, 35-36 and note The contestation of the roll was by the respondent's *auteurs*, the owners of the lands assessed, and having, by their own proceeding, caused the delay they cannot now plead the limitation after the failure of their contestation. We also refer to Cass. 13 Avril, 1810, S. V. 10, 1, 175.

Bond and *Lacoste* for the respondents. The taxes, if any were due, became exigible upon the deposit of the revised roll in the treasurer's office, (sec. 231 of city charter); the prescription provided by sec. 120, therefore, commenced to run from that date; no judicial demand, (art. 2224 C. C.) was made, and the full period of three years had elapsed before proceedings for collection were begun. See *O'Connor* v. *Scanlan* (2). The operation of sec. 408 of the amending act, 62 Vict. ch. 58, can have no retroactive effect to revive the prescribed right. We refer to sects. 565 and 558 of the last mentioned Act, and also to Endlich on Statutes secs. 271-273; 18 DeLorimier, Code Civil, art. 2232, p. 536; Dalloz Rép. *vo.* Loi, *nn.* 183, 184, 205, 380;

(1) Q. R. 23 S. C. 461; 13 K. B. 74. (2) Q. R. 3 S. C. 112.

Supp. *nn.* 118, 124, 235; *Fuchs* v. *Legaré* (1); *Bulmer* v. *Beaudry* (2); *Les Ecclésiastiques de St. Sulpice* v. *City of Montreal* (3).

THE CHIEF JUSTICE.—The appellants, as empowered in such cases, caused the sheriff, in August, 1902, to seize a certain lot of land belonging to the respondents for the recovery of a special assessment imposed upon it by an assessment roll which had been deposited in the office of the city treasurer on the 20th of February, 1895, over seven years before.

The respondents by an opposition asked the annulment of the seizure on the ground that the appellants' claim was prescribed and extinguished.

The judgment of the court of appeal, confirming the judgment of the Superior Court, maintained that opposition and quashed the seizure.

These judgments are in my opinion unassailable.

Section 231 of the appellants' statutory charter of 1889 (52 Vict. c. 79 Que.) which, it is admitted, governs the case, provided that

> the roll of assessment, when finally settled by the commissioners, shall be filed and kept of record in the treasurer's office; *and such special assessment shall thereupon become due and may be recovered by the corporation.*

By section 120 of the same Act, it was enacted that the right to recover any tax or assessment imposed under the Act was to be prescribed and extinguished unless the city within three years * * *to be counted from the time at which such tax or assessment became due*, had commenced an action for the recovery thereof, or had initiated legal proceedings for the same purpose under the provisions of the Act

(1) 3 Q. L. R. 11. (2) Q.R. 12 K. B. 334.
(3) 16 Can. S. C. R. 399.

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provided that in case *any special assessment* is made payable by annual instalments, the prescription runs only from the expiry of each such instalment.

These enactments were clear and unambiguous, and *primâ facie*, the appellant's rights to the proceedings in question were prescribed and extinguished in 1902 when they were initiated.

They contend, however, that it is not so, for the reason that the respondents, availing themselves of the provisions of section 144 of the Act, had filed within six months from the date of the deposit of the said roll a contestation thereof, by which contestation, not finally determined till the 15th of June, 1901, they, the appellants, as they allege in their plea in answer to the respondents' opposition

were hindered, impeded and delayed by the respondents in the collection of the said assessment.

By that section 144 it was enacted that:

Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annullment is prescribed by six months from the date of the passing or completion of such by-law, resolution, assessment roll or apportionment; and, after that delay, every such by-law, resolution, assessment roll or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

The appellants contend that they had not the right to take proceedings for the recovery of the assessment in question until the final adjudication, in June, 1901, of the respondents' said contestation of the roll authorized by that section.

But, as held by the two courts below by the judgment now appealed from, and previously by the judgments in *The City of Montreal* v. *The Land & Loan Co.* (1) where the same question was raised, that contention

(1) 34 Can. S. C. R. 270.

cannot prevail. It is contrary to the plain words of the statute. It probably is therein a *casus omissus*, the propriety of supplying which has since been acknowledged by the legislature in the appellants' subsequent charter of 1899 (62 Vic. c. 58, sec. 408, Que.). But the statute of 1889 must be taken as it was. We cannot add to it or mend it, and by construction fill up gaps and make up its deficiencies, however apparent they may be, and nowhere in its various clauses is there the least indication that the law-giver intended to suspend the appellants' right to take proceedings for the recovery of any assessment for six months, or till after the determination of a contestation of the whole roll. Quite the contrary. As it reads, it is unequivocal. The prescription runs from the date that the assesment became due, says sec. 120, in so many words.

Now, in this case, the assessment became due in 1895, and might then have been recovered according to the plain language of sec. 231. If the appellants then or at any time within three years thereafter had issued a writ against the respondents, the sale would perhaps have been stayed by order of the court or of a judge till the final determination of the contestation of the roll. But they had the right to issue the writ were it merely to interrupt the prescription. Art. 1086 C.C.; 32 Laurent, Nos. 20 *et seq.* And no plea of *lis pendens* could have prevailed against it. Bioche, Procédure *vo.* "Exception," No. 134. An order for consolidation under Art. 291 of the Code of procedure would probably have then been the proper proceeding The appellant vainly relies upon the maxim, "*Contra non valentem agere.*" The city had the right to issue the writ; therefore the maxim has no application.

This section 144 is nothing but an enactment as to the mode by which, the time within which, and by

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whom, a common law right of action can be exercised. (There is no such thing as a rule to quash in such cases in the province). And an action impeaching the validity of such a roll would not suspend the prescription running against the city's right to recover the assessments for the good reason that its right to initiate proceedings for the recovery of the assessments would not be affected by that action. A debtor cannot have it in his power to deprive his creditor of his right of action, as the appellants would contend.

Certainly, as argued by the appellants, prescription does not run against a debt depending upon a condition until such condition happens. But why? Because a conditional debt is not exigible until the fulfilment of the condition. And the appellants beg the question in their argument on this point. They assume that this is a conditional debt. But that is the very point in controversy. And they have failed to establish that the statute imposed any condition whatever upon the maturity of the assessment, or on their right to recover it as soon as the roll was deposited. The forced construction of it that they contend for is based on nothing else than the alleged unreasonableness of enabling them to recover upon a roll which might subsequently be set aside. But with that we have nothing to do. The law-giver has the power to be unreasonable. And the courts are not at liberty to read into a statute clauses or conditions that are not in it simply because they think that they ought to be in it. When a statute is so plain, it has to be given effect to, whatever may be the consequences.

Here the statute decrees not merely that the assessment became due but also that it *may be recovered* immediately after the deposit of the roll creating the debt, and gives the remedy, the right to collect it

immediately. And when it adds that the prescription runs from the date that the assessment *became due*, using the same expression, or when payable by instalments from the date of the expiry of each such instalment, that cannot but be construed as if it said, in so many words, that the prescription runs from the date of the deposit of the roll, or from the expiry of each instalment, if any, and this, whether the roll later on is contested or not, for, if the legislature had intended such a contestation to suspend the appellants' rights, it would have said so, as it has since said in the statute of 1899.

Then, were the non-contestation or the dismissal of a contestation to be considered as a condition, the legislature had the right to say that the assessment would be due and could be recovered before the fulfilment of the condition. And that is what it did, in the public interest, by the enactments in question.

And what shews that there was a debt, a sum unconditionally due upon the deposit of the roll and that could then be recovered, even if the roll were to be subsequently contested and annulled, is the provision of sec. 241 that, in that case, the payments made under it, whether by the contesting party or by anyone else, are not to be invalidated. The city is not then bound to restore what it had received:—and why? Because what it had received was due, though the roll has been annulled. That shows clearly that the debt is not a conditional one, depending upon the validity of the roll. Art. 1088 C. C. What is called a special assessment roll is nothing but the apportionment of the amount due to the city among the different proprietors of the immovables belonging to the parties benefited by the local improvement. Secs. 209, 213; sub-secs. 8, 14, 17, 18, 228, 238, 241.

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The appellant, I observe, claims, under sec. 118 of the Act, interest on the amount of the assessment in question from 1895, or so much of it as is not prescribed. Now, it can only be because the assessment was unconditionally *due and payable* in 1895, according to the words of that section, that they have a right to the interest from that date. And if it was then *due and payable* so as to carry interest *moratoires* because the respondents who were then liable for it, were in default, *en demeure*, the appellants must have had the right to take proceedings to recover it. And, as the prescription against them began to run concurrently with their right to take such proceedings, and as they did not take any until over three years after, they are out of court.

The appellants' further contention that this special assessment is not such a tax or assessment as is, under any circumstances, prescribed by three years, but that it is prescribed by thirty years only, must also be dismissed. The words of sec. 120, "*Any* assessment under this Act" include a special assessment made under the Act. Then when the same section adds:

> Provided that in case any *special assessment* is payable by annual instalments, the prescription of three years runs only from the expiry of such instalments

that makes it still clearer that special assessments like the others are prescribed by three years. The contention that it is only when such special assessments are payable by instalments that the three years prescription applies, but that if they are payable *en bloc*, they are prescribed only by thirty years, would be untenable. Yet that is what the appellants' arguments on this point would lead to.

Further, the words "such special assessment" in section 231 refer to the roll simply called *assessment* in that and the preceding sections 228, 229, 230. Now if

a special assessment is an assessment under the Act in those sections, the word "assessment" in section 120 must likewise include special assessments. And the right to contest an *assessment* roll given by sec. 144 has, by the appellants themselves and by a uniform jurisprudence, always been considered as applying to special assessment rolls.

The appeal is dismissed with costs.

GIROUARD J. (dissenting):—This appeal involves an important question of prescription of a municipal tax and is far from being free from difficulty. It has already divided the judges of the Province of Quebec, and it is not surprising that the judges of this court are not unanimous. Briefly told, the facts, which have been admitted by the parties, are as follows:—

On the 20th February, 1895, a roll of special assessment for the widening of Notre Dame Street, west, section 2, was deposited in the Treasurer's Office of the City of Montreal, by virtue of which a total sum of $205,426.73 was assessed upon all the proprietors interested, and a sum of $24,245.43, with interest amounting to $7,273.63 was claimed from the heirs Cantin, *grèves de substitution*, as their share. On the 8th August, 1895, they, together with a large number of other proprietors, about twenty-five in number, presented to the Superior Court a petition praying for the annulment of the roll, and in a subsidiary manner that all the proprietors, and especially the petitioners, "les propriétaires d'immeubles dans les dites limites et en particulier vos requérants," were not subject to certain charges and payments set forth in the petition, and finally that the said roll be sent back to the commissioners for the preparation of a new roll, allowing a deduction of said charges and payments

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à ce que le dit rôle soit renvoyé devant les dits commissaires pour préparer un nouveau rôle, en y faisant les réductions ci dessus indiquées.

After four years of unexplained delay, probably caused by a hope that the Quebec legislature would pass a declaratory Act, namely, on the 26th October, 1899, the city pleaded to the petition which was finally dismissed *in toto* by a judgment of the Court, rendered on the 29th of June 1900, and confirmed in Review on the 15th of June 1901. That was the end of the contestation of the roll so far as the petitioners and the respondents in particular were concerned.

There remained, however, another contestation of the roll by the Guy estate, which was likewise dismissed by the Superior Court and finally by the court of appeal, by judgment of the 20th of January, 1903. This case may yet be pending before the Privy Council, for what we know, and possibly the roll may yet be annulled; but it is certain that at that date and when the seizure complained of was made, to wit, on the 1st of October, 1902, it was still pending and undecided.

It was contended at the argument that this court cannot take notice of this Guy contestation, as it is not pleaded by either party. I think it is covered by the plea of the appellants, but it is undoubtedly set up by both parties in written admissions which practically constitute a special or stated case under article 509 of the Code of Civil Procedure, as they were made in order to discuss the questions of law raised by the opposition and the contestation of said opposition and the present cause. These admissions were considered in the courts below, not only without objection, but by consent. Even if I am mistaken in the view I take of the effect of these admissions, I think it would be in the interest of justice and within the intention of the

parties, as above expressed, to order an amendment of the opposition.

On the 10th of September, 1902, the sheriff of Montreal seized certain lands of the respondents to levy the amount of their special assessment with interest. On the 2nd of October they fyled an opposition *afin d'annuler* for two reasons. First, because the lands are not seized and advertised to be sold subject to the substitution or substitutions with which they were charged: Secondly, because the debt of assessment is prescribed and extinguished.

The first ground has been rejected by all the courts, and correctly rejected under article 781 of the Code of Procedure. The substitutions alleged by the appellants, not being opened, cannot possibly be affected by a sheriff's sale. The judges were unanimous upon this point, but not so upon the second ground which affords a very remarkable conflict of opinions. We will be able to appreciate them better after the clauses of the charter of the City of Montreal are quoted.

Clause 231. The roll of assessment, when finally settled by the commissioners, as aforesaid, shall be filed and kept of record in the city treasurer's office; and such special assessment shall thereupon become due and may be recovered by the corporation in the same manner as the ordinary taxes and assessments which it is authorized by this Act to impose and levy.

120. The right to recover any tax, assessment or water rate, under this Act is prescribed and extinguished, unless the city within three years, in addition to the current year, to be counted from the time at which such tax, assessment or water rate became due, has commenced an action for the recovery thereof, or initiated legal proceedings for the same purpose under the provisions of this Act; and the privilege securing such tax, assessment or water rate avails to the city, notwithstanding any lapse of time, for the recovery of any sum which may, by any judgment, be awarded to the city, for such tax, assessment or water rate; provided that in case any special assessment is made payable by annual instalments, the prescription runs only from the expiry of such instalment.

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144. Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annulment is prescribed by six months from the date of the passing or completion of such by law, resolution, assessment roll, or apportionment; and after that delay, every such by-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

238. When any roll of assessment or apportionment made by commissioners to defray, in whole or in part, the cost of any improvement under the provisions of this Act, is annulled by competent authority, the city may cause a new roll of assessment or apportionment to be made by commissioners appointed and acting as hereinbefore provided with regard to commissioners for expropriation. And all the provisions of this Act, with respect to the making, revision and completion of any such assessment or apportionment, and to all matters incidental thereto, shall apply to such assessment or apportionment; provided always that proceedings for the making of any new roll of assessment or apportionment shall be commenced within six months from the date of annulment of the previous roll.

241. Whenever a roll of assessment or apportionment for any street improvement shall be annulled and set aside, the payments made under authority of the same shall not be thereby invalidated; but such payments, with interest added, shall go to the discharge of the respective amounts to be fixed by the new assessment roll, subject, on the part of the ratepayers, to making good any deficiency, or to receiving back any surplus according to the difference that may eventually exist between the old and the new roll of assessment; and the present provision shall apply as well to special assessment rolls heretofore made as to those which may be made hereafter.

The contention of the respondents in effect is that, if under these enactments their petition for annulling the roll had been maintained, they would still be liable for their due share of the cost of the expropriation to be settled by a new roll, but as they set up an unfounded opposition to the roll they are liberated *in toto* by lapse of time. This result, if true, reminds me of the old game "*qui perd gagne*", which, I hope, will never hold good in a court of justice.

On two occasions the courts of Quebec have been called upon to pronounce upon this question, and, although divided, they have maintained that prescription commences to run from the day of the deposit of the roll under section 231, and that it is not interrupted nor suspended by its contestation, both as to ratepayers contesting or not.

The point came up first in the case of the *City of Montreal* v. *The Land and Loan Co.* (1), a ratepayer who had not contested the roll. On the 15th January, 1903, Mr. Justice Doherty decided that the prescription of three years was well taken. The learned judge held that article 2232 of the Civil Code did not apply, as the city could proceed to collect, notwithstanding the contestation. He makes no reference to any other article of the code. In appeal, this judgment was confirmed purely and simply, Bossé, Hall and Wurtèle JJ., Blanchet and Ouimet JJ. dissenting (2). Mr. Justice Bossé for the majority said:

Que dans les cas ordinaires, la prescription ait été acquise, ne peut souffrir de doute. Les termes du statut, 52 Vic. ci-haut cités, ne sauraient être plus clairs, ni plus impératifs. Pas d'action, s'il n'a été pris de procédures pour le recouvrement de la dette dans les trois ans.

* * * * * * * * *

Chacun des contribuables a le droit de contester, et, contestant, il le fait pour son compte.

Il peut arriver, en pratique, que le jugement maintenant la contestation d'un seul contribuable réagisse sur la ligne de conduite et les procédures à être adoptées par la corporation, mais en ceci il n'y a rien pour indiquer que les tiers intéressés aient confié au contestant leurs intérêts et l'aient chargé de faire décider leurs droits. Il n'y a là mandat ni exprès, ni tacite, et la contestation faite par Joseph n'intéressait au procès que lui seul, sans pouvoir en aucune manière lier les autres contribuables.

L'on objecte des raisons d'inconvénient ; mais il ne peut y avoir inconvénient, car la corporation avait trois ans pour réclamer contre les autres propriétaires, et elle ne doit s'en prendre qu'à elle-même de la position qu'elle s'est faite.

(1) Q. R. 23 S. C. 461. (2) Q. R. 13 K. B. 74.

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Mr. Justice Blanchet dissenting:

En permettant à tout intéressé de contester le rôle, en son nom, et d'en demander la nullite (sec. 144) non pas seulement quant à lui, mais pour le bénéfice de ses co-intéressés ainsi que le contestant l'a fait, la charte, par exception au droit commun, confiait à celui qui conteste un mandat spécial qui constitue en réalité tous les autres intéressés demandeurs conjoints. En effet, le jugement qui mettra le rôle de côté profitera à tous les intéressés et celui qui le maintiendra liera également ceux-ci et aucun d'eux ne pourrait recommencer la même contestation pour les mêmes causes (*Stevenson* v. *City of Montreal* (1)

La théorie de l'intimé que pour échapper à la prescription invoquée, la cité était obligée de procéder contre tous les intéressés, aurait forcé ceux-ci à se porter opposants ou contestants, en faisant valoir les mêmes moyens que ceux déjà invoqués par le premier requérant, et, comme dans le cas actuel il y a 44 contribuables, il y aurait eu 44 procès au lieu d'un seul, et si le rôle avait été annulé, la cité aurait été condamnée à payer les frais de 44 causes, que les intéressés eux-mêmes auraient en définitive été obligés de lui rembourser.

C'est ce résultats absurde que la charte voulait prévenir, et celle-ci doit recevoir de la part des tribunaux une interprétation large, libérale, propre à assurer l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables esprit et intention. (S.R. Q. ch. 2, sec. 13.)

Mr. Justice Ouimet, also dissenting, was of opinion that a special assessment for street improvements is not a tax or assessment within the meaning of section 120 of the charter. We have decided the contrary in *Les Ecclésiastiques de St. Sulpice* v. *The City of Montreal* (2).

In the case under consideration, which is one between the city and one of the rate prayers contesting, Mr. Justice Robidoux, who rendered the judgment of the Superior Court, likewise maintained the prescription of three years, and that it was not interrupted by the contestation; the question of suspension was not considered:

Considérant qu'il est édicté par l'artiele 231 de la charte de la Cité de Montréal (1889) que les sommes payables en vertu d'un rôle de

(1) 27 Can. S. C. R. 187, 593. (2) 16 Can. S.C.R. 399.

cotisations spéciales deviennent dues dès le moment que ce rôle a été déposé au bureau du Trésorier de la Cité par les Commissaires qui après avoir d'abord été chargés de procéder à l'expropriation, sont ensuite tenus de préparer le dit rôle de cotisations spéciales.

Considérant que c'est le 20 février 1895 que le dit rôle de cotisation spéciales a été déposé au bureau du dit Trésorier de la Cité par les dits Commissaires.

Considérant que c'est à partir de la dite date du 20 février 1895 qu'a commencé à courir la prescription de la dite somme de $24,245.43.

Considérant qu'aux termes de l'article 120 de la dite Charte de la Cité de Montréal (1889) le droit de recouvrir toute cotisation en vertu des dispositions de la dite charte est prescrit et éteint à moins que la dite Cité dans les trois ans à compter de l'échéance de cette cotisation n'ait intenté une action pour le recouvrement d'icelle.

Considérant que le 18 août 1902, date de la dite saisie du dit immeuble—laquelle sasie paraît être la première et seule procédure instituée aux fins de recouvrer la dite somme de $24.245.43 avec intérêt—il s était écoulé plus de trois ans depuis que la dite somme était devenue due en vertu du dit rôle de cotisations spéciales à savoir depuis le 20 février 1895, date où le dit rôle de cotisations spéciales à été déposé comme susdit par les dits Commissaires au bureau du dit Trésorier de la dite Cité de Montréal ;

Considérant que les actes faits par un débiteur dans le seul but de faire déclarer illégal et nul le titre de son créantier ne son pas interruptifs de prescription et que partant la requête en contestation du dit rôle de cotisations spéciales produite le 8 août et dans laquelle Dame Elizabeth Benning, l'un des auteurs des dits opposants Cantin était en effet partie, n'a pas eu pour résultats d'interrompre la prescription de la dite somme de $24,245.43 (Art. 2224 C.C.).

In appeal this judgment appears to have been unanimously confirmed, Bossé, Blanchet, Hall, Ouimet and Charbonneau, *ad hoc*, JJ., no special reason being given. Mr. Justice Blanchet observes, however, that he only concurs in the result, entertaining the same views he expressed in the former case, but as, at the time of the seizure, there was the Guy contestation still pending, the city could not proceed to levy the assessment from the respondents. Mr. Justice Charbonneau is of the same opinion.

The clauses of the charter are undoubtedly ambiguous, but our duty is to reconcile ambiguous enact-

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ments, by giving them a reasonable and even liberal interpretation, so as to give effect to all. C. C. art. 12; Que. Rev. St., Int. Act. Pres. Title, ch. 2, s. 13. This sound principle, as old as legislatures, was followed recently in a remarkable Privy Council case, where the literal meaning of a clause of a statute was overlooked. *Smith* v. *McArthur* (1). All the cases agree that, in construing a section of an Act, regard must be had first to the language of the clause itself, and second to other clauses in the same Act, and that construction should be adopted which makes the whole Act stand consistently together or reduces the inconsistency to the smallest possible limits. See cases cited in Vol. 26, Am. & Eng. Ency. of Law, *vo.* "Statutes," (2 ed.) at page 616.

As I understand the above clauses of the charter, they mean this:—A special assessment becomes due from the day of the deposit of the roll in the city treasurer's office (s. 231), and immediately prescription commences to run and continues to run, if the roll is not contested within six months. If it is contested the prescription is suspended pending the final judgment. This conclusion results from sections 144 and 238. It is not disputed if the contestation is maintained and the roll annulled. A new roll may be then made where the liability of the contesting ratepayer is continued, subjected to a new prescription (sect. 238). But the statute is silent as to the effect upon prescription of a judgment dismissing the contestation. Therefore, it is contended by the respondents, it continued to run as if no contestation had been made. This would certainly be a remarkable case of *summum jus summa injuria.*

The court of appeal holds that, *pendente lite*, the city was bound to proceed by action or seizure in order

(1) [1904] A. C. 389.

to interrupt prescription. If so bound as against the contesting parties, *a fortiori* will it be against the ratepayers not contesting. Hence the necessity of any number of actions or seizures, 100 or 200, or more—at least as many as there are ratepayers assessed—which would be perfectly useless if the roll be annulled. The Court of Appeals calls this state of affairs a mere inconvenience. It leads not only to great inconvenience, but to most absurd consequences which cannot be supposed to have been contemplated by the promoters of the charter or the legislature (26 Am. & Eng. Encyl. of Law, p. 648).

Of course, as Lord O'Hagan said in a well known House of Lords case:

> We must take care that a hard case shall not make bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity. *River Wear Commissioners* v. *Adamson* (1) (H. L. 1877).

In *The Queen* v. *The Judge of the City of London Court* (2) Lord Esher M. R. said:

> In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.

Is it not absurd to suppose that in order to accomplish one object, namely, the determination of the liability of the proprietors, two or more actions—in this instance at least twenty-five—would be necessary; one by the dissatisfied debtors to the effect that the instrument of indebtedness be annulled, and the others by the creditor against all the debtors, contesting or not, praying for the payment of the debt? Especially, is it not preposterous to hold that prescription will be interrupted or suspended if the debtor's

(1) 2 App. Cas 743 at pp. 758; (2) [1892] 1 Q. B. 273 at p. 290. cf. at pp. 762, 764.

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action be maintained, but that it will not, if it be dismissed. With due deference, such a state of affairs is contrary to reason, and cannot be attributed to men in their right senses, as members of a legislature are presumed to be. (26 Am. & Eng. Encyl. of Law, pp. 601, 648).

I therefore consider, independently of the provisions of the Civil Code, and merely by giving a fair meaning to the statute, that prescription was suspended during the pendency of the contestation and that section 408 of the charter of 1899 is merely declaratory, to remove any possible doubt:

> Whenever any valuation and assessment roll, or special assessment roll, is attacked or contested by proceedings, such proceedings shallbe held to interrupt prescription in respect to all such assessment rolls, until the date of the final adjudication upon or determination of such judicial proceeding.

The legislature has used the word "interrupt" instead of the more correct one "suspend"; but it is immaterial in the present case, as both would preserve the right of the city to enforce the collection of the assessment.

It is especially when viewed by the light of the Civil Code that the true meaning of the above statutory enactments appears.

I quite agree with Mr Justice Robidoux, confirmed in appeal, that article 2224 of the Civil Code does not apply, but not for the same reason, namely, that the opposition *afin d'annuler* was made "*dans le seul but de faire déclarer illégal et nul le titre de son créancier.*" Something else was demanded, namely, the confection of a new roll, and in any event, the modification of the first one. It seems to me that the true and, probably, the only reason why Art. 2224 C C. does not apply is to be found in Art. 2226 C. C., which declares that a judicial proceeding does not interrupt

prescription if it be dismissed, as undoubtedly it was here.

But can we not find a cause for interruption of prescription in articles 2184, 2185 and 2227 of the Civil Code? To my mind, the petition to annul the roll of assessment contains not only tacit but express allegations of an acknowledgement of the right to assess and a tacit renunciation of the benefit of the prescription which had commenced to run. The petitioners pray, first, that the roll be annulled; but they knew that this meant not a liberation or discharge from the payment of the cost of the expropriation but the making of a new roll where the legal liability would be continued and adjusted. Finally they pray, in a subsidiary manner, that certain deductions be made from the first roll and, for that purpose, that it be referred back to the commissioners "*pour prépurer un nouveau rôle.*" These allegations of the respondents amount to this: We owe our due share of the expropriation; but the roll is null and illegal and we demand that a new one be made; and if this cannot be granted, we pray for certain deductions. The court, by judgment rendered in 1900, dismissed their demand and as a necessary consequence declared that their share of the tax was as stated in the roll.

It may be said that the acknowledgement in the petition to annul was of no avail to the appellants, as the prescription was not acquired. This would be true if the proceedings had ended then; but, in 1899, instead of invoking prescription by an amendment to their petition or otherwise—prescription being available at any stage of the proceedings even in appeal—they joined issue with the city, persisted in the prayer of their petition as framed and, on the 7th of July, 1900, asked the Court of Review to reverse the judgment of the Superior Court and grant the prayer of

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their demand to annul the roll. All this appears in written admissions and establishes that the last act of interruption happened in 1901. The seizure by the sheriff was made in 1902, when the interrupted prescription was yet running. If these facts do not constitute tacit renunciation of prescription, then I do not know what that word means. Arts. 2227, 2184, 2185, 2264, C. C.

Pothier, Oblig. n. 693 says:

Par quelque acte que le débiteur reconnaisse la dette, cet acte interrompt la prescription.

Dunod, p. 58, adds that

toutes les fois qu'il se fait quelque-chose entre le créancier et le débiteur, le possesseur et le propriétaire, qui emporte un aveu exprés ou tacite de la dette, *du droit* ou de la propriété, ce sera une interpretation civile.

Baudry-Lacantinerie, *Droit Civil*, Vol. 25, n. 529, (2 ed.):

La reconnaissance interruptive de prescription résulte de tout acte ou de tout fait contenant ou impliquant l'aveu de l'existence d'un droit. Elle peut étre, en effet, expresse ou tacite.

Fuzier-Herman, Code Annoté, art. 2221, Vol. 4, pp. 1262, 1263, summarizes the jurisprudence upon this point in the following paragraphs:

7. Il faut observer d'ailleurs que les juges du fait peuvent induire la renonciation, tant des circonstances particulières de la cause que du silence gardé par le défendeur en première instance relativement au moyen de prescription. Cass. 21 mai, 1883, Touchet, précité, Paris 1er mars, 1893 (D. p. 93, 2, 296). Sic. Baudry-Lacantinerie et Tissier n. 51.

14. La renunciation tacite à une prescription acquise peut résulter de déclarations consignées dans des actes de procédure, par example dans un exploit introductif d'instance, ou dans une requête d'avoué, aussi bien que de declarations personnelles, Paris, 16 janvr, 1865 (S. 65, 2, 123, P. 65, 583). Sic, Baudry-Lacantinerie et Tissier, n. 79; Aubry et Rau, t, 8, p. 452, par. 776. Contrà, Troplong, t. 1, n. 55.

27. Celui qui, sans contester l'existence de sa dette, *en discute la quotité*, ou l'époque de l' exigibilité, *sollicite des réductions* ou des

délais, renonce, par là même, à opposer la prescription. Troplong, t. 1, n. 67 et 68 ; Aubry et Rau, t. 8, p. 453, par. 776 ; Baudry-Lacantinerie et Tissier, n. 73, V. suprà, art. 2220, n. 11.

Prescription was not only interrupted, but it was also suspended. These two expressions are not synonymous. All the commentators of the French Code, similar in this matter to the Quebec Code, establish that they have a different meaning and effect. See Quebec Civil Code, arts. 2222 to 2231, and 2232 to 2239, also 2264; 32 Laurent, n. 77; 25 Baudry-Lacantinerie, n. 365. Interruption means the entire destruction of the prescription running which recommences to run for the same time as before. Suspension, as the word indicates, merely suspends the running prescription. The expression is used to indicate cases in which the statute, after having begun to run, is suspended in its operation so that the time during which the statute ran prior to the period of suspension and the time elapsing after are alone to be counted against the creditor.

Mr. Justice Doherty and the majority of the court of appeal held in the case of *City of Montreal* v. *The Land and Loan Company* (1), that the contestation of the roll does not constitute the *absolute impossibility* to collect required by art. 2232 C. C. I believe that practically it does. What valid reason can be advanced to force the city to take hundreds of cases ruinous to all? As many suits or seizures of a similar character and for the same object as there were proprietors, contesting or not, would be necessary. Such an absurd result could not have been contemplated by the legislature. It may be that the learned judges were right in the case before them, that of a ratepayer who did not contest the roll; I express no opinion upon that case which is not before us; but it seems to me that

(1) Q. R. 23 S. C. 461 ; 13 K. B. 74.

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the parties who have contested the roll are bound by this contestation and its result. Evidently the city could not force the collection of the assessment against them until the contestion was finally disposed of. If undertaken by an action or a seizure, it would probably have been met by a plea of *lis pendens* setting forth all the grounds of nullity alleged in the petition to annul the roll, and its demand would be not simply stayed, but dismissed with costs under article 173 of the new Code of Procedure, or article 136 of the old Code. At all events, the ratepayer contesting the roll will be entitled by dilatory exception to a stay of proceedings till the rendering of the decision of the court on his contestation, and will thus prevent the city from enforcing the payment of the assessment *pendente lite* (art. 177 C. P. Q.) The same course would be necessary at least against all proprietors contesting, a most absurd state of affairs which, in my opinion, amounts to absolute impossibility to proceed. The present case, therefore, falls strictly within the exception of article 2232, namely, that it was absolutely impossible for the city, *in law*, to act effectively, *utilement*, to use the expression of French decisions quoted later on. It is the application of the old well known Roman law maxim which is to be found in all systems of jurisprudence: "*Contra non valentem agere nulla currit præscriptio.*" The French Code, art. 2251, different from art. 2232 of our Code, did not retain the maxim. It merely declares that prescription runs against all persons, unless they fall within some exception established by law. The jurisprudence has however maintained the old rule with the limitation resulting from the word "absolute" contained in our article.

On the 21st of May, 1900, the *Cour de Cassation* held that:

La prescription ne court pas contre celui qui est dans l'impossibilité absolue d'agir par suite d'un empêchement quelconque résultant soit de la loi, soit de la convention ou de la force majeure. P.F. 1900, 1,431.

See also Troplong, Pres. vol. 2, n. 701; 5 Zacharié, par. 848; Merlin, Rép. S. 1, par. 7, art. 2, quest. 10 and 11; Dalloz. Rép. Supp. vo. Prescription, n. 454, Vol. 13, p. 178 (1893); Pandectes Fr. vo. Prescription, nn. 970 to 975, Vol. 45 (1903) p. 507, 508; Sirey, Rép. 1902, 1, 133, note 1-2.

It would seem that article 2232 C.C. is sufficient to suspend prescription, if the debt depends upon a condition. Here again the reason of the exception is the absolute impossibility for the creditor to move. The code has, however, specially provided for this particular case. Article 2236 C.C. says:

Prescription of personal actions does not run with respect to debts depending on a condition, until such condition happens.

As I read the various statutory enactments relating to the prescription of a special assessment in the City of Montreal, I find that they are subject to the happening of an event which may or may not come, namely, the contestation of the roll. If no contestation be lodged within six months, the prescription continues its course till accomplished. If a contestation be made, prescription will be suspended pending the litigation. This necessarily results from sections 144 and 238.

The provision of article 2236 C.C. was borrowed, word for word, from article 2257 of the Code of France, where its scope and effect have been fully considered by the highest courts and jurists. I will refer to a few of these decisions: Cass. 20th Feby. and 15th July 1839; S.V. '39,1,215,575; 26th May, 1856; S.V. 57, 1,820; Cass. 14th Feby. 1888; S.V. 90, 1,313; Cass. 28th Oct. 1889; S.V. 91, 1,293; Troplong, Pres. Vol. 2, n. 686; Leroux de Bretagne, n. 512,592.

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A decision of the *Cour de Cassation* of the 22nd June, 1853, is quite in point. A doubt having arisen as to the applicability of a canal tax or toll, both parties referred the case to the *Conseil d'Etat*, the competent tribunal, for determination, it being agreed that, in the meantime, no other proceeding would be taken. The court held, 1st: That prescription had been suspended pending the decision in consequence of the said agreement; and 2ndly, that independently of the agreement and by force of law, prescription was suspended by the proceeding or *instance* before the State Council, where the validity of the title of the creditor was at stake. Dalloz 1853, 1,302:

La Cour: Sur le premier moyen: Attendu que l'arrêt attaqué a reconnu et constaté, en fait, qu'il était intervenu entre les parties des conventions dont le but était de suspendre toutes poursuites jusqu'à ce que le conseil d'Etat eût statué sur la portée du titre en vertu duquel le droit était réclamé: qu'en induisant de ces conventions que la prescription n'avait qu'à courir au profit des demandeurs, l'arrêt attaqué n'a violé ni faussement interpreté les articles invoqués; *Que c'est avec la même raison que le dit arrêt a décidé que la prescription avait été suspendue par suite du litige soulevé sur le titre lui-même, puisque, pendant cette instance, la personne du débiteur étant incertaine, le créancier ne pouvait utilement agir.*

The commentators and *arrêtistes* who have noted this decision, refer only to the last *moyen* which they express as follows:

Jugé que la prescription d'un droit qui repose sur un titre dont la validité est contestée demeure suspendue pendant l'instance en validité du titre. Gilbert sur Sirey, Code Annoté, ed. 1870, p. 573, art. 2257; Marcadé, art. 2257. See also Cass. 27th May, 1857, D. 57, 1,290.

The issue and the facts of the case as detailed in the report lead to no other conclusion, and no authority can be quoted which gives another meaning to this decision of the highest court of France. I am not aware that its soundness has been questioned by either courts or commentators. It is cited as law by the

best authorities: Fuzier-Herman, Rép. 1903, Vo. Pres.; vol. 31, p. 265; Pand. Fr. Rép. 1903, Vo. Pres. vol. 45, p. 507; S.V. 1902, 1,133, note 1-2.

With regard to the Guy contestation, Mr. Justice Blanchet and Mr. Justice Charbonneau held that as long as it is not finally disposed of, the city cannot levy the tax even from the respondents who have been unsuccessful in their petition to annul. It is true that, if the Guy estate succeeds, a new roll may become necessary as to all the proprietors, the respondents included; but this does not mean that they are parties to that case, and that the assessment is not payable as to all who did not contest, or at least those who having contested have been put out of court. As to the latter at least, there is *chose jugée* and they have no other course to adopt than to pay. If the roll be annulled at the suit of the Guy estate or any other proprietor, then the respondents will find their relief in section 241 of the charter. This clearly results from our judgment rendered last December on a motion to quash an appeal for want of jurisdiction in the case of *The City of Montreal* v. *The Land and Loan Company* (1).

For these reasons, I am of the opinion that the appeal should be allowed and the opposition *afin d'annuler* of the respondents dismissed with costs before all the courts.

DAVIES J., concurred in the judgment dismissing the appeal with costs.

NESBITT J. (dissenting):—I must say I have felt very great doubt and difficulty as to this case, but I have come to the conclusion that the opinion of my brother Girouard is the correct one. It appears to me that the debt does not become due on the roll when a

(1) 34 Can. S.C.R. 270.

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person assessed properly disputes it until that dispute is solved and that, in any event, the person so disputing cannot be heard to say at the time the court declares the roll valid and binding on him that no debt is due from him in respect to it.

KILLAM J.—I agree entirely with the reasons given by the learned Chief Justice for the dismissal of this appeal; but on account of the importance of the case and the differences of opinion in this court and the courts below, I desire to add some further considerations.

The prescription given by section 120 of the city charter of 1889 applied to

> the right to recover any tax, assessment or water rate under this Act.

Section 81 of the Act authorized the council to make by-laws to impose and levy an assessment on immovable property liable to taxation in the city, not to exceed one and a quarter per cent of the assessed value of such property, and also to impose and levy a business tax on trades, professions, etc., and certain special taxes upon those engaged in particular kinds of business. By section 82 these assessments and taxes were to be payable annually and at the times fixed by such by-laws.

Section 260 authorised the imposition of rates for the use of water.

Sections 228-231 provided for the making of special assessments of the kind now in question.

By section 1 of the Act:—

> Whenever the following words occur in this Act, they shall, unless the context otherwise requires, be understood as follows:
>
> * * * * * * * * *
>
> The word "assessment" shall mean the rates annually levied upon immovable property in the city generally;

The words "special assessment" or "apportionment" shall mean the assessment levied, from time to time, upon certain proprietors for local improvements;

The word "tax" shall mean the personal duty or license fee levied upon trades, business professions or occupations generally.

The "special assessment" is certainly within the generic term "assessment". While there was an advance by the city of the whole cost of an improvement, one half of which was eventually to be borne by certain property holders only, their proportion of the cost was to be imposed upon them by the sovereign authority vested for the purpose in the governing body of the city. It was as much an assessment upon them as was the imposition of any contribution for ordinary municipal purposes. The benefit being considered to be greater to them than to the city at large, they were made liable to the imposition of a greater proportion of the burden. That was deemed the fairest mode of apportioning the cost of a particular civic improvement.

When a general term, like "assessment," is assigned in a statute a narrower meaning than it would have in its ordinary sense, excluding some of its species, the draftsmen requires to exercise great care to escape its use in the general sense. In such a case a slight indication may be sufficient to warrant the ascribing to it of its full natural meaning. The definition is qualified. It is "unless the context otherwise requires."

Section 120 refers to

the right to recover *any* tax, assessment or water rate *under this Act.*

And the proviso at the end refers to a "special assessment" as if it had been included under the previous language. It is not merely an enactment that, in case of a special assessment payable by instalments, there shall be a similar period of prescription running from the maturity of each instalment. It seems to assume that

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special assessments are included in the previous part of the section; it is a proviso apparently framed to qualify or explain the prior terms; it speaks of "the" prescription, as if that previously provided was applicable; it states that it is to run "*only* from the expiry," etc., as if otherwise it would be different. In my opinion the context sufficiently indicates that a special assessment of the kind now in question comes within the word "assessment" where first used in the section.

The period of prescription ran from the time at which the "tax, assessment or water rate became due." It did not run from the time that proceedings could be taken to collect the tax, assessment or water rate. Different methods and different times were fixed for recovery from different sources. In order to a sale of immovables, there must, whether under the Act of 1889 or under that of 1899 (which was the one in force when these proceedings were taken), have been some tax, assessment or rate in arrear for a year.

In respect of all these various taxes, rates and assessments express provisions were made either directly fixing or authorizing the council to fix the times when they should respectively become due. And in the case of a special assessment the time was explicitly fixed by the statute. Section 231 required the assessment roll to be filed with the city treasurer, and provided that "such special assessment shall thereupon become due."

If there had been nothing in the Act to qualify these provisions it would be absolutely clear that the period of prescription would run from the times thus respectively fixed for the maturity of the claims.

The argument for the city is, however, that section 144 of the Act of 1889 postponed the commencement of the period of prescription, either by postponing

the due date of the assessment or by interposing an obstacle to its enforcement.

The section was as follows:

144. Any municipal elector, in his own name, may, by a petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment; but the right of demanding such annulment is prescribed by six months from the date of the passing or completion of such by law, resolution, assessment roll, or apportionment; and after that delay, every such by-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all purposes whatsoever, provided that the subject matter thereof be within the competence of the corporation.

This section did not relate exclusively to assessments. It had not for its object to fix the times of their maturity. It was general and dealt with other than financial matters.

The sections numbered from 140 to 148 came within a portion of the Act designated as "Title XV." having the heading "By-laws" and beginning with section 140 which authorized the city council to make by-laws on a great variety of subjects.

It appears to me that nothing in section 144 affected in any way the time of the coming into force of valid by-laws, resolutions, assessment rolls or apportionments. It dealt with the method of attacking such matters for illegality and fixed a limit of time within which this could be done. The portion of the section making them valid and binding after the specified delay was not needed in order to make valid and binding by-laws, resolutions, etc., which were legal and valid when made. And it could not have been intended for that purpose. They would be so without any such provision. To hold the council's by-laws and resolutions suspended in their operation until the expiry of the six months, and then until the disposi-

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tion of proceedings attacking them, would be to paralyze the hands of the civic authorities.

The proceedings to annul for illegality the assessment roll in question failed. This established that the roll was valid and legal from the beginning. The proceedings were begun within the necessary six months, so that the expiration of six months gave the roll no greater force than it had when filed with the treasurer.

The last of the conditions upon which it could be said that the debt depended, under art. 2236 of the Civil Code, happened with the filing of the roll. It was not a debt with a term, but one payable immediately upon its coming into existence.

Articles 2222-2231 C. C. deal with the causes which interrupt presenption articles 2232-9 C. C. with the causes which suspend the course of prescription.

The causes of interruption are divided into "natural" and "civil." By its definition "natural interruption" does not apply to a case like the present. The specified causes of civil interruption are judicial demands, renunciation of the benefit of a period elapsed and acknowledgement by the debtor.

The judicial demand, under article 2224 C. C is one served on the person whose prescription it is sought to hinder, not upon the person whose claim may be prescribed. And as the petition was dismissed, it cannot, by the terms of article 2226 C. C., be treated as having interrupted the prescription. Seizures, set-offs, interventions and oppositions are considered as judicial demands. Even if the contestation of the petition to annul the roll could be treated as an opposition within this article, that contestation was not put in until after the expiration of the period of prescription. The result of the proceeding was only the dismissal of the petition, which merely established the

validity of the assessment roll when made and filed and involved no adjudication upon the continuance of its effect.

The petition did not acknowledge the right. It contested it.

By article 2232 C. C.,

prescription runs against all persons, unless they are included in some exception established by this code, or unless it is absolutely impossible for them in law or fact to act by themselves or to be represented by others.

I am quite unable to discover any reason for believing that the petition to annul the assessment roll interposed any obstacle to proceedings for the enforcement of the assessment either against the petitioners or against other property holders affected. It seems to me that, if they had been taken in time and opposition entered, the only relief would be by an appeal to the discretion of the court, which might have stayed the proceedings if the petition had seemed to raise sufficiently substantial questions.

If the mere filing of a petition to annul an assessment roll would suspend its operation or effect, equally a petition to annul a by-law or resolution would suspend the operation or effect of the by-law or resolution, a result which would leave the city at the mercy of any elector in cases in which a short delay might be of serious importance.

Notwithstanding the authorities to which my brother Girouard has referred, I am unable to agree with him that the pendency of this petition had the effect of either interrupting or suspending the prescription.

The summary in Dalloz, 1853,1, 302, of the case there mentioned, does not appear to me to show the circumstances sufficiently to warrant its being taken as a direct decision that the pendency of any collateral liti-

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gation questioning the title to or existence of a right or debt operates *ipso facto* to prevent the owner or creditor from taking direct proceedings to enforce the right or debt. The reason there given

puisque, pendant cette instance, la personne du débiteur étant incertaine, le créancier ne pouvait utilement agir,

appears to limit the decision to a case of that character, although the summary of the case does not clearly show in what the uncertainty of the person consisted. And further it was thought that *le créancier ne pouvait utilement agir*. It was not that it was absolutely impossible for him to act, as the Quebec code requires.

In the present case the prescription was expressly made to run from the time at which the assessment became due, not from the accrual of the right to enforce it, which would be a year later. Neither the city charter nor the Civil Code expressly interposed any obstacle to proceedings upon the claim or to the running of the prescription; and, in the absence of any clear, well-known principle of law to that effect, I cannot think that the existence of such an obstacle should be implied.

Appeal dismissed with costs.

Solicitors for the appellant: *Coyle & Tétreau.*

Solicitors for the respondents: *Brosseau, Lajoie, Lacoste & Quigley.*

THE MONTREAL WATER AND POWER COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

HARRIET SIMPSON DAVIE (PLAINTIFF)..... } RESPONDENT.

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*Oct. 4.
*Nov. 3.

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

Appeal—Jurisdiction—Partial renunciation—Conditions and reservations—Amount in controversy—Supreme Court Act, s. 29—Refusal to accept conditional renunciation—Costs on appeal to court below—Costs of enquête—Nuisance—Statutory powers—Negligence—Legal maxim.

Where a conditional renunciation reducing the amount of the judgment to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original *demande* and, if such *demande* exceeds the amount limited by section 29 of the Supreme Court Act, an appeal will lie.

In an action for $15,000 for damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed *en bloc* by the trial court without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to plaintiff the right of action for subsequent special damages and damages for permanent depreciation and gave full costs against

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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the appellants, on the ground that they should have accepted the renunciation filed.

Held, Davies J. dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed, but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, under the circumstances, to order that each party should pay their own costs thus incurred.

Held, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them upon evidence sufficient to support that finding, the maxim *sic utere tuo ut alienum non lædas* applied and the powers granted by their special charter did not excuse them from liability. *The Canadian Pacific Railway Co.* v. *Roy* ([1902] A. C. 220) distinguished.

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

The facts of the case and questions at issue on this appeal are stated in the judgments now reported.

Beaudin K.C. and *W. J. White K.C.* for the appellants cited arts. 275, 548 C.P.Q.; art. 356 C. C.; *The Canadian Pacific Railway Co.* v. *Roy* (1); *Molleur* v. *Dougall* (2); *Lusignan* v. *Sauvageau* (3); *Bellay* v. *Guay* (4); *Archbald* v. *Delisle* (5); *Drysdale* v. *Dugas* (6); *Williams* v. *Stephenson* (7); *Coghlin* v. *La Fonderie de Joliette* (8), per Girouard J., at page 159; 6 Laurent, nn. 150, 151; 3 Carré & Chaveau, quest. 1460; 3 Bioche, Procédure, 152.

(1) [1902] A. C. 220.
(2) 33 L. C. Jur. 105.
(3) Q. R. 3 S. C. 44[8].
(4) 4 Q. L. R. 91.
(5) 25 Can. S. C. R. 1.
(6) Q. R. 6 Q. B. 278; 26 Can. S. C. R. 20.
(7) 33 Can. S. C. R. 323.
(8) 34 Can. S. C. R. 153.

Cross for the respondent, referred to arts. 1053, 1054 C. C.; *Geddis* v. *Proprietors of Bann Reservoir* (1); *The Hammersmith and City Railway Co.* v. *Brand* (2); *Metropolitan Asylum District* v. *Hill* (3); *Hopkin* v. *The Hamilton Electric Light and Cataract Power Co.* (4); *Meux & Brewery Co.* v. *City of London Electric Lighting Co.* (5); *National Telephone Co.* v. *Baker* (6); *Rapier* v. *London Tramways Co.* (7); *Canadian Pacific Railway Co.* v. *Parke* (8); *Attorney-General* v. *Cole* (9); *Montreal Street Railway Co.* v. *Gareau* (10); *Sanders-Clarke* v. *Grosvernor Mansions Co.* (11); *North Shore Railway Co.* v. *Pion* (12); *Canadian Pacific Railway Co.* v. *Couture* (13); 6 Laurent nn. 145, 147.

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—The respondent by her action claimed $15,000 as damages from the appellants:—

For that a certain pumping station erected by them near her property at Westmount has caused damage to the plaintiff by continuous noise and vibration such as to cause her said house to shake and the windows and movables therein to rattle to such an extent as to deprive the plaintiff and the members of her family of rest and sleep and to injure her and their health, the whole for and throughout one year and ten months now past.

Moreover, the defendant in operating the said pumping station has from time to time during the period last above mentioned, by causing smoke, cinders, water and moisture to be directed against and to fall upon the said dwelling and property of the plaintiff, caused great damage to the latter.

By reason of the premises and by the said acts and faults of defendant the plaintiff's said immovable property has been rendered unfit for occupation as a plac residence and so depreciated as to be unsaleable,

(1) 3 App. Cas. 430.
(2) L. R. 4 H. L. 171.
(3) 6 App. Cas. 193.
(4) 2 Ont. L. R. 240.
(5) 72 L. T. 34.
(6) [1893] 2 Ch. 186.
(7) 63 L. J. Ch. 36.
(8) [1899] A. C. 535.
(9) 70 L. J. Ch. 148.
(10) Q. R. 10 Q. B. 417; 31 Can. S. C. R. 463.
(11) 69 L. J. Ch. 579.
(12) 14 App. Cas. 612.
(13) Q. R. 2 Q. B. 502.

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The said damages and depreciation in value (of which no detail can at present be given) amount to at least $15,000.00.

Wherefore plaintiff brings suit and prays that the defendant be adjudged and condemned to pay to the plaintiff the said sum of $15,000.00 with interest and costs of suit and of exhibits.

After issue joined and a long *enquête*, the Superior Court gave judgment against the appellants for $3,000 as well for the respondent's personal damages as for the damages to her property by the depreciation of its value.

Before an inscription in appeal by the appellants, the respondent produced upon the record an offer of renunciation to $2,590 of the judgment so rendered for $3,000 in her favour by the Superior Court. That offer is couched in the following terms:

The above named plaintiff, with a view to avoid costs, appeals and uncertainty, hereby offers to renounce part of the judgment for $3,000.00 herein rendered on the eight day of January instant, to wit, the sum of two thousand five hundred and ninety dollars, persisting in the said judgment for the remainder thereof and costs, to wit, for the sum of four hundred and ten dollars ($410.00) in satisfaction of the damages mentioned in her declaration in this cause, caused and accrued and suffered prior to the 26th November, 1901 (other than permanent depreciation in value of the property) and costs, but at the same time, reserving to herself to claim hereafter from the defendant the amount of all damages subsequent to the said last mentioned date including the amount of such permanent depreciation as may be established; and she hereby tenders to the defendant a renunciation as aforesaid.

These presents being made for the reasons hereinabove stated are not to be taken as an admission either that the damages do not exceed the sums above mentioned or that the said judgment is not well founded.

Witness the signature of the said plaintiff, this 15th January 1903.

(Signed) HARRIET S. KERR.

The appellants refused to accept that offer; First, because it did not cover the costs on the dismissal of the largest part of the action; Secondly, because the offer was a conditional one, and was made subject to a

reserve of the right to bring another action for the same cause, and brought on their appeal upon which the judgment now complained of by them was rendered. It reads as follows:—

Considérant que l'intimée demanderesse a clairement prouvé qu'elle a été troublée dans la jouissance de sa propriété par la faute de la défenderesse, et que ce trouble résultait des inconvénients qui provenaient du fonctionnement des machines construites par l'appelante sur la propriété voisine de celle de l'intimée ;

Considérant que l'appelante a ainsi violé les lois du voisinage et est responsable des dommages que l'intimée a subis ;

Considérant que ces dommages (en dehors de la dépréciation de la propriété sur laquelle il n'y a pas d'adjudication) s'élèvent, à venir au vingt-six novembre mil neuf cent un, à la somme de quatre cent dix dollars ;

Considérant qu'avant l'institution du présent appel, l'intimée s'est désistée de cette partie du jugement qui lui accordait des dommages à raison de la dépréciation de sa propriété et a consenti à ce qu'il fut réduit a la somme de quatre cent dix piastres :

Considérant que dans les circonstances le jugement de la cour supérieure rendu a Montréal, le huit janvier mil neuf cent trois, doit être réduit a ce montant de quatre cent dix piastres, avec dépens d'une action de cette classe ;

Maintient l'appel, mais avec dépens contre l'appelante ;

Confirme le jugement de la cour supérieure jusqu'a concurrence de quatre cent dix piastres avec intérêt de la date du dit jugement et les dépens d'une action de quatre cent dix piastres en faveur de l'intimée, et la cour donne acte a l'intimee de la reserve faite dans le dit desistement pour le recouvrement des dommages subsequents au 26 novembre 1901 et ceux resultant de la depreciation de la propriéte pour valoir ce que de droit.

A preliminary objection to our jurisdiction to entertain the appeal was taken by the respondent on the ground that, by her renunciation, the amount demanded is now $410 only. There is nothing however in this objection. The original demand was for $15,000 and the conditional renunciation to a part of her claim not having been accepted, the controversy as to the amount claimed remained as it had been before the Superior Court. It was quite open to her, notwith-

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standing her offer, to cross appeal and ask judgment for a higher sum than the $3,000 that the Superior Court had given her. The appeal taken by these appellants to the Court of Appeal was from a judgment for $3,000, in a case where the amount demanded originally was $15,000. The case is therefore clearly appealable. We have not to determine what would be the consequence as to our jurisdiction if the renunciation had been accepted.

As to the merits of the appeal, the judgment *a quo* seems to me erroneous.

The respondent's offer of a conditional renunciation not having been accepted by the appellants, their appeal, as I said, was from a judgment condemning them to $3,000 and the respondent had the right, on that appeal, to treat that offer as out of the record, as it had been expressly made without admission, and to insist upon keeping the judgment of $3,000 that she had recovered in the Superior Court. And that is what she did. And not only did she ask the confirmation of that judgment *in toto* and the dismissal of the appeal, but added in her factum before that court:

> The undersigned would only add that upon the evidence the award (of $3,000) has been very moderate and that the evidence would have justified a condemnation for over $5,000.

However, not having cross-appealed, she could not expect more than a confirmation of her judgment for $3,000.

The Court of Appeal, refusing to adjudicate upon that part of the respondent's claim for damages caused by the depreciation in value of her property and to dismiss the action *pro tanto*, allowed the appeal however for an amount of $2,590 as being so much given for that depreciation in value by the Superior Court, and deducted that sum from the $3,000 awarded by

the Superior Court, leaving the small balance of $410 to the respondent. These figures were taken from the *ipse dixit* of the respondent, for the judgment of the Superior Court allows her $3,000 *en bloc*. However, they may be assumed to be correct for the purposes of this appeal.

Now, what the appellants complain of is that though their appeal was so allowed as to $2,590 out of $3,000, yet they were condemned to pay all the costs of the trial and of the appeal on both sides upon the ground that they should have accepted the respondent's offer to renounce that part of the judgment, and, as another ground of grievance, that the non-dismissal of the action as to the $2,590 and the reservation granted by the Court of Appeal to the respondent of the right of bringing another action against them for these $2,590 is unjust and unlawful.

In my opinion, on both these grounds, their appeal should be allowed. The respondent had no right to that reservation, and the appellants were justified in refusing her offer coupled with it as it was. The action had been tried and judgment given by the Superior Court as well for the damage caused by the depreciation in value of respondent's property as for the other part of her claim; and the Court of Appeal had not the right to refuse to adjudicate upon that part as well as upon the other simply because the respondent asked them conditionally not to do so. She was not, upon the record, entitled to this sum of $2,590, as she now admits, by not cross-appealing for it here and by asking us, on the contrary, to confirm the judgment.

Now, having so failed as to that part of her claim, upon what ground could she ask the court to reserve the right to her of vexing and harassing the appellants a second time for the same cause? She says in her factum:

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It was in view of the fact that the evidence at the trial did not make it clear to what extent the nuisance was attributable to defective construction or bungling which might be regarded as being of a temporary character, and to what extent it was attributable to a cause which would be certain to continue in permanent operation, that the respondent decided to relinquish as much of the judgment in her favour as represented permanent damage and to adhere to it only for an amount representing damages actually suffered prior to action brought.

But if she had not proved her case as to that part of her demand it should have been dismissed by the Superior Court. And she then would have no right to another action.

There is no reason, that I can see, for reserving her that right. Her claim, if not proved, not having been dismissed by the Superior Court ought to have been dismissed by the judgment of the Court of Appeal. By her offer of renunciation, she said to the appellants: "I will abandon my judgment for the $2,590, because I may not have given sufficient evidence of the depreciation in value of my property and the Court of Appeal might reverse it, but only if you consent to my suing you again for it."

Such an offer the appellants had the right to reject, and the Court of Appeal erred in holding the contrary.

Further, the appellants were not bound to accept the respondent's offer of renunciation for the additional reason that it did not cover the costs occasioned by her claim for the $2,590 that she offered to renounce. By her demand of $15,000, now conceded to have been grossly excessive and unfounded to the amount of $14,590, she tripled, if not more, the appellants' costs of defence to her action.

Now, by the judgment *a quo* not only have they to bear the burden of their own costs, but they are also mulcted, in addition to all the costs of the appeal on both sides, with all the respondent's costs occasioned

by her claim for the $2,590, although they succeed on that part of the case. To so put on the appellants the consequences of the exaggeration of the respondent's original claim is a manifest injustice to them. And though the allowance of the appeal will affect principally the costs; *Archbald* v. *Delisle* (1); yet, as the Court of Appeal came to the determination of giving them all against the appellants on the erroneous ground that they should have accepted the respondent's conditional offer of renunciation, we must interfere and redress the injustice that the appellants would suffer if the judgment were to stand. Then the appellants are entitled to have the reservation to the respondent of the right to another action for the depreciation in value of her property struck out of the judgment.

As to the $410 to which the appellants are condemned for personal damages to the respondent, there is nothing in their contention, based on the decision of the Privy Council in the *Canadian Pacific Railway Co.* v. *Roy* (2), that they are not liable because they were acting under their statutory charter. There is a finding of negligence against them on this part of the case, in support of which there is ample evidence, and their charter does not authorise them to be negligent. The maxim *sic utere tuo ut alienum non lædas* has to be read into it.

I would allow the appeal with costs in this court and in the Court of Appeal, dismiss the action as to $2,590 with costs, strike out of the judgment the reservation in favour of respondent of another action for the depreciation in value of her property; reservation of action for damages accrued since first action, if any, to stand; judgment against appellants for $410 with interest from the date of the judgment of the

(1) 25 Can. S. C. R. 1. (2) [1902] A. C. 220.

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Superior Court, and costs of an action of that class to stand. As to the costs of the *enquête*, as it would otherwise create difficulties in the taxation, I would order that each party pay his costs thereof.

DAVIES J. (dissenting).—The two substantial points submitted by the appellants as defences to this action for damages arising out of an alleged nuisance caused to respondent and her property by the operation of appellants' water-pumping station were:—First, that they had legislative authority to commit the nuisance, if nuisance there was, and:—Secondly, that no nuisance had been committed.

On both points, in my opinion, their contention is untenable. They had no legislative authority to erect their pumping station on any particular piece of property, but a general power to do as a company, in this particular, what a private person could do. In doing what they did they are clearly responsible, just as private persons would be for all damages caused thereby to their neighbours.

As to the amount of these damages, they were assessed by the Superior Court at three thousand dollars.

The present appellants then appealed to the Court of King's Bench, persisting in their claim of immunity from an action such as this and in their contention that the plaintiff had not sustained any damage.

Before the appeal was inscribed, the plaintiff, the present respondent, offered in writing to give up $2,590 of the judgment awarded her by the Superior Court and thus reduce her judgment to $410. This $410 which the plaintiff thus offered to accept was expressed to be in satisfaction of the damages caused to her up to the commencement of the action, other than permanent depreciation in value of her property. In the same writing, she expressly reserved to herself the

right to recover all subsequent damage, together with any permanent depreciation she could establish.

The appellants refused to accept this offer, partly on the question of costs and partly because of the reserve made, and persisted in their appeal.

The Court of King's Bench maintained the legal contention of the plaintiff as to her right to bring the action for such damages as she had sustained up to the commencement of the action, which they assessed at $410, but allowed the appeal for $2,590, as being the amount allowed for depreciation of the plaintiff's property by the Superior Court. They also gave the plaintiff her costs in the Superior Court as for an action brought to recover the actual amount allowed by them and damages and on appeal.

I am not disposed, with the facts we possess, to interfere with the judgment below on the question of costs simply. I think the judgment of that court on the substantial questions of law and fact was correct and that they were right in making the reservation they did in the plaintiff's favour as to future actions for damages for depreciation of property. It may well be that the appellants will so improve the working of their pumping power that all reasonable ground for complaint will be removed and the future damages to the plaintiff's property largely decreased, possibly reduced to a minimum. Or they may remove the site of the pumping power to another place, or they may persist in going on as at present. But, in any contingency, the plaintiff's rights were properly conserved by the Court of King's Bench by the reservation made by it in its judgment appealed from.

I think that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *White & Buchanan.*

Solicitor for the respondent: *A. G. Cross.*

1904
*Oct. 5, 6, 7.
*Nov. 3.

THE METROPOLITAN LIFE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THE MONTREAL COAL AND TOWING COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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

Evidence—Verdict—New trial—Life insurance—Conditions of contract—Misrepresentation—Non-disclosure—Accident policies—Warranties—Words and terms—Rule of interpretation.

Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident insurance companies insuring him against death or injury from accidents. The questions so answered did not specially refer to accident insurance, but the policy provided that the statements in the application should constitute warranties and form part of the contract.

Held, affirming the judgment appealed from, the Chief Justice dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application and, consequently, that the questions had been sufficiently and truthfully answered according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed. *Confederation Life Association* v. *Miller*,

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(14 Can. S.C.R. 330) followed. *Mutual Reserve Life Insurance Co.* v. *Foster*, (20 Times L R 715) referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review, at Montreal (1), which ordered judgment to be entered in favour of the plaintiffs, upon the verdict of the jury at the trial, with costs.

The questions at issue on this appeal are stated in the judgments now reported.

R. C. Smith K.C. and *Claxton* for the appellants, cited Arts. 2485, 2490, 2587 C. C.; *McKay* v. *Glasgow & London Ins. Co.* (2); *McCollum* v. *Mutual Life Ins. Co.* (3); *Anderson* v. *Fitzgerald* (4); *Venner* v. *Sun Life Ins. Co.* (5); *Shannon* v. *Gore District Mutual Fire Ins. Co.* (6); *Cornwall* v. *Halifax Banking Co.* (7); Porter on Insurance, p. 484.

Atwater K.C. and *Duclos K.C.* for the respondents referred to the Century Dictionary *vo.* "Insurance," and the definitions of insurance in Chambers Encyclopedia, Standard Dictionary, Encyclopedia Britannica; May on Insurance, ch. 1; 19 Am. & Eng. Encycl. (2 ed.) p. 42; Insurance Act, R. S. C. ch. 124 ss. 4, 49; 62 & 63 Vict. ch. 13, sec. 2 (*b*); Porter on Insurance (2 ed.) pp. 18 and 34; *Anderson* v. *Fitzgerald* (4) per Lord St. Leonards at p. 513; *Notman* v. *Anchor Assurance Co.* (8) at p. 481; *Stanley* v. *Western Ins. Co.* (9), at p. 75 per Kelly C. B. and at p. 76 per Martin B.; *Confederation Life Association* v. *Miller* (10) per Gynne J. at page 344; *Mutual Reserve Fund Life Association* v. *Foster* (11).

(1) Q. R. 24 S. C. 399.
(2) 32 L. C. Jur. 125.
(3) 55 Hun 103; 124 N. Y. 612.
(4) 4 H. L. Cas. 484.
(5) 17 Can. S. C. R. 394.
(6) 2 Ont. App. R. 396.
(7) 32 Can. S. C. R. 442.
(8) 4 C. B. N. S. 476.
(9) 37 L. J. Ex. 73.
(10) 14 Can. S. C. R. 330.
(11) 20 Times L. R. 715.

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THE CHIEF JUSTICE (dissenting) :—I would allow this appeal and dismiss respondents' action.

By the express terms of the policy, the answers and statements contained in the written and printed application for it are made warranties and part of the contract. In the application it is stipulated that any false, incorrect or untrue answer, *any suppression or concealment of facts in any of the answers* * * shall render the policy *null and void* and forfeit all payments made thereon.

Now Muir, by not mentioning the two accident policies on his life when asked what was the amount of insurance he then carried on his life, told a half truth equivalent to a falsehood. And when being further asked if there was any other insurance in force on his life (besides the six he had previously mentioned) he answered "No." That answer was not true. There was no ambiguity in the questions. And whatever popular notions may be on the meaning of the words "life insurance," whatever classifications encyclopedias or books of any kind may think proper on the subject, the indisputable fact remains that these answers did not disclose all the truth.

I fail to understand how the respondents can reasonably contend that Muir's life was not insured by these two companies when they have to admit that Mrs. Muir might have got $20,000 from them because his life was covered by their policies. They were conditional insurances, certainly, but so are all life policies more or less. No amount of reasoning, or of cases or of books, can convince me that Muir told the truth when he said that his life was insured in only six companies and in no other.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs, provided

that the judgment below be reduced by the amount of the unpaid half-yearly premium.

DAVIES J.—Ever since the argument of this appeal I have entertained the gravest doubts as to the decision which should be rendered. Subsequent reflection upon the arguments and consideration of the cases which seemed more or less to bear upon the issues have not removed these doubts. Under these circumstances I will acquiesce in the judgment of the majority of the court dismissing the appeal.

So far as the question of setting aside the verdict and granting a new trial on the ground that the verdict was contrary to evidence is concerned I should have been disposed to allow the appeal. It did appear to me from the evidence that the verdict was not one which reasonable men could under the circumstances fairly find. I understand, however, that my brethern do not concur in this view.

With respect to the legal question whether the deceased had truthfully or untruthfully answered the question put to him at the time he made his application for insurance as to the amount of insurance he then carried on his life, I have had very grave doubts. The untruth alleged was withholding the existence of the two accident policies carried by the deceased. These two policies became payable on his death from the gun-shot wounds unless they were intentionally inflicted, and that they were not so has been disposed of by the verdict of the jury which the courts have refused to disturb. The two accident policies were carried by the deceased at the time he made his application, and one of them at least has been paid to his wife, the beneficiary. Did the withholding of them n the answer to the question as to the amount of insurance then carried on his life amount to an untruth-

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ful answer? I quite concede that as the answer was made a warranty and the basis of the contract it must be true in point of fact and not true simply according to the declarant's sincere conviction or belief. As Lord Fitzgerald tersely put the point in *Thomson* v. *Weems* (1), it must be

> true in fact without any qualification of judgment opinion or belief.

But then again as Lord Watson says in the same case at p. 687:

> The question must be interpreted according to the ordinary and natural meaning of the words used if that meaning be plain and unequivocal and there be nothing in the context to qualify it. On the other hand if the words used are ambiguous they must be construed *contra proferentes* and in favour of the assured.

I have not been able to satisfy myself that the words used are so plain and un-ambiguous as to justify me in dissenting from the opinion of a majority of my brethren and reversing the judgment of the court below. I therefore acquiesce.

NESBITT J.—This action was brought to recover $8,500 on a policy of insurance on the life of one Muir, and two questions are involved in the appeal, namely: (1) whether Muir died by his own act, by shooting himself, on the 14th November, 1902, and; (2) that Muir omitted to inform the company that he carried, on his life, insurance for $10,000 in the Travellers' Life and Accident Company and $10,000 in the Ocean Accident and Guarantee Company.

The case was tried by a jury and a verdict was found by ten of the jurymen against the defence of suicide, which verdict has been sustained by the Court of Review and the Court of King's Bench. Notwithstanding the very able argument addressed to us by the appellants' counsel in favour of an order for a new

(1) 9 App. Cas. 671 at p. 697.

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trial, I do not think it is a case where that power should be exercised, as it is not a case where the evidence so strongly preponderates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it.

On the second ground the defence is based upon a question and answer in the application worded as follows:

E. State amount of insurance you now carry on your life, with name of company or association, by whom granted and the year of issue? (Enumerate each).

Canada Life, $1,000, paid up; Manufacturers Life, $5,000, 1901; Standard Life, $3,000, 1901-2; Imperial Life, $3,000, 1902; New York Life, $5,000, 1902; British Empire, $8,500, 1902.

The canon of construction to be applied in considering such a question and answer is of course that the language is to be read in its plain, ordinary and natural signification and that if there is any ambiguity, such ambiguity is to be resolved against the company who framed the question and in favour of the applicant. See *Mutual Reserve Fund Life Association* v. *Foster* (1). I think reference may usefully be had to two other questions in the application, namely, 6 A and 7 C.

6 A. Have you ever applied to any company, order or association for insurance on your life without receiving the exact kind and amount of insurance applied for? (If yes, give particulars). Ans. No.

7 C. State whether any company has refused to restore a lapsed policy on your life? (If yes, give particulars). Ans. No.

Light is thrown upon the meaning of the words "insurance on your life" by reference to the Insurance Act, R. S. C. (1886), ch. 124, sect. 4, which provides that

no company or person except as hereinafter provided, shall accept any risk or issue any policy of fire or inland marine insurance or policy of

(1) 20 Times L. R. 715.

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life insurance, or grant any annuity on a life or lives or receive any premium or carry on any business of life or fire or inland marine insurance in Canada, without first obtaining a license from the minister.

And section 49 provides that

in the case of any policy other than life, fire or inland marine policy, permission to carry on such business shall be obtained from the minister with the approval of the Governor in Council, who shall determine in each case the terms upon which such permission is to be granted.

And section 10, in the case of life insurance, provides, amongst other things, that the deposit in the hands of the minister shall be a sum sufficient to cover all liabilities to policy holders in Canada, and the full reserve or re-insurance value of outstanding policies. By the amending Act, 1889, 62 & 63 Vict. ch. 13, sec. 2, ss. *b*, "accident insurance" is defined to mean insurance against bodily injury and death by accident, including the liability of employers for injuries to persons in their employment, shewing that statutory recognition is given to the view that a policy of life insurance is not an insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but is an entire contract of insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums, etc.

I find in a recent leading work, Lefort "Contrat d'assurance sur la vie" 1893, vol. 3, on pages 18-19, that author stating as follows :

La prime étant le prix de l'assurance, son taux devrait varier chaque année ; il tombe sous le sens qu'au fur et à mesure qu'une personne vieillit ses chances de mortalité vont en augmentant. Néanmoins et à juste titre, car dans les dernières années le chiffre aurait pu être excessif, il a paru plus pratique et plus rational de ne pas tenir comte des différences qui se produisent d'année en année et de rendre la prime uniforme. On reporte sur les premières années une partie de ce qui serait à payer pour les dernières, en prenant la moyenne des

chiffres donnés par toutes les primes prévues pour l'assurance vie entière et indiquées par les tables de mortalité. Ce chiffre de la prime uniformisée comprend deux parties; l'une correspond à la prime simple d'assurance pour l'année, l'autre est destinée à parfaire l'insuffisance des primes futures, c'est qui constitue la réserve.

So that the legislature and the text writers apparently concur in viewing "insurance on life" as of the character embraced in the answer excluding accident insurance.

I have already drawn attention to the form of questions 6 A, and 7 C., in the application as indicating that the framers of the application took (if I may so describe it) the popular view of the meaning of "insurance on life". I refer particularly to the language of 7 C., which seems to me to be inconsistent with any other than the view that the framer of the application had in mind the ordinary life insurance policy of the character I have above described which had lapsed. I draw attention also to the language in the question E., in dispute, which speaks of "year of issue" indicating the same idea.

Suppose a person bargained with another that in consideration of a loan of $10,000 he would carry "insurance on his life" to the extent of $10,000, it would scarcely be argued that if he tendered an accident policy for $10,000 he was fulfilling his contract, as the accident policy merely insures his life in case certain contingencies happen.

To my mind the answer to the question in this case is correctly given, but in any event if the meaning of the question is that contended for by the appellant, the language used is certainly ambiguous, and as I have said the dispute must be resolved against it. I adopt the language of Mr. Justice Gwynne in *Confederation Life Association* v. *Miller* (1), where on page 341 he says:

(1) 14 Can. S. C. R. 330.

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The rule of construction is that the language of the warranty being framed by the defendants themselves the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it.

It follows that the appeal should be dismissed with costs, with the provision, however, that $113.99, the half yearly premium, should be deducted.

Appeal dismissed with costs.

Solicitor for the appellants: *A. G. Brooke Claxton.*

Solicitors for the respondents: *Atwater, Duclos & Chauvin*

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*Oct. 13.

*Nov. 14.

OVIDE DUFRESNE ET AL. (DEFENDANTS)..... } APPELLANTS;

AND

THOMAS E. FEE ET AL. (PLAINTIFFS)..RESPONDENTS.

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

Construction of contract—Custom of trade— Arts. 8, 1016 C. C.—Sale of goods—Delivery.

The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful and ambiguous.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action with costs.

The principal contention of the appellants was that, according to the mercantile usage of the port of Montreal, their contract with the respondents for the

* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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purchase of their season's cut of lumber was subject to certain conditions as to the times and places of deliveries, notwithstanding that the contract mentioned the place where the delivery of the lumber should be made and did not refer to any trade custom. The questions raised on the appeal are stated in the judgments now reported.

Mignault K.C. and *Bisaillon K.C.* for the appellants. The respondents by the prevailing usage and custom of merchants dealing in lumber at the Port of Montreal, were bound to await shipping instructions before forwarding the lumber. See Arts. 1013-1021 and 1024 C. C. We also rely upon *The Midland Navigation Co.* v. *The Dominion Elevator Co.* (1).

Atwater K.C. and *Buchan K.C.* for the respondents. The contract is free from any doubt or ambiguity as to the place of delivery and as to time. It is evident from the nature of the transaction that the lumber was to be delivered, from time to time, as cut at the mills and according to the best facilities for shipping it forward. No unreasonable delay is charged against us, and no custom proved which, under our contract, could be binding upon us. We refer to articles 8 and 1016 C. C.; *Trent Valley Woollen Manufacturing Co.* v. *Oelrichs* (2), at pages 692-693; *Parsons* v. *Hart* (3); Benjamin on Sales, pp. 130, 131, Rule 23 and p. 233, note 3; *Blackett* v. *Royal Exchange Assurance Co.* (4); *Yates* v. *Pym* (5); *Roberts* v. *Barker* (6); *Clarke* v. *Roystone* (7).

SEDGEWICK J., concurred in the judgment dismissing the appeal with costs.

(1) 34 Can. S.C.R. 578.
(2) 23 Can. S. C. R. 682.
(3) 30 Can. S. C. R. 473.
(4) 2 Tyrw. 266.
(5) 6 Taunt. 445.
(6) 1 Cr. & M. 808.
(7) 13 M. & W. 752.

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GIROUARD J.—En supposant que la coutume ou l'usage invoqué par les appelants serait prouvé—ce que je suis loin d'admettre—doit-il l'emporter sur la convention des parties? Ce n'est que lorsque le contrat est ambigu que l'usage peut être admis. Art. 1016 C.C.

Le bois acheté le 1er février 1901, est celui de la saison qui va suivre, livrable au quai du canal Lachine, Montréal, (*delivered on wharf, Lachine Canal, Montreal,*) et les appelants soutiennent qu'à raison de l'usage de la place cela veut dire que la livraison se ferait quand et où ils l'indiqueraient entre Québec et le canal Lachine. Je comprendrais la force de cette prétention si le contrat et la loi qui le régit étaient douteux. Il est vrai que la date précise de chaque livraison n'est pas stipulée; la nature de la transaction ne le permettait guère; mais le temps où elle pouvait être faite était suffisamment indiqué, puisque c'était la coupe de toute la saison qui était vendue et ne pouvait être livrée, d'après la loi, que dans un délai raisonnable après la production. Il fallait plusieurs vaisseaux pour transporter une si grande quantité de bois et il n'est pas raisonnable de supposer que le vendeur se serait mis entièrement à la merci de l'acheteur sur une matière aussi importante que la date des diverses livraisons. En l'absence d'une stipulation formelle à cet effet, nous ne pouvons le présumer.

Le juge de première instance (Doherty J.,) est d'avis que le contrat ne justifie pas la livraison partielle. Mais c'est la seule que le contrat avait en vue. Comment peut-on livrer en bloc un million et demi pieds de bois scié de jour en jour durant toute la saison, depuis mai jusqu'à novembre. Il suffit d'énoncer une telle proposition pour la rejeter. C'est ce que la conduite des parties démontre jusqu'à l'évidence. La première livraison fut faite le 14 mai et la dernière le 27

novembre 1901, et entre ces deux dates les intimés en firent pas moins de dix-huit qui furent toutes acceptées et reglées sans difficulté par billets après chaque livraison. Il est vrai que généralement les intimés suivirent les instructions que les appelants leur addressaient, étant même de leur avantage de le faire en faisant des livraisons le long de la route, par exemple, au quai Molson ou à Maisonneuve, dans le port de Montréal. Ces instructions spéciales étaient nécessaires pour dispenser les intimés de décharger au quai du canal Lachine, lieu de livraison convenu.

Il est arrivé, cependant, une fois ou deux, que ces instructions, n'étant pas arrivées à temps, ne furent pas suivies, ce qui fut cause que les appelants perdirent quelques ventes, une entre autres, à Longueuil. Il ne paraît pas qu'ils aient fait des protestations ou même des reproches aux intimés pour ne pas avoir attendu leurs instructions. Enfin, quant au temps de la livraison, les appelants ne prétendent pas que ces deux barges en question leur ont été expédiées dans uu délai inopportun et non raisonnable. La correspondance constate qu'ils retardaient cette livraison depuis un mois ;

You have been putting us off for about a month,

disent les intimés aux appelants dans une lettre du 23 août. Puis dans une lettre du 27 août, ils ajoutent ;

Now the season is getting pretty well advanced and we have a large amount of this lumber to ship yet, and the longer it goes now the harder it will be to secure boats and very likely we will have to pay higher freight.

En réponse, les appellants invoquent purement et simplement l'usage du commerce à Montréal, qui certainement n'existe pas à Québec où les chargements devaient se faire. Ils soutiennent,—et c'est là toute leur défense, telle qu'elle fut résumée devant nous—

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qu'ils n'étaient pas tenus de recevoir avant d'avoir envoyé leurs instructions.

Our pretention, (écrivaient-ils aux intimés, le 23 août,) is to receive the lumber bought from you when we need it during the present season of navigation.

La cour d'appel a rejeté cette prétention et nous sommes de son avis. C'est surtout à l'égard du lieu de la livraison que l'usage du commerce invoqué ne peut prévaloir. Juger le contraire serait anéantir la convention écrite des parties.

La cour d'appel s'est aussi appuyée sur le fait que les appelants avaient donné instructions aux intimés et aux messieurs Price d'expédier le bois provenant des moulins de ces derniers le plutôt possible. Ils disent que ces instructions furent données en juillet. M. Ovide Dufresne jure qu'elles le furent au commencement de la saison, mais qu'elles ne furent pas suivies, ce qui fut cause qu'il perdit une grosse vente, encore sans protêt et sans faire de réclamation. Si la version de M. Dufresne est la seule exacte, ne doit-il pas s'en prendre à lui-même, s'il n'a pas plus tard revoqué ces instructions et si les intimés ont naturellement présumé qu'elles avaient été données pour toute la saison. Il ne paraît pas s'en être expliqué autrement durant tout le cours de l'été. Il se retranche derrière la coutume, mais fut-elle établie, fut-elle même incorporée dans le contrat écrit et quand au temps et au lieu de la livraison, il leur était bien permis d'y renoncer.

Les appelants objectent que ce moyen n'a pas été plaidé. Il ne l'a certainement pas été d'une manière spécifique. Se trouve-t-il compris dans l'allégation générale de la déclaration qu'ils ont refusé la livraison *illegally and without right*? La cour d'appel a évidemment considéré qu'il ne s'agissait que d'un détail de preuve. Le point ne paraît pas avoir été

soulevé en première instance, du moins le juge Doherty n'en fait pas mention.

Vu qu'il résulte du témoignage de l'un des appelants et qu'il ne peut lui causer aucune surprise, nous pourrions peut-être ordonner un amendement à la contestation. Nous croyons, néanmoins, qu'il n'est pas nécessaire de recourir à ce procédé. Nous basons notre jugement sur le premier moyen invoqué par les intimés, que nous avons examiné plus haut, savoir l'usage du commerce s'il existe, et son effet sur le contrat écrit des pa

Nous sommes donc d'avis de renvoyer l'appel avec dépens.

DAVIES J.—I agree with the judgment of the Court of King's Bench for Quebec for the reasons given by Mr. Justice Ouimet.

The appellants interpret the contract as meaning that delivery was dependent upon the vendors (Fee) receiving special instructions from the appellants (Dufresne), as to its destination which might vary the contractual place of delivery. I do not so construe the contract.

The special place of delivery being agreed to, neither party could, of his own motion, change it.

The question was raised whether, under a proper construction of the contract, payment could be demanded until after the delivery of the entire season's cut which was agreed to be sold? But, apart from the fact that no such defence is suggested in the pleadings, I do not think the construction of the contract contended for by the appellants on this point is correct. The contract was as follows:

MONTREAL, February 1st, 1901.

MESSRS. Thos. E. Fee & Son, of Ste. Hyacinthe, sell, and O. Dufresne jr. & Frère, of Montreal, buy, all they will have of 6th

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quality spruce deals from different points on the St. Lawrence River, below Montreal, and also all they will have from same points of 1 in., 1¼ in., 1½ in. and 2 in. of same grade; quantities to be as follows:

1,000,000 ft., more or less of 3 in. deals;

500,000 ft., more or less of 1 in. to 2 in. deals.

The above represents the 1901 season's cut; price for the whole eight dollars and fifty cents ($8.50), per M. feet, board measure, delivered on wharf, Lachine Canal, Montreal. Canal toll 3¾c. per M. ft. payable by buyers. Terms 3 months note from date of delivery.

(Signed in duplicate by each party.)

The lumber bought was all that Fee & Son (respondents), would have of a certain quality of dimensions of spruce deals

from different points on the St. Lawrence River below Montreal, representing the 1901 season's cut.

I think the contract clearly contemplated several deliveries of this lumber, probably many, and that Dufresne was entitled to have, and Fee to make, such deliveries at the place stipulated within a reasonable time after Fee had become possessed of any substantial quantity of lumber at any of the points on the St. Lawrence.

The contract as to payment may, I admit, be open to some doubt. But if Dufresne had, as I think he had, a right to exact delivery of lumber from time to time as Fee became possessed of it, and if these deliveries of separate parcels might be months apart and from different places, the payment clause should be construed with reference to this state of facts, and the "date of delivery" from which the three months note was to be given in payment, construed as meaning date of each delivery. This was the construction adopted by the parties all through the season as the proper one. The same principle of construction must be applied to payment as to delivery. If it is unreasonable to hold that Fee would discharge his contract by one delivery at the end of the season,

so it is unreasonable to hold that, while Fee was compelled to make many deliveries of the lumber, he was only entitled to receive payment in the form of a note at three months after the final delivery of the season's cut.

The court of appeal found, as a matter of law, that the respondent Fee's construction of the contract was correct, but they also found, as a fact, that the lumber in dispute, and which Dufresne refused to accept or pay for, had been forwarded at the latter's express request, and that the quality was within the terms of the contract. I see nothing in the evidence to justify any interference with that finding.

Since writing the above, I have read the reasons of my brother Girouard, from which I do not differ.

The appeal should be dismissed with costs.

NESBITT and KILLAM JJ. concurred in the judgment dismissing the appeal with costs for the reasons stated by Girouard and Davies JJ.

Appeal dismissed with costs.

Solicitors for the appellants : *Bisaillon & Brossard.*

Solicitors for the respondents : *Buchan & Elliott.*

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*Oct. 17, 18, 19.

Nov. 21.

JOSEPH COOTE (DEFENDANT) .....APPELLANT;

AND

JAMES BORLAND (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Agreement for the sale of land—Falsa demonstratio—Position of vendor's signature—Specific performance.

On the conclusion of negotiations between between C. and B. as to the sale of two city lots on the corner of Hastings street and Westminster avenue, in Vancouver, B.C., C. signed a document as follows:—

"VANCOUVER, June 28th, 1902.—Received from James Borland the sum of ten dollars being a deposit on the purchase of Lots No. 9 & & 10 Block No. 10 District Lot 196, purchase price twenty thousand dollars ($20,000.00), the balance to be paid within (10 July) days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances.

(Sgd.) JOS. COOTE,
N. W. Cor. Hastings & Westr. Ave."

The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and were the only lots owned defendant; the trial judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:

Held, affirming the judgment appealed from (10 B. C. Rep. 493), Killam J. dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy which should be disregarded and the decree made for specific performance in respect of the lots actually bargained for between the parties.

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

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 493.

at the trial maintaining the plaintiff's action with costs.

The action was brought by the plaintiff to enforce specific performance by the defendant of an alleged agreement for the sale of lands as evidenced by a verbal agreement between them and reduced to writing in the form of the receipt recited in the head-note with a discrepancy, merely, as to the block of the subdivision in which the lots were situated. The defence was that it was intended to make a sale of lots 9 and 10, in block 10, which were on the north-east corner of Hastings street and Westminster avenue, while the plaintiff contended that the lots he purchased were on the north-west corner of those streets, viz., lots 9 and 10, block 9. The defendant also claimed that the words "N. W. Cor. Hastings & Westr. Ave." at the bottom of the receipt were written there after he had signed it.

On the facts, the Chief Justice, at the trial, held in favour of the contentions of the plaintiff on both points, and made a decree in his favour which was affirmed by the judgment of the full court, on appeal (1), Irving J. dissenting.

The same questions were raised on the present appeal and are more fully stated in the judgments now reported.

Joseph Martin K.C. for the appellant.

Davis K.C. for the respondent.

SEDGEWICK J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—The principle on which I reach the conclusion to dismiss this appeal is that the signature of the vendor authenticates the entire document and this under the findings of the trial judge, on evidence

(1) 10 B. C. Rep. 493.

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which I think under the circumstances admissible, confirmed by the Supreme Court in British Columbia, covers the words at the foot of and below the vendor's signature. The findings were that the appellant placed his signature to the document at a time when he saw the words below where he signed and that he signed seeing them there and intending to authenticate them as part of the memorandum or receipt. That being so and these words being written into the document must, I think, to have their natural and reasonable meaning, be read into the description of the property contracted to be sold and so that description would read "the north west corner Hastings and Westminster Avenues, being Lots 9 and 10, Block 10, District Lot 196," or "Lots 9 and 10, Block No. 10, District Lot 196, being the north-west corner Hastings and Westminster Avenues." Read into the description in any way the latter would then only apply to and describe one property, namely, that owned by the vendor, although the number of the Block (No 10) would be at variance with the rest of the description. The whole description then obviously would not accurately apply in all its parts to both corner lots. But with the exception of the block number it would so apply accurately in all its parts to the only lands defendant owned. And I think, that being so, the written part of the description of the lands must prevail and the number of the block, either fraudulently or by mistake inserted, be rejected as *falso demonstratio*. And this not only on the ground that where the written words of a document are at variance with the figures used therein the former must in the absence of other determining evidence prevail, but also in my opinion because the words and letters "N. W. Cor. Hastings and Westr. Ave." are the controlling words and must be held to describe the lands so definitely as to over-ride a mere conflicting number

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of a lot contained in the description of which the said controlling words form part.

I adopt the language used by Lord Cairns in the case of *Charter* v. *Charter* (1), at p. 377, as to the class of cases where extrinsic evidence is receivable to enable the court to understand the language used by the parties. His Lordship was speaking of testamentary dispositions it is true. But I apprehend that the same principle there enunciated by him is equally applicable to contracts between parties. When so applied the language of the learned Chancellor would read: The court has a right to ascertain all the facts which were known to both parties at the time they entered into the contract and thus to place itself in their position in order to ascertain the bearing and application of the language they used and in order to ascertain whether there exists any land to which the whole description given in the contract can be reasonably and with sufficient certainty applied.

Applying then this principle and reading into the description the words at the foot of the signature we find only one piece of land to which the whole description in the contract can reasonably and with sufficient certainty be applicable, and we reject either as surplusage or as *falso demonstratio* the number of the block either fraudulently or erroneously inserted leaving the description with this number rejected perfectly good and sufficient and applicable in all its parts to the lands in question.

GIROUARD J. concurred in the dismissal of the appeal for the reasons stated by Nesbitt J.

NESBITT J.—The trial judge found that the defendant signed the following receipt:

(1) L. R. 7 H. L. 364.

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Nesbitt J.

"VANCOUVER, June 28th, 1902.

"Received from James Borland the sum of ten dollars being a deposit on the purchase of lots 9 & 10 Block No. 10 District lot 196, purchase price twenty thousand dollars ($20,000.00), the balance to be paid within (10 July) days when I agree to give the said James Borland a deed in fee simple free from all incumbrances.

JOSEPH COOTE,
N. W. Cor. Hastings & Westr. Ave."

and that the words following the signature were on the receipt at the time of signing. He admitted parol evidence to show that the parties were dealing about the lots on the north-west corner of the streets mentioned, the defendant being the owner of the same, and that the defendant had furnished the plaintiff with a list showing the names of the tenants and the rents paid, and on his findings there is no doubt the parties were negotiating about the sale of the lots on the north-west corner and no other. Curiously enough the lots on the north-west corner are 9 and 10, Block 9, District lot 196, and so if you substitute 9 for 10 in the block number, the two descriptions are the same property. It also happens that the lots on the north-east corner are actually described as lots 9 and 10, Block 10, District lot 196, and so on the argument I thought it was a case of two specific properties described in the receipt, that is the north-east corner by proper lot and block description and the north-west corner as such, and, therefore, contradictory descriptions or rather two specific properties receipted for in which case no parol evidence would be admissible to shew as an independent fact what the intention of the parties was. See remarks of Coleridge J. in *Lobb* v. *Stanley* (1), at page 582,

(1) 5 Q. B. 574.

In my view the trial judge's findings make it plain we must treat the whole receipt as authenticated by the signature; see *Johnson* v. *Dodgson* (1); *Evans* v. *Hoare* (2); *Caton* v. *Caton* (3); and in that case the receipt is not to be held void if by any reasonable construction it can be made available, and it therefore would seem to be the case that you then have a description applicable to the property owned by the vendor with "10," by error, used for "9" in the block number. If you try to make the words available it must be as a part of a description of property and so reading them they do describe the property in the north-west corner saving only an error in the block number; in fact, make a perfect and true description of the only property owned by the vendor.

I have read all the numerous cases cited and many others, but in none of them do you find the singular state of facts which exist here, viz., both properties being aptly described so as to raise an apparent case of two specific properties being bargained for and yet the last description being read into the document properly filling in and completing the description of the first when read along with it, saving an error in the block number only. I think the doctrine to apply is that of *falsa demonstratio non nocet.*

I have had the advantage of reading the judgment of my brother Killam. The evidence was clearly admissible to show what the parties were dealing about, what was covered by N. W. corner, Westminster and Hastings Avenues, that such property was the only property owned by the vendor and therefore the only property he could sell or can be supposed to have intended to sell, and, therefore, it becomes a case of what is to be taken as the leading feature in

(1) 2 M. & W. 653 at p 659. (2) [1892] 1 Q. B. 593.
(3) L. R. 2 H. L. 127.

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the document as a description of the property bargained about. It is as if I sold lot 8, block 6, etc., and below my signature put "Montagu House in which I live." Surely, on its being shown that the particular description was inaccurate, the inaccuracy would be treated as surplusage and a decree made for what I owned and was bargaining to sell. It is a case simply of identifying the property being bargained about.

I would refer to Washburn on Real Property (6 ed.), 2316-2321; Hunt on Boundaries and Fences (5 ed.), 220-1; *Loomis* v. *Jackson* (1); *Glass* v. *Hulbert* (2); *Plant* v. *Bourne* (3); *Shore* v. *Wilson* (4); *Cowen* v. *Truefitt* (5); *Hutchins* v. *Scott* (6).

The judgment should be affirmed with costs.

KILLAM J. (dissenting).

Three questions arise in this case:—

1. Were the words below the defendant's signature part of the receipt signed by him?

2. Are those words to be incorporated by construction into the description of the property referred to in the receipt?

3. What was the land to which, upon a proper construction, the receipt referred?

The first and third of these are questions of fact; the second is a question of law. It is necessary to thus distinguish in order to determine properly the evidence which should be considered upon these different questions.

As a matter of abstract law it is quite clear that a signature, in order to be a signature within the Statute of Frauds, may be written upon any part of an agreement or memorandum. But when we come to consider

(1) 19 Johns. 449.
(2) 102 Mass. 24.
(3) [1897] 2 Ch. 281.
(4) 9 Cl. & F. 355.
(5) [1899] 2 Ch. 309.
(6) 2 M. & W. 809.

the question of fact, as to whether all the words upon a particular piece of paper bearing a person's signature are to be taken as a part of the agreement or memorandum signed by him, the position of the signature may be of great importance.

In the present case I accept the findings upon this point of the courts below and treat the words and letters below the signature as a portion of the receipt to which the signature relates.

The court in British Columbia has read the receipt as if it described the property referred to therein as being situated at the north-west corner of Hastings and Westminster Avenues. It determined, as a matter of fact, that the land therein described was a parcel so situated and was composed of lots numbered 9 and 10 in a block numbered 9, in a certain district lot in the City of Vancouver, according to a known survey or plan.

The distinction between the questions of the construction of a document and the identification of what is therein referred to was clearly made in *Lyle* v. *Richards* (1).

Lord Cranworth L.C. there said (page 229).

> Parcel or no parcel is a question for the jury, and it was properly left to them. But the judge was bound to explain to the jurymen for their guidance, what was the true construction of any documents necessary for the decision of the question "parcel or no parcel." * *
>
> It was the duty of the judge to decide what was the true meaning of the language there used for describing the boundary line. But in order to adapt the description, contained in a lease or other instrument, of a boundary line (whether expressed by words or by a diagram) to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence. The description in the deed cannot otherwise be identified with the thing intended to be described.

And Lord Westbury (page 239) :—

(1). L. R. 1 H. L. 222.

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In my opinion the evidence was clearly admissible. Upon a question of parcel parol evidence is always received. The error here is latent, not being discovered until it is shewn by extrinsic evidence what was the true site of the house incorrectly laid down on the map, and on a question of the extent or correctness of the parcels in a deed (which are a description of external objects) parol evidence, for the purpose of ascertaining the thing so described or referred to, is admissible.

The principle upon which extrinsic evidence is receivable for such purpose was shown in *Charter* v. *Charter* (1), and by the language of Tindal C. J in *Shore* v. *Wilson* (2) at pp. 565-6; and of Parke B., in the same case at pp. 556-8.

Under the interpretation which it placed upon the receipt, I should have little difficulty in accepting the court's conclusion of fact. In that view the case was one for the application of the maxim *falsa demontratio non nocet*, and the conclusion was supported by such cases as *Blague* v. *Gold* (3); *Shore* v. *Wilson* (2); *Miller* v. *Travers* (4); *Hutchins* v. *Scott* (5); and *Doe d. Dunning* v. *Cranstoun* (6).

It is, however, upon the question of construction that, to my mind, the real difficulty of the case arises. Upon that question the oral evidence of the negotiations should not be considered. It must be decided upon the language of the document itself and evidence of the surrounding circumstances.

In both *Shardlow* v. *Cotterell* (7) and *Plant* v. *Bourne* (8), to which reference has been made, the oral evidence of the property to which the negotiations had related was held to be receivable for the purpose of identification but not for the purpose of construction.

(1) L. R. 7 H. L. 364.
(2) 9 Cl. & F. 355.
(3) 2 Cro. Car. 473.
(4) 8 Bing. N. C. 244.
(5) 2 M. & W. 809.
(6) 7 M. & W. 1.
(7) 20 Ch. D. 90.
(8) [1897] 2 Ch. 281.

Among the surrounding circumstances may be taken, I think, the facts that, according to the only known survey or plan, lots 9 and 10, in block 10, were at the north-east corner of Hastings and Westminster Avenues; that the parcel at the north-west corner was in block 9; that, after oral negotiations between the plaintiff and the defendant, the former went away and reported to one Dawson, on whose behalf the plaintiff was acting; that Dawson drew up the receipt, putting at the bottom the letters and words "N. W. Cor. Hastings and Westr. Ave." and leaving blanks for the numbers of the lots and block; and that it was taken in this condition to the defendant who filled in the numbers as they now appear and placed on it his signature where it now is.

The letters and words below the signature are not connected in sense with the language above. Upon the face of the paper there is nothing to indicate that they have any reference to the description of the property from which they are separated by mention of the price, the time of payment and the agreement to convey. In order to make them applicable to any part of the receipt some connecting words must be understood or supplied.

And when we find that the defendant inserted the figures in the body of the receipt for the evident purpose of describing the property, paying so little attention to the bottom line as to write his signature above it, and that the figures do not describe the property at the north-west corner of the avenues named, it does not appear to me possible to read the bottom line as a portion of the description, to the other portion of which, expressly inserted by the signer, it would be directly contradictory. To thus make a description which involves the rejection as surplusage or *falsa demonstratio* of the very numbers inserted by the signer

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seems more unwarrantable than to treat the portion below the signature as not materially affecting or qualifying any part of the receipt.

The circumstances of ownership and the handing to the plaintiff of certain papers bearing memoranda apparently relating to the north-west corner property do not seem to me to supply the defect.

I do not think that the court can direct an amendment or alteration of the receipt so as to make it evidence of an agreement to sell the lands in block 9. Upon my interpretation the defendant, whether fraudulently or carelessly or otherwise, never signed any such agreement or any memorandum or note thereof, and the court cannot sign one for him or make him do so. As this point was not insisted upon by the respondent's counsel I do not discuss it further.

In my opinion the appeal should be allowed and the action dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Martin & Weart.*

Solicitors for the respondent: *Bowser & Wallbridge.*

ROBERT BAILEY (PLAINTIFF).....APPELLANT; 1904

AND *Oct. 26, 27. *Nov. 21.

JOHN ANDREW CATES (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Negligence—Careless mooring of vessels—Vis major.

The plaintiff's tug, "Vigilant," was moored at a wharf in Vancouver Harbour with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night with no one in charge and no fenders out on the side next the "Vigilant." During the night a heavy gale came up and the "Lois" pounded the "Vigilant" causing her considerable damage.

Held, affirming the judgment appealed from, that, as the defendant was not a trespasser, he was not guilty of negligence, under the circumstances, in leaving his tug as he did and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence.

APPEAL from the judgment of the Supreme Court of British Columbia, reversing the judgment of the trial court and dismissing the plaintiff's action with costs.

The case is sufficiently stated in the above head-note.

R. G. Code for the appellant.

Davis K.C. for the respondent.

SEDGEWICK and GIROUARD JJ. concurred in the judgment dismissing the appeal with costs.

DAVIES J. concurred with Killam J.

NESBITT J.—I do not feel strongly enough to reverse in this case but I confess it is very near the line. I

* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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cannot but feel that the trial judge was affected in his view that negligence had been made out by reading the trial judgment in *McDowall* v. *The Great Western Railway Co.* (1), reversed in 1903 (2), and this case, like that, seems to me to fail for lack of proof that the negligence complained of was itself the affecting cause of the accident, and on the further ground that, granted negligence existed, the result was not what would reasonably be apprehended. See *Sharp* v. *Powell* (3); *Wood* v. *The Canadian Pacific Railway Co.* (4).

I should have felt great doubt in holding the storm described came within the doctrine of *vis major*. See *Garfield* v. *The City of Toronto* (5), where Hagarty C.J. summarizes all the authorities to date as determining the *vis major* rule to be satisfied when what has occurred "is extraordinary and that it could not reasonably be expected."

The evidence here would not have satisfied me as coming up to that standard. I do not feel, as I have said, confident enough to reverse and restore the trial judge and, so, when in doubt, affirm.

The appeal should be dismissed with costs.

KILLAM J.—In my opinion this appeal should be dismissed.

As I look upon the case it is one of fact only. The defendant committed no trespass or other actionable wrong in mooring his tug beside the plaintiff's. Whether any or how many or what class of men should have been kept on board, whether there should have been a watch, whether steam should have been kept up or other precautions taken, depended wholly

(1) [1902] 1 K. B. 618.
(2) [1903] 2 K. B. 331.
(3) L. R. 7 C. P. 253.
(4) 30 Can. S. C. R. 110.
(5) 22 Ont. App. R. 128.

upon the circumstances. The cases which have been cited to show that the absence of certain precautions was regarded as constituting negligence depended upon the particular facts and the respective situations of the vessels.

Viewing the evidence as a whole, I cannot find that the defendant was negligent, under the circumstances, in leaving the tug as he did. The storm that came up was one of exceptional violence and it is by no means certain that, without the observance of extreme and very unusual precautions, the injury could have been avoided.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor, Bradburn & Innes.*

Solicitors for the respondent: *Bowser & Wallbridge.*

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*Nov. 23.
Dec. 1.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

ALBERTINA BIRKETT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Proximate cause—Imprudence of person injured.

A railway train was approaching a station in London and the conductor jumped off before it reached it intending to cross a track between his train and the station contrary to the rule prohibiting employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross which struck and killed him. The light engine was moving slowly and showed a red light at the end nearest the conductor which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial and a new trial was granted by the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, Davies and Killam JJ. dissenting, that as the light engine had been allowed to pass a semaphore beyond the station on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with said engine, the plaintiff was not entitled to recover.

Held, per Davies and Killam JJ. dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident and plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light.

APPEAL from a judgment of the Court of Appeal for Ontario setting aside a non-suit and ordering a new trial.

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*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

The facts of the case are sufficiently stated in the above head-note.

Walter Cassels K.C. for the appellants. The deceased did not take ordinary precautions to avoid injury and was the author of his own wrong. *Jean* v. *Boston and Maine Railroad Co.* (1)

Moreover his disobedience of the rules of the company would bar recovery. *Sloan* v. *Georgia Pacific Railroad Co.* (2).

J. S. Robertson for the respondent, referred to *Balfour* v. *Toronto Railway Co.* (3); *Randall* v. *Ahearn & Soper* (4).

SEDGEWICK and GIROUARD JJ. concurred in the reasons given by Mr. Justice Nesbitt for allowing the appeal.

DAVIES J (dissenting)—After reading the evidence on which the trial judge non-suited the plaintiff together with the company's rules which were invoked by both parties, I am of opinion that this appeal should be dismissed for the reasons, given by Mr. Justice Garrow speaking for the Court of Appeal.

I purposely refrain from a critical analysis of the evidence because it might prejudice the parties in case of a new trial.

Assuming that the deceased conductor had, contrary to the rules, stepped on to the platform from his train before it had actually stopped, it is quite clear that such action on his part was not the *causa causans* of his death. He reached the space between his train and the reversing engine and tender safely, and it was what took place subsequently and was not necessarily

(1) 26 Am. & Eng. Rd. Cas. (N.S.) 234.
(2) 44 Am. & Eng. Rd. Cas. 573.
(3) 5 Ont. L. R. 735; 32 Can. S. C. B. 239.
(4) 34 Can. S. C. R. 698.

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the consequence of the too speedy stepping from the train which caused the death. In other words there was no necessary relation or casual connection between the breach of the rule in stepping off the train, if breach there was, and the accident which brought about deceased's death. Mr. Robertson's argument on this phase of the case was, to my mind, conclusive.

It was conceded without qualification by Mr. Cassells that the reversing engine and tender, which was running along an inside track between the deceased and the station house, displayed a red light instead of a white one, as required by the rules. This, to an experienced railway man, such as deceased was, would, under ordinary circumstances, indicate that the engine and tender were either stationary or were going away from him. It is, in my opinion, sufficient to entitle the plaintiff to have the question submitted to a jury whether or not, under the circumstances at the time, the deceased was misled and thrown off his guard and so excused from taking those precautions which under different conditions he would have been obliged to take to ascertain definitely whether the reversing engine and tender were running towards him or not. It was open to the jury to find, under the special circumstances of this case, that the crossing of the track by the deceased at the time he did might lose its character of negligence by reason of its being induced by the false signal, the red light, which might easily convey to him the impression in effect that the train was either stationary or receding from him. See *Coyle* v. *Great Northern Ry. Co.* (1), at page 425.

NESBITT J.—The negligence which must be charged against the defendants in this action must consist in the running of an engine reversely with a red light

(1) 20 L. R. IR. 409.

instead of a white one at the particular spot and at the particular moment that the accident occurred.

The man in charge of the semaphore proved that he allowed the light engine to proceed past the semaphore as, in his judgment, it would be in a position of safety before the incoming passenger train would stop and allow its passengers to alight. It is not disputed that his judgment in this matter was correct, and that, in fact, had the rules of the plaintiff company been observed there would have been no negligence so far as this plaintiff is concerned, the negligence charged, as I have said, being the running of the engine with a red light at the particular spot and at the particular moment, causing the injury to the plaintiff. This seems to me to be the point entirely overlooked by the Court of Appeal. Had not the unfortunate deceased disobeyed the express rules of the company and stepped off the moving train there would have been no negligence in the engine being where it was. Both courts below have found that the train was in motion and did not come to a stop until the light engine had moved to a point beyond where the train stopped, and, therefore, the act of the conductor in stepping off the moving train produced the negligent situation charged. The semaphore man in allowing the light engine to proceed as he did had a right to assume the conductor would not get off the moving train, and, as I have pointed out, there was no negligence in any servant of the company in the engine being at the point it was at the moment of the accident. It was argued that when the conductor got off the train he was in a place of safety and was misled by the red light being displayed instead of the white one. This seems to me not to be the point in the case. The negligence, as I have pointed out, causing the accident, was the act of the conductor in disobedience

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of the rules stepping off a moving train, and bringing himself, therefore, into a situation where he had no right to be and the company had no right to expect him to be. It was not negligence, so far as he was concerned under the particular circumstances, to have the engine at the point that it was.

In my view the appeal should be allowed and the judgment of the trial judge dismissing the action restored.

KILLAM J. (dissenting.)—I agree with the view taken by the Court of Appeal.

The act of the deceased in alighting from the train while in motion cannot, in my opinion, be taken as the proximate cause of the accident. If the deceased had remained where he alighted until the train stopped he would have been in the same position as if he had remained upon it; it was subsequent acts that brought him into danger. The most that can be said is that possibly he alighted so hurriedly and in such a manner as momentarily to disturb his mental equilibrium or render his faculties less acute than usual; and it may be that his attempt to cross the track was made too soon or that it was made without due care.

These questions, however, appear to me as proper for the consideration of a jury in connection with the fact of the use of the red light.

Appeal allowed with costs.

Solicitor for the appellant: *John Bell.*

Solicitors for the respondent: *Idington & Robertson.*

JOSHUA CALLOWAY (PLAINTIFF).....APPELLANT;

AND

STOBART SONS AND COMPANY (DEFENDANTS).....RESPONDENTS.

1904

*Nov. 3, 4.

*Dec. 1.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Principal and agent—Broker—Sale of land—Commission for procuring purchaser—Company law—Commercial corporation—Contract—Powers of general manager.

A land broker volunteered to make a sale of real estate owned by a trading corporation and obtained, from the general manager, a statement of the price, and other particulars with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned and who, after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property having found a qualified purchaser at the price quoted.

Held, affirming the judgment appealed from (14 Man. Rep. 650) Taschereau C. J. and Girouard J. *dubitante*, that the broker could not recover a commission as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission.

Per Taschereau C.J. and Girouard J. That the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose.

APPEAL from the judgment of the Court of King's Bench for Manitoba, (1), affirming the trial court judgment by which the plaintiff's action was dismissed with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

(1) 14 Man. Rep. 650.

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CALLOWAY v. STOBART SONS AND CO.

The plaintiff is a real estate broker in Winnipeg, Manitoba, and the defendants are a commercial corporation carrying on the business of wholesale dry goods merchants there. The defendants had built a new warehouse for the purposes of their business and it became generally known that their old premises were to be sold as soon as the new building was ready for occupation. Several real estate brokers were looking out for purchasers and the plaintiff applied to the general manager for the defendants and obtained from him a memorandum of the price asked for the property, the terms for payment, and probable date when the old premises would be vacated by the owners. Up to this time the corporation had not given the manager special authorization to offer the property for sale. The plaintiff found a person willing to purchase at the price stated, $70,000, and with the necessary means to do so and brought him to the manager to settle about the purchase of the property. They met in the manager's office and had some conversation about the rentals and so forth, when the purchaser deposited $5,000 on account of the price, proposed some modification as to the date of delivery of the premises and they separated without closing the transaction. Shortly afterwards the defendants sold the property to another person for $71,000 and the deposit of $5,000 was returned. The plaintiff then brought an action against the corporation and the general manager to recover a broker's commission on the price of the sale. The action was tried before Killam C.J. without a jury, who found that the general manager gave the plaintiff particulars of the terms on which the property would be sold, knowing and expecting that the plaintiff asked for them with a view to finding a purchaser for a commission to be paid; that he assented that the plaintiff should try to do this; that he knew that the

plaintiff was so trying; that the plaintiff brought his purchaser and the manager together. He refused to find that the manager agreed to sell to this person on any terms, or that he settled with him on the terms proposed as those on which he or his company was willing to sell. The trial judge would not imply from the circumstances a request to the plaintiff to give his services for reward, or an agreement to pay him merely for finding and introducing a person who was ready and willing to purchase on the terms mentioned, or on those or other terms to be settled. The action was, accordingly, dismissed with costs. On an appeal by the plaintiff, the full court, Perdue J. dissenting, affirmed the decision of the trial judge by the judgment (1), from which the present appeal is asserted. Upon the appeal in the court below the plaintiff abandoned his claim against the general manager and, consequently he is not now made respondent.

Ewart K.C. and *Pitblado* for the appellant. Under the contract, as found by the trial judge, all that the plaintiff had to do in order to earn his commission was to find a purchaser able and willing to buy the property at the price quoted and he did so. The purchaser, thus found, proceeded so far as to make a verbal contract as to the special terms of payment and delivery of the premises. There was no revocation of the plaintiff's authority until after he had earned his commission. In fact, as there were several brokers employed, the completion of the work by the plaintiff was a revocation of the authority of all others. Addison on Contracts (10 ed.) 888.

The commission was earned; see Hart on Auctioneers (2 ed.) 321, 337, 371; *Simpson* v. *Lamb* (2); *Prickett* v. *Badger* (3); Bowstead (2 ed.) 189-190; *Roberts* v.

(1) 14 Man. Rep. 650.
(2) 17 C. B. 603.
(3) 1 C. B. N. S. 296.

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CALLOWAY v. STOBART SONS AND CO.

Barnard (1); *Green* v. *Lucas* (2); *Fisher* v. *Drewett* (3); *Wilkinson* v. *Alston* (4); 4 Am. & Eng. Encyl. pages 967, 975; *Bird* v. *Phillips* (5); *Kock* v. *Emmerling* (6); *Doty* v. *Miller* (7).

The premises were a part of the plant or machinery of the business. The manager had absolute power in regard to the affairs of the company and entire control of them. See sec. 64, "Manitoba Joint Stock Companies Act." His acts are binding on the company without the company's seal. The other directors were, in fact, consulted individually and gave their approval. The sale actually made was effected by the manager, without any resolution by the directors. The manager as agent of the company, had power by the by-laws, under the circumstances of the case, to enter into a contract for the sale of the land in question, without a formal resolution of the directors. However, the contract sued upon is not one for the sale of the property, but to find a purchaser for property belonging to the company, which it intended and desired to sell, and such a contract would come directly within the scope of the authority from the company to the manager giving him "the entire control and management of the affairs of the company," and would be binding on the company. *Howarth* v. *Singer Mfg. Co.* (8); *South of Ireland Colliery Co.* v. *Waddle* (9); *Wilson* v. *West Hartlepool Harbour Co.* (10); *Biggerstaff* v. *Rowatt's Wharf, Limited* (11).

Howell K.C. for the respondents. There was no promise by the respondents or by their manager to pay any commission and, as the proposed purchaser was

(1) 1 Cab. & Ell. 336.
(2) 33 L. T. 584.
(3) 39 L. T. 253.
(4) 48 L. J. Q. B. 733.
(5) 87 N. W. Rep. 414.
(6) 22 How. 69.
(7) 43 Barb. (N. Y.) 529.
(8) 8 Ont. App. R. 264.
(9) L. R. 3. C. P. 463; L. R. 4 C. P. 617.
(10) 34 Beav. 187.
(11) [1896] 2 Chy. 93.

not accepted, none can be inferred. In any event, the company did not authorise a sale through the plaintiff's agency and the manager of the company, a trader in dry goods, could not presume to deal in such a manner with its real estate as part of the ordinary administration of its affairs. Masten's Company Law pp. 237-238; *Balfour* v. *Ernest* (1). A broker to be entitled to a commission must be actually employed by the principal as broker. Bowstead on Agency, 176-9; 4 Am. & Eng. Encly. 970, and note; *Cook* v. *Welch* (2); *Smith* v. *McGovern* (3). He must establish his employment either by previous authority or by acceptance of his acts. *Keys* v. *Johnson* (4).

The plaintiff did not find a purchaser ready and willing to buy on the terms stated by the manager. See *Grogan* v. *Smith* (5), per Esher L. J. at p. 133; and *Hamlin* v. *Schulte* (6). The plaintiff was a mere volunteer to whom the company had assumed no responsibility. They were not obliged to accept any purchaser he might introduce, although he might be willing to subscribe to all the terms. If they had accepted the purchaser, and thus taken advantage of plaintiff's labour, then and only then would they become liable to remunerate him.

We also refer to *Soper* v. *Littlejohn* (7); *In re Marseilles Extension Railway Co.* (8); *D'Arcy* v. *Tamar, Kit Hill and Callington Railway Co.* (9); *Re Haycraft Gold Reduction and Mining Co.* (10); *Mooty* v. *The London, Brighton and South Coast Railway Co.* (11); per Cockburn C. J. at page 292; *Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.* (12); *Curran* v. *The*

(1) 5 C. B. N. S. 601 at p. 624.
(2) 9 Allen, 350.
(3) 65 N. Y. 574.
(4) 68 Pa. St. 42.
(5) 7 Times L. R. 132.
(6) 18 N. W. Rep. 415.
(7) 31 Can. S. C. R. 572.
(8) 7 Ch. App. 161.
(9) L. R. 2 Ex. 158.
(10) [1900] 2 Ch. 230.
(11) 1 B. & S. 290.
(12) 31 O. R. 40.

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The Chief Justice.

Rural Municipality of North Norfolk (1); *Keighley Maxstead & Co.* v. *Durant* (2); *Toulmin* v. *Millar* (3).

THE CHIEF JUSTICE.—I am not quite convinced that the view of the case taken by Mr. Justice Perdue in the court below on the evidence of the agreement between the parties and the legal results therefrom is not the correct one. However, in my view of the case, that is immaterial for the determination of the appeal. I am of opinion that it must be dismissed upon the ground that Stobart had no authority to bind the company by an agreement to pay Calloway a commission of over $1700 for introducing a purchaser whom the company might not accept and whose services might therefore be fruitless to them. Calloway knew very well that he was dealing with an officer of limited authority. And he must be assumed to have known that selling the company's real property is not within the usual powers of its president or manager.

I would dismiss the appeal with costs.

SEDGEWICK J.—I agree with my brother Nesbitt.

GIROUARD J.—I agree with the Chief Justice.

DAVIES J.—I take the same view of the facts proved by the evidence in this case as that taken by the trial judge, Chief Justice Killam. There was no actual contract of hiring but it is argued one must be implied. I cannot on the findings of the learned judge do so. The plaintiff was at the utmost a mere volunteer. He applied to defendant for the terms on which his property was for sale and defendant gave them to him. It is said defendant knew plaintiff obtained them with

(1) 8 Man. Rep. 256. (2) [1901] A. C. 240.
(3) 3 Times L. R. 836.

the object and hope that he would find a satisfactory purchaser. The facts are so found. But these facts did not of themselves constitute plaintiff the agent of the defendants to sell the property nor from them can there be implied a contract to pay him for his services as a land agent.

I agree that if the owners had, under the circumstances, accepted a purchaser produced to them by the plaintiff and thus profited by the plaintiff's volunteered services, the case would be different and the plaintiff might recover. But that is not the case here. The owners declined to enter into a contract with the purchaser introduced by the plaintiff. They did not therefore profit by any work or services performed by the plaintiff. Under the facts as found, I cannot infer a contract to pay the plaintiff a commission and concur in the dismissal of the appeal.

NESBITT J.—Had the finding of the trial judge relied upon by the appellant stood alone I should have differed from him as to the legal conclusion. The finding was as follows:

> Stobart gave the plaintiff particulars of the terms on which the property would be sold, knowing and expecting that the plaintiff asked these with a view to trying to find a purchaser for a commission to be paid. I infer that he assented that the plaintiff should try to do this. I find that he knew that the plaintiff was so trying.

I would infer from this an implied contract of agency entitling the plaintiff to be paid on production of a purchaser on the terms demanded by the defendant. See Bowstead on Agency, (2 ed.) pp. 15 and 177. I adopt the statement of law to be found in 4 Am. & Eng. Encyl. of Law, (2 ed) p. 967:

> Where several brokers are employed independently about the same transaction, the accomplishment of the object of the agency by one operates as a revocation of the authority of the others, and third persons subsequently dealing with them do so at the risk of such

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revocation; and no action for damages will lie in such case against the principal unless the nature of his contract with the broker is such as to estop him from setting up the revocation.

This avoids the difficulties suggested by Dubuc C. J. in the court below.

In this case, however, the Chief Justice (Killam) further found

> the plaintiff brought Mr. Hespeler and Mr. Stobart together. I cannot find that Mr. Stobart agreed to sell to Mr. Hespeler on any terms or that he settled with Hespeler on the terms of the latter's letter as those on which he or his company was willing to sell.

And while Mr. Hespeler swore he was ready to purchase on the Stobart terms his letters introduced terms which no doubt he thought were a substantial offer to purchase in accordance with the memo. handed by Stobart to the plaintiff, but which could not be treated as an unqualified acceptance of them and, therefore, a purchaser was not found in the precise terms of the memo. relied upon as taken with the finding I have quoted as entitling the plaintiff to his commission. See *Fuller* v. *Eames* (1) where the cases referred to by Mr. Ewart are collected.

It is therefore unnecessary to discuss the other questions raised as to the authority of Stobart or how far the company could afterwards ratify.

I would dismiss the appeal with costs in all courts.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, Pitblado & Co.*

Solicitors for the respondents: *Howell, Mathers & Howell.*

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(1) 8 Times L. R. 278.

THE SANDON WATER WORKS AND LIGHT COMPANY (DEFENDANTS)..... APPELLANTS;

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*Oct. 19, 20.
*Nov. 21.

AND

THE BYRON N. WHITE COMPANY, (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Pleading—B. C. Rule 168—*New points raised on appeal—Condition precedent—Construction of statute*—59 *V. c.* 62 *ss.* 9, 25, (*B.C.*) —*Mineral claim—Expropriation—Watercourses—Trespass—Damages —Waiver—Injunction.*

The B. C. Sup. Ct. Rule 168, provides that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be), and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings." In an action for trespass and a mandatory injunction, the defendants pleaded the right of entry under a private Act, and the consent or acquiescence of the plaintiffs. The plaintiffs replied setting up the failure of defendants to comply with certain conditions precedent to the exercise of the privileges claimed but did not set up another condition precedent upon which the judgment appealed from proceeded though it was not referred to at the trial.

Held, Killam J. contra, that the rule refers rather to cases founded on contract than to those where statutory authority is relied upon and that the plaintiffs need not have replied as they did, but having done so without setting up the condition specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs in appeal.

Per Killam J.—It was improper for the court appealed from to allow the absence of proof to be set up for the first time on the appeal.

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* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken and compensation made. *Goodson* v. *Richardson* (9 Ch. App. 221), and *Cowper* v *Laidler* ([1903] 2 Ch. 337) applied. But where there has been acquiescence equivalent to a fraud upon the defendant the injunction ought not to be granted, even where the legal right of the plaintiff has been proved. *Gerrard* v. *O'Reilly* (3 Dr. & War. 414); *Wilmot* v. *Barber* (15 Ch. D. 96): *Johnson* v. *Wyatt* (2 DeG. J. & S 17); and *Smith* v. *Smith* (L. R. 20 Eq. 500), referred to.

By the defendants' charter [59 Vict. ch. 62, ss. 9, 25, (B. C.)], it was provided that the powers to enter, survey, ascertain, set out and take, hold, appropriate and acquire lands should be subject to the making of compensation and that the powers, other than the powers "to enter, survey, set out and ascertain," should not be exercised or proceeded with until approval of the plans and sites by the Lieutenant Governor in Council. The defendants entered upon lands of the plaintiffs, made surveys and constructed works thereon without making compensation or obtaining such approval. Some time after entry the defendants obtained the necessary order in council approving of the plans and sites of the land to be expropriated.

Held, that making of compensation was not a condition precedent to making the survey and taking possession of the land, and as the said order in council was not dealt with at the trial the rights of the parties could not properly be determined on the material presented; the injunction, should, therefore, be refused and the parties left to take proceedings as they should respectively see fit.

Per SEDGEWICK and KILLAM JJ.—That as approval of the plans had not been obtained till some time after the defendants had taken possession and appropriated the land, there was a trespass for which the plaintiffs were entitled to recover, but after the approval had been obtained the defendants remained rightfully in possession and could not be compelled by a mandatory injunction to replace the land in its former position.

Judgment appealed from (10 B. C. Rep. 361) varied.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), reversing the decision of Irving J. at the trial, and maintaining the action of the plaintiffs with costs of the trial court.

(1) 10 B. C. Rep. 361.

The plaintiffs own a mill-site near Sandon, B.C., called lot 590 and that part of the Wyoming Mineral Claim, lot 754, lying to the east of Sandon Creek, and claim that the defendants wrongfully went upon the same in 1897 and built a tank and pipe line, and that the plaintiffs require the space thus taken for the deposit of tailings, etc.; they limited their claim for relief, in the statement of claim, to that for a mandatory injunction compelling the defendants to restore the land to its former condition, and to general damages for trespass.

The defendants claim:

1st. That they, acting under the authority of a private Act of Parliament to erect and operate a water and light plant for the citizens of Sandon, went there under the powers given by their private Act (being chapter 62 of the Statute of British Columbia, 1896), and that they are properly in possession.

2nd. That they went upon such lands with the full knowledge and consent or, in the alternative, the acquiescence of the respondents.

3rd. That it was necessary for the appellants to go upon said lands in order to make their water and light system effective.

4th. That the "Wyoming" being a mineral claim, the respondents have no surface rights on the same, hence cannot object to the appellants' possession.

5th. That the respondents by their delay, or their acquiescence above named, have waived their right to object to the appellants' conduct; or in the alternative the limitation clauses of the appellants' private Act, chap. 62 of 1896, preclude the present action.

The respondents in reply claim that the appellants did not comply with the following conditions precedent in their private Act contained to enable them

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to take advantage of their private Act, reading as follows:

"In further answer to paragraphs four and five of the amended statement of defence the plaintiffs say that prior to the trespass complained of the defendants did not comply with the following conditions precedent under the said 'Sandon Water Works and Light Company Act, 1896,' to entitle them to enter upon the lands in question:

"(*a*) They did not file and have approved by the Lieutenant Governor in Council the plans and sites of their works under section 9.

"(*b*) They did not serve upon the plaintiffs any notices to treat or any other notice under the said Act, nor did they obtain the consent of the Chief Commissioner of Lands and Works under section 25.

"And the plaintiffs say that without compliance with the said conditions precedent the defendants obtained no right or privilege under the provisions of their said Act as against them."

On the appeal another and new condition precedent was urged as to which no amendment was asked or opportunity to give evidence was allowed, and no admission was made, viz.: "That the defendants did not show on the trial that they had a water record for Sandon Creek; and hence no right to enter the plaintiffs' lands under the private Act"; and upon this point alone the appeal was allowed.

HUNTER C. J. in the Supreme Court of British Columbia gave judgment as follows, the other members of the court concurring therein:

"The court is unanimously of the opinion that the appeal should be allowed. This is a common law action of trespass by the Byron N. White Company against Sandon Water Works and Light Company. The Water Works Company were entitled to go upon the

lands and do what they did under the powers given by their Act, provided they proved strict compliance with the conditions imposed, because that was their only authority for interfering, as they did, with the property of the plaintiffs. It was not shown at the trial that the Lieutenant Governor in Council had authorized the diversion of the water, and that, in my opinion, was a preliminary essential, or a condition, to the exercise of the power of interfering with the soil of the plaintiffs.

"It is not necessary to decide on this occasion whether the authority of the Lieutenant Governor to divert the water was a condition precedent to the right of entry, but it was certainly a condition precedent to the right of interference with the soil of the plaintiffs. It was open, on the pleadings, to the plaintiffs to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned judge was not directed to the fact that there was no proof that the authority of the Lieutenant Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiff from taking advantage of the point of law, especially as this is a court of re-hearing.

"As to the defence raised on the ground of laches, it is quite clear that there were no laches which would raise any equity on behalf of the defendants. If we were to hold, on the facts which are before us on this occasion, that there were laches which preclude the plaintiffs from enforcing their legal rights we would wipe out the statute of limitations. To raise an equity in favour of the defendants in such circumstances as appear here, it would have to be shown that they were induced to make the expenditure they did by some equivocal conduct on the part of the plaintiffs. It is quite clear they were not in any way misled when

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they entered on the property, and they have only themselves to thank for the consequences. I think only nominal damages ought to be allowed, say $10, and I think the right ought to be further aided by the issue of a mandatory injunction, not to be drawn up, however, for six months, in order to enable the parties if possible to come to some understanding.

"As to the costs: The appeal, in strictness, is not successful, as the defendants are defeated on the ground not taken at the trial, or in the notice of appeal. Therefore, while the plaintiffs should have succeeded at the trial and, therefore, should have the costs of the action, there should be no costs of the appeal."

Davis K.C. and *Taylor K.C.* for the appellants. The plaintiffs allege that defendants did not file plans nor serve notice of expropriation. But having obtained the order in council approving of the plans and site after being some years in possession it should be presumed that all necessary preliminaries had been observed.

They claim, also, that defendants could not enter without first making payment but that is not a condition precedent under their Act of incorporation. See *Harding* v. *Township of Cardiff* (1); *Stonehouse* v. *Township of Enniskillen* (2). Moreover the plaintiffs acquiesced in such possession. *Kelsey* v. *Dodd* (3); *Sayers* v. *Collyer* (4), at pp. 106-8.

Plaintiffs could not set up violation of one condition after pleading that of two others only. *Collette* v. *Goode* (5).

Bodwell K.C. and *Lennie* for the respondents. Performance of the conditions alleged in plaintiffs' reply is an essential preliminary to defendants' right to

(1) 29 Gr. 303.
(2) 32 U. C. Q. B. 562.
(3) 52 L. J. Ch. 34.
(4) 28 Ch. D. 103.
(5) 7 Ch. D. 842.

interfere with the premises. *Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2).

Defendants could not take possession without making compensation. *Harding* v. *Township of Cardiff* (3).

Defendants did not ask for consent of plaintiffs to their entry and cannot rely on acquiescence. *Fullwood* v. *Fullwood* (4); *Willmot* v. *Barber* (5), at p. 105; *Archbold* v. *Scully* (6) at p. 388. Mandatory injunction is the proper remedy. *Smith* v. *Smith* (7), at p. 504; *Goodson* v. *Richardson* (8), at pp. 223, 227; *County of Welland* v. *Buffalo and Lake Huron Railway Co.* (9); Kerr on Injunctions, 4 ed. p. 33.

SEDGEWICK J.—I concur in the judgment allowing the appeal, in part, without costs, and ordering that the judgment appealed from should be varied by refusing the injunction for the reasons stated by my brother Killam.

GIROUARD J. agreed with Mr Justice Nesbitt.

DAVIES J.—I have given much consideration to this case and have had the additional advantage of reading the conclusions reached by my brothers Nesbitt and Killam. I concur in the disposition of the appeal proposed by my brother Nesbitt, and in the reasons given by him.

NESBITT J. — The plaintiffs, a mining company, brought an action of trespass against the defendants' the Sandon Water Works and Light Company.

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 29 Gr. 308.
(4) 9 Ch. D. 176.
(5) 15 Ch. D. 96.
(6) 9 H. L. Cas. 360.
(7) L. R. 20 Eq. 500.
(8) 9 Ch. App. 221.
(9) 31 U. C. Q. B. 539.

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The defendants are incorporated under a special Act of the legislature of British Columbia, ch. 62, of the statutes of 1896.

The plaintiffs are the owners of a mill site near Sandon, B C., on lot 590, and also part of the Wyoming Mineral Claim, lot 754, lying to the east of Sandon Creek, and allege that the defendants wrongly went upon their land in 1897, and built a tank and pipe line.

The action was commenced on the 16th of July, 1902, and is for damages for trespass and a mandatory injunction compelling the defendants to restore the land to its former condition.

The defendants pleaded the private Act I have mentioned, and that they went upon the land under the authority of the private Act and with the full knowledge and consent, or, in the alternative, with the acquiescence of the plaintiffs, and also claimed that the "Wyoming" being a mineral claim the plaintiffs have no surface rights on the same, and the possession of the defendants did not interfere with the rights of the plaintiffs.

The plaintiffs replied setting up failure upon the part of the defendants to comply with certain conditions in the private Act which they claimed were conditions precedent to enable the defendants to obtain any right or privilege under the private Act. The plaintiffs did not reply another alleged condition precedent upon which the judgment in the Court in appeal proceeded, the learned Chief Justice saying:—

It is not necessary to decide, on this occasion, whether the authority of the Lieutenant Governor to divert the water was a condition precedent to the right of entry, but it was certainly a condition precedent to the right of interference with the soil of the plaintiff. It was open on the pleadings to the plaintiff to take advantage of any failure of proof by the defendants of their case, and although the attention of the learned judge was not directed to the fact that there

was no proof that the authority of the Lieutenant Governor in Council to divert the water had been obtained, I do not think that precluded the plaintiff from taking advantage of the point of law, especially as this is a court of rehearing.

The defendants in this court objected to the course which was taken in the Supreme Court of British Columbia relying upon rule 168 which provides that:

> Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be) and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings.

I think that this rule rather has reference to contracts than to cases such as this where the party relied upon the statute as justifying his action, and that in such a case it would not be necessary for the plaintiff to reply as was done here, but as he has seen fit to do so and thereby not only not drawing attention to something he relies upon but perhaps misleading the defendant, he was properly punished by the court below by being deprived of his costs in appeal.

To deal then with the various defences raised, I think that the plaintiffs have shewn that they are entitled to the use and possession of all the property in dispute. The other questions involved are more difficult.

I think that the authority of the Lieutenant Governor in Council to divert the water is a condition precedent to the expropriation of lands for the purpose of utilizing the water so alleged to be diverted, and in this I agree with the court below. I think, however, it would be most unsatisfactory to have the rights of the parties ultimately determined upon what at present appears before the court. Counsel strenuously argued upon the one side that it was for the defendant to shew that such an order in council existed; and

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upon the other side it was argued that the defendants, owing to the course of the pleading, had a perfect right to assume that this was not the question, and pointed to the order in council which approved of the plans and site as shewing that when such order was issued some years after the works were erected, the Council had before them the affidavit shewing that the company had continuously from 1897 to March, 1902, been using the water, and shewing the various works in use, and that, therefore, it should be presumed that all necessary consents of all public authorities of the province were given. If this case is to be determined upon that point I think the facts would appear rather to justify such presumption, but, in the view that I take, I think that the proper course is to refuse an injunction and leave the parties to their respective rights, the plaintiffs if they are so advised to bring trespass or ejectment, and the defendants to take immediate proceedings to expropriate, when it can be properly determined whether they have complied with the necessary conditions precedent to enable them to expropriate, and if they have not no doubt plaintiffs will, upon making a proper case, be entitled to have their rights protected and recover possession of their property.

The next question for consideration was whether payment or tender of the money was a condition precedent to taking of possession. The private Act relied upon is very difficult of construction. There is no doubt that the rule is plain that parties shall not be deprived of the use and possession of their property before payment unless by express words or necessary implication in the statute conferring rights of expropriation.

I have examined, in addition to the cases mentioned by the parties, a number of authorities including *Boyfield* v. *Porter* in 1811 (1); *Doe dem Robins* v. *Warwick Canal Co.* in 1836 (2); *Lister* v. *Lobley* in 1837 (3); *Earl of Harborough* v. *Shardlow* in 1840 (4); *Peters* v. *Clarson* in 1844 (5); *Johnson* v. *Ontario, Simcoe & Huron Railroad Co.* in 1853 (6), and I have come to the conclusion that, on the true construction of this Act, the making of compensation is not a condition precedent to taking possession.

It will be observed that looking at clause 9 the power is to

> survey, ascertain, set out, and take hold, appropriate and acquire * * * * (subject, however, to making compensation therefor in manner hereinafter mentioned).

And had that been the only language used in the Act I would have held it was necessary to make compensation before taking possession. But the statute then proceeds:

> The powers other than the powers "*to enter, survey, set out and ascertain*" conferred by this section, shall not be exercised or proceeded with until the plans and sites are approved of.

It will be seen that while the surveying, setting out, ascertaining, taking, etc., are all grouped together (subject to making compensation) they are dissevered when you come to the necessity of obtaining the approval of the plans and site, which is clearly a condition precedent, and as it could never be intended that for the mere purposes of surveying, etc., there should be payment as a condition precedent, I take it that the legislature by necessary implication put surveying and expropriation on the same footing as to payment since it joined all these processes in speaking of payment, and therefore payment is not a condition pre-

(1) 13 East 200.
(2) 2 Bing. N. C. 483.
(3) 7 A. & E. 124.
(4) 7 M. & W. 87.
(5) 8 Scott N. R. 384.
(6) 11 U. C. Q. B. 246.

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cedent to the taking possession of the land either to survey or take. The legislature has clearly stated that expropriation cannot take place until the plans and site are approved of and apparently imply that, when such approval is given, then possession may be taken subject to making payment and either party can set the law in motion for obtaining payment. I refer also to clause 13 as indicating that in the case of clearing lands and underwood it is plain that payment is to follow the work.

I am unable to derive any light upon the subject from a consideration of clauses 22 and 23 relied on by Mr. Davis. Much argument was devoted to the question of acquiescence as affecting the granting of the injunction. Even assuming the court below was right in holding that the right to divert was a condition precedent compliance with which was necessary by the plaintiff, in the view I take of the case that the injunction should not go on the present record it is perhaps unnecessary to discuss the point, but as the same question has arisen more than once recently I desire to say that in cases where a legal right is established the general rule is that laid down in *Goodson* v. *Richardson* (1) in 1873, viz.: that where the invasion of the right is for the purpose of a continuing trespass which is in effect 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, this is a proper subject for an injunction. See also *Cowper* v. *Laidler* (2), where the rules to date are stated by Buckley J.

Where, however, the case is one in which the party trespassing would, if proper steps had been taken, have the right to expropriate, I think the better course is to withhold the issue of the injunction in order to

(1) 9 Ch. App. 221. (2) [1903] 2 Ch. 337.

enable the necessary steps to be taken and payment made. See *Corporation of Parkdale* v. *West* (1), pp. 613-15-16; *Pion* v. *North Shore Railway Co.* (2), pp. 629-30; *County of Welland* v. *Buffalo and Lake Huron Ry. Co.* (3).

There is another class of case in which it may be that an injunction will not be granted even where the legal right is proved, viz.: where there has been acquiescence practically amounting to a fraud upon the defendant. See as an example the observation of Lord St. Leonards in *Gerrard* v. *O'Reilly* (4), pp. 433-4; and see rules expressly laid down by Fry J. in *Willmott* v. *Barber* (5), pp. 105-06.

As it is the duty of the court to decide upon the rights of the parties and the dismissal of the bill upon the grounds of acquiescence amounts to a decision that a right which has once existed is absolutely and forever lost, (see per Turner, L. J. in *Johnson* v. *Wyatt* (6), p. 25, I would hesitate to say the court could refuse the injunction at the trial were legal right established unless in case of fraud. See also *Smith* v. *Smith* (7), at pp. 504-505, per Jessel M. R. Had the case been clearly proved here I think an injunction should have gone, the order not to issue if within a limited time the defendants had put matters in train for expropriation, but in view of the doubt whether the defendants can now put themselves in position to expropriate I would allow the appeal so far as an injunction is concerned, but as the defendants could have applied to the court for a suspension of the order to enable them to set the proceedings for expropriation in motion, and also have failed in their argument that the authority to divert was not a condition pre-

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 30 U. C. Q. B. 147; 31 U. C. Q. B. 539.
(4) 3 Dr. & War. 414.
(5) 15 Ch. D. 96.
(6) 2 DeG. J. & S. 18.
(7) L. R. 20 Eq. 500.

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cedent, I think there should be no costs to either party and both should be left to their remedies which I have pointed out.

The order should be to vary judgment below by refusing the injunction.

KILLAM J.—If, as found by the Supreme Court of British Columbia, no objection was made at the trial to the want of strict proof of a formal order in council authorising the defendant company to divert and use the water of the creeks mentioned in the statute, I do not think that the absence of such proof should have been allowed to be set up on appeal. It is possible that upon the point being raised the evidence could have been supplied. See *Eyre* v. *Highway Board* (1); *Page* v. *Bowdler* (2); *Graham* v. *The Mayor etc., of Huddersfield* (3); *Kennedy* v. *Freeth* (4); *Armstrong* v. *Bowes* (5); *Proctor* v. *Parker* (6); *Hughes* v. *Chambers* (7).

The defendant company, for over four years, operated its works through and over the plaintiff company's lands and used the waters of the creeks for the purpose. With notice of this the Lieutenant Governor in Council approved of the plans of the works. The plaintiff company had no interest in the waters, which were vested in the Crown, and no right other than that of an ordinary citizen to object to any allowance by the executive of their diversion and use. The plaintiff company, by its pleadings, expressly set up several conditions precedent to the defendant company's right to take and use the plaintiff's lands under the statute, but not the absence of authority to use the water. It appears to me that it was proper to assume

(1) 8 Times L. R. 648.
(2) 10 Times L. R. 423.
(3) 12 Times L. R. 36.
(4) 23 U. C. Q. B. 92.
(5) 12 U. C. C.P. 539.
(6) 12 Man. Rep. 528.
(7) 14 Man. Rep. 163.

that any necessary formal authority for the use of the water had been given.

In *The North Shore Ry. Co.* v. *Pion* (1), where the company had built its railway along the fore-shore of a river, cutting off the plaintiff's access to the water, although, as appears by the reports of the case in this court (2), and in the courts of Quebec (3), the formal authority to the railway company to use the shore was neither set up in the pleadings nor directly proved, Lord Selborne, in delivering the judgment of the Judicial Committee of the Privy Council, said:

> Their Lordships do not in this case proceed upon the assumption that the consent of the Lieutenant Governor in Council of Quebec was not duly given to the use made by the railway company of the foreshore of the river St. Charles for the construction of their works. If it were necessary to determine that point the facts would appear to their Lordships rather to justify the presumption that all necessary consents of all the public authorities of the province were given.

And in the *Corporation of the County of Welland* v. *The Buffalo and Lake Huron Ry. Co.* (4), it was presumed, from the use by a railway company for a number of years of a strip of land of the Crown and its crossing, near by, of a canal for which the authority of the Governor in Council was required, that the company had obtained the authority of the Governor in Council to so use the land.

No evidence of the want of authority was given at the trial and no motion was made against the judgment of the trial court on evidence of the want of such authority in fact. While it is claimed in the respondents' factum that, upon the argument in the full court, the defendant company conceded that the Lieutenant Governor in Council had not allowed, granted or approved of the diversion of the water,

(1) 14 App. Cas. 612.
(2) 14 Can. S.C.R. 677.
(3) 12 Q.L.R. 205.
(4) 30 U. C. Q. B. 147; 31 U. C. Q. B. 539.

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this does not appear in the printed case; and the judgment of the court did not proceed upon any such admission, but upon the supposed want of evidence in that respect.

Upon careful perusal of the various statutes of British Columbia relating to the diversion and use of the natural waters, and of the appellant company's Act of incorporation, I am of opinion that the payment of compensation was not a condition precedent to the right to enter upon and use the plaintiff company's lands. Under the Land Act, C. S. B. C. (1888) c. 66, ss. 39 to 52, payment of compensation in advance was expressly required in the cases in which parties were thereby authorized to acquire the right to divert and use water and to enter and use the lands of others for the purpose. Under the Water Privileges Act, 1892, 55 Vict. ch. 47 (B C.), it was necessary to obtain the authority of a judge in order to enter upon and use the lands of others. The judge ascertained the compensation in advance and could impose such terms as he thought fit respecting payment or security.

Under the Water Clauses Consolidation Act, 1897, 60 Vict. ch. 45, R. S. B. C ch. 190, the power to enter upon, use or expropriate the lands of others was to be governed by The Lands Clauses Consolidation Act, 1897, 60 Vict. ch. 20, R. S. B. C. ch. 112, which expressly required payment of or security for compensation before entry, except for the purpose of surveying, taking levels, etc.

By the appellants' Act of incorporation, 59 Vict. ch. 62, s. 9, the company was authorized to enter into and upon the lands of other parties

to survey, set out, ascertain, and take, expropriate, hold and acquire such parts thereof as it may require, etc., subject, however, to making compensation therefor in manner hereinafter mentioned, but the powers (other than the powers to enter, survey, and set out and

ascertain what parts thereof are necessary for the purposes aforesaid, or for making the plans hereinafter mentioned) conferred by this section shall not be exercised or proceeded with until the plans and sites of the said works have been approved by the Lieutenant Governor in Council.

It will be noticed that, in this section, the portion beginning "subject, however" applied to surveying, setting out and ascertaining, as well as to taking, expropriating, holding and acquiring. If, then, this portion should be interpreted as expressing a condition precedent it would be applicable to entry for the purpose of surveying and ascertaining the parts to be taken, as well as to the permanent acquisition and use of the property. It is usual in such Acts to allow, as in The Lands Clauses Act just referred to, entry for the purpose of surveying and ascertaining the land to be taken without previous compensation, which cannot well be estimated until the land has been ascertained. This Act authorized either the company or the owner to initiate arbitration proceedings to fix the compensation. By section 22 the owner was bound to convey upon payment or tender of the compensation. By section 23

the lands, rights and privileges which shall be ascertained, set out and appropriated by the said company for the purposes aforesaid, shall, so long as the said company use the same for the purposes of this Act, be vested in the said company.

By section 9 one condition precedent was expressly imposed for the permanent acquisition of the land, and to that it was expressly limited. It seems, then, not unreasonable to construe the Act as not imposing the payment of compensation as a condition precedent for any purpose, except for formal conveyance.

As the approval of the plans was an express condition precedent to the right to appropriate and use the plaintiff company's lands, and as the plans were not approved until long after the appellant company

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had taken possession and appropriated the lands, there was clearly a trespass for which the plaintiff company was entitled to recover. But after the approval of the plans the appellant company remained rightfully in possession.

In my opinion the portion of the judgment appealed from awarding an injunction should be struck out, and the respondent company should pay the costs of the appeal.

Appeal allowed, in part, without costs.

Solicitors for the appellants: *Taylor & O'Shea.*

Solicitors for the respondents: *Elliott & Lennie.*

HENRY GIEGERICH (PLAINTIFF) .....APPELLANT;

AND

JULES JUSTIN FLEUTOT (DEFENDANT) ..... } RESPONDENT.

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*Oct. 26, 26.

*Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Title to land—Champerty.

In *Briggs* v. *Newswander* (32 Can. S. C. R. 405), the plaintiff was held entitled to a conveyance from defendants of a quarter interest in certain mineral claims. In that action Newswander *et al.* were only nominal defendants, the real interest in the claims being in F. After the judgment was given plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $500 payable by instalments. Briggs afterwards assigned the above-mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest.

Held, affirming the judgment appealed from (10 B. C. Rep 309) that the transfer to G. of the nine-tenths was champertous and the court would not interfere to assist one claiming under a title so acquired.

Held, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest.

APPEAL and CROSS-APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the plaintiff except as to one-tenth of the property claimed.

The facts will be found sufficiently stated in the above head-note.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 309.

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S. S. Taylor K.C. for the appellant. The conveyance of the nine-tenths was not champertous, it being for the valuable consideration of money lent and advanced as well as the undertaking to pay costs. See *Fischer* v. *Kamala* (1) at page 187. If it was, a stranger to the deed could not take advantage of it. *Knight* v. *Bowyer* (2) at page 444.

On the cross-appeal the plaintiff contends that there is no connection between the assignment of the one-tenth interest remaining in Briggs and the prior agreements or arrangements. Consequently the cross-appeal should not succeed.

R. M. Macdonald for the respondent. The appellant can only succeed by relying on an illegal conveyance which he will not be permitted to do. *Hilton* v. *Woods* (3).

On the cross-appeal we should have relief against the decision of the court below as Fleutot is estopped from asserting any prior equity by reason of his standing by and not disclosing his rights during the litigation of the case of *Briggs* v. *Newswander* (4).

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that these appeals should be dismissed with costs.

The original transfer from Briggs to Giegerich of nine-tenths of Briggs' interest was clearly champertous. Admittedly, it was in pursuance of an arrangement by which Giegerich was to maintain the suit against Newswander, Doras and Darignac for a share of the property to be recovered.

Newswander had a right of action against Giegerich for maintenance. The transaction was wrongful towards him. The present action was brought to

(1) 8 Moo. Ind. App. 170.
(2) 2 DeG. & J. 421.
(3) L. R. 4 Eq. 432.
(4) 8 B. C. Rep. 402; 32 Can. S. C. R. 405.

enforce, as against Fleutot, the judgment in the suit against Newswander *et al.* (1). Whether Fleutot should be held barred by the judgment as an assignee of Newswander *pendente lite* or as having a prior interest represented by Newswander, Giegerich cannot be in a better position to enforce the judgment against him than against Newswander himself.

In our opinion a court of equity should not interfere against either Newswander or Fleutot at the instance of one claiming under a title so acquired. See *Burke* v. *Greene* (2); *Prosser* v. *Edmonds* (3); *Harrington* v. *Long* (4); *Hilton* v. *Woods* (5); *Re Cannon* (6); *Peck* v. *Heurich* (7).

Giegerich alone appeals. Briggs has repudiated the transactions with him by conveying to Fleutot. In so far as they were illegal and wrongful towards Newswander Giegerich cannot insist on the right to use Briggs's name to enforce the former judgment.

We agree with the court below, also, in considering the transfer of the remaining one-tenth interest as good. It was severable and upon good consideration. The fact that the consideration was expressed to be in part for a confirmation of the former illegal transfer could not invalidate the legal part of the transaction. See *Pigot's Case* (8); *Bank of Australasia* v. *Breillat* (9); *Pickering* v. *The Ilfracombe Railway Co.* (10).

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *Taylor & O'Shea.*

Solicitor for the respondent: *R. M. Macdonald.*

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(1) 8 B. C. Rep. 402; 32 Can. S. C. R. 405.
(2) 2 Ball & B. 517.
(3) 1 Y. & C. Ex. 481.
(4) 2 Mylne & K. 590.
(5) L. R. 4 Eq. 432.
(6) 13 O. R. 70; Cout. Dig. 234.
(7) 167 U. S. R. 624.
(8) 11 Co. 26 *b*.
(9) 6 Moo. P. C. 152.
(10) L. R. 3 C. P. 235.

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*April. 27,28,
Oct. 17.
*Nov. 14.

AUGUSTE RÉAL ANGERS (PLAINTIFF) ..... } APPELLANT;

AND

THE MUTUAL RESERVE FUND LIFE ASSOCIATION (DEFENDANTS)..... } RESPONDENTS.

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

Practice—Quorum of judges—Judgment pronounced in absence of disqualified judge — Jurisdiction — Mutual life insurance — Natural premium system—Level premium—Mortuary calls—Rate of assessment—Rating at attained age—Fraud—Puffing statements—Warranty — Misrepresentation — Acquiescence — Mistake — Rescission of contract—Estoppel.

Art. 1241 C. P. Q. permits four judges of the Court of King's Bench to give judgment in a cause heard before five when the remaining judge, after hearing the case argued, recused himself as disqualified. Davies and Nesbitt JJ. *contra.*

A took out a policy on his life in a mutual association relying on statements contained in circulars issued by the association stating that interest on the reserve fund would be sufficient to cover increases in the death rates and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest and then allowed his policy to lapse and sued for a return of the payments he had made with interest and for a declaration that the contracts were void *ab initio.*

Held, Sedgewick and Nesbitt JJ. dissenting, that the statements in the circulars only expressed the expectation of the managers of the association as to the future and did not prevent the rates being increased in the discretion of the directors. *The Mutual Reserve Fund Life Association* v. *Foster* (20 Times L. R. 715) distinguished. *The Provident Savings Life Assurance Society* v. *Mowat* (32 Can. S. C. R. 147) referred to.

Per Taschereau C. J. As the contracts of A. with the association were only voidable he was not entitled to be repaid the premiums for

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

which he had received value by being insured as long as the contracts were in force. *Bernardin* v. *La Réserve Mutuelle des Etats-Unis* (Cour d'Appel, Paris, 10 Feb. 1904 : Gaz. des Trib. 26 fév. 1904), referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court and dismissing the plaintiff's action with costs.

The declaration of the plaintiff alleged that he had been, in 1885 and 1887, solicited and induced by the agent of the defendants to become a member of the association and insure his life therein upon the assessment system at an annual rate of contribution by mortuary calls according to a minimum and maximum rate determined by his age at entry, the contributions not to be increased as age advanced but subject to decrease by quinquennial divisions of profits and in no case to exceed, in any year, the maximum rate of assessment indicated by the tables of the association; that one-fourth of the assessments collected were to be accumulated as a reserve fund for the benefit of policy holders, and that he should pay $30 admission fee and $20 for dues annually. He further alleged that he was induced to enter into the contracts of insurance he made with the association and to persist therein for some time by their written false and fraudulent representations in their circulars and statements; that, in May, 1898, when the rates of assessment had been greatly increased by virtue of powers given by certain clauses in the certificates or policies of insurance issued to him, he became aware of the fraud, deceit and wilful misrepresentations so made by the association for the first time, that he then protested against the increased rates as being contrary to the terms on which he had been induced to apply for membership, discontinued further

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payments and was, at his increased age, unable to obtain life insurance in another company or association without great loss and increased rates of premium. The action was for $6,509.57 damages, being the amount of the payments made with interest, and to have the policies declared null and void *ab initio*. The defence was a denial of any fraud, deceit or misrepresentation, that the association carried on the business of mutual life assurance effectually according to the provisions of its charter and the conditions of the contracts with the plaintiff in accordance with his applications, certificates of membership and the constitution and by-laws of the association. It alleged that the association had the right of increasing the assessments as they did, that it was necessary and obligatory for them to do so for the benefit of members of the association and under the laws of the State of New York; that the plaintiff had received value for all payments made by him by the insurance of his life while he continued a member of the association; that, for a time, the plaintiff had continued to pay the increased rates and had acquiesced in the increased assessments; that, having failed to pay his assessments his contracts of insurance had lapsed and all moneys paid thereon had been forfeited to the association in virtue of the conditions, by-laws and regulations to which they were subject and that he was estopped of any right of action upon any ground whatever.

In the trial court Lavergne J. entered judgment for the plaintiff for the amount demanded with interest, declared the contracts void *ab initio*, that the payments made by the plaintiff had been made in error and by reason of the false and fraudulent representations and concealment by the defendants and that they had been received by them in bad faith.

In the Court of King's Bench, on appeal, the case was argued before five judges, in September, 1902, but, when it was ripe for judgment, on 23rd December, 1902, one of the judges, Mr. Justice Würtèle, withdrew from the court for special reasons on account of which he considered himself disqualified and incompetent to take part in the judgment about to be rendered. The four remaining judges then proceeded to render the judgment now appealed from, allowed the appeal, reversed the judgment of the Superior Court and dismissed the plaintiff's action with costs.

When the appeal came on for hearing in the Supreme Court of Canada, counsel on behalf of the appellant took preliminary objections to the validity of the judgment of the Court of King's Bench, on the grounds that the four remaining judges in that court had taken an erroneous view of the provisions of art. 1241 C. P. Q.; that as the hearing had taken place before five judges, art. 1227 C. P. Q. could not have the effect of reducing the court to a bare quorum; that the case did not fall within the exceptions mentioned in arts. 1205, and 1206 C. P. Q. but was one of disqualification or incompetency ruled solely by art. 1242 C. P. Q.; that, consequently, the judgment so rendered was an absolute nullity, that no appeal was necessary and that the judgment of the Superior Court should stand restored and confirmed with costs to the appellant in all the courts.

After hearing counsel on the question, the majority of the court overruled the objection, Davies and Nesbitt JJ. dissenting, and the hearing on the merits was proceeded with.

The questions arising on the present appeal are stated in the judgments now reported.

After the case had been argued judgment was reserved pending the decision of a case by the same

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association against Foster then pending in the House of Lords, on appeal from the decision of the King's Bench Division, in England (1), and which was subsequently decided against the association (2). After this decision, on the application of the association, the Supreme Court of Canada ordered a re-hearing upon the points of somewhat similar nature to those in the *Foster Case* (2) involved on the present appeal. These questions are shortly stated in the arguments of counsel.

T. Chase Casgrain K.C. and *Lafleur K.C.* for the appellant. The appellant was deceived by the false representations made by the association in their circulars, prospectuses and written statements issued by them from time to time, and kept under delusion and in error up to the time he protested against the increased assessments and allowed his insurances to lapse. The extracts printed in our factum clearly shew how he was kept in ignorance and the payments exacted from him in bad faith. He was even induced to believe that the association could eventually shew that the Superintendent of Insurance for the State of New York was wrong in compelling the association to change their system of assessment and that, in the end, there would be a general reimbursement and the old rates, as at age of entry, resumed. He did not discover the fraud until the last moment and, consequently, never acquiesced in the increased mortuary calls. In fact, he never ceased to protest against the increases. No one can complain that another has believed too implicitedly in the truth of his statements. This is specially so when the party making the statements is an expert. Pollock on Contracts, pp. 535, 537, 547, 550, 571; Kerr on Fraud and Mistake, pp. 54 and 55; Bigelow on Torts, pp. 63 and 64;

(1) 19 Times L. R. 342. (2) 20 Times L. R. 715.

Encycl. of the Laws of England, vo. "Company" p. 184; *New Brunswick and Canada Railway and Land Co.* v. *Muggeridge* (1); *Central Railway Co. of Venezuela* v. *Kisch* (2), at page 113. If the statements forming the basis of the contract are false the contract must be rescinded. See *Ranger* v. *The Great Western Co.* (3). *In re Reese River Mining Co.; Smith's Case* (4); *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (5). It is only necessary to shew that there was a material misrepresentation; *Derry* v. *Peek* (6), at page 359; *Arkwright* v. *Newbold* (7); Dalloz Rep. "Obligations" no. 218; *Sun Mutual Life Insurance Co.* v. *Béland* (8); Pand. Fr. vo. "Assurance Mutuelles" nn. 311-317; S. V. '80, 1, 125; Pand. Fr. vo. "Assurances en general" nn. 63, 421, 422, 423. We also refer to arts. 993, 1047, 1049, 2488 C. C The appellant relies with confidence on the decision of the House of Lords in the *Foster Case* (9), which involves points exactly similar to those in the present case.

Beaudin K.C. and *Aimé Geoffrion K.C.* for the respondents. There has been no proof of fraud made and none can be presumed; Art. 993 C. C. It requires proof in writing in the case of a contract of mutual insurance; Art. 2471 C. C. Testimony can be received only in the cases mentioned in Art. 1233 C. C. There is not even a written protest proved, and a verbal protest, even if proved, would be insufficient. On the contrary, it is shewn that the plaintiff acquiesced in the increase of the rates by making voluntary payments for three years, six times in each year, and is, consequently, estopped from disputing his rating at

(1) 1 Dr. & S. 363.
(2) L. R. 2 H. L. 99.
(3) 5 H. L. Cas. 72.
(4) 2 Ch. App. 604.
(5) [1896] 1 Ch 178.
(6) 14 App. Cas. 337.
(7) 17 Ch. D. 301.
(8) 5 Legal News 42.
(9) 20 Times L. R. 715.

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this stage. *Bain* v. *City of Montreal* (1); *Baker* v. *The Forest City Lodge* (2).

It is quite clear from the circulars that the rating was to be on the natural premium system according to current age, that is, according to the attained age of the insured, from time to time, as assessments were made. There was no warranty as to level premium as at age of entry in the circulars, no representations of the kind were made. The applications and contracts make none, and they, alone, constitute the contracts between the parties. They do not mention any premium nor fix any maximum rates. However, it is not contended that the maximum assessment according to attained age has been exceeded.

No rescission of the contracts is necessary here because the plaintiff voluntarily allowed his contracts to lapse. If he ever had any right of action for specific performance, (arts. 1065, 1066 C. C.,) he lost it by ceasing to make payments for the purpose of keeping the insurances alive. Art. 1067 C. C. He simply dropped out of the association after getting full value for the moneys he paid by the insurance carried on his life from the time he entered until the contracts lapsed, under the conditions therein expressed, by default to continue payments of the assessments. Consequently, the plaintiff is not entitled to recover back any of the moneys so paid for value received.

It is not shewn that any wilfully false statements were made or that any artifice, deceit or trick was practised upon the plaintiff. Even if the prospects proved to be exaggerated or puffed up in the circulars and statements, they were made in good faith according to the expectations of the managers of the association. Such statements cannot amount to fraud or

(1) 8 Can. S. C. R. 252.

(2) 24 Ont. App. R. 585; 23 O. R. 238.

misrepresentation, although they may afterwards have turned out less advantageous on account of a mistake in their scheme of insurance.

We rely, also, upon the following authorities: *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1); *Hiven* v. *La Réserve Mutuelle des Etats-Unis* (2), at page 42; *Bernardin* v. *La Reserve Mutuelle des Etats-Unis* (3); R. S. C. ch. 124, ss. 36 to 39; Paud. Fr. vo. "Obligations" nn. 7281, 7285, 7288, 7291, 7296–9, 7303; Fuzier-Herman vo. "Assurance Mutuelle" nn. 53, 54, 55; Beaudry-Lacantinerie, "Obligations," vol. I, no. 109, note 2, no. 111; *Banque Ville-Marie* v. *Montplaisir* (4); *Lovell* v. *St. Louis Mutual Life Insurance Co.* (5); *Grymes* v. *Saunders* (6); and Lindley on Companies (8 ed.) p. 62

We contend that the case of *The Mutual Reserve Fund Life Association* v. *Foster* (7), recently decided in the House of Lords differs from the present case in the following respects: The policies were in different form; there were different representations made to the assured; there was no acquiescence by Foster; there were different questions of laches and no question as to the amount Foster should recover on cancellation of the policy arose, as in this case.

THE CHIEF JUSTICE.—Though as the result of the decision of the House of Lords in the *Foster Case* (8), the respondents are precluded, in my view of the evidence, from supporting the judgment *a quo* upon the *considérants* of the court of appeal on the facts of the case and the inferences of fact there-

(1) 32 Can. S. C. R. 147.
(2) [1901] Pasicrisie, 3.
(3) Trib. Civ. de la Seine, 12 fev. 1902; Gaz. des Trib. 26 fév. 1904.
(4) 18 R. L. 153.
(5) 111 U. S. R. 264.
(6) 93 U. S. R. 55.
(7) 20 Times L. R. 715.

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from, the proof of the company's fraud being still stronger in this case than in that one, and the appellant's policies being in terms as tricky and intentionally misleading as Foster's was, yet, under the civil law which, it is conceded, governs the present controversy, the appeal, in my opinion, fails, and the action must stand dismissed upon the ground that though the appellant be entitled to a rescission of the contracts *ab initio*, his claim to the reimbursement of premiums, either as *condictio indebiti*, or as damages, is unfounded in law. Under the latter head, all that he demands by his declaration is the amount, with interest, of the premiums. So that the same reasons militate against both branches of his action. If he recovered judgment for the amounts he paid because they were payments *indus*, he could not recover in this action any additional amount for damages. And, *a converso* he cannot recover as damages the amounts he paid if they were not payments *indus*. As to any other, could they be considered as claimed, none but remote, indirect, fictitious and exaggerated damages to himself personally are in evidence.

This is not, as in the *Foster Case* (1), an action for rescission of an existing contract. The appellant and respondents had both determined, before the institution of the action, to treat these policies as rescinded for the future; and it is mutual ground that to all intents and purposes they stand rescinded from that time. (Pars. X, XI, of conditions indorsed on second policy). The action is consequently nothing but one by the appellant to recover back the premiums he has paid to the company respondent during the continuance of the policies. Pothier, Oblig. No. 29; 24 Demol. No. 181; arts. 988,

(1) 20 Times L. R. 715.

993, 1000 C.C. As Laurent well puts it, Vol. 20, No. 346:

Si la résolution doit être demandée en justice, l'action en répétition de l'indu se confond avec l'action qui tend à résoudre le contrat.

Now, upon principle, the appellant's contentions cannot prevail.

The rescinding *ab initio* of a contract for fraud has no doubt the same effect as would the rescinding of a contract under an express resolutory clause in the case provided for by art. 1088 C. C. A contract such as those in question here is, in law, subject to the tacit resolutory clause that, if it be obtained by fraud, the party defrauded and suffering prejudice thereby, will have the right to have it rescinded. Consequently the appellant's proposition that the parties must, in the latter case as in the former, be restored, *as far as possible* to "as they were" before they entered into the contract is undeniably correct.

But in a case like this one, where a contract of mutual insurance may be rescinded at the suit of the insured for false representations by the insurer, the insured, as said by DeLalande, Assur. No. 825, is not entitled to the return of the premiums, because they were

l'équivalent des risques que la compagnie a réellement courus. Suscepti periculum pretium' (says Pothier, Assur. No 1).

The appellant got for his money all the value he had bargained for. It was indeed by false representations that he was induced to enter into the partnership that this mutual company in law constitutes; 1 Couteau, assur. Nos. 132 *et seq.*, 192; 2 Couteau, Nos. 364, 382, 433, 438; Dall. 76, 1,345; Pand. fr. 86, 1, 220; S. V. 86, 2, 225; Delangle, Sociétés, Nos. 41 to 47; but he put no capital therein; the premiums he paid did not inure to the benefit of the company; they went in satisfaction of his obligations as co-insurer towards his co-

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insured; he got all the benefit from these payments that he could expect; the company, consisting of himself and his co-insurers, fulfilled its obligation to carry the risk of the amount insured on his life; his co-partners had the right to exact from him his share of the burdens of the co-partnership so long as he enjoyed his share of its benefits; and no court, no power on earth, can declare that he has not been effectively insured; he suffered no loss from the fraud he now complains of, and fraud without damage gives him no cause of action. *Petrie* v. *Guelph Lumber Co.* (1); Bedarride, Dol & Fraude, Vol. 1, Nos. 268, 270, 272, 300 to 308. His claim lacks one of the essential ingredients required by the law. *Point d'intérêt, point d'action.* An action in rescission *ab initio*, (*restitutio ad integrum* of the Roman law) cannot be maintained when the contract has previously come to an end if the plaintiff has not been *lésé.* 2 Bonjean, des actions en dr. rom. page 144; Ancien Dénizart, *vo.* Rescission; 1 Solon Nullités, Nos. 426,431.

Pour proposer une nullité, (says Favard de Langlade, Rep. vo. Nullité, part. 3), il faut y avoir intérêt. Une nullité serait même susceptible d'être prononcée dans l'intérêt de la loi qu'elle ne pourrait pas l'être dans celui de la partie à qui elle ne fait aucun tort.

It is on this principle that, under the civil law, a minor who, after becoming of age, obtains the rescission of a contract entered into with the required formalities whilst he was a minor, is given that recourse, as a general rule, not *tanquam minor sed tanquam læsus.*

After saying that a contract of insurance so rescinded *ab initio* must be considered as never having produced any effect, Lefort, Assur. sur la vie, Vol. 3, pages 9 and 17, adds, quoting other leading commentators:

(1) 11 Can. S. C. R. 450.

Mais il importe de noter que le contrat ayant eu une existence, la responsibilité de l'assureur ayant été engagée, ce dernier a le droit de conserver les primes qui représentent les risques courus. * * Dans l'assurance, il est impossible que l'assuré rende l'assureur ce qu'il a reçu de lui, c'est-à-dire la garantie de la chose assurée.

And Demolombe, Vol. 25, No. 464, citing cases in the Cour de Cassation and other courts upon an analogous question, points out how, in a case of this kind, it is impossible to replace things in the same state as if the contract had never existed, in the words of art. 1088 of the Code, saying

car le caractère de la convention est tel qu'il est impossible d'effacer, in præteritum, les conséquences qu'elle a produites, tant qu'elle existait.

See also Troplong, Contrats Aléatoires, Nos. 154,298.

For the same reasons the action, taken as one *condictione sine causâ*, arts. 984 and 989 C. C., must likewise fail.

The appellant has received from the company in return for the premiums all the value and consideration he could expect up to the time he chose not to renew his bi-monthly contracts with them. Were he now to be re-imbursed all that he has paid to the company, he would make a speculation out of their fraud. And that he cannot be allowed to do. Where a party to a voidable contract has received a benefit under it, he is bound by it; and if the contract be rescinded and it be, as in this case, impossible for him to return the benefit because of the nature of the benefit, he cannot recover the sum he paid for it. He is not entitled to both. He paid for nothing that he did not get. He got everything that he paid for.

For every mortuary call he paid, he received compensation by the assurance that if he were to be the next one to be called out of the world his surviving partners would pay to his executors or beneficiaries the $20,000 he was insured for.

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L'assureur, ayant jusqu'au jour de l'annulation du contrat couru les risques, les primes qui correspondent à la période des risques n'ont pas été payées sans cause et ne sont pas sujettes à répétition. Dall. 78, 2, 58, 60.

A judgment reported in Sirey, 83, 2, 19, orders the return of the premiums upon the rescission of a policy, but there the policy was void, *nulle ab initio* (not merely voidable, *annulable*) for a reason that might have been invoked by the insurer as well as by the insured. And the Court of Appeal affirming the judgment *de première instance* distinctly points out the difference and holds that if the policy had been valid at its origin, the insured would not have been entitled to a return of the premiums.

The judgment (reprinted in the factum) of the court of original jurisdiction in the case precisely similar to this one of Bernardin against this same company, now respondent, has since been affirmed by the Paris Court of Appeal on the 10th February last [*Bernardin* v. *La Réserve Mutuelle des Etats-Unis*] (1). One of the *considérants* upon which the judgment of that court dismissing the action rests, has its full application here. It reads as follows:

Considérant que les demandeurs ont joui respectivement des avantages de l'assurance pendant plus de dix ou onze ans, qu'ainsi l'effet de l'assurance, qui consiste dans la garantie du risque mortuaire, a été produite contre la compagnie, alors que, par la restitution des primes, si elle était ordonnée, l'effet de l'assurance ne se produirait pas contre eux, et que l'allocation de dommages-intérêts, réquise au profit de mutualistes sortis volontairement de l'association, aurait pour conséquence d'en faire supporter la charge par les nouveaux associés, derniers admis, ce qui serait contraire à l'équité et à la règle de l'égalité qui doit persister entre mutualistes * * *

Such is the law that rules this case.

I would dismiss the appeal, without costs however, as the findings of fraud by the trial judge against the

(1) Gaz. des Trib. 26 fév. 1904.

company respondent are amply supported by the evidence of record.

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SEDGEWICK J.—I dissent from the judgment of the majority of the court dismissing this appeal for the reasons stated by my brother Nesbitt, in which I entirely concur.

DAVIES J.—For the reasons given by the Chief Justice of the Court of King's Bench, speaking for the whole court, I am of opinion that this appeal should be dismissed.

I think the fact that the company was a mutual one and carried on under the assessment system, and that the underlying principle of the company was over and over again in its documents and literature declared to be the natural premium principle as distinct from the level rate premium adopted by all old line companies, would call for very strong and positive evidence to shew that these principles were to be so far departed from as to ensure to the appellant an assurance for $20,000 on assessment calculated upon his age at entry into the association and which assessments were not to be subsequently increased. Such evidence as I shall shew is, in my opinion, distinctly wanting.

Nor do I think plaintiff has succeeded in shewing that there were other fraudulent representations made to him going to the basis of the contract at and before the time he entered into it, and which induced him to enter into it, which would avail him to have all the premiums he paid during the years, he was insured returned to him.

We have been pressed with the argument that the late decision in the House of Lords of *The Mutual Reserve Fund Life Association* v. *Foster* (1), confirming a

(1) 20 Times L. R. 715.

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judgment of the Court of Appeal for a rescission of the policy and a return of all the moneys paid thereunder settled the questions in controversy in this appeal and is binding on us. If the substantial questions there determined were to be determined on this appeal and on the same or analogous facts, I should not for a moment hesitate to follow that decision. We have had the advantage of having a re-argument of this appeal on this one point as to whether the decision of the House of Lords substantially covers it, and I am opinion that it does not. It is true the company is the same and that in very many particulars the policy there rescinded was the same as those in question on this appeal. But *Foster's Case* (1) was one for rescission of an existing contract in which it was not necessary to allege or prove fraud, and the grounds upon which the contract was rescinded were that the policy was not such a policy as was held out to him being wholly inconsistent with Bridgeman's letter supported by its accompanying documents, and that it differed essentially and on the vital point of the age on which assessments should be levied from the representations made to the plaintiff before and at the time when the proposal was signed and upon which he acted, and that the documents circulated by the company and on which Foster and Bridgeman, their officer, acted were tricky and misleading on this vital point of age for assessment purposes.

The policy in the *Foster Case* (1) expressly declared in its third clause or provision that

> There should be payable to the association a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount should not exceed the maximum rates indorsed thereon according to the age of each member.

(1) 20 Times L. R. 715.

Indorsed upon the policy was a schedule showing in columns the ages of the members from 25 to 60 and opposite to each age two sums in separate columns, one being headed "largest amount which may be collected every two months" and the other "maximum amount which can be collected annually on each £100 insured." The main question there debated was whether the age of the member was intended to mean his age "at entry" or at the time of the call or assessment. It was held, under the terms of the policy, to mean the latter; but the contract was set aside because of the Bridgeman letter and other documents submitted to Foster at the time he applied for insurance which it was held justified him in believing that he was only to be assessed at the rates as of the age of entry. The Bridgeman letter was clear and specific. He was assured that "it (the assurance) would cost him about £70 per annum only" and calculated on the basis of *age at entry* that was correct, but on the basis of *attained age* at the time the calls would be made, which was the legal construction of the policy given Foster, was entirely misleading.

This action is entirely different. It is not an action to have an existing policy declared to mean what the insurer was led to believe it did mean when entering into it or in the alternative to have it rescinded, but is one brought to have it declared that on policies which the plaintiff knowingly allowed to lapse, before action brought, the lapsed policies should be declared void *ab initio* and all the assessments paid under them returned to the plaintiff with interest on the ground of fraudulent representations made before and at the time of plaintiff taking out his policy.

The first policy in this case taken out by plaintiff for $10,000 in 1885, was in its fifth clause expressly made

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subject to all the provisions and conditions contained in the constitution and by-laws of this association with the amendments made and that may be hereafter made thereto.

Clause 1 provided for the levying of assessments

at such rates according to the age of each member as may be established by the said Board of Directors,

while clause 3, in its closing words, declared that

at each apportionment the rate of assessment may be changed to correspond with the actual mortality experience of the association.

Nowhere in this contract, either in the body or in the table of rates indorsed upon it, is any reference made to any "maximum rates" which could not be exceeded, or to any "age of entry" as the age on which assessments should be based. So far from that being true the provision was for

such rates according to the age of each member as might be established by the Board of Directors,

and that without regard to any limit. That, together with the express power at each apportionment to change the rate, seems to me to be the main and broad distinction between the policy in the *Foster Case* (1) and the first one in the present appeal. The plaintiff's chief claim, as I understand, is that he is entitled to have had a maximum rate and that such rate should be based upon his age at entry, and the answer is that so far as the first policy is concerned there was no reference whatever to any maximum rate or any limit except the rate which might be fixed by the directors as necessary to meet the accruing death charges.

Then, is there anything in the evidence here with respect to the inducements held out to the plaintiff to take out policies analogous to the Bridgeman letter and its accompanying documents as shewing that the "age of entry" was intended as the age on which the assessment should be made? I am not able to find

(1) 20 Times L. R. 715.

anything, and a careful reading of the evidence given by the plaintiff himself as to the inducements held out to him to insure convinces me that whatever else they were, the right to be assessed for calls only on the "age of entry" was not one of them.

The plaintiff says he was solicited to take the insurance and, to induce him, the agent used the circular put in evidence. He quotes the parts of the circular on which he says he relied and so far as its truthfulness is challenged his evidence reads as follows:

"The expenses of the management limited to $2 on each $1,000." That was very material for me.

"A Reserve fund which provides against excessive assessments. The interest on the reserve fund is applied to the payment of death claims. This will be nearly, or quite sufficient to pay all claims caused by any increase in the death rate by reason of the advancing age of the association". That I considered most important.

"Graded assessments so that each member pays only his exact share. Its system provides through its reserve fund for the decrease of assessments and this lessens payment in after years. The assessment of persistent members will be greatly reduced in fifteen years, and it is estimated that the certificate will be nearly, if not quite self-sustaining."

"It pays all legitimate claims promptly and in full."

"Its members have a voice and vote in the management."

And on page 5: "Insurance actuaries calculate that should this association experience the same mortality and ratio of lapses as that experienced by the level premium companies in the past decade, its certificates will be self sustaining after fifteen years."

The foregoing are substantially all the alleged representations which induced the plaintiff to take out his policy. Where is anything said or called to plaintiff's attention which could have induced him to believe that age of entry was to be the only age at which he could be assessed. I do not find anything. Much was pointed out which convinced him the policy would be a much more favourable one than it turned out to be.

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But on the crucial point of "age of entry" the representations are silent. The broad comment I would make upon these extracts from the circular (on which the plaintiff says he relied) as shewing how different this case is from Foster's, is that they make no reference to maximum or minimum rates, nor do they say anything with respect to the crucial question whether these rates were to be calculated as plaintiff now contends he was induced to believe on the "age of entry" or the "attained age" when the calls were made.

With regard to the truthfulness or otherwise of the statement or predictions themselves it does seem to me that there might be great difficulty in reaching a conclusion as to them if instead of assessing on the basis of "age of entry" the directors had from the time plaintiff became a member assessed on that of "attained age", and if the members themselves had allowed the reserve fund to remain intact. But, in the beginning of the year 1889, the members themselves at the annual meeting, by what is known as the Shield's resolution, determined that the age of entry should be retained and continued as the basis upon which assessments should be levied and radically impaired the *surplus reserve emergency fund* by applying the current receipts applicable to it to the payment of death claims. These expedients gave temporary relief to the existing members it is true, but they were the action of the members themselves or of the necessary majority under the constitution. But the carrying out of this Shield's resolution could only have one result, and that was the impairment of the reserve and eventually its destruction with the alternative of bankruptcy or the placing of the assessments upon the only possible scientific basis (if indeed it is that) of attained age. If the reserve system and the "attained age" as the basis of the assessments had not been

departed from there might possibly have been a substantial reduction in the amount of assessments of "persistent members in fifteen years" as promised, and the statements as to the calculations of insurance actuaries would not necessarily be false. It might require a lively imagination to believe in the fulfilment of the predictions but, granted the data I have assumed, namely, the assessment of all the members at their respective attained ages and the maintenance intact of the reserve, I do not find any evidence to convince me that the statements quoted from the circular by the plaintiff were necessarily false, much less false to the knowledge of those who made them. Of course if you assume age of entry as the basis of the actuarial statements of the circulars on which plaintiff says he relied it would be easy to prove their falsity, and a not unreasonable conclusion that their author must have known them to be so.

The same inducements were placed before plaintiff to take out his second policy, namely, the company's circular, known as Exhibit No. 3, from which I have quoted above.

Plaintiff also refers to another circular, Exhibit No. 26, as having been shown to him, but does not point out specially anything in it as distinct from the statements of the first circular upon which he depended. It seems clear to me, at any rate in the absence of any special statement in the latter circular having been relied on by plaintiff, that his case must rest upon his first policy and the inducements under which he applied for it. The second policy differed from the first in having the "Table of Rates" indorsed showing a "maximum amount which could be collected annually on each $1,000," with a note at the foot stating that this rate was based upon the mortality tables and the experience of the association for *current ages*

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The body of the policy expressly provided for a bi-monthly

payment of a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount shall be at such rates according to the age of each member as may be established by the Board of Directors.

The question of maximum and minimum rates has been magnified. The complaint is not that the maximum of one or other age has been exceeded—indeed that of attained age is admitted not to have been—but that "attained age" was adopted and exacted in levying assessments instead of age of entry. And it seems to me that the question on this branch of the case has been reduced to whether there is such evidence in the case as shews that the plaintiff was clearly induced to take out his policy by representations that his premium annually would not exceed the maximum sum payable on his age at entry and so bring it within the principle laid down in the House of Lords in the *Foster Case* (1).

The fact that for years subsequent to the taking out of his policies and the passage of the Shield's resolution the assessments were based upon the *age of entry* and that the calls upon the members for these assessments gave prominence to this fact cannot in any way avail the plaintiff. Both he and the management may have been living in a fool's paradise. It appears to me the passage of the Shield's resolution by the members of the association and the attempt to carry on the company on the basis it prescribed foredoomed the company to failure, but there is nothing in anything which transpired after his policies were taken out which can avail plaintiff in this action.

Having reached these conclusions I have not thought it necessary to go into the question of the effect of the

(1) 20 Times L. R. 715.

plaintiff's acquiescence in the raising of the rates or as to whether considering the pecuniary and other benefits he derived from the assurance on his life for so many years at the premiums paid by him the facts shew he has really sustained actionable damage. On both points I incline against the appellant.

As the majority of the court is not agreed as to the grounds upon which the appeal should be dismissed I concur that under the circumstances there should be no costs.

NESBITT J. (dissenting).—I have had the advantage of reading the judgments of the Chief Justice and my brother Davies. I am unable to agree with the grounds upon which either arrives at the result of dismissal of this appeal. I concur with the Chief Justice that both policies were obtained by misleading and fraudulent misrepresentations.

I cannot view the so-called puffing circulars as mere boastings or think that the plaintiff should have looked upon them as mere expressions of hope and expectation. Language which under some circumstances may well be held to be hope and expectation may, under other circumstances, be looked upon as a representation which a party is entitled to rely upon, and I think that in this case the plaintiff would be entitled to assume that the statements were statements of fact. The language was adopted by experts in insurance who professed to have discovered a new system of insurance which differed from any other system in vogue, and that the result of this system was that the person insuring would save from one half to two-thirds of capital which he otherwise would take from his business to pay the old line companies for the same amount of insurance; that by the use of the reserve fund his certificate would be practically

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self-sustaining after fifteen years as the reserve fund provided against excessive assessments, and that the reserve fund had securely invested more than was necessary to meet all liabilities; and that by reason of the cutting down of the cost of management the company was able to furnish life insurance at one-half the rates of ordinary companies, and that cost would not increase as age advanced. It might be less, but it would not exceed the maximum amount indicated by tables, etc.

It is urged that the second policy differs from the first inasmuch as the second policy has a table on the back containing minimum and maximum amounts. But the constitution and by-laws of the society are made part of the first policy, and I cannot read the policy with the constitution and by-laws as reasonably indicating to a person of average intelligence that the premiums which he was asked to pay would not exceed the amount stated upon the back of the policy as at age of entry, coupled with the representation which the plaintiff was led to rely upon as coming from experts asserting that they had discovered a new system of insurance. I think that the two policies are upon the same footing and that both are substantially upon the same footing as the policy in the *Foster Case* (1) and the more recent case of *Cross* v. *Mutual Reserve Life Ins. Co.* (2). It is answered that, assuming the circulars and agents' statements were untrue, the plaintiff upon reading his policy should have discovered the fraud, that in fact he had become a member of a company which entitled the directors to assess at least up to the maximum amounts called for by the policies at current age, that with the knowledge of such a condition of things he elected to treat the policy as existing, and that he has received benefits

(1) 20 Times L. R. 715. (2) 21 Times L. R. 15.

under the policy by being kept insured during a number of years.

In my view the policies were framed in such tricky and misleading language and the calls which were sent to the plaintiff were so framed that any reasonable person would be thrown off his guard and would have remained in a state of blissful ignorance of the real nature of the contract and have been entitled to assume that the age of entry was what was intended, and that when a highly increased assessment was asked for it was only asked for by way of advanced payment in order to satisfy the technical requirements of the Superintendent of Insurance for the State of New York. I think, therefore, that the defence of approbation of the contract, if I may so describe it, fails, and that when the plaintiff really became aware of the nature of the gross fraud which, in my opinion, has been perpetrated upon him, he, within a reasonable time, took action to recover the premium.

I find in the record in the *Foster Case* (1), in the House of Lords that the very point was made that there could not be a return of the premium because the plaintiff in that case had been kept insured and had in reality suffered no damage, but, notwithstanding such an argument, the House ordered a return of the premiums with interest, and the same argument was addressed to the court in the *Cross Case* (2), but without avail. It seems to me that where the plaintiff has been induced by fraud to enter into a contract of insurance (although he may be said to be kept insured during the time that he remained ignorant of the fraud and until he claimed a return of his money) he is entitled as against the person guilty of the fraud to say, you obtained my money in bad faith, you shall not be heard to say that I have received benefit. As a

(1) 20 Times L. R. 715. (2) 21 Times L. R. 15.

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fact it is difficult to say whether he had received a benefit by the so-called contract of insurance which he allowed to expire. Had he died in the meantime and the company had offered to pay the money his representatives would not be able to elect to take the money and also claim that the premiums had been obtained through fraud, and ask for a return of them; but, is he in this position? If it is found that the premiums were obtained through fraud, and the plaintiff is to be defeated in this case, I do not see how Foster was able to obtain a return of his premiums where he (Foster) had received precisely the same benefits as plaintiff did, and was asking to rescind the contract. I cannot see what difference it makes that the plaintiff, unable to keep up the extortionate demands made upon him, pays under protest, and says, in this case: "the contract is obtained by fraud—I have just discovered it—I demand my premiums so paid;" and, in the other case says: "I have been misled into a contract different from what I expected I was entering into, and as the court finds that the contract is as the other side argued for it I claim to be entitled to receive my money back." Both the parties may be said to have enjoyed the benefit of insurance during the time they remained ignorant.

In the last case the House of Lords has said that the premiums are to be returned with interest. In the present case I think the principle of that decision is clearly applicable and that the plaintiff is entitled to recover the premiums paid, with interest, and costs in all the courts. It may be said that this is hard measure, but there is high authority for saying "the way of the transgressor is hard." The case is one of much importance and involves, we are told, many others, and I regret that the questions of law cannot be said

to be settled by our present decision which proceeds on such various grounds.

KILLAM J.—In the main I agree with the views so well expressed by Sir Alexander Lacoste C.J., in the Court of Appeal for Quebec, and by my brother Davies here.

I desire to state as briefly as possible the grounds upon which, particularly, I base the conclusion that this appeal should be dismissed.

The formal transaction began in each case with the filling up, by the appellant himself, of blanks in a printed form entitled "Application for a Membership in the Mutual Reserve Fund Life Association," and its signature by him. Each application was, by its terms, expressed to be subject to all the limitations and requirements of the constitution and by-laws of the association, with the amendments made or that might thereafter be made thereto, all of which were thereby made part of any certificate that might be issued on the application. And the applicant agreed that, if he or his representatives should omit or neglect to make any payment as required by the conditions of such certificate or by the constitution and by-laws of the association, then the certificate to be issued upon the application should be null and void, and the officers of the association might cancel the certificate, and all money paid thereon should be forfeited to the association.

At the top of each form were the words: "This abstract of the application is to be filled up at the office only." Certain particulars were given, among them "assessments", the blanks following which were filled in "$17.60" and "$20.00" respectively. These particulars were evidently memoranda for the company's convenience, not intended to be part of the

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application. The blanks are not shewn to have been filled in by the appellant or before he signed, and I infer that they were not filled in until after the applications were received at the head office. I would not take these particulars either as forming any part of the application or as having influenced the appellant to enter into the contract.

Upon each application was issued what was called a "Certificate of Membership". Between the two documents there were differences which in some aspects might be material, but for the purposes of my present reasoning I treat the two as practically alike. By each it was stated that, in consideration of the application (which was expressed to be made a part of the contract), the association thereby received the applicant as a member of the association. By each there was to be payable to the legal representatives of the applicant, upon his death, $10,000. Each provided for the making of assessments upon the members to meet death claims, the assessments to be at such rates, according to the age of each member, as might be established by the Board of Directors, and the amounts (less 25 per cent) to go into a death fund out of which the death claims were primarily to be paid. The 25 per cent was to go into a reserve fund and, at the expiration of each period of five years, a bond was to be issued to each member for an equitable proportion of the reserve fund; and it was provided that, at each apportionment, the rate of assessment might be changed to correspond with the actual mortality experience of the association.

The first instrument expressly provided (par. 5) that it should be subject to all the provisions and conditions contained in the constitution and by-laws of the association, with the amendments made and that might thereafter be made thereto. The second did not

set out such a provision in terms, but through the incorporation of the application it appears to have embodied it.

On the back of the first certificate there was indorsed what was styled a "table of rates," in which it was stated "the basis of the assessment rate for each member, according to the age taken at the nearest birthday, on each $1,000, is as follows"; this was followed by columns giving rates opposite different ages.

On the back of the second certificate there was indorsed what was styled "mortuary rates and comparison of cost," composed of columns for "age," "minimum rate of each bi-monthly assessment on $1,000 insurance," "maximum amount which can be collected annually on each $1,000 insurance," and "old line rates," giving amounts opposite different ages.

The judgment of the Superior Court proceeded solely upon the ground that the appellant had been induced by misrepresentation to enter into the contracts. Upon this point alone the case has been argued before us. There is no question of contravention of either contract, or of the levy of assessments in excess of what the terms of the contracts warranted.

Fortunately we are not left to evidence of verbal representations, but the appellant points to two circulars issued by the association (exhibits 3 and 26) as containing the representations, and to no others. These alone should be considered for the purpose.

These circulars set out the system of insurance adopted by the association. Naturally they magnified the advantages of the system and its prospective results, and made claim to great superiority over other systems. In so far as the nature of the system was concerned it was accurately described. Unfortunately

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the expectations were not realized; the advantages and superiority were not all that were claimed.

I will not go over the circulars in detail but will refer only to the portions upon which the argument for the appellant appears to be the strongest. The principal complaint on the part of the appellant is that he was induced to believe that the contracts were to be such that assessments were always to be made with reference to ages of entry into the association, and were not to advance beyond the maxium amounts shewn by the table for the ages of entry. There does not seem to me to have been anything in the circulars representing such a limitation as part of the contracts into which parties were invited to enter. The tables of maximum rates did not specify that they were to be calculated upon the ages of entry. The strongest clause of the circulars in this respect was one to the effect that

> the interest on the reserve fund is applied to the payment of death claims. This will be nearly or quite sufficient to pay all claims caused by any increase in the death rate by reason of the advancing age of the association.

This is claimed to amount to a representation that the assessment would not increase with the age of the insured.

There is a manifest difference between increase by reason of the advancing age of the association and increase due to the advancing age of the insured. The framers of the circulars might think that, for some years at least, there would be an increase in the death rate among members which would not be wholly met by the addition of new members, and that the interest on the reserve fund would make up this deficiency. The realization of this expectation would depend upon many contingencies. The expression of the expectation could not properly be understood as more than an expression of opinion.

But all the members had to bear in some proportions the assessments necessary to meet death claims, even if the aggregate did not increase by reason of the advancing age of the association. And as new members were introduced, if, as stated in the circulars, the assessments were to be graded so that each member would pay only his exact share, the apportionment among them should have reference to relative ages and chances of life, for which purpose actual ages ought to be taken. This clause of the circulars did not touch upon that subject.

And those responsible for the circulars might have honestly believed and honestly expressed the opinion that the system provided, through its reserve fund, for the decrease of assessments, that this would lessen payments in after years, and that the payments of members would be greatly reduced in fifteen years, if the assessments should be properly apportioned among members and the reserve fund kept increasing according to the system—that there would come a time when the accumulation in the reserve fund would provide sufficient to largely or wholly pay for insurance during the balance of life.

The circulars should not be read as expressing more than the opinions of the responsible heads of the association in these respects. We have not to consider whether the system was sound or fallacious, whether the expectations were reasonable or unreasonable, but whether or not the proposed contracts were wrongly represented.

Evidence of experts in insurance was given for the purpose of shewing that actuaries could not have made the calculations stated in the circulars; but this evidence does not appear to me to prove that, if the system had been fairly laid before actuaries deemed to be reliable, they might not have so calculated. The

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experts were probably referring to the practice subsequently followed and not to the real system outlined. The other portions of the circulars seem sufficiently covered by these remarks. I cannot find that there was in either any misrepresentation sufficient to avoid the contracts, whether under the law of England or under that of Quebec. It was not proved that anything stated as a fact was untrue, or that anything stated as matter of opinion or expectation did not represent the real opinion or expectation of the responsible heads of the association.

I wish to add but a few words as to *Foster's Case* (1). It appears to have determined only that an assured person in his position, deceived as he was adjuged to have been deceived, and drawn into accepting as the embodiment of his contract a written document calculated, as that was adjuged to have been, to maintain the deception, may have judgment for the rescission of the contract and a return of the moneys paid under it, even after acting under it to the extent that he did, and after suing in the alternative as he did and failing upon the question of interpretation. When it is sought to apply the decision in another case, it is necessary to consider whether there have been similar misrepresentations or other material and false representations inducing the contract and whether the policy is similarly deceiving.

In my opinion neither the representations nor the policies or certificates in this case were similar to the representations or the policy in *Foster's Case* (1). These documents provided for assessments at such rates, according to the age of each member (presumably at the age of assessment), as might be established by the board of directors, and also for changes in the rates. Thus, on the face of the

(1) 20 Times L. R. 715.

documents, apart entirely from the constitution and by-laws (to which I have purposely omitted specific reference as their terms did not appear in the documents), there was no apparent limitation upon the powers of the directors and nothing to mislead in that regard. The contracts being clear in these respects upon their face, and there being no evidence that the appellant was misled as to their terms, the decision in *The Provident Savings Life Assurance Society* v. *Mowat* (1), and the cases there cited seem applicable.

Under the circumstances I agree that there shall be no costs.

Appeal dismissed without costs.

Solicitors for the appellant: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitors for the respondents: *Geoffrion, Geoffrion & Cusson.*

(1) 32 Can. S. C. R. 147.

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*Oct. 24, 25.
*Nov. 21.

STEPHEN ALLEN SPENCER (DEFENDANT)..... } APPELLANT;

AND

THE ALASKA PACKERS ASSOCIATION (PLAINTIFFS).. ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Practice—Jury trial—Findings as to negligence—Questions as to special grounds—Judge's charge—Non-direction—Misdirection—Application of law to facts—New trial.

Upon a trial by jury, the judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying, and, where the form of the charge was defective in this respect and, consequently, left the jury in a confused state of mind as to the questions in issue, there should be a new trial. Judgment appealed from (10 B. C. Rep. 473) affirmed, Davies J. dissenting.

Held, per Nesbitt J.—That in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence.

APPEAL from the judgment of the Supreme Court of British Columbia (1), which reversed the judgment of the trial court in favour of the defendant and ordered a new trial.

The defendant had undertaken to tow the respondents' ship into Victoria, B.C., from a point outside the harbour where she had been driven by a gale. The ship was attached to the defendant's tug by a hauser and proceeded to haul up her anchor when the winch

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 473.

chain broke. After the necessary repairs had been made, the ship continued to haul in the anchor chain without regard to the position of the tug which was such that the tug could not exercise power over the ship and, when the ship broke ground, she was swung by the current upon an island near by and was injured. In an action for damages founded on negligence and want of skill, judgment was entered in favour of the defendant upon the verdict of the jury, but this judgment was set aside by the judgment now appealed from and a new trial ordered on the ground that, in charging the jury, the trial judge had failed to point out the bearing of the facts in evidence upon the questions to be determined and, consequently, that the jury had been misled by the incompleteness of the charge.

The questions at issue upon the present appeal are fully discussed in the judgments now reported.

Peters K.C. for the appellant.

Bodwell K.C. for the respondents.

SEDGEWICK J. concurred in the judgment dismissing the appeal with costs.

GIROUARD J.—From what took place at the time of the trial, I think that the learned trial judge did not give proper and full directions to the jury and, as a consequence, that the latter did not understand the case. The confused state of their minds is revealed in the number of applications by them for further instructions which the judge did not, however, give, holding that they involved only questions of fact. I entirely concur in the opinion of my brother Justice Nesbitt.

DAVIES J. (dissenting).—I would allow this appeal.

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Davies J.

On full consideration of all the facts proved and in evidence before the jury I do not doubt that they fully understood the charge of the trial judge. His language, it is true, is vague but it must be read and understood in the light of the facts as they were then before the jury and, so read now, or heard by the jury then, I think they leave no reasonable room for doubt. I do not think the real facts to be determined were imperfectly and inadequately stated by the judge and so stated as tending to mislead the jury.

At any rate, if the counsel for the plaintiff thought the charge defective for non-direction it was his duty clearly to have pointed out the nature of the charge the judge should have made, and I am not satisfied that he did this.

As, however, a majority of my colleagues think that, under the circumstances, there should be a new trial for non-direction, I purposely refrain from discussing at length the reasons why I differ from that conclusion.

NESBITT J.—This is an appeal from a judgment of the Supreme Court of British Columbia directing a new trial in a case tried by a jury in which a general verdict was rendered in favour of the defendant.

The case was very fully argued and the appellant relied upon certain authorities (which I propose shortly to analyze), as establishing the position that the case at the furthest was one simply of non-direction, and that in any event the judge was not bound to do more than direct the jury as to the law which, it was contended, had been very fully done by the learned trial judge in this case.

I think it is necessary to refer to the pleadings to see whether the case which the parties went down to

try was in fact tried out. In the language of Lord Halsbury in *Bray* v. *Ford* (1), at page 48

> the case must be tried again and I desire to say nothing which can in any way influence the arguments upon the trial which must take place.

The plaintiff in substance charges in his statement of claim that the tug "Mystery" coming alongside the "Santa Clara" which had drifted in a storm to a position just outside Trial Island, the captain represented that his tug was supplied with plenty of power and could tow the "Santa Clara" from her then position to Ladysmith, and that relying upon such representations, which were the result of special inquiry, the ship's captain allowed the captain of the tug to undertake the towage. It is to be borne in mind that, apart from any special representation of this kind, the plaintiffs relied upon the rule of law that a steamboat engaging to tow a vessel for a certain remuneration, while not warranting her ability to do so under all circumstances and at all hazards, does engage that she will use her best endeavours for that purpose and will bring to the task competent skill and such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class, and that she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task, and, furthermore, that the captain of such a tug is bound to know the various currents, etc., which set about the places where he undertakes to tow from. In this case, as I have said, an express representation was alleged to have been made that the tug was of capacity to tow a boat double the size of the "Santa Clara."

The defence substantially set up was that the damage occurred owing to the negligence of those on board the "Santa Clara" in breaking ground with the

(1) [1896] A. C. 44.

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anchor at a time when the tug was in a position that she could not reasonably be expected to save the "Santa Clara" from drifting on the rocks.

Such being the substantial issue to be tried the plaintiffs say that the learned trial judge proceeded to give a very full and accurate statement of the law of negligence and contributory negligence and adverted at considerable length to a further suggested defence, namely, that owing to the breaking of one of the propeller blades on the tug, the tug was unavoidably deprived of the power she otherwise would have had, but that he did not apply the law to the facts, or give the jury any instruction as to what the plaintiffs claimed were the obligations undertaken by the defendants and what would form an answer in law by them, and that the questions by members of the jury showed that they were unable to grasp what the real issues were, and particularly unable to appreciate what bearing, as a matter of law, the last act of negligence, as it was described by the trial judge, had upon the case, and I think it is apparent from the questions asked both before the jury retired and afterwards when they came into court to seek information that they were greatly puzzled to know how to apply the law, as stated to them by the trial judge, to the facts. Mr. Bodwell, at the conclusion of the charge, pressed in various ways upon the trial judge a request that he should charge the jury that the plaintiffs relied upon an express representation as to the power of the tug and if they found that that representation was made that it would have a double bearing on their view of the case: First, that, as a matter of law, if the representation was made the plaintiff was entitled to a verdict, and: Secondly, in any event, that the captain of the "Santa Clara" was entitled to assume that he could safely break ground with his anchor in the position

the tug was in, as he claimed that the evidence showed that if the tug was of sufficient power she could easily have prevented drifting, and that, therefore, under such circumstances, the act of the captain of the "Santa Clara" was not negligence, in fact being reasonably prudent with a powerful tug. He also pressed upon the trial judge that under his direction the jury would naturally assume that the hoisting of the anchor was an act of negligence *per se*, and that if that act was found to have been, in point of time, the last act before the disaster it amounted to substantially a direction to the jury to find for the defendant. I agree that the charge is open to this construction.

The learned trial judge, after the jury returned to court and made some inquiries, repeated in another form his definitions of negligence and contributory negligence, but Mr. Bodwell again requested the trial judge to point out to the jury how the law did apply to the facts, and the more I read the direction to the jury the more I am convinced that the jury had a very confused idea of how they were to apply the law to the facts before them.

A number of cases were commented on to shew what was the duty of a judge in directing a jury. I think that one cannot do better than adopt the language of Lord Watson in the case of *Bray* v. *Ford* (1), at page 49,

> that every party to a trial by jury has a legal and constitutional right to have *the case* which he has made either in pursuit or in defence *fairly submitted* to the consideration of that tribunal.

I think it is very dangerous to quote from cases statements of the duty of a judge in directing a jury which are only applicable to the particular case. I quote the language of Lord Halsbury in *Quinn* v. *Leathem* (2):

(1) [1896] A. C. 44.
(2) [1901] A. C. 495 at p. 506.

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Now before discussing the case of *Allen* v. *Flood* (1), and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Much reliance was placed upon the language of the court in *Ford* v. *Lacey* (2), as adopted by the Privy Council in the case of the *Great Western Railway Company of Canada* v. *Braid* (3), (at page 122) namely that *non-direction* is only a ground for granting a new trial where it produces a verdict against the evidence.

Let us see the circumstances under which that language was used. Turning then to *Ford* v. *Lacey* (2), it will be found that that was a case for trespass for breaking and entering land of the plaintiff, and it appeared that the plaintiff had been for many years in the occupation of certain lands, and the land, the subject of the action, according to the plaintiff's case, formed part of a property of the landlord of the plaintiff, and that the land in question had been left dry by the river gradually changing its course. Four questions were left to the jury and a motion for a new trial was made upon the ground that the judge ought to have directed the jury on the question raised by the defendants, that land left by the gradual change of a river becomes part of the adjoining property. Mr. Baron Bramwell pointed out that the rule had not been obtained on the ground of the ver-

(1) [1898] A. C. 1. (2) 30 L. J. Ex. 351.
(3) 1 Moo. P. C. N. S. 101.

dict being against evidence, and Chief Baron Pollock pointed out that the assumption of liability argued for did not arise where there was positive evidence of ownership, which existed in the case in question. Mr. Baron Martin thought that the third and fourth questions left to the jury were the real and substantial questions in the case, and that, so far as he could see, the evidence appeared to be all one way, and said that as the verdict was right and there was no complaint of it being against evidence, he did not see how the fact of the judge not having drawn the attention of the jury to a particular proposition of law could be a ground for setting aside the verdict. Mr. Baron Bramwell said that the court thought there might be some cases where *non-direction* would amount to *misdirection*, but he did not see that the fact of the judge not having adverted to the law upon the point in that case amounted to a misdirection. And Baron Channell (at page 355) said:

> I do not mean to say that it may not be a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent the probability of its being misunderstood. For instance suppose a plea of payment and no evidence to show an actual delivery by the defendant of the money claimed, but evidence of circumstances amounting in point of law to a payment, if the judge, without informing the jury of the legal effect of those circumstances, left it nakedly to them to say whether or not there had been a payment, I think so bare a direction would amount to a misdirection that would justify a new trial. But if the law is clear, as it is here—for there is no question that the law as laid down by Lord Hale is correct—and if, as here, the jury have found a distinct issue, I do not think that the omission of the judge to instruct the jury respecting a clear proposition of law *which does not affect the issue*, is an omission of anything he was bound to state.

Is the non-direction complained of here of the character referred to in that case?

If the facts here were found by the jury as the plaintiff contended for they would necessarily find no negli-

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gence upon his part, and it seems to me that the jury were left wholly without direction as to the application of the law of negligence to the particular contentions which the parties were respectively making.

The observations of Mr. Justice Brett in the case of *Bridges* v. *The North London Railway Co.* (1), were also much relied upon. Those observations would not be disputed if read in connection with the case. The learned judge, at page 159, sets out what a plaintiff must prove in order to shew that defendants were guilty of negligence causing the injury, and that as between him and the defendants such negligence was the sole cause of the injury, and he points out that such a direction is not sufficient; it requires to be amplified by a legal definition as to what amounted to negligence and he proceeds to give such definition and then says:

> The final and full and strict direction to a jury, therefore, in such cases, is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done? * * * Have they or their servants by such act of commission or omission caused injury to the plaintiff? Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? The plaintiff can only recover if he satisfies the jury by evidence that the defendants or their servants were guilty of negligence as described and that he has been injured thereby, and that he has not been guilty of negligence, as described, contributing to the accident.

He then proceeds to consider what is the duty of the judge before giving such a direction, and then follows the sentence so much relied upon, (at page 160), namely:

> When the judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. He

(1) 43 L. J. Q. B. 151.

ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jury the bearing of the facts in evidence upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts directly deposed to which are to be considered but facts or propositions of fact which are to be inferred by them from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the plaintiff is bound to maintain. But the judge has no legal right, either directly or indirectly, to force upon the jury his view of any fact or inference of fact.

He follows this statement by amplifying at considerable length what he means, pointing out that judges would have no right, for instance, in such a case as that before him, to say to a jury that the calling out of the name of a station was no intimation that the passengers might, on the stopping of the train, alight; that was a matter in his opinion of life and habits solely for the determination of the jury. I do not view this as in any way impeaching the view generally held that a judge's duty is to place distinctly before the jury the application of the rules of law laid down by him according as they find the facts and inferences of the facts are made out. I consider the illustrative charge given by the learned judge the best possible example of what I mean when I say the law must be applied to the facts. I do not think the judge is bound to comment upon evidence in the sense of reviewing what the several witnesses have sworn to, or to point out for the consideration of the jury anything which may strike him as throwing light upon the credibility of the story, but I think he is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them.

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Nesbitt J.

Reliance was also placed upon the judgment of Lord Justice Bramwell in *Clark* v. *Molyneux* (1), (at page 243) where that learned judge said:

> I certainly think that the summing-up is not to be rigorously criticized; and it would not be right to set aside the verdict of a jury because, in the course of a long and elaborate summing-up, the judge has used inaccurate language; the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions. In the present case, however, I cannot help coming to the conclusion that the question left by the judge to the jury was put in an inaccurate shape.

I adopt this but it is to be observed that, in that case, the Lord Justice was of opinion that the very form of the questions left by the judge to the jury was in itself a misdirection. And I think, in this case, without, as I have said, expressing any view whatever upon the evidence, that the form of the charge must necessarily have left the jury in a confused state of mind, and that they were not directed as to the real contest between the parties and as to what should be the proper result in law according to the view they took of the facts sworn to. The plaintiff was suing upon a contract the very making of which involved certain legal obligations which obligations the plaintiff contended were added to by express representations which in any point of view he contended rendered his conduct perfectly proper and not negligent, whereas if such representations had not been made and were not relied upon by the captain of the "Santa Clara" the jury might take a very different view of the reasonableness of his conduct under the circumstances. None of this was pointed out to the jury. If questions are answered by a jury many difficulties are avoided and the jury's attention would be directed to the points at issue.

(1) 3 Q. B. D. 237.

In case of a new trial I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specifically upon which they find negligence. Lord Coleridge in the case of *Pritchard* v. *Lang* (1), uses some strong expressions in reference to this subject, in fact saying that in pursuing the course of not asking the jury to put the specific ground upon which they found negligence was calculated to mislead them and to defeat justice.

I have had an opportunity of reading the judgment prepared by my brother Killam and I entirely concur in the view he expresses regarding the respective duties of judge and counsel and the distinction between misdirection and non-direction.

I would dismiss the appeal with costs.

KILLAM J.—I would dismiss this appeal. Stated in the abstract, it may be said that it is the duty of a judge presiding at a jury trial to see that the jury are instructed as to what are the issues of fact upon which their findings are required, and the law relating to these, and how their verdict should be according as their findings of fact are in one way or another. But the degree in which it is important to point out these things expressly in a formal charge must always depend upon the circumstances of the case.

It can never, then, be a sufficient statement of an objection to the judge's charge that he did not apply the law to the facts. If in the opinion of counsel some further direction than that given by the judge is required, in justice to his client, counsel should formulate the propositions of law, applicable to the facts, which he desires that the judge should express to the jury and ask the judge to instruct the jury accordingly.

(1) 5 Times L. R. 639 at p. 640.

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I find nothing in section 66 of the Supreme Court Act, 1904, referred to by Mr. Justice Martin in the court below, which varies in these respects the practice at common law. The effect of that section in regard to objections not taken at the trial is not now in question.

In *The Great Western Railway Co.* v. *Braid* (1), the Judicial Committee of the Privy Council expressly approved of the rule stated to have been laid down in *Ford* v. *Lacey* (2), that

> non-direction is only a ground for a new trial when it produces a verdict against the evidence.

While this may be taken as the general rule, it must be confined to cases of pure non-direction, and not applied to cases in which non-direction on some particular matter amounts to misdirection.

Upon the latter point the correct principles were well stated by Lord Blackburn in *The Prudential Assurance Co.* v. *Edmonds* (3), at pages 507-8 :

> I take it that when there is a case tried before a judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Further than that, it is not necessary for him to go. * * * So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the judge should state it ; and, although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo*. When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide, to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*.

(1) 1 Moo. P. C. N. S. 101. (2) 30 L. J. Ex. 351.
(3) 2 App. Cas. 487.

Upon a careful reading of the charge, I am of opinion that the portion relating to contributory negligence, especially after the return of the jury into court, was calculated to leave the jury in a very confused state of mind respecting the law. The learned judge was not bound to tell the jury, as the plaintiffs' counsel asked, that there was an express warranty or representation of the power of the tug. That was matter of inference from the evidence of a conversation. It might have been better if the judge had asked the jury to consider the conversation and take it into account in determining how far the plaintiff's captain was justified in relying upon the tug's power and whether, in view of that and the other circumstances, he was negligent in raising the anchor when he did. But the omission to do this was merely an omission to comment on particular portions of the evidence.

Some parts of the charge, however, seem to me to have been misleading. These were the portions in which the learned judge spoke of the last act of negligence as a determining factor. It was for the jury to find on the power of the tug and whether, if the tug had had the requisite power, she might have been able to save the ship even after the anchor had been raised. An alleged deficiency of power was one of the chief complaints on the part of the plaintiff, and yet it was hardly likely to be considered by the jury as the last act of negligence.

Upon the whole I think that the court below was right in directing a new trial.

Appeal dismissed with costs.

Solicitors for the appellant: *Peters & Wilson.*

Solicitors for the respondents: *Bodwell & Lawson.*

1904
*Nov. 28.

ARTHUR GEORGE..... ..APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law — Crown case reserved — Form of charge—Theft—Taking "fraudulently and without colour of right"—Criminal Code, 1892, *secs.* 305 *and* 611—*Form FF—County Court Judges' Criminal Court —Court in banco—Jurisdiction of quorum.*

The Supreme Court of Nova Scotia, composed of a quorum of four judges only, has jurisdiction to hear and decide a Crown case reserved stated by the judge of the County Court Judges' Criminal Court for the opinion of the Supreme Court.

The prisoner was charged before the County Court Judges' Criminal Court with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently and without colour of right.

Held, affirming the decision appealed from, that the offence of which the prisoner was accused was sufficiently stated in the charge.

APPEAL from the Supreme Court of Nova Scotia, declaring that the charge to which the prisoner pleaded and on which he was tried and convicted in the County Court Judges' Criminal Court was not bad by reason of the omission to charge the offence of theft as having been committed fraudulently and without colour of right. The case stated for the opinion of the court below was as follows:

"CASE STATED FOR THE OPINION OF THE COURT.

OCT. 11, 1901.

"The prisoner was charged before me under section 305 of the Code, that on a certain day in the month of April, A.D. 1901, he unlawfully did steal one piece of

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

Oregon pine wood, of the value of five dollars and forty cents, the property of His Majesty the King.

"At the conclusion of the evidence, Mr. Power, counsel for the accused, objected that the charge of stealing in this case must allege that the offence was committed fraudulently and without colour of right, etc.

"I found the prisoner guilty, but at the request of his counsel I suspended sentence, and granted a reserved case, upon the following question:

"1. Is the charge to which the prisoner pleaded, and on which he was tried, bad by reason of its omitting to charge the offence as having been committed fraudulently and without colour of right, and, if yes, is the conviction therefore bad, the accused not having objected until after the close of the evidence?

"The only doubt which I entertain in respect of the sufficiency of the charge is caused by the opinion expressed by Mr. Justice Taschereau in his work on the Code, at page 675, as to the restricted application of section 611 of the Code and the Form FF given in schedule one. But for that opinion I would have had no doubt whatever as to the sufficiency of the charge, and would have refused the application for a reserved case.

"(Signed), W. B. WALLACE,

"*Judge of County Court, District No.* 1,
and Judge of the County Court Judges'
Criminal Court for the County of Halifax."

When the case was heard by the Supreme Court of Nova Scotia, sitting *in banco*, that court was constituted of four of its judges only, being a quorum according to the rules of practice. The majority of the judges, Weatherbe J. dissenting, were of opinion that the charge to which the prisoner pleaded and

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upon which he was tried and convicted was not bad by reason of the omission to charge the offence as having been committed fraudulently and without colour of right, and ordered the case to be remitted to the trial court and the proper sentence passed upon the prisoner. The prisoner appealed to the Supreme Court of Canada.

John J. Power for the appellant. The charge was insufficient. It should have set out in substance all the elements which under sec. 305 of the Criminal Code constitute the offence of theft or stealing; in other words, it should have been averred that it was done "fraudulently and without colour of right" and with "intent, etc."

There was no jurisdiction in the court below to render the decision now under appeal. The Supreme Court of Nova Scotia, by sec. 5 of the Nova Scotia Judicature Act, is composed of seven judges and, as constituted, *in banco*, of a number less than seven judges, it had no jurisdiction to hear or determine the case reserved by the judge of the County Court Judges' Criminal Court. Section 3, (*e*, iii) of the Criminal Code requires criminal appeals or cases reserved, in Nova Scotia, to be heard before the court *in banco*. See definition of "Court *in banco*" in the Century Dictionary, also in the Imperial Dictionary. Order 58, Rule 7, and Order 61, Rule 1, of the Nova Scotia Judicature Act, fixing the quorum of judges on the hearing of appeals, relate merely to civil matters and do not affect procedure in criminal and matrimonial cases. These rules are rules of procedure only, passed under section 45 of the Nova Scotia Judicature Act, and do not relate to the "constitution" of a court. See British North America Act, 1867, sec. 92, s.s. 14. Section 15 of the Imperial Judicature Act of 1881 allows a court composed of five judges to hear criminal appeals in Eng-

land. Prior to the passing of that Act all the judges of the Court of Queen's Bench attended during arguments of Crown cases reserved. As no such provision regarding the proper quorum in criminal cases exists in Nova Scotia, the attendance of all the judges of the Supreme Court of that province is necessary to give jurisdiction.

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Longley K.C., Attorney General for Nova Scotia, for the Crown, was not called upon for any argument.

The judgment of the court was delivered by

SEDGEWICK J. (Oral).—We are all of the opinion that there was jurisdiction in the court below to hear and decide the case reserved and that the court as then constituted, composed of a quorum of the judges only, was properly constituted for that purpose.

We are also of opinion that the offence of which the appellant was accused is sufficiently stated in the charge upon which he was convicted in the County Court Judges' Criminal Court.

The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitor for the appellant: *John J. Power.*

Solicitor for the Attorney General for Canada: *F. F. Mathers.*

Solicitor for the respondent: The Attorney General for Nova Scotia.

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*Nov. 16.

*Dec. 14.

JAMES PEARSON (DEFENDANT).....APPELLANT,

AND

CARPENTER & SON (PLAINTIFF).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and agent—Gambling in stocks—Advances by agent—Criminal Code, s. 201.

P. speculated on margin in stocks, grain, &c., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo and the price going down C. & Son forwarded money to the latter to cover the margins. P. having written the brokers to know how he stood in the transaction received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you" on which he gave them his note for $1,500 which they represented to be the amount so advanced. Shortly after the Buffalo firm failed and P. became satisfied that they had only conducted a bucket shop and the transaction had no real substance. He accordingly repudiated his liability on the note and C. & Son sued him for the amount of the same.

Held, Davies and Killam JJ. dissenting, that the evidence showed that the transaction was not one in which the wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of sec. 201 Crim. Code and plaintiff could not recover.

Held also, Davies and Killiam JJ. dissenting, that assuming C. & Son to have been agents of P. in the transaction they were not authorized to advance any moneys for their principal beyond the sums deposited with them for the purpose.

Held per Davies and Killam JJ. that the transaction was completed in Buffalo and in the absence of evidence that it was illegal by law there the defence of illegality could only be raised by plea under rule 271 of the Judicature Act of Ontario.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff but reducing the amount of the damages.

The facts are sufficiently stated in the above headnote and in the judgments published herewith.

W. R. Smyth for the appellant. Sec. 201 of the Criminal Code makes this transaction illegal and not merely void as was that in *Read* v. *Anderson* (1), and similar cases. See Anson on Contracts, 8 ed. p. 258, for the distinction between the two.

It being illegal the plaintiffs cannot recover. *Leggatt* v. *Brown* (2).

Illegality need not be pleaded. *Re 'Summerfeldt* v. *Worts* (3).

See also *Walsh* v. *Trebilcock* (4).

Lynch-Staunton K.C. and *A. M. Lewis* for the respondents. The deal was made in Buffalo and was not within our Criminal Code. *Cowan* v. *O'Connor* (5); *Re Noble* v. *Cline* (6).

Whether the wheat was actually bought or not there was a liability on the part of the firm in Buffalo to deliver it which makes it a real transaction. *Universal Stock Exchange* v. *Stevens* (7).

Even if it was a wagering contract plaintiff can recover for money advanced on defendant's behalf *Read* v. *Anderson* (1).

THE CHIEF JUSTICE and SEDGEWICK J. concurred in the opinion of Mr. Justice Nesbitt.

DAVIES J. (dissenting).—I agree with Mr. Justice Killam.

(1) 13 Q. B. D. 779.
(2) 29 O. R. 530; 30 O. R. 225.
(3) 12 O. R. 48.
(4) 23 Can. S. C. R. 695.
(5) 20 Q. B. D. 640.
(6) 18 O. R. 33.
(7) 40 W. R. 494.

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NESBITT J.—In this case, as I understand, a different view having been taken of the facts by at least one of my brother judges I have again gone carefully over the evidence, and a re-perusal of it satisfies me that Camp & Co. were carrying on in Buffalo what is popularly known as a bucket shop, pure and simple, that is to say, there was an absolute unreality as to any transactions. They never placed nor intended to place any order which was telegraphed to them but simply entered same upon the sheets and bet against it. I have also no doubt whatever that Carpenter & Co. were agents for Camp & Co. by whom they were paid a commission, and that when Pearson went in and instructed a purchase or bet, whichever view is taken of the evidence, that that was telegraphed on by Carpenter & Co. to their principals, Camp & Co., and no transaction was entered into either by bet or otherwise until Camp & Co. signified to Carpenter & Co. that Carpenter & Co. were authorised by them to issue a memorandum (which took the form of a sold note) and that the transaction was not completed until the acceptance of it by Camp & Co. was received in Toronto and notified to the customer there. If this is a proper view of the transaction then it was not consumated except in Toronto, and it is to my mind clearly within section 201 of the Criminal Code, and being illegal is within the reasoning of this court in *Walsh* v. *Trebilcock* (1).

If the view is taken that Carpenter & Co. were agents for Pearson, and that everybody understood that the substance of the transaction was a mere bet, I am unable to find that there was an implied authority to do more than pay over the money deposited at the time, and I think it would require express instructions from Pearson to Carpenter & Co. to pay money

(1) 23 Can. S. C. R. 695.

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on a lost bet such as this to enable Carpenter & Co. to recover from Pearson. I do not think that such a transaction as this comes within the purview of *Read* v. *Anderson* (1), That was a case of a simple bet, not of a succession of payments on further bets arising out of the original bet which is this case. Even on this view of the evidence that Carpenter & Co. were agents for Pearson to telegraph to Buffalo to make a bet, it is plain that the bet never became a bet until Carpenter & Co. notified him of the acceptance of it by Camp & Co., and the transaction would still be within the section of the Code I have referred to. In my view, however, the defence set up by Pearson is the correct one. I think that in all of these cases it is a question of fact whether the transaction entered into is really that of betting as in *Universal Stock Exchange* v. *Strachan* (2), or whether there was a knowledge upon the part of both parties that no transaction really ever took place. It is to be noted that both the Messrs. Carpenters swore in the most positive terms that they had no actual knowledge that the transactions of Camp & Co. were merely betting transactions. They both swore that they had a right to assume that when Camp & Co. telegraphed back accepting the order telegraphed to them that such an order was in fact placed; and it is to be noted that when they telegraphed similarly to Ladenburg, Thalman & Company, or Bartlett & Fraser that the transactions were in fact placed, and while as in *Universal Stock Exchange* v. *Stevens* (3), there never was any expectation that the stocks would actually be asked for, yet, if they were asked for at any time, evidence was forthcoming that the transactions had been originally placed and were carried, and, therefore, the customer was bound, on the one

(1) 13 Q. B. D. 779.

(2) [1896] A. C. 166.

(3) 40 W. R. 494.

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hand, to pay any losses that might occur in selling the stocks out or, on the other, he could, if he desired, pay up the balance over and above the margins and get his stocks. I have no doubt whatever that Pearson was perfectly aware of the difference between the two styles of broker's offices, and it was for this reason that he made the inquiry that he did in his letter of April 6th, in which he says:

SATURDAY EVENING, 6th April, 1901.

MESSRS. CARPENTER & SON.

DEAR SIRS,—You will have to tell your people that I cannot arrange more margins just now on that wheat. I suppose Monday will be a holiday but I expect to be back Tuesday. Am going to Rochester tomorrow. If they purchased the stuff I must try and arrange it some way but don't you pay any money on my account.

Yours truly,

J. PEARSON.

and again on April 9th:

TORONTO, April 9th, 1901.

MESSRS. CARPENTER & SONS.

DEAR SIRS,—As you have seen fit to consult a solicitor I presume you are inquiring what your rights are, it will not be out of place for me to see what mine are. I had not been thinking on this line.

The only open transaction is the wheat. The others are closed. I gave you the order to buy and if this order was carried out then I have 30 M bushels of May wheat bought and if party with whom I am dealing has sold this wheat for me then I am behind in my margin and intend to put it up but if he closed out the transaction as soon as the margin I had up was exhausted or before that then I do not owe him anything. It all depends on the facts.

Now as you have asked me for a letter and I have written it I ask you for one to state just how the transaction stands—the actual facts.

Yours truly,

(Sgd.) JAMES PEARSON,

pp. "D."

And, as I have said, until inquiry was made it was impossible for him to tell whether the transaction was a mere bet or was, as in the case of the two brokers' offices I have mentioned, a real transaction. I cannot understand what object he had in writing this letter

except it was trying to ascertain his position. He knew or supposed that he was not liable to pay if it was a mere bet, which is apparent from the fact that he wanted them not to pay any money on his account. He knew the doctrine of *Read* v. *Anderson* (1) and was guarding himself against the notion of Carpenter & Co. claiming to make good the loss upon his (Pearson's) bet. And, on the other hand, if the transaction was one they could shew had been placed he knew that he would be liable to pay. To this letter Carpenter & Co. replied on the 9th April as follows:

TORONTO, April 9th, 1901.

J. PEARSON, Esq.,
Barrister, &c., City.

DEAR SIR,—Answering yours of to-day you are mistaken in thinking that we consulted a solicitor professionally respecting our right against you. All we did was this: our senior partner's private solicitor is Mr. Teetzel and being with him on private business yesterday it occurred to him to inquire whether he knew you, and on being informed that he was well acquainted with you ventured to inquire as to your standing, and in the course of confidential talk told Mr. Teetzel of the relation between us and expressed his anxiety on account of the size of your account, and also explained that the claim being large, and not knowing you personally, some quibble might be raised, whereupon Mr. Teetzel volunteered to 'phone you more as a friend than a solicitor to know if there was any trouble. Mr. Teetzel assured him you were a gentleman of high honour and if everything was fair we need fear no trouble.

Now the facts are: Your order was placed with us as your broker, and we at once wired to purchase, and as your agents forwarded from time to time your margins, as our books will show. No doubt the wheat was bought and has been carried, and whether it has been or not our good money has gone to protect the deal for you. You also knew from the beginning that we held ourselves directly responsible to you and you could have no misgiving as to our financial ability to meet all engagements undertaken. We regret that you should suggest even the idea of a dispute between us, and while greatly regretting the deal has gone against you we feel assured you will acknowledge

(1) 13 Q. B. D. 779.

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our legal and moral claim without delay. Let us have settlement and in the mean time write us when we are to close the deal.

Yours truly,

CARPENTER & SON,

per D.

And upon this Pearson gives the note in question in this action.

How it can be said by Carpenter & Co. that upon its turning out upon their statement that the wheat had actually been carried that they could recover upon a note given entirely upon the faith of its being a real transaction I cannot understand. It does not lie in the mouth of the person who makes the statement of fact to say that the other party should have known better, and that is really what the judgment of the Court of Appeal comes to.

I do not see what object Pearson would have in writing the letter unless it was for the purpose of finding out whether he was bound to pay or not. It has been said that, if it is found to be a gambling transaction, that has not been pleaded, and the defendant has disclaimed any desire to take advantage of the section in the Criminal Code. My answer is that that is not the business of the defendant but of the court whose duty it is to refuse to give assistance to a plaintiff asking to enforce an application arising out of an illegal transaction.

I adopt the language of Lord Justice Lindley in *Scott* v. *Brown* (1) at p. 728.

I think the real facts are that Pearson was not sure whether the whole thing was a bet or not, that in order to make himself sure he wrote the letters that he did, and that Carpenter & Co. are bound by their answer, and that the note was given on the representation that the transactions were real and that the wheat was in fact purchased and carried, and the

(1) [1892] 2 Q. B. 724.

evidence makes it perfectly plain that there never was a transaction. If this view of the evidence is not taken I think certainly that it is clear that if all the parties knew the whole thing was a mere betting transaction from beginning to end that, nevertheless, the substance of the transaction was that Pearson proposed to Carpenter & Co., in Toronto, to make a bet knowing that they would telegraph his offer to a principal of Carpenter & Co., and both parties perfectly understanding that the bet would not be made until Carpenter & Co. signified to Pearson, in Toronto, that they were ready and willing to make the bet on behalf of their principal and went through the form (if it is to be assumed that they were really only betting) showing a real transaction of purchase and sale, and that, therefore, the transaction was expressly within the Criminal Code and Carpenter & Co. cannot recover for moneys paid by them in a matter arising out of such illegal transaction. I would also hold in any event that if Carpenter & Co. are held to be the agents of Pearson that the only authority they possessed was to forward the moneys deposited by him on the original making of the bet and that in such a case there is no implied authority to forward other moneys to make good additional losses, but that there must be in every such case as this an express request to pay the money on behalf of the person sued, and there is no pretence of an express request in this case by Pearson to Carpenter & Co. to pay any further or additional moneys for him, but that they must be taken to have assumed to pay them relying upon his honour to make restitution to them.

People carrying on this type of business should understand that the courts will not be eager to assist, and that when they get the original amount out of the party with whom they deal, they must be very

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alert to get the actual money for further losses; and that if they see fit to give credit for such pretended further losses they cannot come to the courts of this country for aid to collect.

I think the appeal should be allowed with costs.

KILLAM J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for Ontario in an action for the balance claimed by the plaintiffs upon a promissory note for $1,600 made by the defendant in favour of the plaintiffs.

The plaintiffs carry on business as brokers and financial agents in Toronto and Hamilton, Ontario. The defendant speculated through their Toronto office in stocks, grain, etc., upon margin; and the note in question was given in respect of a claim made by the plaintiffs for moneys said by them to have been advanced for him to protect his transactions.

At the trial the plaintiffs recovered judgment for the full amount claimed by them. The Court of Appeal reduced the amount by a sum advanced upon a transaction found by the court to have been made contrary to direction from the defendant, but confirmed the judgment for the balance, which is now alone in question.

There is no doubt that the plaintiffs made the advances. It seems to me quite clear that the courts were correct in finding that the plaintiffs had the authority of the defendant to make advances necessary to protect his transactions

The defence set up by the pleadings was that the plaintiffs had obtained the note by representing to the defendant that they had made purchase or sales in accordance with the defendant's orders when, in fact, no such purchases or sales had been so made.

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The transactions in question were carried on between the plaintiffs and a firm in Buffalo, N.Y., styled Camp & Co. The defence pleaded rests upon the theory that the plaintiffs were merely the agents of Camp & Co., by whom the purchases and sales were to be made, and that, in reality, none were so made or attempted to be made by Camp & Co., but that, as between the plaintiffs and Camp & Co , there was merely a series of speculations by Camp & Co. in differences which were charged or credited to the plaintiffs according to circumstances as upon assumed purchases and sales.

The learned trial judge found that Camp & Co. were the agents of the plaintiffs to effect the purchases and sales, that while Camp & Co. did not make real purchases or sales they reported such to the plaintiffs as having been actually made, and that the plaintiffs, believing the reports and having made the payments relying upon them, were entitled to recover the amounts.

The Court of Appeal held, upon the evidence, that the plaintiffs were the agents of Camp & Co., whose real business and the transactions in question were of the nature found by the trial judge, but that both the plaintiffs and the defendant knew the nature of the transactions, and that, as the moneys had been paid under authority to so deal, the defendant was bound to repay them.

There can be no doubt that Camp & Co. never made or assumed to make any contracts of purchase or sale on the defendant's behalf with any other persons. The most that can be contended for is that any contracts or transactions were made or conducted between Camp & Co. and the defendant through the medium of the plaintiffs acting as the agents of one party or the other or partly for each. And in my opinion none of the parties ever intended or expected that there were to

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be any real contracts for the purchase or sale of commodities or stocks.

In the particular cases out of which this action has arisen the defendant initialled and gave to the plaintiffs a memorandum in the following form :

MEMO.

Buy 18th May.
10 May wheat
at 76 7-8 & 20 at 76 1-2.

J. P.

The plaintiffs telegraphed an offer in these terms to Camp & Co., and it was accepted. The defendant knew nothing of Camp & Co. It was not material to him whether the plaintiffs effected a deal with another party directly or through the medium of some one in Buffalo. He obtained what he sought—an arrangement by which there was to be the semblance of a sale to him and a subsequent re-sale, as a result of which he was to receive or pay the difference in market prices. The result was a loss which he, and not the plaintiffs, should bear. The defence on the record failed.

Before the Court of Appeal, as appears by the judgment of the learned Chief Justice of Ontario, the defendant disclaimed any desire to avail himself of the defence that these were gambling transactions. He now seeks to do so.

If it were clear that the contracts were wholly made in Toronto between the defendant and Camp & Co. through the agency of the plaintiffs, it appears to me that they were directly within section 201 of "The Criminal Code, 1892."

And, probably, as the transactions and the authority to make the advances were all linked together and the plaintiffs directly parties to them all, the advances would not be recoverable.

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On the other hand, there seems to be nothing in the statute or otherwise to make it unlawful to employ a person in Canada to enter into such transactions abroad, though the agent's right to recover for moneys advanced upon them would probably depend upon the law of the country where they were entered into.

In the absence of express or implied prohibition by statute, moneys paid at the request of another in discharge of a lost bet or wager made by or for the latter is recoverable under the law of the Province of Ontario. See *Hussey* v. *Crickitt* (1); *Rosewarne* v. *Billing* (2); *Knight* v. *Cambers* (3); *Bubb* v. *Yelverton* (4); *Oldham* v. *Ramsden* (5); *Read* v. *Anderson* (6); *Bank of Toronto* v. *McDougall* (7).

Whether this is the law in the State of New York; whether there is there any statute similar to ours or which, either expressly or by implication, makes money paid upon such transactions as that now in question non-recoverable, there is nothing to show.

By Rule 271 under the Judicature Act of the Province of Ontario:

Each party in any pleading shall raise all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Statute of Limitatations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.

If the evidence made it clear that the consideration for the note was illegal the defect in pleading would be easily got over. Although the plaintiffs were spoken of by some of the witnesses as agents of Camp & Co. and were allowed commissions in their dealings, yet,

(1) 3 Camp. 168.
(2) 15 C. B. N. S. 316.
(3) 15 C. B. 562.
(4) 19 W. R. 739.
(5) 32 L. T. 825.
(6) 13 Q. B. D. 779.
(7) 28 U. C. C. P. 345.

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upon the evidence as a whole, I am inclined to the view that the plaintiffs acted as agents of the defendant to carry on the dealings for him, and that the transactions should be deemed to have occurred in Buffalo. But whether this view is correct or not, still, in the absence of the plea, it should not be assumed that all the evidence was given that could be given upon the question as to where the transactions should be considered to have taken place. And whatever might be the presumption in a proper case as to the law in New York, it would be a presumption of fact which could not properly be raised without the plea because, if raised, it might have been rebutted.

I think that the new defence should not be allowed at this stage, and in my opinion the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Wm. R. Smyth.*

Solicitors for the respondents: *Harrison & Lewis.*

ALICE R. COX AND EVELYN S. COX (DEFENDANTS) .... } APPELLANTS;

AND

ANDREW A. ADAMS (PLAINTIFF).....RESPONDENT

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*Nov. 10.
*Dec. 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Security for debt—Husband and wife—Parent and child.

C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt it was agreed between them that if he could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first the wife and daughter finally agreed to sign notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice.

Held, reversing the judgment appealed from, Taschereau C.J. dissenting, that though the daughter was twenty-three years old she was still subject to the dominion and influence of her father and the contract made by her without independent advice was not binding,

Held also, Taschereau, C. J. and Killam J. dissenting, that his wife was also subjected to influence by C. and entitled to independent advice and she was, therefore, not liable on the note she signed.

Held, per Sedgewick J. that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures of the notes and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required therefore the plaintiff could not recover.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Killam JJ.

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The facts of the case are sufficiently stated in the head-note and in the opinions of the judges on this appeal.

Laidlaw K.C. and *G. T. Blackstock K.C.* for the appellants. Defendants are entitled to an account of securities obtained by Walmsley from Cox. *Newton* v. *Chorlton* (1); *Forbes* v. *Jackson* (2); *Dixon* v. *Steel* (3).

The notes were given under marital and parental pressure and plaintiff cannot recover. *Turnbull* v. *Duval* (4); *Bergen* v. *Udall* (5); *Delong* v. *Mumford* (6); *Lavin* v. *Lavin* (7).

The notes were obtained from the defendants by fraud and misrepresentation. *In re McCallum* (8).

Shepley K.C. and *D. M. Robertson* for the respondent, cited *Sercombe* v. *Sanders* (9); *Bainbrigge* v. *Browne* (10); *Smith* v. *Kay* (11) at page 772; *Turnbull* v. *Duval* (4).

THE CHIEF JUSTICE.—I would dismiss this appeal. The opinion delivered by the Chief Justice of Ontario is unanswerable. I entirely agree with his reasoning. A proper understanding of the facts of the case as they have been found by the trial judge and by the Court of Appeal, unanimously, leaves no room for the application of the law and of the authorities upon which the appellants have attempted to support their contentions.

SEDGEWICK J.—I entirely agree with the conclusions at which my brother Girouard has arrived in his very able and exhaustive judgment, but it appears to me

(1) 10 Hare 646.
(2) 19 Ch. D. 615.
(3) [1901] 2 Ch. 602.
(4) [1902] A. C. 429.
(5) 31 Barb. 9.
(6) 25 Gr. 586.
(7) 27 Gr. 507.
(8) [1901] 1 Ch. 143.
(9) 34 Beav. 382.
(10) 18 Ch. D. 188.
(11) 7 H. L. Cas. 750.

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that the same end might have been reached by a less elaborate process. To my mind the transaction impeached in this case is a most unconscionable one, a transaction the like of which, so far as I know, no court of equity has ever ventured to affirm. Reading as well what is conspicuously between the lines as the lines themselves, the following facts may, I think, be fairly gathered from the evidence.

The real plaintiff, one Walmsley, is a stock broker of considerable wealth, in the City of Toronto. For three years, at least, he and the defendant, E. Strachan Cox, who was possessed of but little means, were dealing jointly in the purchase and sale of mining and other stocks, speculating to the extent of over a million dollars. For the purpose of carrying on this business Walmsley would discount Cox's paper whenever it was necessary for him to do so. The final result of these speculations was that, while Walmsley made out of them what may be regarded as a small fortune, Cox came out of them, not only penniless, but very heavily involved, owing Walmsley several thousands of dollars. Walmsley had managed to obtain from Cox an absolute transfer of all possible interests that he had in any mining stock in which they both, theretofore, had been interested, as well as all stocks he held in his individual name, and began pressing for payment of the balance due (a wholly usurious balance), although he was aware that Cox had no means whatever of paying the debt out of any assets of his own. He, however, was determined either to get his money or security for it.

Now it happened that the appellant, Mrs. Cox, was a lady who held a life estate in certain property devised or bequeathed to her by her father, and that their only child, a girl of twenty-three, Evelyn by name, had a reversionary interest in the *corpus* of the estate. It also happened that Cox was very anxious

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to raise the sum of $1,000 for his own personal benefit, probably to try his luck once more at the casinos or bucket shops which are becoming so numerous in the larger cities of this country, and the idea was conceived—Cox asserts by Walmsley, while Walmsley asserts by Cox—of achieving the desires of both of them, namely, security for Walmsley, and $1,000 for Cox, at the expense of Mrs. Cox and her daughter. So it was proposed that Walmsley should advance $1,000 to Cox, upon Cox inducing his wife and daughter to become surety to Walmsley for the debt which Cox owed him and for the $1,000 proposed to be advanced, Walmsley, in effect, saying:

> You will get the $1,000 cash, if you can manage (honestly if you can, but somehow, anyway), to get your wife's and daughter's signatures to promissory notes in my favour.

He knew, as I have said, that Cox was worse than worthless. He knew that he could give nothing of a pecuniary kind to his wife and daughter in consideration of their assisting him, but nevertheless, he held out as a bribe to Cox for the use of his marital and parental influence over the mother and child, the $1,000 which the latter was so feverishly anxious to obtain. Cox thereupon proceeded with his task. It is unnecessary to go into details. After many days, not only of expostulation and entreaty but also upon the most atrocious misrepresentation of his financial position and his prospects of ultimate success from property which he then falsely asserted that he owned, they both were induced to sign the notes which are the instruments sued on in this case.

I look upon the whole thing as a conspiracy between Walmsley and Cox to rob, for their mutual advantage, those weak and trustful ladies. I call it a conspiracy because both the conspirators must have known that there was no prospect or likelihood that Cox would

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ever be able to make good the amounts for which his wife and daughter were to become responsible, and, therefore, it was a deliberate attempt on the part of both to defraud them. The evidence shows conclusively, and it was so admitted by all parties at the argument, that Cox obtained these signatures by false pretences, and that his proper place was in a penal cell. It is said, however, that Walmsley was not affected by the criminal conduct of Cox. I would have found, as a juryman, that he was a party to it, but that is not necessary, in my view, where he gets the benefit of his companion's crime.

It makes but little difference, the name of the particular relationship which existed between the two. Cox may not be in strict legal *parlance* the *agent* of Walmsley, but he was his instrument, a tool used by him to work out, at the expense of mother and daughter, Cox's indebtedness to him, and therefore he was responsible for everything that Cox had done in order to carry out their dishonest scheme.

I need say no more. If the case be such as I have represented it then the equitable principles regarding undue influence need not be resorted to, with reference to which I can usefully add nothing to what my brother Girouard and my brother Davies have said.

GIROUARD J.—As I understand the case there is only one serious issue, namely, that of undue influence which the courts below disposed of in a few words. The trial judge (Falconbridge C. J.), came to the conclusion that so far as the ladies were concerned, the provisions of the Bills of Exchange Act entirely covered the case. Without examining the effect in law of the notice which Walmsley had of the relation between his debtor and his wife and his only child, Miss Cox, the learned judge concludes:

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It would add new terrors to the conduct of the banking business, if the law were declared to be that if a person indorsing to effect a loan should suggest the name of his wife or daughter as joint maker of a note, or even if the banker intimated that he would discount a note made by the wife or daughter, that the would-be borrower should be hereby constituted the agent of the banker, so as to bind the banker by his statements or his mis-statements.

The same misconception of the case seems to have prevailed in the Court of Appeal. Chief Justice Moss said:

He (Walmsley), had no knowledge of the means employed by the defendant E. S. Cox, and the makers have failed to show any facts or circumstances from which notice or knowledge of any infirmity affecting the title to the notes can be attributed to him.

Knowing that these notes were to be obtained from the appellants as sureties by a man having control over them as husband and father, was not Walmsley bound to ascertain that they knew exactly what they were going to do? Was he not under some legal obligation to inform them of the nature of the transaction and recommend competent and independent advice? If that advice had been taken, is it probable that the gross misrepresentations and fraud perpetrated by the principal debtor would not have been discovered by the solicitor inquiring either from Walmsley or elsewhere, as was done later on, about the time of the institution of this action, when the ladies asked the advice of Mr. Laidlaw, K.C.? The courts below have not dealt with this branch of the case, and in the few remarks I intend to offer I will confine myself to that particular point.

Our duty is not to find out what would be most beneficial to banks and money lenders. I do not agree, however, that a decision reversing the courts below would add "new terrors to the conduct of banking business." The same banks which deal in Ontario find it profitable to have offices in the Province of

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Quebec, where the law is far more sweeping. In that province no married woman, separated as to property, can bind herself either with or for her husband directly or indirectly, as surety or otherwise, even when fully understanding the facts and having competent and independent advice. In such a case her obligation is absolutely null and void even in the hands of a third party in good faith and for cash value, for instance the holder in due course of a note, at least to the extent to which she failed to take any benefit. I am not aware that any bank, although bound to use extraordinary precautions, has left the Quebec field of operation, or has suffered materially in consequence of this rigourous law, although it has been in force for more than sixty years; (Art. 1301 C. C.). If we are able to judge from the law reports of the province, even sharpers have not been frightened, for they are flourishing in Montreal as well as in Toronto. The reports of the Judicial Committee of the Privy Council for the current year afford an interesting and most remarkable illustration of the application of the Quebec law in *Trust and Loan Co. of Canada* v. *Gauthier* (1). Like the English equity rule respecting undue influence, it is founded on the best interests of society, the peace and harmony of families, which is not only equal but superior to the welfare of banks. Whatever may be the consequences, the law must be applied whether the creditor represents a regular banking house or a mere bucket or shaving shop. If by possibility incorporated banks should place themselves in the position of Walmsley, I do not see how they could receive better treatment. The sooner it is understood that a perfect knowledge of the transaction by all the immediate parties is necessary in matters where confi-

(1) 20 Times L. R. 15.

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dential relations exist, the better for society, the banks and all concerned.

But is it not mere irony to compare a regular banker to a common shaver or financial shark? Is it possible to imagine a bank lending for years thousands of dollars upon the mere name of one person in bad repute from a business point of view? Can any one conceive a bank charging interest at a rate varying from one-quarter of one per cent per day to three per cent per month as Walmsley did for years. But it must be added, however, that when he secured the signatures of both ladies, he generously reduced it for the future to one and one-half per cent per month or 18 per 100 per annum. Banks do not enter into mining or other speculations, although they frequently promote them upon the security of shares and other securities furnished by the individual speculators—an operation to which Walmsley, a man of wealth, often resorted, paying a moderate rate of interest, in this instance 5 or 6 per cent per annum.

The notes sued upon were largely the ultimate result of a series of transactions between jobbers or dealers in mining stocks, one having no money and no credit, but any amount of energy and self-confidence and all the illusions peculiar to his profession, and the other having large means enabling him to carry them on to a profitable end. Their dealings were large; sometimes shares were bought on separate account and sometimes on their joint account especially 1980 shares of Crow's Nest Pass Coal Company; but in every instance Walmsley was always careful to get an absolute transfer of Cox's interest as security for any balance which might be due to him in any transaction. The Crow's Nest shares cost $104,940, which was advanced by the Imperial Bank to Walmsley, he getting from Cox, as usual, the full title to the shares which he

deposited with the bank. After a few years of more or less unprofitable operations, for Cox at all events, in the fall of 1899, the mining excitement collapsed and Cox was found to be indebted to Walmsley in a large balance, some $13,000, covered by scrip in various mining companies, which, ultimately, all went to grief, except Crow's Nest Pass Company. As at that time, 1899, there was a great falling off in the value of mining stock generally and Crow's Nest shares in particular, Walmsley—for reasons it is difficult to understand, as he already had an absolute transfer—exacted from Cox a complete and final release of his interest in these shares which was signed on the 11th of October, 1899, although Cox swears that Walmsley promised him verbally to let him share in the profits, if any, a statement emphatically denied by Walmsley. It was about this time that Mrs. Cox appeared upon the scene. Cox was in great straits for money. Walmsley was demanding the arrears of interest. He knew that Mrs. Cox enjoyed a life interest in the wealthy estate of her father, James Gooderham Worts, securing her an annual income of $10,000, sufficient for the needs of the family, subject to a reversionary interest to her daughter, worth about $200,000, and besides this she had the homestead and furniture in Toronto. Cox brought two notes signed by his wife and indorsed by him, one for $3,000 and the other for $900. Walmsley discounted these notes in October, 1899, after the release of the Crow's Nest shares was signed. He gave Cox, in cash, $1850 on the first note and $819 on the second, charging a discount of 36 per 100 per annum. When speaking of the last note for $900, Cox writes that

> much against my will I persuaded her to give me the inclosed. I do not know why you should always get your own way.

Of course, these notes were not met and remained on sufferance for some time. In August, 1900, Walms-

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ley pressed for a settlement. He writes to Cox on the 23rd that he

> would like to see it closed to-morrow, or otherwise I shall hand matters to my solicitor.

On the 29th he repeats the threat. Cox wanted more money for his own use, for neither wife nor daughter ever benefited by the advances made to him even to the extent of one farthing. Cox swears Walmsley suggested that he should get the three notes sued upon signed by his wife and daughter, and he would give him $1,000 more. Walmsley swears, on the contrary, that the suggestion came from Cox himself. Be that as it may, I think the difference in their statements is immaterial. This passage of Walmsley's evidence is sufficient for the purposes of the case:

> Q. You thought if you could get the note of the girl and the note of her mother, you would agree to renew the old debt and give a fresh advance?—A. Yes.

One thing is certain; at all times Walmsley knew of the confidential relations existing between Cox and his wife and daughter, whatever that may mean in law, and did nothing to prevent fraud and misrepresentation by informing either of these ladies of the true state of affairs and recommending them or either of them to take competent and independent advice. He did not do so before Cox applied to the ladies, nor pending the negotiations which lasted a few days, nor before making the fresh advance of $1,000, or rather, to use perhaps more correct language, before paying to Cox what appears to me to be his reward for the violation of his natural trust and protection. As might be expected Cox had a most plausible story; these notes were wanted to carry the Crow's Nest shares and everything would be all right in the end. Such, he said, was also the opinion of Walmsley, known to the ladies as a shrewd and prudent speculator. The

daughter, although affectionate and inclined to please her father, did not like to sign the notes at first, but, after three or four days of persuasion, she was willing to do so. The mother, who had more than once previously been deceived, was very reluctant, as she was at the time of signing the two notes in 1899; so the daughter says; discussions took place in the morning and evening, after breakfast and dinner; many tears were shed. Finally they both signed the notes and the $1,000, less interest, were paid to Cox who was very careful not to divulge to them this little secret.

I am not prepared to admit, with the judges of the courts below, that Walmsley is not responsible for the false statements and misrepresentations of Cox; but I humbly submit that he knew it was a case of presumptive undue influence, that the daughter was about twenty-three years of age and was living with her father and mother under the same roof, and, finally, that she had an expectant interest in a wealthy estate; he knew that she would not benefit by the transaction to the extent of one cent. Under these circumstances, was it not his duty to inform this affectionate and confiding young lady, having no business experience, to take independent advice? The practical *dénouement* of all these manœuvres has been that Walmsley, at the time of the trial, had realised or might realise the little profit of over $68,000 out of the Crow's Nest shares and that the wife and daughter of Cox are condemned to pay him $7,642.73, the principal and interest of the above notes, composed, to the extent of nearly one-half, of arrears of interest.

This extraordinary result induced the trial judge to express the hope

that the real plaintiff, Mr. Walmsley, relieved by this judgment of any possibility of having to account to Mr. Cox for any shares of the profits, in view of the enormous gain which has eventually accrued

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to him out of the transaction, would see his way to forbear pressing his suit to the bitter end against these ladies.

The expression of such a reasonable hope by a judge who saw and heard the witnesses, was useless. Not only is Walmsley resisting the highly equitable contentions of these ladies; he has even resorted to the extreme process of execution on the furniture of the homestead.

But what are the consequences, in law, of such a state of affairs? Is the wife liable because she is considered "in all respects" as a *feme sole* under the statutory law of Ontario, at least to the extent of her separate property? I will discuss this point later on, after having disposed of Miss Cox's case. Is she also liable? I have come to the conclusion that she is not, undue influence or fraud in law being presumed.

All the authorities agree that even a third party knowing the relation which is the foundation of this legal presumption can derive no benefit from the transaction, unless he establishes that competent and independent advice had been given to the party acting under such influence. *Bridgman* v. *Green*, 1755, (1); *Huguenin* v. *Baseley*, 1807, (2); *Molony* v. *Kernan*, 1842, (3); *Archer* v. *Hudson*, 1844, (4); *Maitland* v. *Irving*, 1846, (5); *Cooke* v *Lamotte*, 1851, (6); *Espey* v. *Lake*, 1852, (7); *Baker* v. *Bradley*, 1855, (8); *Smith* v. *Kay*, 1859, (9); *Nottidge* v. *Prince*, 1860, (10); *Berdoe* v. *Dawson*, 1865, (11); *Sercombe* v. *Sanders*, 1865, (12); *Rhodes* v. *Bate*, 1866, (13); *Kempson* v. *Ashbee*, 1874, (14); *Bainbrigge* v. *Browne*,

(1) 2 Ves. Sr. 627.
(2) 14 Ves. 273.
(3) 2 Dr. & War. 31.
(4) 7 Beav. 551.
(5) 15 Simons 437.
(6) 15 Beav. 234.
(7) 10 Hare, 260.
(8) 7 DeG. M. & G. 597.
(9) 7 H. L. Cas. 750.
(10) 2 Giff. 246.
(11) 34 Beav. 603.
(12) 34 Beav. 382.
(13) 1 Ch. App. 252.
(14) 10 Ch. App. 15.

1881, (1); *Allcard* v. *Skinner*, 1887, (2); *Liles* v. *Terry* (3); *De Witte* v. *Addison*, 1899, (4); *Powell* v. *Powell*, (5); *Barron* v. *Willis*, (6); *Tunrbull* v *Duval*, (7).

The learned Chief Justice of Ontario, speaking for the Court of Appeal, and dealing with the defence of Miss Cox, finds that she is

a lady of intelligence, knowledge and firm will. She was fully aware of the nature of the act she was called upon to do and of its consequences. She may have been misled as as to the true purposes for which her father needed the notes, but beyond stating his need and the reasons for it he does not appear to have exercised any control over her will. Apparently she was left without restraint to exercise her own free will and judgment after hearing her father's statement. Her mother was at first opposed to signing the notes, and to her daughter signing, and there appears to have been a considerable interval between the time when the matter was first broached and the signatures. She does not now say that she did not fully understand and appreciate the explanation of the transaction given by her father, nor has she sworn that she yielded to his parental authority, surrendering her own will to his without the exercise of her own judgment, and the circumstances do not demonstrate that she did. But the title of Walmsley to recover upon the notes is not to be effected by evidence such as offered in this case. Miss Cox had, undoubtedly, the capacity to contract generally. When it is sought to show want of capacity in the particular instance disabling her from incurring liability on the promissory notes in question, the right of the holder in due course should not be taken away unless upon clear and distinct proof of the infirmity and of his knowledge of it.

I do not think the evidence goes so far as stated by the learned Chief Justice. Miss Cox is intelligent, it is true, but has no knowledge of business. She knew that she was signing notes to help her father, but she knew nothing of the nature of the transaction. She understood, from the repeated statements of her father, that she was helping him in a mining stock specu-

(1) 18 Ch. D. 188.
(2) 36 Ch. D. 145.
(3) [1895] 2 Q. B. 679.
(4) 80 L. T. 207.
(5) [1900] 1 Ch. 243.
(6) [1893] 2 Ch. 578; [1900] 2 Ch. 121.
(7) [1902] A. C. 429.

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lation which he was carrying jointly with Walmsley. This was all untrue, but she never dreamed of asking him for paper or document showing his interest in the speculation, or of going to Walmsley, or elsewhere, for information, as a competent or independent adviser would have done; she simply believed every statement of her father as gospel truth. She had, undoubtedly, capacity to contract generally, but not under the special circumstances of the case unless she had independent advice. Walmsley knew of the confidential relationship existing between the father and daughter; that she was living with him and her mother in the same house; that she was young and yet under the dominion and control of her father; and, if he took no care to see that she got that independent advice, he did so at his own risk and cannot consider himself a holder in due course within sections 29 and 30 of the Bills of Exchange Act. The expression "holder in due course" has no magic effect. It means nothing more than the "holder in good faith and for value" known to the commercial law in force before that Act, but he is in no better position under the Act. He had notice of the defect in his title, and knew, or is presumed to have known, of the illegality of the obligation of Miss Cox without competent and independent advice, and for that reason he cannot recover, even under the provisions of the Bills of Exchange Act. This is fully established by the cases cited above and it will be sufficient to quote from a few of them.

In *Powell* v. *Powell* (1), Farwell J. said:

> On the authorities it seems to me not to be a question of actual pressure or deception, or undue advantage or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption and must be rebutted.

In *Allcard* v. *Skinner* (2), Lord Lindley said:

(1) [1900] 1 Ch. 243.

(2) 36 Ch. D. 145.

So long as the relation between the donor and the donee which invalidates the gift lasts, so long it is necessary to hold that lapse of time affords no sufficient ground for refusing relief to the donor.

In *Rhodes* v. *Bate* (1), Sir G. J. Turner, L. J. said:

Age and capacity are great considerations in cases in which the principle does not apply; but, I think, they are of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence.

In *Liles* v. *Terry* (2), Lopes J. said:

I do not think that evidence of any explanation by the solicitor of the document or any assistance given by him to enable the client to understand the effect of it is of any avail to prevent the application of the general rule. What the solicitor ought, in such case, to do is to suggest to the client that, in order to make the gift effectual, the client should procure independent professional advice.

In *Berdoe* v. *Dawson* (3), securities obtained from sons, aged twenty-five and a half and twenty-three years respectively, for their father's debt were set aside although the solicitor of the creditor declared positively that they knew what they were doing and that he gave them full information upon the subject and explained everything to them. The Master of the Rolls, Sir John Romilly, said:

Now one of the principal things which the court always requires, in matters of this description, is, (as Lord Eldon observes in several cases), proof that it was a "righteous transaction," and the strongest and best evidence is this—that the person giving up his property should have an independent solicitor and independent advice in the matter. * * *

The case of *Baker* v. *Bradley* (4) is a distinct authority on that subject. The marginal note is this: "A mortgage was made of property by a father and son, immediately after the latter had obtained his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security for the purpose of subjecting to it her separate estate, which she was, however, by a clause

(1) 1 Ch. App. 252.
(2) [1895] 2 Q. B. 679.
(3) 34 Beav. 603.
(4) 7 DeG. M. & G. 597.

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not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. *Held*, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence."

In *Sercombe* v. *Sanders* (1), the same eminent judge observes:

It is not sufficient to show that a man knew what the actual transaction was, you must also show that he is emancipated from control and had the advantage of a separate solicitor.

In *De Witte* v. *Addison* (2), a case much similar to the present one, where two daughters, one nearly twenty-three years old and the other just over twenty-one, mortgaged their reversionary interest under a certain will to pay their father's debts and save him from being adjudicated a bankrupt, Romer J. said:

I may here state that I repudiate the suggestion made on behalf of the defendants in this case, that the plaintiff must be taken not to have acted under parental influence, within the meaning of that phrase as used in the authorities, because no direct threat by the father is apparent, or because the plaintiff acted from affection for the father, and from that pressure that was brought to bear upon her morally by his pecuniary position and liabilities. Under these circumstances, under this parental influence, under the pressure of the father's position, she executes the mortgage in question. In the transaction she has no independent advice, in my opinion, within the meaning in which that phrase is used in the authorities that are cited and bear upon a case like this.

In the same case on appeal, after quoting the language of Fry J. in *Bainbrigge* v. *Browne* (3), Lord Lindley says:

Then the next point which arises is this: Against whom does this inference of undue influence operate? Clearly, it operates against the person who is able to exercise the influence (in this case it was the father), and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity.

In this case of *Bainbrigge* v. *Browne* (3), the trans-

(1) 34 Beav. 382.
(2) 80 L. T. 207.
(3) 18 Ch. D. 188.

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action was upheld, however, on the evidence. Fry J. added in conclusion:

I think that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully emancipated from him, assisted by the advice of their friends, and by the advice of a solicitor who was bound to do his duty to them.

In *Huguenin* v. *Baseley* (1), which is looked upon as the leading case upon the subject, the Lord Chancellor, Lord Eldon, says:

With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt should be entertained, whether it is not competent to a court of equity to take away from third parties the benefits which they have derived from the fraud, imposition or undue influence of others. The case of *Bridgman* v. *Green* (2), is an express authority that it is within the reach of the principle of this court to declare that interests, so gained by third persons, cannot possibly be held by them.

In *Maitland* v. *Irving* (3) the Vice-Chancellor, Sir L. Shadwell, said:

There may not have been in the minds of Mr. Brown and Mr. Irving the knowledge of the principles which govern this court. But it seems to me to be very extraordinary that men of mature age, who were carrying on a lucrative business, were told by a gentleman, who was himself unable to perform his contract with them, that he would procure a young lady who was residing with him, who was possessed of a large fortune and to whom he had been guardian, to give them a guarantee for the fulfilment of his contract—it seems, I say, very extraordinary that, with full knowledge of all these circumstances, they should have at once acceded to the proposal without making any inquiry or taking any pains to ascertain whether the young lady was a free agent and perfectly willing, with a full knowledge of the consequences, to do what her guardian said he would invite her or propose to her to do.

The last case I wish to quote is *Espey* v. *Lake* (4), which is, perhaps, more in point, as the liability of

(1) 14 Ves. Sr 273.
(2) 2 Ves. Sr. 627.
(3) 15 Sim. 437.
(4) 10 Hare 260.

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the child, a young lady in her twenty-second year, appeared on the joint promissory note of herself and her step-father, given as surety for the debt of her step-father, in whose house she had been residing with him and her mother for many years. The holder of the note, Lake, was not charged with any misrepresentation or personal negotiations or interviews with the daughter who signed solely on the representations of her mother and step-father. Lake knew of the relations between the step-father and daughter; he was his brother in-law and constantly in the habit of meeting the daughter.

The Vice-Chancellor, Sir G. J. Turner, found this knowledge beyound doubt, but nothing more. He said:

> The loan was to be a loan by Lake to Speakman, the step-father of the young lady. Now, what next took place? I take the circumstance from Lake's own affidavit in reply to this case. Lake says, "I asked for security, and he, (Speakman), said he had no security to offer but that of his step-daughter, meaning Miss Espey." It is clear, therefore, that Lake knew that the only security he could have was that of the plaintiff, the step-daughter of Speakman, who was, at the time, living in the house with her step-father, and under his influence. Lake, knowing these circumstances, nevertheless took the joint and several promissory note of Speakman and the plaintiff, dated the 1st of January, 1843, for securing the £500.

The question arose on a motion in restraint of execution. The Vice-Chancellor, Sir G. J. Turner, finally said:

> I take it to be quite clear that the principles of this court go to this extent,—that, in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other person and the person from whom the security is taken which constitutes anything in the nature of a trust, or anything approaching to the relation of guardian and ward or of standing in *loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily and without any

influence having been exercised by the party in whose favour the security is made, or by the party who was the medium or instrument of obtaining it. * * * * *

In the application of the principles of the court I see no distinction between the case of one who himself exercises a direct influence, or of another who makes himself a party with the guardian who obtains such a security from his ward. The defendant, Lake, left it to Speakman, who had influence over his young ward, as she may be called, to induce her to join in the security, thereby placing her more directly under undue influence than if he had applied for the security himself. Such a security cannot be maintained consistently with the principles of this court.

It has been contended that our decision in *Trust and Guarantee Co.* v. *Hart* (1), conflicts with this conclusion. I cannot see that it does. The gift in that case was not by the son to his father for the benefit of a creditor, but by a father to his son for the benefit of his grandchildren; it was a just family arrangement, resting on a very different basis from the one involved in this case. As stated by Mr. Justice Taschereau, who delivered the judgment of the court, at p. 559;

He, (the donor,) never, in fact, was under his son's influence. It is a gift by his son to him that might have been suspicious.

But is Mrs. Cox standing in a different position from that of her daughter? That is the last question we have to examine. Was she not, like her daughter, known to Walmsley to be under the control and influence of her husband? True, a married woman may validly contract to the extent of her separate property "in all respects as if she were a feme sole." (Ont. Rev. Stat., 1897, ch. 163). But her daughter, being of age, can exercise the same and even greater rights. Why then a different rule in the determination of undue influence?

The point does not seem to be settled by authority binding upon us. There are decisions pro and con which will

(1) 32 Can. S. C. R. 553.

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be found collected in White and Tudor's Leading Cases in Equity, (ed. 1886), vol. 2, pp. 621 to 641; Kerr on Fraud and Mistake (ed. 1902), pp. 172, 173; and in Cyclopedia of Law and Procedure (1903), vol. 9, pp. 456 to 459. Mr. Justice Cozens-Hardy, in the late case of *Barron* v. *Willis* (1), referred to some of these decisions and held that the relation of husband and wife is not one to which the doctrine of *Hugenin* v. *Baseley* (2) applies, although he admits that text-writers seem to adopt the opposite view. In appeal, his decision was reversed and the transaction set aside, not on that ground, which was not even discussed by the judges, but on a different conclusion of fact.

In a more recent decision rendered by the Privy Council of *Turnbull* v. *Duval* (3), a Jamaica appeal, it was conceded that the question was not yet settled, the case turning specially upon the ground of fraud by the husband for which the creditors were held responsible. Lord Lindley said:

> Whether the security could be upheld if the only ground for impeachment was that Mrs. Duval had not independent advice, has not really to be determined. Their lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is, in their lordships' opinion, quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull & Company are unaffected by such pressure and ignorance. They left everything to Duval and must abide the consequences.

Relief was granted, but to do so in the present case the point of law must, I conceive, be determined.

I confess that the view advocated by the text-writers commends itself to my judgnent and knowledge of human nature. Can the wife be considered an entirely free agent as long as she lives with her

(1) [1899] 2 Ch. 578. (2) 14 Ves. 273.
(3) [1902] A. C. 429.

husband in matters where her interest conflicts with that of her husband? Is the mother more capable than the daughter of forming a full and true comprehension of business affairs? Experience teaches us and the law reports establish abundantly that married women, in nearly all cases, are under the control and influence of their husbands and rarely can resist their mere demands and requests, much less their solicitations and supplications, and that these generally prevail, while threat and violence seldom do. The presumptive influence of the husband over his wife so permeates the laws of England that, till recently changed by parliament, all offences committed by a married woman in presence of her husband, except high treason and murder, were presumed to have been committed under coercion. Upon what ground can coercion and undue influence not be presumed in civil matters, when husbands or third parties through them claim extraordinary benefits and unfair advantages from their wives, is more than I can conceive. I cannot see that a material distinction can be made between the case of the mother and that of the daughter; the control may exist on some occasions in a less degree, but it is not a question of degree which may depend upon circumstances; some daughters may be more intelligent and firm than others; boys, especially those trained in business, may be more competent than their sisters; it is conceded that all hold the same legal position and that it always raises the presumption of undue influence. Why a different rule in the case of the wife? Can it be supposed that Walmsley did not know that Mrs. Cox was not free from that influence? He had not only presumptive but positive knowledge of the situation. In 1899, when one of the first notes was signed, Cox writes to him that *at last he persuaded her to sign it.* I have

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come to the conclusion that the rule which governs the case of Miss Cox applies also to that of Mrs. Cox and that, in fact, it applies to all near relations or persons placed in the same position of dependence and control. I think that this conclusion comes within the language of Lord Cranworth, in *Smith* v. *Kay* (1).

> In my opinion, although this bill is framed upon the ground of this supposed fraud, the circumstances of the case, as now proved, make it abundantly clear that this fraud was totally immaterial in order to entitle the plaintiff to set aside this bond, upon the ordinary principle of this court which protects an infant or any other person who is, from the relations which have subsisted between him and another person, under the influence, as it is called, of that other. My lords, there is, I take it, no branch of the jurisdiction of the Court of Chancery which it is more ready to exercise than that which protects infants and persons, in a situation of dependence, as it were, upon others, from being imposed upon by those upon whom they are so dependent. The familiar cases of the influence of a parent over his child, of a guardian over his ward, of an attorney over his client, are but instances. The principle is not confined to those cases, as was well stated by Lord Eldon in the case of *Gibson* v. *Jeyes* (2), in which he says, it is "the great rule applying to trustees, attorneys or anyone else."

I have less hesitation in arriving at this conclusion that I am inclined, on the evidence, to think that both these ladies, as in *Turnbull* v. *Duval* (3), *Bridgeman* v. *Green* (4), *Huguenin* v. *Baseley* (5) and *Smith* v. *Kay* (1), were, in fact, badly pressed and grossly deceived as to the nature of the transaction and that Walmsley became an active party to the fraud by the promise of $1,000 which it is hardly possible, under the circumstances, not to consider as a reward to Cox for betraying the persons who were entitled to his protection.

I would, therefore, allow the appeal and dismiss the action of the respondent against the appellants with costs in all the courts.

(1) 7 H. L. Cas. 750.
(2) 6 Ves. 266, 278.
(3) [1902] A. C. 429.
(4) 2 Ves. Sr. 627.
(5) 14 Ves. 273.

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DAVIES J.—After much consideration and considerable doubt so far as the appellant, Alice R. Cox, the wife of E. S. Cox, is concerned, I have reached the conclusion that the appeal must be allowed as regards both the appellants.

I rest my decision upon the principle that both the wife and daughter, at the time they signed the notes sued on, stood towards E. S. Cox in the position of parties having confidential relationship with him; that the law, on grounds of public policy, presumes that the transaction was the effect of influence induced by these relations, and that the burden lay upon Walmsley, the indorsee of the notes and the beneficial plaintiff in the action, who took them with notice and full knowledge of the relationship, of showing that the makers had independent advice.

I concur with my colleagues in holding that the Bills of Exchange Act does not relieve an indorsee getting possession of a note under circumstances and with knowledge, such as in this case, from such burden.

I also agree that, apart from this beneficial and salutary rule of public policy, the facts would not in themselves be sufficient to justify interference with the judgment of the Court of Appeal.

With respect to the case of Evelyn S. Cox, the daughter, I content myself with concurring in the judgments prepared by my brothers Girouard and Killam which I have read, and I adopt the reasoning and conclusion of my brother Girouard so far as Mrs. Cox's case is concerned.

I admit that the authorities are by no means clear as to whether or not the wife does stand towards her husband within those degrees of confidential relationship requiring independent advice as a necessary condition precedent to the presumption of the validity of

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the gift or grant from her to him. Cozens-Hardy J. in the late case of *Barron* v. *Willis* (1), seemed to think that he was bound by authority to hold that the relationship of husband and wife was not one of those within the doctrine established by *Huguenin* v. *Baseley* (2), and the Court of Appeal (3), which reversed his decision upon another point, makes no reference to his judgment on that question.

In addition to the cases cited and commented upon by my brother Girouard, and as being at variance with those by which Cozens-Hardy J. thought himself bound, I would refer to *Coulson* v. *Allison* (4). There a widower had married the sister of his deceased wife (a marriage not legal by the laws of England), and it was held, nevertheless, by Lord Chancellor Campbell, that the relationship thus constituted imposed upon the widower claiming the benefit of a settlement made on him by his wife's sister (with whom he had gone through the form of a marriage), the onus of showing that, at the time of entering into the transaction, she was fully and duly informed of all the circumstances of the case and of the possible consequences of what she was about to do.

In the case of *McClatchie* v. *Haslam* (5), it was said by Kekewich J. in setting aside a deed given by a wife to secure a debt due by her husband to a society of which he was secretary, that the rule laid down by Lord Westbury in *Williams* v. *Bayley* (6), was at least as strong in the case of a husband and wife as of a father and a son.

A security given by one person for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon

(1) [1899] 2 Ch. 578.
(2) 14 Ves. 273.
(3) [1900] 2 Ch. 121.
(4) 2 DeG. F. & J. 521.
(5) 63 L. T. 376.
(6) L. R. 1 H. L. 200-218.

the free and voluntary agency of the person who enters into it. Where the person giving that security is the wife of the debtor it does appear to me desirable and necessary that the same guarantee of that freedom and voluntary action should be made plain to the court before the security is upheld as would be required in the case of a child and a parent. I would even go so far as to say more desirable and necessary because, in my opinion, the peculiarly sacred and confidential relationship existing between husband and wife renders the exercise of undue pressure more easy and effective on the part of a husband than a father.

The influence of a man over a woman to whom he is engaged to be married is presumed to be so great that the court will not only look with great vigilance at the circumstances and situation of the parties, but will *require satisfactory evidence that it has not been used.* See *Page* v. *Horne* (1), where, at page 235, Lord Langdale, master of the Rolls, says:

> It is true that no influence is proved to have been used, but none can say what may be the extent of the influence of a man over a woman whose consent to marriage he has obtained.

In the case of *Cobbett* v. *Brock* (2), which was an action brought by a married woman to set aside an ante-nuptial security she had given for the debt of a man to whom, at the time, she was engaged to be married and whom she subsequently married, Sir John Romilly, the Master of the Rolls, said:

> I fully adhere to what I expressed in the cases of *Cooke* v. *Lamotte* (3) and *Hoghton* v. *Hoghton* (4), and, *if this were a case between Mr. Brock and his wife, I should require him to prove all the requisites I have pointed out in those cases as necessary to give validity to the transaction.*

See also Pollock on Contracts (7 ed.), 600-603; Kerr on Fraud (3 ed.), page 172.

(1) 11 Beav. 227.
(2) 20 Beav. 524.
(3) 15 Beav. 234.
(4) 15 Beav. 278.

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The law as it prevails in the United States on the question is thus summed up in 27 Am. & Eng. Encycl. (1 ed.) pp. 480-482, under the head of "Undue Influence."

> No relation known to the law affords so great an opportunity for the exercise of undue influence as that existing between husband and wife. Owing, however, to the common law disabilities of a married woman, the older cases do not present many instances of the application of the rules governing their transactions with their husbands.

And, after referring to the close scrutiny to which transactions between husband and wife will be subjected in equity, where they will be set aside upon evidence which might be insufficient were the parties in no confidential relation to each other, the text goes on:

> The principle is independent of any presumption and is universally recognized. Nearly all the courts, however, go further than this and bring the matter in line with the decisions as to agreements between other parties to fiduciary relationship, viz., that a *presumption of undue influence exerted by the husband arises* which is rebuttable by proof of the fairness of the transaction, full understanding and free agency on the part of the wife and that there was no fraud, concealment or imposition on the part of the husband.

The compiler refers to many authorities in support of the doctrine as laid down in the text, the reasoning in which is satisfactory and which seems fully to support the principle above quoted. See also Cycl. Law & Proc. vol. 9, page 456; Bispham's Principles of Equity (6 ed.), sec. 237; Pomeroy's Equity Jurisprudence (2 ed.) sec. 963.

I would also refer to the case of *McCaffy* v. *McCaffy* (1), where the same principle was recognized and approved.

The Judicial Committee of the Privy Council in the late case of *Turnbull* v. *Duval* (2), seems to have left the question still an open one.

(1) 18 Ont. App. R. 599. (2) [1902] A. C. 429.

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On the whole, and after much consideration, I am of the opinion, on grounds of public policy, that the safest and best rule to adopt is to hold that the confidential relations existing between the husband and wife bring them within the rule established by *Huguenin* v. *Baseley* (1), and that this appeal should be allowed as regards both appellants.

As regards third parties the rule is clear that where a gift has been obtained by undue influence, either presumed or actually proved, a purchaser for value subsequently taking with notice of the equity thereby created or with notice of the circumstances from which the court infers the equity will be bound thereby. *Bainbrigge* v. *Browne* (2). In the case before us, no possible doubt can exist that Walmsley, the beneficial plaintiff, when he took the notes in question, was fully aware of the existence of the relations between Mrs. and Miss Cox and E. S. Cox, and was, therefore, bound by the rule.

KILLAM J.—I agree that the appeal of the defendant Evelyn S. Cox should be allowed and the action dismissed against her, with costs here and in all the courts below.

After the exhaustive examination of the authorities made by my brother Girouard it is quite unnecessary to discuss them further. The equitable principle is well known and firmly established. A child recently come of age and still subject to parental dominion and influence to the extent of not having wholly become a free agent, is not deemed capable of making a binding donation to the parent or of becoming security for the parent or entering into a transaction with the parent under which the latter obtains a benefit, without inde-

(1) 14 Ves. 273. (2) 18 Ch. D. 188.

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pendent advice. Family settlements are a class by themselves and do not now require consideration.

I think that the defendant Evelyn S. Cox was still under the parental dominion when she signed the notes in question, so far as to be entitled to the application of this principle.

The plaintiff held the note for the benefit of Thomas Walmsley and was subject to all the equities to which Walmsley was subject. Walmsley had full notice of the relative positions of E. Strachan Cox and his daughter and of the latter's prospects. This was sufficient to make him subject to the equities between them in taking the note.

In my opinion, the Bills of Exchange Act did not affect the exercise of the principles upon which a court of equity raises and enforces trusts or avoids transactions for fraud, actual or constructive.

The definition of a "holder in due course" given by section 29 of the Act excludes one having notice of any defect in the title of the person who negotiated the bill or note, and it appears to me that this is not to be confined to defects recognized by courts of law.

On the other hand, it is not shewn that Walmsley had notice of the actual misrepresentations made by Cox to his wife and daughter which operated towards inducing them to join in making the notes in question. In my opinion the presumption arising from the mere relation of parent and child and the circumstances known to Walmsley do not apply to the relation of husband and wife and the circumstances affecting them known to Walmsley.

In *Field* v. *Sowle* (1), a wife had joined her husband in a promissory note to the plaintiff for money advanced by him to the husband. The wife set up

(1) 4 Russ. 112.

undue influence and coercion, but gave no proof thereof. Sir John Leach M.R. said:

> The signature of the promissory note by the defendant Sarah Cowle is *primâ facie* evidence to charge her; and it is upon her to repel the effect of her signature by evidence of undue influence and not upon the plaintiff to prove a negative.

In *Barrow* v. *Willis* (1), Cozens-Hardy J. said, at page 585:

> It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* (2), applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid.

While the decision was reversed on appeal (3), it was upon the ground of the giving of a benefit to the son of the solicitor who advised in the transaction.

In *Turnbull* v. *Duval* (4), Lord Lindley, in delivering the judgment of the Judicial Committee of the Privy Council, said, at page 434:

> In the face of such evidence their lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it.

The decision rested upon the ground that the security was obtained by pressure to which the appellant's agent, who was trustee under the will of the wife's father, was directly a party.

While the Judicial Committee left the point in a measure open, I am of opinion that the weight of

(1) [1899] 2 Ch. 578.
(2) 14 Ves. 273.
(3) [1900) 2 Ch. 121.
(4) [1902] A. C. 429.

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English authorities is in favour of the view that the mere relation of husband and wife does not give rise to such a presumption that the giving of a security by a wife for a husband is obtained by undue influence as to place upon the party obtaining it in good faith in other respects the onus of displacing the influence. The trend of modern legislation towards the emancipation of the wife renders the presumption more difficult.

There is, however, a further contention that Walmsley had procured Mr. Cox to release to him certain shares of stock held by Walmsley as security for previous notes given by Mrs. Cox, the amounts of which were included in the notes now in question, and that this had the effect of discharging Mrs. Cox from liability on the previous notes and constituted a defence to the present action in favour of her and her daughter, either wholly or *pro tanto*. This contention was disposed of by the learned Chief Justice of Ontario, as follows :—

> It is true that the amount of the three promissory notes sued on is made up in part by taking into account the two promissory notes previously made by the defendant, Alice R. Cox, and held by Walmsley. These defendants say that their co-defendant, E. Strachan Cox, procured the defendant, Alice R. Cox, to sign them by representing that he was interested in the shares and needed money to pay advances in respect of them. In point of fact, the smaller of the two notes, that for $900, was not made until some weeks after the release had been given, and although that for $3,000 bears date eleven days previously to the release, it was not discounted by Walmsley until after the release had been agreed upon.

Walmsley advanced moneys to Cox on Mrs. Cox's note for $3,000 at different times. As I read the evidence, $600 were advanced upon it upon the 10th of October, 1899, the day before the giving of the release, but the balance not until after the release.

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The note for $900, as the learned Chief Justice has said, was not made for some weeks after the release.

But I am further of opinion that the released shares were not held as security for the $3,000 note at all. When the note was transferred to Walmsley, Cox signed a memorandum in these words:

> In consideration of Thomas Walmsley making an advance to me of (3,000) three thousand dollars, re-payable on call with interest at..... per cent per annum, I have assigned to him as collateral security for the due payment of said advance, 10,000 shares Diamond Jubilee Mining Dev. Co., Limited, and agree that these and all previous collateral securities shall be held as securities generally, for all advances previously or hereafter made, and I agree to keep up a cash margin thereon of not less than twenty per cent.

The released shares had been bought by Walmsley and Cox on joint account and were held by a bank to secure advances to both of them for the purchase. They do not appear to me to come within the terms of the memoradum, which related to securities previously given to Walmsley for loans by him to Cox, and I think that the negotiation by Walmsley of Mrs. Cox's note should not be deemed to have effected the right of Cox and Walmsley to deal with those shares as their interest might appear to demand.

Thus, the fact that an advance was made upon the note for $3,000 before the release seems immaterial.

The other defences raised below were not set up before us.

In my opinion, the judgment against Mrs. Cox should stand but that against Miss Cox should be set aside.

Appeal allowed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Robertson & Maclennan.*

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*Nov. 14.
*Dec. 14.

THE CANADA WOOLLEN MILLS, LIMITED, (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS H. TRAPLIN (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Master and servant—Dangerous works—Knowledge of master—Employers' liability.

T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and while in it the elevator fell to the bottom of the shaft and T. was injured. On the trial of an action for damages it was proved that the elevator was over twenty years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key again to fall out occasioning the accident. On appeal from the judgment of the Court of Appeal maintaining a verdict for the plaintiff:

Held, Nesbitt J. dissenting, that the company was negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of its employees and was, therefore, liable at common law.

Held, per Nesbitt J. that as the company had employed a competent person to attend to the working of the elevator it was not liable at common law for his negligence although it was liable under the Employers' Liability Act.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiff.

The facts of the case which are sufficiently summarized in the above head-note are fully set out in the judgments published in this report.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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Shepley K.C. for the appellants. The defendants had procured the best style of elevator known when it was made and had always kept it in repair. That was their sole duty at common law. See *Hastings* v. *LeRoi No. 2, Limited* (1).

The evidence did not show that the falling of the key was due to any want of care and attention on defendants' part.

Riddell K.C. and *Guthrie K.C.* for the respondent. As to the duty of defendants in regard to the elevator, see Am. & Eng. Ency (2 ed.) vol. 10 pp. 945, 953, 957.

The duty of defendants was to keep the elevator in a safe condition so as to protect the employees using it. *Smith* v. *Baker* (2); *Moore* v. *The J. D. Moore Co.* (3); *Grant* v. *Acadia Coal Co.* (4); *Williams* v. *Birmingham Battery and Metal Co.* (5).

THE CHIEF JUSTICE.—This is a frivolous appeal, and the learned judges of the court *a quo* rightly treated the appellant's contentions as they deserved by unanimously dismissing them without giving written opinions therefor. The case for the jury was one of inference of fact from the fact clearly proved of the dilapidated condition of this elevator. And their finding that the falling of the key was caused by the vibration and general dilapidation of the running gear is far from being unreasonable. That being so, for us to disturb their verdict would be to usurp their functions.

I refer to *McArthur* v. *The Dominion Cartridge Co.* (6), in the Privy Council, and to what Baron Pollock said in *Bridges* v *The North London Railway Co.* (7), and Lord Penzance in *Parfitt* v. *Lawless* (8), in the passages I cited, 31 Can. S. C. R. 404.

(1) 34 Can. S. C. R. 177.
(2) [1891] A. C. 325.
(3) 4 Ont. L. R. 167.
(4) 32 Can. S. C. R. 427.
(5) [1899] 2 Q. B. 338.
(6) 21 Times L. R. 47.
(7) L. R. 7 H. L. 213.
(8) L. R. 2 P. & D. 462.

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The appeal is dismissed with costs.

SEDGEWICK J. concurred in the dismissal of the appeal.

DAVIES J.—This was an action brought by the plaintiff, one of the workmen employed in one of the defendants' (appellants') mills, for injuries received by him while being carried on an elevator of the mill from one story to another in the discharge of his duty.

It is necessary, in order to understand the questions put to the jury and the answers to those questions, as well as the contentions of counsel on the argument, that a short outline should be given of the facts.

The elevator was one used by the workmen in carrying the material or products on which they were engaged from one part of the mill to another, and in enabling men like the plaintiff to get speedily from one to another department.

The elevator had been placed in the mill some twenty years before and had been in use all that time.

The chief witness called as to its condition at the time of the accident was one Baker, a machinist in the defendants' employ. He was not the foreman of machinists, simply an ordinary machinist working with others under the foreman machinist. From Baker's testimony it is quite evident that the elevator machinery either from age and use or other causes had lived its life. He says he was called upon to make repairs to it ten or twelve times during the year immediately preceding the accident, and that the impression made upon his mind by the examinations he necessarily made was that "this thing (meaning the elevator and its gear) was in a bad shape of repair and should be renewed at once;" that "they ought to have a new elevator there as soon as possible because I thought

this was very unsafe for anybody to travel on." Baker made during the twelve months two separate reports to the managers, Morrison and Berry, who succeeded each other during that period, repeating his opinion as above and specially mentioning the pinion gear and the driving gear. The day the accident occurred the elevator fell three times. It was on the third fall the plaintiff was injured. The witness Baker testifies that he was sent to fix the cable or see about it, and that he found the first fall of the elevator due to the cable attached to it having come off the drum and wound around the shaft. This had happened several times previously. The next fall of the elevator which took place a few hours afterwards was found by him to be caused by the dropping out of the key or pin which fastened and held the wheel and the shaft together. The falling out of the pin left the wheel free, and the elevator, as a consequence, simply fell to the bottom of the elevator shaft. Baker replaced the pin driving it home to its place. There was a good deal of dispute as to whether or not in doing this he had been guilty of negligence for which the defendants could be held liable under the Workmens' Compensation Act but there is no finding of the jury upon the point. A couple of hours after this last repair the pin again came out and unfortunately at the time the plaintiff was in the elevator. The elevator was precipitated to the bottom of the shaft, its gear greatly damaged, and the plaintiff seriously injured.

It was common ground on the argument at bar and at the trial also that the primary cause of the accident was the dropping out of the pin or key and the question was: To what cause was this attributable? I think the findings of the jury on this crucial point fully justified by the evidence. In their opinion it resulted from the "vibration and general dilapidation

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of the running gear." They also found the defendants guilty of negligence which brought about the accident in not having a competent man appointed to look after the operating of the elevator daily and in not having a set screw placed in front of the pin which fell out.

There was no evidence given showing that it was the duty of any person specially to inspect these elevators and to see from time to time that they were reasonably fit for their work. Murdock, the head machinist, testified that when he went to the mill many years previously he changed somewhat the construction of the elevator, putting a chain in instead of a wire cable, and cutting out the grooves in the sheaves which he found too shallow, but that was all he did. Baker, one of the machinists, used to go and repair the elevator machinery when it was reported to him to be out of order, but he does not appear to have reported to his foreman machinist as to the condition of the elevator and its running gear, though on two occasions he did so to the manager of the mill. No evidence of any kind was given as to the system on which the mill was operated. It appeared incidentally that there was a manager, and also that there was a general manager of the company for all their mills, but as to their powers or duties and as to the resources placed at their disposal, if any, to supply or provide new machinery when required, we are left entirely in the dark From all that appears in evidence all of these powers and duties may have been purposely retained in their own hands by the directors.

No question was raised on the argument as to the amount of the damages in case the defendants were held to be liable. Mr. Shepley, on the question of common law liability, contended that in the first place there was no evidence of negligence in respect of the

matter which caused the accident, and that the case was governed by the decision of this court in *Hastings* v. *LeRoi No. 2, Limited* (1), and that the defendants were entitled to the benefit of the doctrine of common employment.

On all these questions I have reached the conclusion that the contentions cannot be maintained.

In the case of *Hastings* v. *LeRoi No. 2, Limited* (1) the main question argued and on which the decision was based was whether Burns, the foreman, through whose negligence in failing to supply a proper hook for the hoisting gear after the defect in the one being used was discovered and reported to him, was a workman of the defendants in common employment with the injured man. The decision turned largely upon the proper construction of the agreement between the defendant company and a firm of contractors for the sinking of a winze in their mine. This court held, affirming the judgment of the Court of British Columbia, that the negligent workman and the injured workman were in the common employ of the defendants, and that under the circumstances of that case the doctrine of common employment could properly be invoked by the company to relieve them of liability. In that case there was a specific act of negligence on the part of a fellow workman which caused an injury to another in the common employment of the defendant company and, on that ground, as I understand it, the case was decided. But in the case at bar, under the findings of the jury and the evidence given, there is not, in my opinion, any room for the invocation by the defendants of the doctrine of common employment as an excuse from a liability which would otherwise attach. The negligence found as responsible for the injury is not that of a fellow labourer of the deceased in the com-

(1) 34 Can S. C. R. 177.

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mon employment of the defendants but is the negligence of the defendant company itself. It had failed to discharge that plain duty of an employer so clearly and persistently declared by the House of Lords for many years back of "seeing that his works are suitable for the operations he carried on at them being carried on with reasonable safety."

The distinction between the employer's liability to his servant for injuries occasioned by the carelessness of a fellow workman and that arising out of a breach of the employer's duty to his workman to provide and maintain suitable and proper machinery and appliances for carrying on his operations with reasonable safety is well pointed out by Lord Cranworth in his celebrated judgment in *Bartonshill Coal Co.* v. *Reid* (1). In reviewing the cases on the subject the noble Lord there said at page 288:

> This case [*Brydon* v. *Stewart* (2)] it will be observed, like that which preceded it, turned, not on the question whether the employers were responsible for injuries occasioned by the carelessness of a fellow workman but on a principle established by many preceding cases, namely, that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition so as to protect the servant against any unnecessary risks.

The latter principle is reaffirmed by both Lord Herschell and Lord Watson in *Smith* v. *Baker* (3). The latter learned Lord at page 353 says:

> It does not appear to me to admit of dispute that, at common law, a master who employs a servant in work of a dangerous character is bound to take all reasonable precautions for the workman's safety. The rule has been so often laid down in this House by Lord Cranworth and other noble and learned Lords, that it is needless to quote authorities in support of it.

(1) 3 Macq. H. L. 266. (2) Macq. H. L. 30.
(3) [1891] A. C. 325.

He then goes on to quote authorities for the proposition that long before the passing of the Employers' Liability Act a

master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself.

After pointing out that many of the enactments of the Employers' Liability Act were simply declarations of "the acknowledged principles of the common law" he goes on, at page 356, to say:

At common law his (the employer's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect.

I assume the noble Lord meant by the term "ignorance," as used by him, ignorance of something which he ought to have known. And at page 362 Lord Herschell says:

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered.

There is then a broad distinction between the liability of the master for his personal negligence or for the condition of his premises or machinery, and that arising out of the negligence in the management or operation of that machinery by the servants to whom he has entrusted it. I venture to think that failure to appreciate this distinction has given rise to many of the difficulties which surround this branch of the law, and that a clear appreciation of it will serve to reconcile many apparently conflicting cases. With respect to the liability of an employer for injuries caused to one of his employee's by the negligence of a

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fellow servant, the statement of it laid down by Lord Cairns in *Wilson* v. *Merry* (1), seems alike concise, complete and generally accepted. His Lordship said, at page 332:

> What the master is, in my opinion, bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do.

These oft quoted words when applied to the branch of the law of master and servant, to which the learned Lord was addressing himself, and which he had before him in the case he was deciding, seem to cover the whole ground. It is equally clear to me that they were not intended to cover cases arising out of the master's liability for injuries caused by defects either in the system or in the condition of his premises or machinery which he either knew or ought to have known about, and of which the injured servant was ignorant. *Johnson* v. *Lindsay & Co.* (2), at page 379, where Lord Herschell says:

> I think it clearly means that he (Lord Cairns), did not intend to state the law differently from Lord Cranworth whose opinions in *The Bartonshill Coal Co.* v. *Reid* (3) he quotes with approval,

and Lord Watson at pp. 385-7.

As Mr. Beven states the liability at page 738 of his work on Negligence (2 ed.):

> The master is not liable for the negligence of his superintendent]; nevertheless, he is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety. If the master leaves the supervision of his works to his superintendent, the master cannot by doing so escape liability, for the duty is one of which he cannot divest himself. If the superintendent is negligent the master is not answerable, yet, if the appliances with which the men have to work are not reasonably suitable, the neglect is the master's.

(1) L. R. 1 H. L. Sc. 326. (2) [1891] A. C. 371.
(3) 3 Macq. H. L. 266.

The employer cannot escape from liability to a third person for injuries caused by defective premises or machinery on the ground that he had not personally interfered in the construction or management of his works; nor can he do so in the case of his employee, unless these risks are held to be risks incident to the servant's employment which, by the decided cases, they are certainly not; as Lord Herschell tersely puts it, such an assumption would be equivalent to relieving by implication an employer of his negligence. The effect of the workman's knowledge of the defects when he enters upon or continues in his master's employ is an entirely different question, and depends upon the facts of each case as proved and the proper interence to be drawn from them. It is clear that while, on the one hand, the employer is liable to his servants for his own personal negligence in the actual performance of work or for failure to provide appliances for the proper carrying on of the work, or for default in the appointment of competent servants, he is not, on the other hand, liable either for the negligence of the servant injured or that of his fellow servant. While bound to use reasonable precaution and care in providing his employees with reasonably suitable premises and machinery on which and with which to work, he does not insure the absolute safety of the machinery provided by him. If he fails in this duty of precaution and care he is responsible for injuries which may happen to his employees through defects which were or ought to have been known to him and were unknown to the employees. When the necessity of executing repairs springs from the daily or ordinary use of appliances the master is of course bound to provide the means of executing the necessary repairs, and when he has done so it remains for the servants to secure themselves in those matters which can easily

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be remedied and do not involve the permanent operations of skilled mechanics; and if the employer seeks to escape from liability on the ground that the servant entered upon or continued in the employment with knowledge of the facts the onus lies upon him of proving that the servant took upon himself the risk without the precautions which might or would have avoided it. *Williams* v. *Birmingham Battery and Metal Co.* (1).

I fail to find anything in the evidence relieving the defendants from their common law liability arising out of the injuries caused by the defective elevator. The defect was not one arising out of its daily or ordinary use and which could be met by ordinary repair. It was, on the contrary, one arising from the elevator's general worn out condition, and from the fact that it "had lived its life." While it was perhaps impossible to put one's finger on any specific defect in the gear it was not only possible but reasonable and proper to conclude that it was worn out and dangerous and unfit for further use. The knowledge of these facts is a knowledge which must be imputed to the employer. To refuse so to impute it would be in effect to declare that he could by the simple expedient of employing a foreman relieve himself from his common law liabilities. The worn out condition of the running gear of the elevator having been shewn (of which the workman did not have and could not under the circumstances be assumed to have knowledge) coupled with the injuries to the workman caused by it completed the case for the plaintiff, and no evidence was given of any kind which, in my opinion, justified or excused the defendant company from the results of what I hold to have been its proved negligence.

(1) [1899] 2 Q. B. 338.

In cases coming within the doctrine of common employment the onus is upon the injured workman of proving negligence on the part of his employer, and in such cases it may well be that the plaintiff must prove either that the workmen by or through whose negligence the injury was caused were incompetent or that adequate materials or resources were not furnished because they are all parts of one whole proposition going to make up the negligence. But I cannot see that such a rule applies to cases lying outside of that doctrine. In such cases the defendant's negligence is proved when evidence is given shewing damages arising from a failure to provide or maintain that which the law says it is his duty to provide alike in premises, machinery or appliances. Failure to do either one or the other constitutes the negligence and when followed by consequent damages creates the liability. If the employer claims that for some reason he ought to be excused the onus rests upon him to shew it. The case of *Allen* v. *New Gas Company* (1) cited in support of a contrary doctrine is not, I venture to say, authority for that doctrine. That case was argued and decided, as appears from the report, exclusively upon the ground of the duty of employers to employ a competent person to take charge of their premises and without reference to their duty to see to the condition of the machinery. The basis of that decision is to be found in the following extract from the judgment of the court at page 254:

> We think that the mischief in this case arose from the conduct of the plaintiff's fellow workmen as such and not from the defendants' default nor from the default of any manager or vice-proprietor, and that therefore the defendants are not liable.

Any further observations made in the case must be read with reference to this ground work of the deci-

(1) 1 Ex. D. 251.

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sion. The case should be read along with the cases I have already cited and also of those of *Vaughan* v. *Cork & Youghal Ry. Co.* (1); *Webb* v. *Rennie* (2); the judgments of Ch. J. Cockburn and Byles J., in *Clarke* v. *Holmes* (3); and *Murphy* v. *Phillips* (4); with which might be compared *Spicer* v. *South Boston Iron Company* (5). I adopt the language of Mr. Beven, at page 763 of his book, where he says:

> The master is liable in all cases where there has been neglect in providing proper machinery and competent servants. He is not liable when the injury results from the management of proper machinery by servants not incompetent.

This rule is strictly in accord with the jurisprudence of this court as laid down in *Grant* v. *Acadia Coal Co.* (6), and *McKelvey* v. *LeRoi Mining Co.* (7); the latter decision being entitled to greater weight from the fact that an application for leave to appeal to the Privy Council was refused.

In my opinion the appeal should be dismissed with costs.

NESBITT J.—In this case the plaintiff, an employee of the defendants, sued for injury caused to him by the fall of an elevator used in the premises of the employers and which, on the evidence, we must assume the plaintiff was properly using.

The plaintiff claims both at common law and under the Workmen's Compensation Act, and the jury have assessed the damages under each branch of the claim.

It is to be regretted that the Court of Appeal has not seen fit to give reasons for the affirmance of the judgment of the trial judge, holding the defendants liable at common law.

(1) 12 Ir. C. L. R. 297.
(2) 4 F. & F. 608.
(3) 7 H. & N. 937.
(4) 35 L. T. 477.
(5) 138 Mass. 426.
(6) 32 Can. S. C. R. 427.
(7) 32 Can. S. C. R. 664.

This and other cases of late have been argued at length on the supposition that the case of *Smith* v. *Baker* (1), which I shall hereafter refer to, has introduced a modification of the common law rule which had theretofore been assumed to be well settled, and I think it is advisable to re-state that rule and see how far it *has* been modified and explained, and then to apply the rules to the facts proved in this case complied with the findings of the jury.

For his own personal negligence a master was always liable and still is liable at common law. See per Bowen L. J. in *Thomas* v. *Quartermaine* (2). And before the Workmen's Compensation Act he was not otherwise liable by reason of the doctrine of common employment, first enunciated by a decision of the Court of Exchequer in the year 1837, in the much discussed case of *Priestley* v. *Fowler* (3), and finally established in the year 1858, in the case of *Bartonshill Coal Co.* v. *Reid* (4), in which it is to be noted that all the Scotch cases referred to in *Smith* v. *Baker* (1) were discussed, and in which, after two years consideration, Lord Cranworth finally settled the doctrine of common employment, the effect of which was, as stated by Mr. Ruegg in the sixth edition of his Employers' Liability Act, at page 27:

> Before the Act was passed a workman could only recover, if injured in his employment, when he could prove that the employer had *personally* been guilty of the negligence which led to his injury, and which in the case of large employers was almost, *and in the case of corporations quite, impossible.* Now a workman is *primâ facie* entitled to recover where the employer—be he private employer or corporation—has delegated his duties or powers of superintendence to other persons, and such other persons have caused injury to the workman by negligently performing the duties and powers delegated to them, but the doctrine of common employment, save in so far as it is thus abrogated, remains.

(1) [1891] A. C. 325.
(2) 18 Q. B. D. 685.
(3) 3 M. & W. 1.
(4) 3 Macq. H. L. 266.

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I adopt this statement of the law and propose to cite some of the legal authorities which, to my mind, clearly establishes it.

In 1868 the case of *Wilson* v. *Merry* (1), came before the House of Lords composed of Lord Cairns L. C., Lord Cranworth (who had delivered the judgment in *Bartonshill Coal Co.* v. *Reid* (2), and *Bartonshill Coal Co* v. *McGuire* (3), Lord Chelmsford and Lord Colonsay. Lord Cairns points out that, in the *Bartonshill Coal Co.* v *Reid*, (2) Lord Cranworth explained with great clearness the difference between the liability of a master to one of the general public and his liability to a servant of his own for an injury occasioned, not by the personal neglect of the master himself, but by the negligence of some person employed for him, and then summarises the law relating to the duty of the master towards his servant as follows:

> What the master is, in my opinion, bound to his servant to do, in the event of his not *personally* superintending and directing the work, is to select competent and proper persons to do so, and to furnish them with adequate material and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence that is not the negligence of the master.

In *Howells* v. *Landore Siemens Steel Company* (4), Lord Blackburn points out that a company or corporation must be treated in the same way as an individual on this point, and it is to be noted in this last case that the *manager* was one appointed pursuant to an Act of Parliament, and yet the company were held not liable for his negligence. And in the same case Lord Blackburn further observes:

> When a master *personally* interferes he is liable for his personal negligence just as the individual servant would be.

And the discussion by counsel makes it perfectly plain

(1) L. R. 1 H. L. Sc. 326.
(2) 3 Macq. H. L. 266.
(3) 3 Macq. H. L. 300.
(4) L. R. 10 Q. B. 62.

that the court, composed of Chief Justice Cockburn and Blackburn, Quain and Archibald JJ., assumed that after the decision in *Wilson* v. *Merry* (1) the subject was no longer open to discussion, and apparently, as a corporation can only act through managers, it can only be held liable in the very nature of things for failure to select proper and competent persons to superintend and direct the workings and failure to furnish them with adequate material and resources for the work.

In 1876 two other cases came before the courts, the first being *Allen* v. *The New Gas Company* (2), and the judgment of the court composed of Bramwell, Amphlett and Huddleston BB., was read by Huddleston B., and he points out at page 254 what is necessary to be proved in order to make out a master liable to common law; he says:

> To establish, therefore, negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works, or that the persons employed by them were not proper and competent persons, or that the materials were inadequate, or the means and resources were unsuitable to accomplish the work. The onus is upon him, and failing to do so he fails to establish negligence.

In the same year *Murphy* v. *Philips* (3), was decided in the Exchequer Division in a court composed of Kelly C. B., and Cleasby and Pollock BB. It was an action by a servant against his master for negligence in failing to *examine machinery* and therefore most apposite to the case at bar. It appeared that the chain had become so much worn by long and constant service that it was at the time in question in need of being repaired, and was in fact in such a condition that if unrepaired it was dangerous and unfit to be used and serious injury was not unlikely to be the result of its being used in its then condition. It was,

(1) L. R. 1 H. L. Sc. 326. (2) 1 Ex. D. 251.
(3) 32 L. T. 477.

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therefore, a question of whether it *was* or *was not* the duty of the defendant as the master and employer of the plaintiff to see and examine from time to time the state and condition of the chains and other machinery employed on his premises in his business, and it was clearly held that it was his duty. And Cleasby B. says:

> Now here I think that the defendant was under an obligation to ascertain that this chain was fit for use in the work in which it was about to be employed, and that it was not in a dangerous condition. This might have been accomplished by the defendant in *two* ways; *he might have appointed a fit and competent person expressly to superintend and see to the examining and testing of the chain, and had he done so he would, of course, have been himself exempt from all liability, or, he might have examined the state of the chain himself.*

And Pollock B. says:

> It is hardly possible to lay down any one general rule with reference to the duty of a master to examine into the state and condition of the machinery that is used in his business, and the question is obviously one of degree; but it is to be noted in the present case that the defendant *was aware of the age of this chain.*

Prior to this, in 1865, in a case of *Webb* v. *Rennie* (1), Cockburn C. J. directed the jury in reference to the duty cast upon the master respecting the maintenance of machinery as follows:

> It was his business to know if by *reasonable care and precaution, he could ascertain whether the apparatus or machinery were in a fit state or not.* It was not enough, therefore, that the master did not know of the danger if, by *reasonable* care, he might have known, and if, reasonably, he *ought* to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either *himself* to take the proper means of knowing of the danger, or to employ some competent person to do so. There were many things which a man could not himself *know of.* Thus, in the case of a manufacturer employing machinery which might be attended with danger to the person employed about it, a danger which might be greatly aggravated by the machinery not being in a proper condition—as, fo

(1) 4 F. & F. 608.

instance, in the case of a boiler of a steam engine bursting as it would be more likely to do if in an improper condition—the master manufacturer might have no means of personally knowing the condition himself, and the question being whether he had used reasonable care and diligence to ascertain it, *all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it.* The master must either ascertain the state of the machinery or apparatus himself or employ some competent person to do so; and if he did employ such a person, and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence.

On the question of onus of proof see also *Hanson* v. *Lancashire and Yorkshire Railway Co.*, (1872), (1), where the court was composed of Byles, Brett, Grove and Willes JJ. See also *Griffiths* v. *London and St. Katharine Docks Company* (2), where the cases are fully collected as establishing that at common law it was necessary for a servant to establish, not only his own want of knowledge, but also knowledge on the part of the master; both must be alleged and proved, otherwise the plaintiff must fail. It is argued that Mr. Beven, in his second edition of his work on Negligence, beginning at page 736, lays down the rule that the master does not fulfil his duty by the appointment of a fit and proper person to superintend but that he must himself see that the works are suitable for the operations he carries on at them and that they are being carried on with reasonable safety. I propose showing later that the cases cited by Mr. Beven for this in no sense established any such proposition, but that an examination of the authorities themselves will in every case show either personal superintendence or that the defect or negligence was known to the defendant who, with that knowledge, permitted or possibly allowed the work to proceed, in which case I could understand holding him liable. It is on this ground *Webster* v. *Foley* (3),

(1) 20 W. R. 297.
(2) 13 Q. B. D. 259.
(3) 21 Can. S. C. R. 580.

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must be assumed to have been decided; see Labatt Master and Servant, p. 1983 & 677, note 3. The doctrine so contended for, I admit, is applicable where the duty is one imposed by statute; that involves very different conditions. In the care of a corporation, which is an abstract personality, or of a person who, without any knowledge of the business, brings into existence an undertaking or industry of which he is entirely ignorant, the cases show that all that can be required is to employ competent persons, to supply adequate materials and means and resources suitable to accomplish the work. Negligence is defined as the omission to do something which a reasonable man, guided by those considerations which originally regulate the conduct of human affairs, would do, or the doing of something which a prudent or reasonable man would not do. Per Alderson B. in *Blyth* v. *The Company of Proprietors of the Birmingham Water Works* (1), at page 784. And, again, in the words of Brett M. R. the neglect of the use of ordinary care or skill towards a person to whom defendant owes the duty of ordinary care or skill; *Heaven* v. *Pender* (2). How, therefore, a corporation, an abstract personality, can do anything but appoint a competent person, etc., I am unable to understand. See *Kettlewell* v. *Paterson & Co.* (1886) (3). How a person entirely ignorant of the undertaking can do otherwise than employ competent contractors for the work and competent persons to supervise it, whose duty it is to see that the machinery, etc., is kept in proper order, I am at a loss to understand. The very attempt on his part to supervise or regulate the operations might be the most disastrous thing possible for the servants, and as put by Lord Cranworth in *Bartonshill Coal Company* v. *Reid* (4), the servant, before he goes

(1) 11 Ex. 781.
(2) 11 Q. B. D. 503.
(3) 24 Sc. L. R. 95.
(4) 3 Macq. H. L. 266.

into the employment, knows whether he is entering into the employment of one who does pretend to know or of one who leaves the whole matter to managers.

I come now to see whether *Smith* v. *Baker* (1), did purport to break in upon the rule I have indicated or to establish any modification of these doctrines. In the first place, it is to be observed that in *Smith* v. *Baker* (1) the only point which was decided by the court did not involve this question at all. In the report of the case at page 335, Halsbury L. C. says:

> The objection raised, and the only objection raised, to the plaintiff's right to recover, was that he had voluntarily undertaken the risk. That is the question, and the only question, which any of the courts, except the county court itself, had jurisdiction to deal with.

Again on page 354 Lord Watson says:—

> The only question which we are called upon to decide, and I am inclined to think the only substantial question in the case, is this, whether, upon the evidence, the jury were warranted in finding as they did, that the plaintiff did not "voluntarily undertake a risky employment with a knowledge of the risks."

I have mentioned this because the expressions relied upon in argument as being used by the judges in giving judgment were not used in reference to the point decided, nor when examined did they in fact, with one exception which I shall mention, suggest any modification of the common law I have above stated. The first expression occurs at page 339, where Lord Halsbury says:

> I think the cases cited at your Lordship's Bar of *Sword* v. *Cameron* (2), and the *Bartonshill Coal Company* v. *McGuire* (3), establish conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any provisions of the Employers' Liability Act.

(1) [1891] A. C. 325. (2) 1 Sc. Sess. Cas. (2 ser.) 493.
(3) 3 Macq. H. L. 300.

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In *Bartonshill Coal Co.* v. *Reid* (1) Lord Cranworth who, it is to be remembered, took part in the judgment of *Wilson* v. *Merry* (2), after discussing the facts found in *Sword* v. *Cameron* (3) says as to that case:

> It is to be inferred from the facts stated that the notices and signals given were those which had been *sanctioned by the employer.*

This comes clearly within the rule of *Wilson* v. *Merry* (2), personal superintendence or personal knowledge. *Bartonshill Coal Co.* v. *McGuire* (4), was an action arising out of the same accident as *Bartonshill Coal Company* v. *Reid* (1). The Lord Chancellor expressly laid down the rule at page 276 in his judgment in the *Reid Case* (1), which was made part of the judgment in the *McGuire Case* (4), that the master is not responsible if he has taken proper precautions to have proper machinery and proper persons employed. How he takes proper precautions is employed, as I have indicated above, by Cleasby B. in *Murphy* v. *Philips* (5), in cases where he had not the knowledge himself. In that case the accident was caused by the neglect of the engineman, Shearer, as it caused the accident in the *Reid Case* (1). And on page 311 of the *McGuire Case* (4) Lord Chelmsford, then Lord Chancellor, states with approval the observations of the Lord Justice Clerk in *Dixon* v. *Rankin* (6):

> The recklessness of danger on the part of the men is a result of the trade in which the master employs them, and he is bound in all such cases to hire superintendence which will exclude such risks, etc.

Shewing that at common law, even if the master did not personally superintend, if he was aware of and sanctioned the use of improper machinery or inadequate means he was liable. The same question is again

(1) 3 Macq. H. L. 266.
(2) L. R. 1 H. L. Sc 326.
(3) 1 Sc. Sess. Cas. (2 ser.) 493.
(4) 3 Macq. H. L. 300.
(5) 35 L. T. 477.
(6) 14 Sc. Sess. Cas. (2 Ser.) 353, 420.

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referred to at page 353, in the judgment of Lord Watson, where the learned judge cites *Sword* v. *Cameron* (1), *Bartonshill Coal Company* v. *Reid* (2), and *Weems* v. *Mathieson* (3). I have already dealt with *Sword* v. *Cameron* (1) and *Bartonshill Coal Co.* v. *Reid* (2), and an examination of *Weems* v. *Mathieson* (3) will shew that in that case the employer was held responsible for injury caused by the falling of a cylinder insufficiently sustained

> the manner of the suspension having been suggested by the defendant himself;

and that this was clearly in the mind of the learned judge at that moment is seen by the very next sentence at the foot of page 354, where he says the main, although not the sole, object of the Act of 1880, was to place masters who do not upon the same footing of responsibility as those who do personally superintend the works of their workmen. The only sentence I do not understand in the judgment of Lord Watson is at page 358 where he says:

> At common law his ignorance would not have barred the workman's claim as he was bound to see that his machinery and works were free from defect.

If the learned judge is there speaking of the obligation of the master to either himself, or by others competent to do so, inspect and see that machinery is kept in a proper state of maintenance, I agree, but if he means to say that a competent person has been employed whose duty it was to inspect and see that the machinery was kept in a proper state of maintenance, and that that person's neglect the master is responsible for, it seems to me to be against any authority to be found in

(1) 1 Sc. Sess. Cas. (2 Ser.) 493. (2) 3 Macq. H. L. 266.
(3) 4 Macq. H. L. 215.

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the books subsequent to the case of *Wilson* v. *Merry* (1). I think, therefore, that the judges in *Smith* v. *Baker* (2), in discussing the Scotch case, did not intend in any sense to qualify the doctrine of *Wilson* v. *Merry* (1), which case was itself decided some ten years after the last of the Scotch cases referred to, and in which case Lord Cranworth took part and in no way suggested any modification of the language used by Lord Cairns in defining the duty of the master to the servant at common law. I think, therefore, that when a defective system is spoken of which renders the master liable it is a system which he has either personally taken part in or has subsequently sanctioned or had knowledge of, and that the full extent of his duty is as defined in *Wilson* v. *Merry* (1). I do not see in many cases at the present day how it would be possible for the employer to have any knowledge whatever as to whether a system was perfect or defective; much of such knowledge is technical and all that he can do is to use ordinary care to see that he gets competent contractors to supply his machinery and competent persons to see that the machinery is properly run and properly maintained, and that such persons are supplied with adequate means and materials to so run and maintain the machinery in a reasonably safe condition, and that if any failure to keep the machinery up to date is due to the neglect of such superintendent, in the absence of knowledge upon the part of the employer, he is not liable at common law. Any other rule would, it seems to me, entirely lose sight of the numerous undertakings requiring special scientific knowledge both as to the machinery required and as to the method of running, and as to when it was out of repair, and as a rule such knowledge is not possessed by the people having the

(1) L. R. 1 H. L Sc. 326. (2) [1891] A. C. 325.

necessary capital to create the undertaking and employ labour, but the employer has necessarily to depend upon the skilled knowledge of others.

I am fortified in the view that *Smith* v. *Baker* (1) did not attempt to decide anything more than that "*sciens* was not *volens*," by the judgment in *Williams* v. *Birmingham Battery and Metal Co.* (2), where, although the defendants were held liable for non-maintenance, it appeared that the defendants were aware of the absence of any ladder or proper means of ascending to or descending from the tramway, and A. L. Smith L.J., at page 342, quotes from Lord Herschell as follows:

It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, etc., (and then continues in his own language) This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man.

And again:

This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master, if the appliances became unsafe whereby the man has been injured unless he avers and proves that *the master knew of their having become unsafe and that the man was ignorant of it.*

The case is similar to that of *Mellors* v. *Shaw* (3). When you turn to *Mellors* v. *Shaw* (3) it is again found to be a case decided upon the ground of the master's personal negligence.

I have dealt at perhaps too great length with the English authorities, but my only excuse is that nearly every case at the present day is launched and fought out both at common law and under the Employer's Liability Act, and we are continually pressed with

(1) [1891] A. C. 325. (2) [1899] 2 Q. B. 338.
(3) 1 B. & S. 437.

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the argument that the law is not as it was always supposed to be, namely, the law as enunciated by Lord Cairns in *Wilson* v. *Merry* (1).

The Ontario cases are well summed up in the judgment in *Rajotte* v. *Canadian Pacific Railway Co.* (2); and *Matthews* v. *Hamilton Powder Co.* (3); and the British Columbia authorities are collected in *Wood* v. *Canadian Pacific Railway Co.* (4), affirmed on other grounds by this court. Much discussion has taken place also in the case of *Sim* v. *Dominion Fish Co.* (5), in 1901 at page 69. That case is not entirely satisfactory but I take it that it was established that the boxes supplied were unfit, as will be seen by a reference to the evidence at page 72, and the Chief Justice, at page 75, points out that the uncontradicted evidence showed that the boxes were not fit for the purpose for which they were provided, and then says that from that evidence the inference arose that the defendants had not exercised due care in providing boxes and gave no evidence whatever in excuse for their so doing. I assume that had the defendants proved that they employed competent men with instructions to obtain adequate materials, and that the neglect to provide such adequate materials was that of the persons so employed, that the learned Chief Justice would have held no liability existed at common law, but in the view of the expression of opinion of Huddleston B. in *Allen* v. *The New Gas Co.* (6), above cited, to which the attention of the learned judge had not been drawn, I should have doubted whether the plaintiff satisfied the full onus cast upon him.

(1) L. R. 1 H. L. Sc. 326.
(2) 5 Man. L. R. 297, 365.
(3) 14 Ont. App. R. 261.
(4) 6 B. C. Rep. 561; 30 Can. S. C. R. 110.
(5) 2 Ont. L. R. 69.
(6) 1 Ex. D. 251.

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Applying, then, the rules above indicated to the facts of this case, I find that it is proved that there was a head machinist employed who did in fact inspect the elevator from time to time and pointed out the serious defect which he said was remedied, and after that he himself saw another ground of complaint. I find also that Baker, a sub-machinist, did in fact inspect continually and make repairs, and that he pointed out the old and worn condition of the machinery to both the general superintendents of the company, who failed apparently, notwithstanding such inspection and notice to them, to change the pinion gear. I think, therefore, that, as no knowledge was brought home to the company, the case comes clearly within the decision of *Williams* v. *Birmingham Battery and Metal Co.* (1) and *Matthews* v. *Hamilton Powder Co.* (2), and that there is no liability at common law. But I cannot see upon this evidence and the findings of the jury how the defendants can escape under the Employer's Liability Act See *Henderson* v. *The Carron Co.* (3). The statute is comparatively simple, R. S. O., 1897, ch. 160, sect. 3, s.s. 1 and 2, coupled with section 6, s.s. 1. It is quite true that the under-machinist, when he drove in the key, swears that he did it properly, and that he saw nothing wrong with the machinery, and that he was the person entrusted with the duty of seeing to the remedying of that particular defect, but he had, if defendants are to be believed, and the jury did believe them, already pointed out that the vibration and general dilapidation of the machinery was such that it ought to be renewed, and that, therefore, while the patching up by putting in the key made good the falling out of the key for the moment, the defect which he had pointed out, namely,

(1) [1899] 2 Q. B. 338. (2) 14 Ont. App. R. 261.
(3) 16 Sc. Sess. Cas. (4 Ser.) 633.

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the vibration and general dilapidation, and which he said he believed brought about the second falling out of the key, still existed and had not been remedied owing to the negligence of the superintendent who must also be said to be a person entrusted with the duty of seeing to the proper carrying out of the business generally, because it is sworn that the superintendent had the general conduct, and it would be for him to give general directions either to the head machinist or to a subordinate machinist, and certainly to give directions for the renewal of machinery, and I think that under this section of the Act there may be various parties in different degrees of authority to whom the work of seeing to defects may be entrusted. I would, therefore, vary the judgment by directing a judgment to be entered for the amount of damages assessed by the jury under the Workmens' Compensation Act.

KILLAM J.—It is not disputed that the appellant company was liable, under "The Workmen's Compensation for Injuries Act," R. S. O. (1897) c. 160, for the injuries sustained by the plaintiff. The only question is whether or not it was liable at common law.

I agree with my brother Davies in the opinion that the case falls within the class of cases in which an employer has been held liable on the ground that the state of the appliances was such that there could properly be imputed to him knowledge of the defects or neglect of the duty to know them.

The authorities have been very exhaustively and ably discussed by my learned brothers, and it appears unnecessary that I should attempt any further examination of them.

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Probably, as my brother Nesbitt thinks, the decision in *Smith* v. *Baker* (1) has been to some extent misconstrued and misapplied, but it seems to me to be clearly established that the duty of an employer is not satisfied by the instalment of a sufficient set of appliances and the adoption of a sufficient system of working, leaving them to managers or superintendents of apparently sufficient skill to manage or operate. Some responsibility remains in the employer. And while the onus was upon the injured workman, at common law, to show negligence in the employer himself, it might be discharged by evidence of circumstances raising an inference either of knowledge of the defects or of neglect of the duty to exercise care to acquire such knowledge and remedy them. *Paterson* v. *Wallace & Co.* (2); *Weems* v. *Mathieson* (3); *Clarke* v. *Holmes* (4); *Murphy* v. *Phillips* (5): *Webb* v. *Rennie* (6); *Webster* v. *Foley* (7).

In the present case I agree with the opinion of my brother Davies that the evidence warranted the findings of the jury and the judgment for the full amount allowed.

Appeal dismissed with costs.

Solicitors for the appellants: *Duvernet, Jones, Ross & Ardagh.*

Solicitors for the respondent: *Guthrie & Guthrie.*

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(1) [1891] A. C. 325.
(2) 1 Macq. H. L. 748.
(3) 4 Macq. H. L. 215.
(4) 7 H. & N. 937.
(5) 35 L. T. 477.
(6) 4 F. & F. 608.
(7) 21 Can. S. C. R. 580.

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*Nov. 21.

*Dec. 14.

THE CANADA FOUNDRY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JOHANNA MITCHELL AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Employer and workman—Volenti non fit injuria—Finding of jury.

In an action claiming compensation for personal injuries caused by negligence the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk unless it so plainly appears by the plaintiff's evidence as to justify the trial judge in withdrawing it from the jury and dismissing the action. Sedgewick and Nesbitt JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict for the plaintiff at the trial.

The action was brought by the widow and infant children of Charles Mitchell who was killed while working at the construction of the iron work on the exhibition buildings in Toronto as an employee of the defendant company. The particular work on which he was engaged at the time was hoisting purlins up to the roof and bolting them to the rafters, being a gang foreman in charge of the men doing such work. There were several modes of hoisting such purlins, and the one used by deceased and his men was, as plaintiffs alleged and the jury found, an improper method, as it would not raise the purlins high enough and they had to be pushed up into place by the men.

* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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The defendants claimed that a better method was supplied and the gang used the one they did for their own convenience, but the jury found that it was by direction of the defendants' foreman.

The plaintiffs obtained a verdict at the trial, the jury finding that deceased had not voluntarily incurred the risk and the verdict was maintained by the Court of Appeal.

Duvernet for the appellants.

John M. Godfrey for the respondents.

SEDGEWICK J. (dissenting) concurred in the opinion of Mr. Justice Nesbitt.

GIROUARD J. concurred in the dismissal of the appeal.

DAVIES J.—The one doubt I have had in my mind as to the soundness of the judgment of the Court of Appeal in this case was whether the deceased workman had not, by continuing at his work with full knowledge and appreciation of the risks he ran in doing the work with the appliances which were used, necessarily accepted those risks and so relieved the defendants from liability. The jury found that he did know and fully appreciate the risks and they also found that he did not voluntarily incur them. The question is one of great nicety and it is very difficult at times to reach a satisfactory conclusion as to the application of a proper rule. The general law on the point may be accepted as that laid down by Lord Justice Bowen in the case of *Thomas* v. *Quartermaine* (1), as explained and modified by the decision of the House of Lords in *Smith* v. *Baker* (2), and by the Appellate Court in the still later case of *Williams* v. *Birmingham*

(1) 18 Q. B. D. 685. (2) [1891] A. C. 325.

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Battery and Metal Co. (1). Lord Justice Bowen had said that:

> Where the danger is visible and the risk is appreciated, and where the injured person knowing and appreciating both risk and danger voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier (the employer) at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete.

In the subsequent case of *Yarmouth* v. *France* (2), approved of by Lord Herschell in *Smith* v. *Baker* (3), Lord Esher and Lindley, L.J., sitting with Lopes L.J. as a divisional court and accepting as such the exposition of the law given by the Appeal Court in *Thomas* v. *Quartermaine* (4) engrafted this distinction or qualification upon it; that the question whether a workman was "volens" or not was a question of fact depending upon evidence adduced in each case.

The decision in *Smith* v. *Baker* (3) really turned upon the right inference to be drawn from the continuance of a workman in an employment the risks of which he knew and appreciated. What that case really decided is well summarised by Mr. Ruegg in his work on Employer's Liability, page 170, (5 ed.) as follows:

> There is no inference to be implied by law even where a workman knows of and appreciates a danger from the fact of his continuance in the employment; the question is one of fact and is for the jury; the consent to run the risk must be proved by the defendant who wishes to rely on the maxim the reason being that a workman does not impliedly take the risk of his employers' negligence.

The latest decision on the question is that of the Court of Appeal in *Williams* v. *Birmingham Battery and Metal Co.* (1), where it was held that to enable an employer to successfully invoke the doctrine of

(1) [1899] 2 Q. B. 338.
(2) 19 Q. B. D. 647.
(3) [1891] A. C. 325.
(4) 18 Q. B. D. 685.

volenti non fit injuria he must obtain a finding of the jury upon it in his favour. I adopt as correct the propositions of law which Romer L.J. formulated as established by the decided cases:

> If the employment is of a dangerous nature a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury the employer is *primâ facie* liable; and it is no sufficient answer to the *primâ facie* liability for the employer to shew merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer, and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued in, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him.

In the case at bar not only was there no finding that the deceased voluntarily had incurred the risk, but an express finding that he had not. If it is essential to the judgment being entered for the defendant on this single point that he should have obtained a finding in his favour from the jury, then, how can we, in the presence of a contrary finding, declare that deceased did agree to undertake the risk of the defendant's negligence. Fear of dismissal rather than voluntary action on the workman's part might have been inferred by the jury in reaching their finding.

The evidence of Hall and of the foreman, Bullock, agree that the gin poles which were the safest and best appliances to have used in the raising of the purlins were discarded by the express orders of the engineer, Law, who had as said, "sent up the monkeys or davits to be used in place of the gin poles," and that, as the foreman said, "they must be used." The orders to use the monkeys or davits and not the gin

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poles were peremptory and could not be disobeyed. There is really no substantial distinction between the appliance substituted for the davit and the latter itself. The substitution was rendered necessary by the condition of the particular part of the roof where the men were working. Both were alike defective in compelling the men to descend from the top chord to the lower one so as to raise the purlin out of its place by their personal force and strength, and it was this action of descending to the lower chord which created the extra danger.

I entirely concur in the reasoning and conclusions of the learned Chief Justice of the Court of Appeal on this latter branch of the case. I think the foreman, Bullock, was by his own confession responsible for the use by the men of an unsafe appliance in the raising of the purlins; that, under the statute, the master is liable for his negligence as a person having the superintendence of this very work, and that the evidence did not show that the deceased was a gang foreman or occupied any position of superintendence which gave him control over or made him responsible for the appliances used in the raising of the purlins used in the construction of the building.

On the authority of the cases above quoted, and the findings of the jury, I would dismiss the appeal.

NESBITT J. (dissenting).—This is an action founded upon negligence, and I adopt the definition of negligence of Brett M. R. in *Heaven* v. *Pender* (1).

> The neglect of the use of ordinary care and skill towards a person to whom the defendant owes a duty of observing ordinary care and skill *by which neglect* the plaintiff, without contributory negligence on his part, had suffered injury to his person or property.

It is not disputed in this case that the defendants not only employed competent superintendents and sup-

(1) 11 Q. B. D. 507.

plied all necessary means and appliances, but also that the proper appliances to raise the purlins above the upper chord was not used, but that a device contrived by the gang of men, of whom deceased was the foreman, was substituted for a proper appliance as being easier to be used; and it is also not disputed that the deceased who was, as I say, *foreman of the gang* in question, was a skilled workman and knew and fully appreciated the risk he ran in doing the work with the appliances which were used. It is therefore plain that there was no breach of duty towards the deceased at common law; and the only ground upon which a breach of duty on the part of the defendant is put is that the foreman, Albert E. Bullock, who was immediately above the gang foreman, had seen the men adopt the device in question at various times and had made no objection, and, therefore, while there is no pretence that there is any breach of duty towards the deceased in the actual giving of an order, that there is negligence in superintendence. I doubt if the facts of the case bring it within the subsection "whilst in the exercise of such superintendence" or that Bullock, as respects this particular operation, was in any way *exercising superintendence*, but assuming the subsection applied, I am unable, so far as the deceased is concerned. to appreciate a construction of the statute which would bring the defendants within the above definition as failing to do anything "by which neglect" the deceased suffered. I take it that, if the deceased were an unskilled workman and any person in authority either instituted or sanctioned a dangerous system of carrying on the work, the employer would be liable under this subsection which, as I understand it, was enacted in order to make an employer *not exercising personal superintendence, liable for those to whom he deputed the super-*

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intendence. But I do not understand that there is any breach of duty or want of care towards a man who has been supplied with the proper appliance, knows how to use it, and is fully cognizant of the danger he runs in using another appliance, to actually forbid the use of the other appliance when it is known that the skilled workman is fully conscious of the risk he runs in himself actually adopting the more dangerous of the two methods of doing the work. An employer is bound to take reasonable care that his men are protected against injury, and to warn them against dangers so that they may be aware of them; but I cannot hold that an employer is bound to stop a workman performing work in a certain way where he knows the workman is perfectly well aware that a safe way is provided for him to do the work and for his own convenience chooses to do it in another way and is injured. This is the very highest that this case can be put. I think this is covered in principle by what is said by Lord Watson in *Smith* v. *Baker* (1), at page 357, where he points out that if a servant engages to do work of such a nature *that his personal danger and consequent injury* must be produced by his own act, he could not recover if he clearly foresaw the likelihood of such a result and, notwithstanding, continued to work, and this was a case where defective machinery was supplied to the workmen. I think that if a workman knows that proper means and appliances are supplied to him and, notwithstanding this, for his own convenience, chooses to adopt some other method, knowing and fully appreciating the risk he ran in doing the work, that he cannot be heard to say that his employer (through a foreman), is liable to him in an action of negligence for a want of care in giving him information of danger (for that must be what the negligence consists in),

(1) [1891] A. C. 325.

when the foreman already knew that he was perfectly aware of that danger and was taking the course he did to save himself trouble. It is, to my mind, just like the case constantly arising of where the person is entitled to have warning, say of an approaching train, by whistle or by bell. It is clear law that no action of negligence will lie where it is found that the person so entitled to warning knew otherwise of the approaching train and persisted in his course and is run into by the train.

In this case it is from the workman's own particular act that the injury arises, and the jury found that he fully appreciated the risk he ran in performing the act. What good could it have been for the foreman above him to have told him "don't do that with gin-poles as it is dangerous." He knew such to be the case perfectly well.

I distinguish the case from that of a workman continuing to work with defective machinery where the machinery is used by others over whom he has no control. Here he has the right of selection himself and chooses to take a dangerous course where danger can only arise from his own act. I think he is in such a case, the author of his own wrong and the doctrine of *volens* is applicable. See *Callender* v. *Carlton Iron Co.* (1); *Dominion Iron and Steel Co.* v. *Day* (2).

I would upon the answers of the jury and undisputed facts, allow the appeal with costs.

KILLAM J.—Upon the argument of the appeal in this case I was inclined to the view that the plaintiffs were not entitled to recover, on the ground that the deceased was really the author of his own injury.

(1) 9 Times L. R. 646; 10 Times L. R. 366.

(2) 34 Can. S. C. R. 387.

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Further examination of the evidence has, however, convinced me that there was a case to go to the jury and that, upon their finding, the judgment was rightly entered for the plaintiffs.

Whatever criticism may be passed upon the finding that the deceased was working under protest, it still remains that there was no finding that he voluntarily incurred the risk and that the evidence for the plaintiffs did not so far establish this as to enable the court to take that question from the jury.

It is now established that mere knowledge of the risk is not necessarily sufficient to preclude the workman and that the onus is upon the master to show that it was voluntarily incurred.

I agree with the reasoning of the Court of Appeal and that of my brother Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Duvernet, Jones, Ross & Ardagh.*

Solicitors for the respondents: *Robinette & Godfrey.*

THE NORTH BRITISH CANADIAN INVESTMENT COMPANY } APPELLANTS;

AND

THE TRUSTEES OF ST. JOHN SCHOOL DISTRICT, No. 16, OF THE NORTH-WEST TERRITORIES ..... } RESPONDENTS.

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*Oct. 20, 21;
Nov. 4.
*Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Appeal—Jurisdiction—Land Titles Act—"Torrens System"—Involuntary transfers—Registry laws—Confirmation of tax sale—Persona designata—Court of original jurisdiction—Interlocutory proceeding—Constitutional law—Conflict of laws—Legislative jurisdiction—Construction of statute—Retroactive effect—Redemption of land sold for taxes—Vesting of title—Interest in lands—Equitable estate—N. W. T. Ord. 1896, c. 2; 1900, c. 10; 1901, cc. 12, 29 and 30—57 & 58 V. c. 28 (D)—Practice—Form of order.

The confirmation of a tax sale transfer by a judge of the Supreme Court of the North-West Territories, under section 97 of the "Land Titles Act, 1894," is a matter or proceeding originating in a court of superior jurisdiction and an appeal will lie to the Supreme Court of Canada from a final judgment of the full court affirming the same. *City of Halifax* v. *Reeves* (23 Can S. C. R. 340) followed. Sedgewick and Killam JJ. *contra.*

The provisions of the N. W. T. ordinance, ch. 2, of 1896, vesting titles of lands sold for taxes in the purchaser forthwith upon the execution of the transfer thereof free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th and 97th sections of the "Land Titles Act, 1894," and, consequently, *pro tanto, ultra vires* of the Legislature of the North-West Territories. Sedgewick and Killam JJ. contra.

The second section of the N. W. T. ordinance, ch. 12 of 1901 providing for an extension of the time for redemption of lands sold

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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for taxes, deals with procedure only and is retrospective and save the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands. Sedgewick and Killam JJ. contra. *The Ydun* (15 Times L. R. 361) referred to. *In re Kerr* (5 Ter. L. R. 297) overruled.

Per Sedgewick and Killam JJ. The provisions of the said section 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case.

APPEAL from the judgment of the Supreme Court of the North-West Territories, dismissing an appeal from an order by Mr. Justice Wetmore confirming the transfer of the lands in question on a sale for arrears of taxes.

The lands in question were, on 23rd January, 1897, sold for arrears of school taxes, under the provisions of the North-West Territories ordinance, ch. 22 of 1892 and ch. 22 of 1896, and the trustees became the purchasers under the provisions of section 173 of the latter ordinance, receiving the usual transfer as provided by sections 176 and 184 of the same ordinance. A caveat was lodged by the purchasers in the Land Titles Office and, upon the expiration of the time allowed for the redemption of the lands, they applied (in May, 1902,) to the judge of the district where the lands were situated for the confirmation of the transfer under section 97 of the "Land Titles Act", 57 & 58 Vict. ch. 28 (D.) The necessary evidence was filed on this application, including a registration abstract, as follows:

"LAND TITLES OFFICE FOR THE ASSINIBOIA LAND REGISTRATION DISTRICT.

"REGINA, 22nd July, A.D. 1902.

"Registration Abstract and Certificate of the Title of the N. W. ¼ of Section 14 in Township 15, in Range

3, West 2nd Meridian, in Assiniboia in North-West Territories;

Number of Instrument.	Nature of Instrument.	Date of Instrument.	Date of Registry.	Grantor.	Grantee.	Quantity of Land.	Consideration. Amount of Mortgage, etc.	Remarks.
3139	Cert. of Title.	March 17/90	March 17/90	Registrar.	John McLaren and Charles L. Benedict.	....	$400 00	
1580	Mortgage.	June 17/86	June 22/86	Arthur Biggins et ux.	North British Canadian Investment Co., Ld.	....		
5742	do	Jan'y 11/90	June 6/90	John McLaren et al.	Allan Brydges et al.	....	$200 00	
22082	Tax Sale Notice.	Jan'y 23/97	March 11/97	W. A. Mann, Treas.	St. John S.D. No. 16, N.W.T.	....		

"I certify that the above are all the instruments registered in this office, mentioning the above lands.

(Signed) "J. KELSO HUNTER,

Deputy Registrar, Assiniboia Land Registration District.

The persons appearing by this record to have any interest in the land were notified of the application by the trustees and an opposition was entered by the company, appellants, who claimed to be interested as mortgagees and that they had the right to redeem the lands by paying the trustees the amount of their purchase money with interest, charges and costs as provided by sec. 2 of the N. W. T. ordinance ch. 12 of 1902, the company alleging that these sums amounted altogether to $90, for which they mailed a cheque to the trustees. This cheque, however, was returned as being tendered by a party without interest in the land and, at any rate, insufficient. Upon the investigation as to the regularity of the transfer to the trustees, Mr. Justice Wetmore, the judge of the

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Supreme Court of the North-West Territories, to whom the application was made, referred the matter to that court, *in banco*, stating the circumstances and concluding as follows:—

"It appeared by the transfer executed by the treasurer that the land in question was sold on the 23rd January, 1897, and that the transfer was executed on the 26th January, 1898.

"Only three questions were urged at the hearing or argument against the company's right to redeem;—

"1. That the time appointed for the hearing was the 29th of July last, and the company had no right to redeem after that date.

"2. That the transfer, immediately upon its execution on 26th January, 1898, by virtue of sections 184 and 185 of 'The School ordinance, 1896,' which was then in force, vested the land and all rights thereto in the applicants. And that ordinance No. 12 of 1901 has no retroactive operation to defeat such vested rights.

"3. That under section 179 of 'The School Ordinance, 1896,' the company had no right to redeem.

"By virtue of section 140 of "The Land Titles Act, 1894," I refer the matter to the court *en banc*.

"The question submitted is:—Has the company a right to redeem the land?

"Dated 22nd November, 1902.

"E. L. WETMORE, J. S. C."

The court, *in banco*, after hearing arguments upon the reference, answered that the company was not entitled to redeem the lands and that the tax sale transfer should be confirmed. Mr. Justice Wetmore confirmed the sale accordingly and transmitted the record of his investigation and the proceedings thereon to be filed in the Land Titles Office.

The company now appeals, raising the following points in the factum, namely:

(1) Is section 2, chapter 12, ordinances 1901, retroactive?

(2) If so, are the appellants entitled to redeem?

(3) If the reply to the last question should be in the negative, were the appellants entitled nevertheless to raise the question that the sale was invalid?

When the appeal came on for hearing in the Supreme Court of Canada, objection was taken by motion, on behalf of the respondents, to the jurisdiction of that court to hear the appeal for the following reasons:—

Coutlée K.C. for the motion. The matter or proceeding on which the judgment of the court below was rendered did not originate in a court of superior jurisdiction and special leave was not obtained under subsec. (*i*) of sec. 24, of the Supreme Court Act. The judge, designated by the Land Titles Act, 1894, and the ordinances, is referred to, *nominatim*, as a special examiner on applications for the registration of involuntary transmissions under the "Torrens System"; he did not in any sense constitute or represent a "court" of any kind, certainly not a "court of superior jurisdiction." He was merely an officer of the Land Titles Office for a special purpose, the act he performed was ministerial only and merely interlocutory, the final executive function, that is, the issue of the new certificate, being performed by the registrar, after the lapse of the time limited. See *Virtue* v. *Hayes* (1); *Hamel* v. *Hamel* (2); *Shaw* v. *The Canadian Pacific Railway Co.* (3); *Molson* v. *Barnard* (4); *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.* (5); *McDougall* v. *Cameron* (6). Moreover, the appel-

(1) 16 Can. S. C. R. 721.
(2) 26 Can. S. C. R. 17.
(3) 16 Can. S. C. R. 703.
(4) 18 Can. S. C. R. 622.
(5) 19 Can. S. C. R. 434.
(6) 21 Can. S. C. R. 379.

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lants' interest had been cut out and they could not appeal under sec. 139 of the Act; and by confirmation of the transfer and transmission of the record of his investigation to the Land Titles Office, the judge became *functus officio*, consequently, there could be no appeal, even to the Supreme Court of the North-West Territories, the judgment now appealed from is a nullity and, therefore, no appeal lies from that court to the Supreme Court of Canada.

This case is ruled by *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Therèse* (1), where the statute coincided with the enactments in question in this case. In *The City of Halifax* v. *Reeves* (2), the Nova Scotia statute gave the jurisdiction to issue the certificate to the Supreme Court of that province or a judge thereof, representing that court, in chambers; the petition was filed "in court" and the "summons" issued by the "clerk of the court." (54 Vict. ch. 58, s. 455, N. S.) Here the application was presented to the judge in person and he ordered the "notices" to be served in the same manner as the officer known as the examiner of titles would do in ordinary cases.

The record shows no proof of any interest in the appellants which would entitle them to maintain an appeal either in the court below or in this court.

Ewart K.C. contra. This case cannot be distinguished from the case of *The City of Halifax* v. *Reeves* (2), which is the latest case decided in this court on such objections as have been raised.

The court reserved judgment on the question of jurisdiction and, in the meantime, ordered that the hearing on the merits should proceed.

Ewart K.C. for the appellants. The point involved is whether sec. 2 of the N. W. T. ordinance of 1901 is

(1) 16 Can. S. C. R. 606. (2) 23 Can. S. C. R. 340.

etrospective. The cases which determine that vested interests will not be affected by subsequent legislation, unless the statute clearly indicates that intention, are not denied. The contention now is two-fold: (1) The tax purchasers had not a vested right as asserted, and; (2) Even if they had, the ordinance is wide enough to re-open the right to redeem.

The N. W. T. legislation assumes to declare that a school district transfer upon a sale for taxes "shall not only vest in the purchasers all rights and properties which the original holder had therein, but shall also purge and disencumber such land from all . . . . mortgages." This ordinance is, however, in direct conflict with the Dominion statute (1894, ch. 28, sec. 54) which declares that "after a certificate 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." (See also sec. 59).

The ordinance, moreover, is only operative when the tax sale is valid, for it expressly excludes the three following cases:—1. Where the sale was not conducted properly; 2. Where there were no school taxes in arrear and; 3. Where the land was not liable to be assessed.

It is clear, therefore, that the tax transfer had no such effect as that assumed by the court below, and that no estate whatever had vested in the tax purchaser. The right to redeem had expired, but that right was extended by the ordnance under consideration.

The only remaining question is whether or not the mortgagees were included under the words "any person interested in such land." It is impossible to contend otherwise, for it is quite clear that the legal estate remains in the mortgagees. The "person interested" was some person who would desire to "redeem the

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said land." The judgment appealed from declaring that there was no person entitled to redeem because all rights to the land had been cut out by the tax sale, is wrong. That interpretation would reduce the paragraph to a nullity. It assumes that there are some persons interested in redemption, and the "persons" intended by the ordinance were those who would benefit by the redemption. This is clear by the 3rd section, which provides that upon payment of the taxes and interest, all rights of the purchaser are to cease, that is, to cease as to persons entitled to redeem, and those would be the persons who would be entitled to the land but for the tax sale.

That the ordinance is retroactive is clearly shewn by its language—comparing particularly secs. 1, 2 and 4. The whole ordinance, including the particular section in question, is retroactive as that section cannot be separated from the rest.

Coutlée K.C. and *Macdougall* for the respondents. The Legislature of the N. W. Territories had power to pass the legislation in question dealing with property and civil rights in the territories. Parliament, in enacting the Land Titles Act, dealt merely with matters of procedure and did not, in any way attempt to legislate as to property and civil rights. The Act merely provides a procedure for the purpose of giving certainty to *evidence* of title. It does not deal with titles themselves; they must exist previously, apart from and outside of that Act, in some way or another. The Land Titles Act declares that, for registration purposes, the passing of the title, on transfer or transmissions, shall, so far as the evidence is concerned, be in suspense until the issue of the new certificate of title; it never intended to affect the validity of an owner's title, nor to diminish his rights, but required certain proofs to be furnished and approved as

a condition precedent to the registration, *i. e.*, confirmation of the transfer in the case of involuntary transmissions. In the meantime, in this case, the title vested in the purchaser at the tax sale on the execution of the transfer freed from all encumbrances. All other interests were cut out, likewise all rights of redemption, and the purchasers were entitled to confirmation of their actually existing title, unless the sale could be invalidated on account of fraud, collusion, no taxes being due or exemption from taxation. The Land Titles Act recognizes the validity of these tax titles and provides for their registration; it does not deny the vesting of the title; it provides means for its confirmation and the issue of a certificate as to its indefeasibility. See *Jellett* v. *Wilkie* (1), per Strong C.J. at pages 289-291.

The appellants' interest, if they ever had any, was gone long prior to the application; the trustees had a good title against all the world, although not yet registered. The appellants made no proof of any interest, no mortgage debt is proved. The abstract does not prove it. In fact, it only shews a mortgage from a stranger to the title and without consideration. A mortgage under the "Torrens System" is only a lien, at any rate, and conveys no estate. Even if they had any interest to entitle them to redeem, the ordinance requires the redemption to be made *before the hearing* of the application and they failed to do this. They are, therefore, estopped by the very statute they invoke.

The ordinance of 1901 is retroactive only in its provisions as to procedure. The second and third sections do not deal with procedure but with vested rights accruing subsequently and cannot affect rights in property which vested prior to its enactment. *Nova constitutio futuris formam imponere debet, non præteritis.* See Maxwell on Statutes, (3 ed.) ch. 8, and the cases

(1) 26 Can. S. C. R. 282; 2 Ter. L. R. 133.

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there collected, particularly the remarks at pp. 298 to 318; Hardcastle on Statutes, pp. 353, 354, 357. All presumptions are against disturbing vested rights and no statutes should be so construed unless absolutely necessary. There is no such necessity here for the Dominion Act regulating the procedure as to the registration is quite reconcilable with the ordinance creating the title; they are necessary one to the other.

We rely upon the authorities cited by the judges of the court below on the reference and the remarks of Mr. Justice Scott *In re Kerr* (1).

SEDGEWICK J. (dissenting). — I dissent from the decision of the majority of the court for the reasons stated by my brother Killam.

GIROUARD J.—I concur in the opinion of my brother Davies.

DAVIES J.—As to the question of this court's jurisdiction I entertained great doubts but, being unable to distinguish this case from that of the *City of Halifax* v. *Reeves* (2), I agree in holding that we have jurisdiction.

As to the merits I have reached the conclusion that the appeal must be allowed.

The first question to be decided is whether or not the ordinances of the North-West Territories, under which the sale of the lands in question in this appeal took place, were in conflict with the plain provisions of the "Land Titles Act, 1894," and if so, whether such ordinances, to the extent to which they were so in conflict, were *ultra vires*. The question has lost much of its general importance by the late amendments to the North-West Ordinances bringing them

(1) 5 Ter. L. R. 297. (2) 23 Can. S. C. R. 340.

into accord with the Land Titles Act. The ordinances under which the sale of the lands for taxes took place which the appellants claim to redeem not only vested such lands in the purchaser on the execution of the transfer to him, but also

purged and released such land from all payments, charges, liens, mortgages and incumbrances of whatever nature and kind other than existing liens of the School District or Crown.

They further provided that, after the expiration of one year from the date of the transfer, these latter should be conclusive evidence of the assessment and valid charge of the taxes on the lands therein described and that all necessary formalities had been taken and observed and that, afterwards, such sale and transfer should only be questioned or set aside on three specified grounds which are not now in question.

It was admitted that, if these provisions were *intra vires*, the rights of the appellants, whatever they were in the lands in question, had become extinguished and that, unless they were revived by the ordinance of 1901, the appellants were not interested parties within the meaning of the ordinance and had no right to redeem.

Section 97 of the "Land Titles Act, 1894," amongst other things, enacted that

upon the completion of the time allowed by law for redemption and upon the production of the transfer of the land in the prescribed form with proof of its due execution by the proper officer *and a judge's order confirming the sale*, the registrar shall, four weeks after the delivery to him of the transfer and *the judge's order of confirmation*, register the transferee as absolute owner of the land so sold.

By this legislation the production of a judge's order confirming the sale was made just as essential to give any effect to the sale as the production of the transfer itself.

The object Parliament had in view was very plain. It desired to give an effective means for the recovery

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of taxes against lands while providing that owners, mortgagees and others interested should be notified through the confirmation proceedings before their interests in the land should be, by statutory provisions, transferred to another party. The confirmation of the sale became, therefore, as necessary and essential a condition precedent to giving statutory effect to a sale which disposed of and barred third parties' rights as the production and proof of the transfer by the proper officer. The territorial ordinance under which the lands in question were sold changed all that. It dispensed with the necessity of any previous confirmation of the sale by a judge and gave the effect to a transfer by itself and without confirmation as above pointed out by me. If this latter is *intra vires* it operates *pro tanto* as a repeal of the 54th, 59th and 97th sections of the Land Titles Act and dispenses with the necessity of a judicial act involving notice to all interested parties which parliament declared to be essential.

The power to legislate conferred upon the North-West Territories by the Parliament of Canada was a power given expressly subject to the limitation that it was not to be exercised in a way or to an extent inconsistent with Dominion legislation. In my opinion, the ordinances in question were inconsistent by giving an effect to a transfer alone which the Dominion legislation declared should only be given after the tax sale had been confirmed by a judge. The fundamental error, therefore, of the judgment appealed from is the holding that the present appellant had no interest in the lands in question and that such interest as they formerly had passed by virtue of the ordinances to the purchaser at the tax sale on the execution of the transfer. If these ordinances were *intra vires* that might well be so held. As they are at variance with

Dominion legislation on the special point I cannot agree that any such effect follows the transfer.

I think the ordinance of 1901 under which these confirmation proceedings were taken were clearly retroactive so as to cover the appellants' interest and that being persons interested in the land, within the meaning of those words in subsec. 2 of sec. 1, they have the right to redeem and to oppose the application for confirmation.

If at the time the application was made for a confirmation of this land tax sale the transferees had already acquired vested interests in the land it would require express words in the ordinance to give it a retrospective operation so as to take away these vested interests. But on the construction of the Dominion and territorial legislation reached by me no such vested interests had accrued and the ordinance dealing with matters of procedure only should have a retrospective operation given to it. See the decision of the Court of Appeal in *The Ydun* (1).

The appeal should be allowed with costs.

MEMO. The form of the minutes should be—

(1.) Order that the appeal be allowed and the orders appealed from be discharged. (2.) Declare that the appellants are entitled to appear and contest the confirmation proceedings and, on such appearance, to prove that they are existing *bonâ fide* mortgagees of the lands in question and that, on such proof being given, they are entitled to redeem such lands. (3.) Order that the respondents do pay appellants' their costs of this appeal and of the appeal from Mr. Justice Wetmore's order of the 22nd December, 1903, to the Supreme Court of the N. W. Territories from which the appeal to this court was taken.

(1) 15 Times L. R. 361.

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NESBITT J.—I have arrived at the same conclusion for the same reasons, and having had the advantage of reading the judgment prepared by my brother Davies, I have nothing to add to what he has written.

KILLAM J. (dissenting).—I would dismiss this appeal for want of jurisdiction in this court to entertain it. It was not brought by leave, and so, it is not within section 24, subsec. (*i*) of the Supreme and Exchequer Courts Act. The appellant must rely upon subsection (*a*), under which the right of appeal is confined to

cases in which the court of original jurisdiction is a superior court.

Whether the jurisdiction to make the order is to be considered as having been given by the Dominion Act, 57 & 58 Vict. ch. 28, s. 97, or by one of the territorial ordinances referred to, it does not appear to me that the court of original jurisdiction was a superior court.

Both the Dominion statute and the ordinances authorised a judge to make an order for confirmation of a sale for taxes, not in the course of or as relating to any proceeding in his court. The judge was simply *persona designata*, a particular official considered a fitting one to inquire into the regularity of the sale and the propriety of giving effect to it. The case appears to me to come directly within the reasoning of Patterson J. in *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Therèse* (1), and to be quite distinguishable from *The City of Halifax* v. *Reeves* (2). In the latter case the statute authorised the presentation of the petition to the court or a judge. While it was addressed to the Chief Justice or one of the judges of the court, it was apparently filed in the court and a summons issued upon it by the clerk of the court. The court having jurisdiction it could entertain the petition, in which case the Supreme Court of

(1) 16 Can. S. C. R. 606. (2) 23 Can. S. C. R. 340.

Nova Scotia could properly be said to have been the court of original jurisdiction. In the present case, as the jurisdiction was only in a judge *nominatim*, and not in the court, the intitling of the proceedings in the court could not give the court jurisdiction or prevent the judge from acting in the matter under the statute.

Had it not been that the majority of the court consider that we have jurisdiction, I should not have expressed any opinion upon the merits. But, on this ground, too, I think that the appeal should be dismissed.

When the conveyance in pursuance of the tax sale was made, the jurisdiction of a judge arose under the Dominion statute alone. Whatever the effect of the conveyance, in view of the apparent conflict between the Dominion and the territorial legislation, at any rate all right of redemption under the then existing legislation was gone and the grantee had acquired a vested right to apply for a confirming order under the Dominion Act and, if the sale and conveyance were valid, to have the order made.

I think that the subsequent action of the Legislature of the Territories, in establishing a further period for redemption, should not be construed as affecting cases in which the right was gone and conveyance issued. That legislature had no power to interfere with the jurisdiction under the Dominion Act or to interpose a bar to the exercise of that jurisdiction. It could, for its own purposes and in carrying out the enforcement of taxes by sale of the property taxed, require a confirmation by a judge and allow redemption up to confirmation, but this should not be deemed to have been intended to affect transactions finished and closed, in so far as its own previous legislation was concerned, and merely awaiting action by authorities constituted

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by Dominion legislation for the purpose of the system of land tenure and transfer adopted by the Dominion.

Appeal allowed with costs.

Solicitors for the appellants: *Andrews & Andrews.*

Solicitor for the respondents: *Hugh A. J. Macdougall.*

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*Oct. 21-24.

SANDBERG v. FERGUSON.

Mines and minerals—Location of claim—Planting of Posts—Formalities required by Stutute, R. S. B. C. (1897) *c.* 135, *s.* 16—61 *V. c.* 33, *s.* 4 (*B. C.*)

APPEAL from the judgment of the Supreme Court of British Columbia, affirming the judgment of Martin J. at the trial (1) by which the plaintiff's action was dismissed with costs.

The plaintiff's action was on an adverse claim for the purpose of determining the title to two overlapping locations. At the trial, before Martin J. without a jury, judgment was entered in favour of the defendant which was affirmed by the full court on appeal. The principal questions raised upon the present appeal by the plaintiff to the Supreme Court of Canada were; First: After No. 1 post has been properly planted on a claim may No. 2 post be placed in ice or shifting ground, such as a glacier, and; Secondly: Whether there was sufficient proof of the defendant's presence on the senior claim as located at the time of the over-location by the plaintiff.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 123.

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After hearing counsel on behalf of the appellant and without calling upon counsel for the respondent, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

S. S. Taylor K.C for the appellant.

Davis K.C. for the respondent.

HOTTE *et al.* v. BIRABIN *et al.*

1904

*Oct. 11.
*Oct. 26.

Will — Testamentary capacity — Evidence—Art. 831 C. C. — Marriage contract—Duress.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal (1), affirming the judgment of the Superior Court, District of Ottawa, which dismissed the plaintiffs' action with costs.

The action was to annul a marriage contract and to set aside a will and codicil on the grounds of insanity and duress. The circumstances of the case are stated in the report of the judgments of the courts below (1), The action was dismissed by the Superior Court (Rochon J.) at the trial, and the present appeal was asserted by the plaintiffs against the judgment of the Court of Review, affirming the decision of the Superior Court.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, for the reasons given in the court below.

Appeal dismissed with costs.

McConnell for the appellants.

Foran K.C. and *McDougall K.C.* for the respondents.

*PRESENT: — Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 2 Q. R. 25 S. C. 275.

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*Jan. 20.

THE MONTREAL STREET RAILWAY COMPANY..... } APPELLANTS;

AND

THE MONTREAL TERMINAL RAILWAY COMPANY AND THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Appeal—Special leave—"Railway Act, 1903"—*Order of Board of Railway Commissioners—Use of public streets—Removal of tracks—Constitutional law—Property and civil rights—Jurisdiction of board—Imposing terms.*

Where the judge entertained doubt as to the jurisdiction of the Board of Railway Commissioners for Canada to make the order complained of and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of sec. 44 (3) of "The Railway Act, 1903."

PETITION for leave to appeal from an order of the Board of Railway Commissioners for Canada made on the 27th of December, 1904, directing the removal of the rails of the Montreal Street Railway Company on Pius IX. avenue in the Town of Maisonneuve.

The petitioners are incorporated for the purpose of constructing and operating an electric passenger railway on the Island of Montreal and given the necessary powers for that purpose under the several acts of the legislature of the Province of Quebec and, in the exercise of their statutory powers, they laid a double line of rails along Pius IX. avenue in the Town of Maisonneuve, about the 15th of October, 1904. The respondent company are incorporated under a provincial statute and

*PRESENT :—His Lordship Mr. Justice Sedgewick (in chambers).

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declared to be a work for the general advantage of Canada by enactments of Parliament, giving them powers, also, to construct and operate an electric railway on the Island of Montreal. They are constructing a railway through the Town of Maisonneuve which will intersect Pius IX. avenue and on 27th December, 1904, they obtained an order from the Board of Railway Commissioners for Canada directing the petitioners, at their own cost and expense, within forty-eight hours after service of such order upon them, to remove their double line of rails on Pius IX. avenue at the intersection of Ernest street and restore the roadway as nearly as possible to its original condition, the costs of the application of the respondents for the order in question to be paid by the appellants. Leave to appeal is sought under the provisions of sec. 44 (3) of the "Railway Act, 1903."

Campbell K.C. for the petition. The board had no jurisdiction to make the order, because the respondent company had no power to construct the line of railway as they proposed to do at the place in question, while the petitioners had such power and the line they had constructed was their property. The order could not be carrried out without interfering with property and civil rights which are subject exclusively to provincial jurisdiction. The Railway Act of 1903 does not and cannot authorise the board to allow Dominion railways to use the streets belonging to municipalities nor to interfere with property and civil rights in a province. Section seven refers only to connections and crossings and does not bring provincial railways within the purview of the Act as regards the removal and alteration of their physical condition. If it is to be so construed, it is *ultra vires* to that extent.

These are all matters of great public importance and should entitle us to leave for an appeal.

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A. G. Blair for the Board of Railway Commissioners. We do not oppose the granting of leave for an appeal although we consider that the order in question was necessary to enforce two former orders made in June and September, 1904, in respect to the construction of the Montreal Terminal Railway and was perfectly justified under the circumstances and by sub-section (*a*) of section 23 of the Railway Act, 1903.

Dandurand K.C. and *Belcourt K.C.* for the Montreal Terminal Railway Co. We oppose the petition on the ground that the order was within the jurisdiction of the board under sec. 23 (*a*) of the Act and necessary for the enforcement of the former orders made in June and September, which are clearly within the jurisdiction of the board. The order does not affect the status of the petitioners and only affects their property to the extent necessary for our crossing. This is a matter clearly within the jurisdiction of the board.

The petitioners have merely laid a few rails, without connections at either end with any part of their system; their sole purpose is to obstruct the construction of our line and if leave for the appeal should be granted there should be terms imposed to prevent delays and to allow us to go on with our construction.

SEDGEWICK J. (Oral).—I have read the petition and the clauses of the "Railway Act, 1903," which affect the case and it appears to me, on the face of the proceedings, that there is grave doubt as to the jurisdiction of the Board of Railway Commissioners to make the order complained of and whether or not it amounts to an interference with a matter falling exclusively within the jurisdiction of the Superior Court for the District of Montreal. It is possible that the proper course would have been to proceed before the provin-

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Sedgewick J.

cial court by way of injunction or some other appropriate action. I think the questions raised of sufficient public importance to call for a decision of this court as to the conflict of jurisdiction and the construction of the provisions of the statute constituting the Board of Railway Commissioners and defining their powers. I therefore grant leave for the appeal as prayed for, on the understanding that the case shall be inscribed for hearing at the next session of the Supreme Court of Canada. I also consider it proper, in the exercise of my discretion, to impose terms, (all parties assenting thereto), and to order that, while the appeal is pending, the Montreal Terminal Railway Company may, at any time, remove the rails of the Montreal Street Railway Company so far as may be necessary for the construction of their railway across Pius IX. avenue, in the Town of Maisonneuve, subject to replacement should the final decision of the appeal require it.

The costs of the present application will be costs in the cause.

Petition granted.

Solicitors for the petitioners: *Campbell, Meredith, Macpherson & Hague.*

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*Nov. 11, 14.
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*Jan. 31.

WALTER PHELPS (PLAINTIFF).....APPELLANT;

AND

H. F. McLACHLIN AND CLAUDE McLACHLIN (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of goods—Refusal to perform—Specific performance—Damages.

By contract in writing M. agreed to sell to P. cedar poles of specified demensions, the contract containing the following provisions: "All poles as they are landed in Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining in Arnprior over one month after they are in shipping condition to be paid for on estimate in thirty days therefrom less 2 per cent discount. * * For shipments cash 30 days from dates of invoices less 2 per cent discount."

Held, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition but only after 30 days from receipt of the estimate of such poles.

M. refused to deliver logs that had been on the ground one month without previous payment and P. brought an action for specific performance and damages claiming that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles.

Held, Sedgewick and Killam JJ. dissenting, that each party had misconceived his rights under the contract, and no judgment could be rendered for either.

APPEAL from the decision of the Court of Appeal for Ontario reversing the judgment for the plaintiff at the trial and ordering the judgment to be entered for the defendants on their counterclaim.

The material facts are set out in the head-note.

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Killam JJ.

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Watson K.C. and *Slattery* for the appellants.

S. H. Blake K.C. and *Henderson* for the respondents.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Davies.

SEDGEWICK J. (dissenting).—I agree with Mr. Justice Killam.

GIROUARD J.—I also concur in the opinion of Mr. Justice Davies.

DAVIES J.—The rights of the parties are to be determined as they existed on the 20th August, 1902, the date of the issue of the writ.

The agreement out of which the dispute arose is badly drawn and it is somewhat difficult to discover its real meaning. I agree, however, so far as the time for payment is concerned, with the trial judge and Mr. Justice Garrow and, as I gather from his reasons Mr. Justice Maclaren, that the purchaser, the plaintiff in the action, was to have thirty days for payment alike from the delivery of the invoice in cases of actual delivery of the logs, as from delivery of the estimate where the logs had been over a month at Arnprior in shipping condition. On this latter point I cannot agree with the Chief Justice of the Court of Appeal that the payment could be exacted (where actual delivery had not taken place) at the expiration of a month after the logs had been at Arnprior for one month whether vendee had notice or not. It seems to me to be a more reasonable construction that the vendee was to have a month for payment alike in cases of delivery and non-delivery after, in the one case, he received the invoice and, in the other, the estimate of the logs which were ready for delivery and

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had been in shipping condition for a month. I agree that the plaintiff had to supply the cars and the defendants load them.

I think both parties misconceived their rights under the agreement; the plaintiff was wrong in claiming that the cars should be supplied by the defendant and that he could not be called upon to pay for any poles unless they were first inspected and passed by him; the defendants were wrong in insisting that they had a right to immediate payment when the logs were on the ground a month and that without payment they could not be called upon to deliver.

I cannot see in any case how judgment could be given for defendant on his counterclaim. Under any construction of the contract the onus lies upon him of proving affirmatively that the poles, for which payment is claimed, were in a shipping condition for a month at Arnprior. The trial judge made no finding on this nor does the Court of Appeal. I cannot say the evidence establishes the fact. Both parties being at fault and misinterpretating the contract at the time the action was brought, the circumstances do not warrant a judgment being rendered for either. I would, therefore, allow the appeal, dismiss the action and the counterclaim without costs here or in the courts below.

KILLAM J. (dissenting)—I agree with the view taken by Mr. Justice MacMahon by whom the action was tried, and by Mr. Justice Garrow, in the Court of Appeal, as to the construction of the contract in question. It appears to me that the defendants were wrong in claiming that the amount of the estimate was payable immediately and in refusing to deliver further logs until this was paid. And it does not appear to me that the plaintiff's contentions were such as to disentitle him to hold the defendants in default. They may have

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been untenable but they did not amount to a repudiation of the contract on the part of the plaintiff. The plaintiff's counsel has argued the case before us upon the contention that the defendants' refusal to deliver further logs without payment of the amount of their estimates constituted such a repudiation of their contract as gave the plaintiff the right to sue for damages as for its breach. But even assuming that under the principles of the cases of *Hochster* v. *De la Tour* (1); *Danube & Black Sea Railway etc. Co.* v. *Xenos* (2); *Withers* v. *Reynolds* (3); and the *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.* (4), the plaintiff was entitled to rescind the contract and sue for damages as at common law, I think that he precluded himself from taking this position. I would refer in this connection to the principles laid down by Lord Esher M.R. in *Johnstone* v. *Milling* (5) at page 467:

> When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare, that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would

(1) 2 E. & B. 678.
(2) 13 C. B. N. S. 825.
(3) 2 B & Ad. 882.
(4) 9 App. Cas. 434.
(5) 16 Q. B. D. 460.

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arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract.

See also *Frost* v. *Knight* (1).

The plaintiff did not elect to rescind the contract. On the contrary he elected to insist upon its performance. On the 7th August, 1902, his solicitor wrote to the defendants:—

> Mr. Phelps is still willing to carry out his contract and will ask you to do the same. * * * * * * * * * *
> My instructions are to enter proceedings to have the contract enforced and for damages. If I have no word from you by the 9th instant that you are willing that the contract should be carried out I will proceed on instructions.

On the 20th August the action was begun. At that time the thirty days which, in my view, were to be allowed for payment had not elapsed; the plaintiff was not then in default. When he filed his statement of claim the plaintiff asked for specific performance of the agreement. It is true that he asked also for damages, but it is clear that at the time that he began the action he had not taken and he was not thereby taking the position of rescinding the contract so as to entitle him to damages as at common law. By their statement of defence the defendants denied any breach of the contract but stated that they were still ready and willing to have it performed and to perform it on their part. For these reasons I think that the decree of the court for specific performance should stand.

It is now urged on the part of the plaintiff that, after the lapse of time which has intervened, and which, it is claimed, was due to the defendants' course in contesting the action as they have done, it is unjust to compel the plaintiff to perform the contract and to accept the logs. Probably such delay would be in many cases a ground for the exercise by the court of

(1) L. R. 7 Ex. 111.

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the equitable jurisdiction under Lord Cairns's Act to award damages in lieu of specific performance, but it does not appear to me that in the present case this should be done. The plaintiff asked for specific performance. The court has decreed what he asked for. When the statement of claim was filed the time for payment for the logs upon the ground had, in any view of the contract, expired. The plaintiff was then, at least, bound to pay for those that had been left upon the ground on estimate. I cannot doubt that if he had then offered to do so any difficulty in the way of full performance of the contract would have been removed. From the time when the thirty days expired the plaintiff was in default and on that ground I think he should be left to the position in which he placed himself when he began the action.

I am not satisfied upon the evidence that there had been on the ground, in shipping condition, for the period required by the contract, logs to the number and dimensions estimated by the defendants, which were up to the standard of the contract. The judgment of the Court of Appeal admits that to be doubtful. I would have preferred a decree by which it should first be ascertained what poles were up to contract before the enforcement of the plaintiff's liability to pay for them. But in view of the opinion of the other members of the court it does not appear important to consider that question any further. I will simply say that I think that either such variation should be made or the appeal should be dismissed.

Appeal allowed without costs.

Solicitor for the appellant: *R. J. Slattery.*

Solicitors for the respondents: *MacCracken, Henderson & McDougal.*

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*Nov. 22, 23.
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*Jan. 31.

THE IMPERIAL BOOK COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ADAM AND CHARLES BLACK AND THE CLARK COMPANY, LIMITED (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Copyright—Foreign reprints—Notice to English Commissioner of Customs—Entry at Stationers' Hall—Imperial Acts in force in Canada.

The judgment appealed from (8 Ont. L. R. 9) was affirmed, the court, however, declining to decide whether or not the doctrine laid down in *Smiles* v. *Belford* (1 Ont. App. R. 436) was rightly decided.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming, with variations, the judgment of Street J. at the trial.

The circumstances under which the action was taken and the questions at issue on this appeal are fully stated in the reports of the judgments in the courts below, above referred to.

Raney and *Hales* for the appellants.

Barwick K.C. and *J. Moss* for the respondents.

SEDGEWICK J.—We are unanimously of opinion that the conclusion at which the majority of the Court of Appeal arrived is the correct one, and that the appeal should be dismissed with costs. In so deciding, however, we wish to state that we express no opinion one way or the other upon the question as to whether

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 8 Ont. L. R. 9. (2) 5 Ont. L. R 184.

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IMPERIAL BOOK CO. v. BLACK.

Sedgewick J.

Smiles v. *Belford* (1) was rightly decided. It is still open for discussion as to whether the Parliament of Canada, having been given exclusive jurisdiction to legislate upon the subject of copyright, may not, by virtue of that jurisdiction, be able to override Imperial legislation antecedent to the British North America Act, 1867. The Court of Appeal were, of course, right in referring to that case and in following it as one of its own previous decisions, but we are not so bound, and we wish to leave the question open so far as this court is concerned.

We may also say that we entirely agree with the Chief Justice and Osler and Maclennan JJ., that the Customs Laws Consolidation Act is not in force in Canada, having regard to sec. 151 of that Act.

The appeal is dismissed with costs.

GIROUARD and DAVIES JJ. concurred with Sedgewick J.

NESBITT J.—I would dismiss the appeal with costs for the reasons given by the majority of the Court of Appeal for Ontario.

I express no opinion as to whether the doctrine laid down in *Smiles* v. *Belford* (1), is sound. I reserve the right to consider this when occasion arises.

KILLAM J. concurred with Sedgewick J.

Appeal dismissed with costs.

Solicitors for the appellants: *Mills, Raney, Anderson & Hales.*

Solicitors for the respondents: *Barwick, Aylesworth, Wright & Moss.*

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(1) 1 Ont. App. R. 436.

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*Nov. 29
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*Jan. 31.

WILLIAM SMITHEMAN .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM HIS LORDSHIP MR. JUSTICE DAVIES, IN CHAMBERS.

Criminal law—Venue—Indictment—Commitment to penitentiary—Warrant—Criminal Code, 1892, *ss.* 609, 754—*R. S. C. c.* 182, *s.* 42.

The venue mentioned in section 609 of the Criminal Code, 1892, means the place where the crime is charged to have been committed and, in cases where local description is not required, there is an implied allegation that the offence was committed at the place mentioned in the venue in the margin of the record. It is of no consequence whether or not the trial court should he considered an inferior court.

Under section 42 of "The Penitentiary Act," R. S. C. chap 182, a copy of the sentence of the trial court certified by a judge or by the clerk or acting clerk of that court is a sufficient warrant for the commitment and detention of the convict.

Judgment appealed from (35 Can. S. C. R. 189) affirmed.

APPEAL from the judgment of Mr. Justice Davies, in chambers (1), refusing the application of the appellant for a writ of habeas corpus to inquire into the cause of his imprisonment in the Penitentiary at Dorchester, N.B., on a conviction in a County Court Judges' Criminal Court, under the provisions of Part LIV. of "The Criminal Code, 1892," for the Speedy Trial of Indictable Offences.

The questions raised on the appeal were similar to those raised on the application for the writ of habeas corpus mentioned in the report of the judgment appealed from.

*PRESENT :—Sedgewick, Girouard, Nesbitt and Killam JJ.

(1) 35 Can. S. C. R. 189.

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John J. Power for the appellant. The forms FF. to the Code are merely examples of the manner of stating offences. See Endlich on Statutes, sec. 71, pp. 91-92. A form given in a schedule, especially if there is no reference to it in the body of the Act, is to be regarded merely as an example. See also the foot note 77, on page 92.

Every element must be stated in an indictment as heretofore required by law. *Smith* v. *Moody* (1), at page 60-63, *per* Alverstone C.J., and Wills and Channell JJ.

The words "County of Halifax" in the margin must denote either (*a*) the place where the document was drawn up; 1 Burns's Justices of the Peace (30 ed.) 1118, and *Austin's Case* (2); or (*b*) the venue as laid down in section 609 of the Code. The venue is intended to shew where the facts were alleged to have occurred and that the court and jury had jurisdiction in the matter. It was formerly necessary to state the venue expressly in the indictment, or by reference to the venue in the margin in every material allegation. Now, by virtue of sec. 609 of the Code [taken from 18 Vict. c. 92, (U. C.) R. S. C. ch. 174, sec. 104, and 14 & 15 Vict. (Imp.) ch. 100, s. 23] it is not necessary to state any venue in the body of any indictment.

Section 651 of the Code relates to procedure only, and does not authorize any order for the change of the place of trial of a prisoner, in any case where any such change would not have been granted under the former practice; it does away with the old practice of removing the case, by certiorari, into the Queen's Bench, and then moving to change the venue. But if the venue be changed, what of the marginal "place" as indicating where the crime was committed.

(1) [1903] 1 K. B. 56. (2) 8 Mod. 309.

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It is submitted, at all events, that the words "any record" referred to in s.s. (*l*) of sec. 3 of the Criminal Code means "any nisi prius record." See sec. 30 of 14 & 15 Vict. (Imp.) ch. 100. By sub-sec. 3 of sec. 764 of the Code the *record* in any case must be filed in the court. The warrant is a certificate under sec. 42 of the "Penitentiary Act," and is given to the warden of the penitentary through the officer who carries the prisoner, the act of a ministerial officer; it is not a "record," and therefore, is not covered by sec. 609 and sub-sec. (1) of sec. 3 of the Code.

As to the distinction of courts of general and limited jurisdiction, see the *Lefroy Case* (1), and 8 Am. & Eng. Ency. of Law, (2 ed.) pages 37, 38. Jurisdiction in the County Court Judge's Criminal Court depends on (*a*) committal for trial or binding over; Code secs. 596, 601, 765; *The King* v. *Komiensky* (2); (*b*) certain crimes; sec. 765; or (*c*) consent of prisoner; secs. 765-767.

We also refer to *Christie* v. *Unwin* (3), at p. 379; *The Queen* v. *Slavin* (4); *Ex parte Macdonald* (5); *Case of the Sheriff of Middlesex* (6).

Longley K.C., Attorney General for Nova Scotia, for the Crown. Under the Criminal Code, 1892, and the Dominion statutes respecting the imprisonment of convicts in the penitentiary the warrant in question in this case is a sufficient compliance with the law. I adopt the arguments used in the judgment of His Lordship Mr. Justice Davies in the judgment appealed from. There can be no doubt that the marginal venue is a proper and sufficient allegation of the place where the offence charged was committed.

The judgment of the court was delivered by:

(1) L. R. 8 Q. B. 134.
(2) 6 Can. Cr. Cas. 524.
(3) 11 Ad. & E. 373.
(4) 35 N. B. Rep. 388.
(5) 27 Can. S. C. R. 683.
(6) 11 Ad. & E. 273.

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Killam J.

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

By sec. 609 of the Criminal Code,

> it shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof shall be the venue for all the facts stated in the body of the indictment; but if local description is required such local description shall be given in the body thereof.

The word "venue" in this section means the place where the crime is charged to have been committed. See Taschereau's Criminal Code, page 671, and 22 Enc. Pl. & Pr., page 819.

By sec. 764 of the Criminal Code, and R. S. N. S. (1900) c. 157, county court judges' criminal courts are courts of record. The forms of records for these courts given by the Criminal Code, MM and NN, do not state any place of commitment of the offence. By sec. 3, sub-sec. (*l*), of the Criminal Code, the word "indictment" includes "any record." The offence of which the appellant was convicted was not one for which local description was required.

The venue in the margin of the record was:

> Canada,
> Province of Nova Scotia,
> County of Halifax.

There was, then, by force of the statute, an implied allegation that the offence was committed in the County of Halifax and the Province of Nova Scotia. This was sufficient to show the jurisdiction of the court, and it is unimportant whether that court should or should not be considered an inferior court.

By the Penitentiary Act, R. S. C. c. 182, sec. 42, the officer conveying a convict to a penitentiary is to deliver him over without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried and certified by a judge or by the clerk or acting clerk of such

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court. This was done in the present case and the copy furnished showed a record in a form which satisfied the statute, and which by virtue of the statute showed the jurisdiction of the court.

Appeal dismissed.

Solicitor for the appellant: *John J. Power.*

Solicitor for the respondent: *J. W. Longley.*

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*Nov. 28.

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*Jan. 31.

JULIUS G. SIEVERT (PLAINTIFF).....APPELLANT;

AND

SAMUEL M. BROOKFIELD (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Trespasser—Licensee—Master and servant.

A trespasser or bare licensee injured through negligence may maintain an action.

The workmen of a contractor for tearing down portions of a building in order to make alterations turned on a water tap in a room where they were working and neglected to turn it off whereby goods in the story below were damaged by water.

Held, Davies and Nesbitt JJ. dissenting, that the act of the workmen was done in course of their employment; that it was negligent; and that the owner of the goods could recover damages though he was in possession merely as an overholding tenant who had not been ejected.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

This is an action brought by the appellant, Julius G. Sievert, a tobacco merchant and manufacturer,

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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residing and doing business in Halifax, Nova Scotia, against Samuel M. Brookfield, a builder and contractor, residing and doing business in the same city, for injuries occasioned by the negligence of a servant of the respondent in carelessly and improperly leaving a water tap open and causing the shop and warehouse occupied by the appellant to be flooded with water and his stock in trade seriously injured.

The goods were contained in a four storied building, Nos. 187 and 189 Hollis street, in the City of Halifax, which was and had been for many years occupied by appellant as a yearly tenant, his year expiring May 1st.

On June 1st, 1882, one William M. Harrington was the owner of the building and premises, and on that date executed a mortgage thereof to one Brenton H. Collins. William M. Harrington subsequently died and the title to the property became vested in one Emily A. Piers, a trustee under the will of the said William M. Harrington. The Eastern Canada Savings & Loan Company arranged with the Harrington estate to purchase the property, and in consequence of some defect in the title this was carried out by means of a foreclosure sale. Shortly after the sale the loan company's solicitor wrote three letters to the appellant, endeavouring to make some arrangement with him in reference to his vacating the building. Finally, an agreement was arranged and executed, by which appellant was to vacate on 28th February, 1903, and was to be paid $510 and provided with new premises till the first of May at a rental of $55 per month.

The appellant did not vacate the premises on Saturday, the 28th of February, 1903, because the new premises to be provided for him under the terms of the agreement were not then ready for occupation, but on Monday the 2nd of March he commenced to move

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out of the building. He removed his property from the fourth floor on that day. The respondent had a contract with the loan company to remodel and repair the building, and his workmen had for some time previously, by leave of the appellant, been working in the cellar of the premises by preparing the foundation for a vault, and on Tuesday, the 3rd of March, respondent's workmen entered the fourth story for the purpose of tearing down the plaster and partitions. In the room where the work began there was a tap connected with the city water supply pipe, with a catch basin and waste pipe, and on Tuesday afternoon one of the workmen, named Moore, turned the tap for the purpose of cleaning out the basin and could not say that he turned it back again. The workmen, when working in the room where the basin was, covered it with a board to keep the plaster from dropping into the basin and when they had finished working in that room they removed the board and washed out the basin but did not turn off the water. Work was then proceeded with in the next room where the knocking down of the plaster upon the wall opposite the basin would drive plaster through into the first-mentioned room and into the basin. The second, third and fourth stories are entirely separate from the ground floor and basement and are reached by a separate street door. When the workmen left, on Tuesday evening, the door leading to the upper stories was locked and was not opened until Wednesday morning.

On Wednesday morning the plaintiff found the three lower stories of the building saturated with water which had flowed from the tap in question, and that his stock in trade, and tobacco in course of manufacture, had been very seriously injured. This action was accordingly brought and on the trial questions were

submitted to the jury which, with their answers, are as follows:

"I. Q. What was the nature of the plaintiff's occupation of the building between the end of the last day of February and the time of the flooding? (Answer fully.)

"A. Tacit consent of the loan company.

"II. Q. If you say that he was in possession with the assent, tacit or otherwise, of the loan company state the grounds on which you base such finding?

"A. Because the store which was promised him in the agreement with Mrs. Piers was not ready for occupancy according to the evidence of Mr. Sievert, which was not contradicted, and the keys not delivered up.

"III. Q. Did the defendant's workmen enter the building for the purpose of taking possession of the whole premises or only of that part in which they intended to carry on the work?

"A. Not that day.

"IV. Q. Was the injury to plaintiff's goods caused by the negligence of defendant's servant?

"A. Yes.

"V. Q. If so, was the act or neglect of the defendant's servant in regard to a matter within the scope of his authority?

"A. Yes.

"VI. Q. What damages has plaintiff sustained in consequence of defendant's negligence?

"A. One thousand dollars."

Upon the findings of the jury, Mr. Justice Meagher directed judgment to be entered for the sum of $1,000 and costs.

The defendant moved before the Supreme Court of Nova Scotia *en banc* for a new trial of the action and the plaintiff also moved for a new trial as to damages

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alone. The defendant's motion was granted and the motion by the plaintiff was refused. The plaintiff now appeals from the order granting a new trial generally.

W. B. A. Ritchie K.C. and *Lovett* for the appellant. The verdict ought not to have been set aside as there was ample evidence in support of the findings. The jury were entitled and bound to draw all the necessary inferences and ought, in fact, to have given larger damages. See *Byrne* v. *Boadle* (1); *The Grand Trunk Railway Co.* v. *Rainville* (2), [affirmed by the Supreme Court of Canada (3) on appeal], remarks by Osler J. at page 249 and cases there refererred to; *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (4); *Davey* v. *London & South Western Railway Co.* (5), at page 76 *per* Bowen L. J.; *Re Leeds & Hanley Theatres* (6), at page 7. The negligent acts of respondent's servants were in regard to a matter within the scope of, or incident to, their employment, and the jury has made an express finding of fact to this effect. *Whiteley* v. *Pepper* (7); *Limpus* v. *London General Omnibus Co.* (8); *Ruddiman* v. *Smith* (9); *Abelson* v. *Brockman* (10); *Stevens* v. *Woodward* (11) at page 320; *Whitehead* v. *Reader* (12).

The appellant's occupancy of the building was lawful and as of right, or with the consent of the owner. The appellant, under his lease from the Harrington estate, had a good title to the property till May 1st.

Under all the circumstances it must be assumed that the owner consented to a delay of two or three days in vacating the premises in accordance with the

(1) 2 H. & C. 722.
(2) 25 Ont. App. R. 242.
(3) 29 Can. S. C. R. 201.
(4) 3 App. Cas. 1155.
(5) 12 Q. B. D. 70.
(6) 72 L. J. Ch. 1.
(7) 2 Q. B. D. 276.
(8) 1 H. & C 526.
(9) 60 L. T. 708.
(10) 54 J. P. 119.
(11) 6 Q. B. D. 318.
(12) [1901] 2 K. B. 48.

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agreement of January 31st. There are other circumstances tending strongly to show this, besides the new premises not being ready. See *Gallagher* v. *Humphrey* (1); *Watkins* v. *Great Western Railway Co.* (2); *York* v. *Canada Atlantic Steamship Co.* (3), *per* Sedgewick J. at page 171; *Harris* v. *Perry & Co.* (4); *Holmes* v. *North Eastern Railway Co.* (5), at page 258, *per* Channell B.

If appellant was a mere licensee respondent is liable for damages caused by his negligent act although not wilful if such act be a wrongful act of commission, or the injury arose from a concealed cause of mischief. Beven on Negligence (2 ed.) p. 525 *et seq*; *Bolch* v. *Smith* (6), at page 742, *per* Wilde B.; *Gautret* v. *Egerton* (7); *Burchell* v. *Hickisson* (8). The turning on and leaving turned on the tap was a wrongful act of commission; it created a concealed cause of mischief. The duty to use ordinary care and skill in order to avoid danger was neglected. *Heaven* v. *Pender* (9), at page 509; *Hawley* v. *Wright* (10), at page 45, *per* Sedgewick J. See also *Barnes* v. *Ward* (11): *Bird* v. *Holbrook* (12). This is not a case for the question to be considered as to whether or not the respondent had good reason to suppose, or whether it was probable, that the goods of a trespasser would be on the premises or not, and likely to be injured by the water at the time of the injury. This is not a case of probability but of certainty. *The goods were there to the knowledge of the respondent.* The negligence complained of is not non-feasance but misfeasance. The injury arose from a concealed cause of mischief, that

(1) 6 L. T. 684.
(2) 46 L. J. C. P. 817.
(3) 22 Can. S. C. R. 167.
(4) [1903] 2 K. B. 219.
(5) L. R. 4 Ex. 254.
(6) 7 H. & N. 736.
(7) L. R. 2 C. P. 371.
(8) 50 L. J. Q. B. 101.
(9) 11 Q. B. D. 503.
(10) 32 Can. S. C. R. 40.
(11) 9 C. B. 392
(12) 4 Bing. 628.

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amounted to a trap. The existence of the basin and waste pipe sufficient to carry the water off, was an intimation to all in the building that no injury would arise from the escape of the water through the tap; it was unnecessary to examine every tap in the building to see that none were left running. The fact that the tap was left open and the basin clogged was concealed from the appellant and the source of the danger was not apparent.

The finding in answer to question VI. as to damages is against the weight of evidence. The only evidence as to damage to injured stock was offered by the appellant, was not broken down on cross-examination, and is absolutely uncontradicted. This evidence is amply sufficient to prove the damages to be $2153.86. A new trial may be ordered only as to the question of damages. Judicature Rules, Ord. 37, R. 7; *Commercial Bank* v. *Morrison* (1); *Hesse* v. *St. John Ry Co.* (2); *Marsh* v. *Isaacs* (3). We also refer to *Bayley* v. *Manchester, &c., Railway Co.* (4); *Milner* v. *Great Northern Railway Co.* (5); *Marble* v. *Ross* (6); *Herrick* v. *Wixom* (7); and the cases cited in Roberts & Wallace Employers' Liability Act (ed. 1895) at page 87.

Mellish K.C. and *Silver* for the respondent. The injury was simply the result of an accident, and was not caused by any wilful or wanton act. The plaintiff had no right whatever to be in the building, he was a trespasser, and the defendant owed to him no duty other than that of abstaining from the infliction of a wilful or wanton injury. This case is governed by the decision in *Jones* v. *Foley* (8), and the new trial was properly ordered. See also *Beddall* v. *Maitland*

(1) 32 Can. S. C. R. 98.
(2) 30 Can. S. C. R. 218.
(3) 45 L. J. C. P. 505.
(4) L. R. 8 C. P. 148.
(5) 50 L. T. 367.
(6) 124 Mass. 44.
(7) 121 Mich. 384.
(8) [1891] 1 Q. B. 730.

(1); *Stone* v. *Jackson* (2); *Jordin* v. *Crump* (3); *Murley* v. *Grove* (4); and *The Grand Trunk Railway Co.* v. *Anderson* (5).

Even if the first finding stands the plaintiff cannot recover, because he thereby becomes only a bare licensee upon the property; he is there without any allurement, inducement or invitation express or implied, on the part of the defendant, and the defendant owes him no duty other than that of abstaining from doing to him or his property a wilful or wanton injury. Beven on Negligence, page 767; *Gautret* v. *Egerton* (6); *Wilkinson* v. *Fairrie* (7); *Burchell* v. *Hickisson* (8); *Batchelor* v. *Fortescue* (9); *Ivay* v. *Hedges* (10); *Southcote* v. *Stanley* (11); *Rogers* v. *Toronto Public School Board* (12).

The plaintiff's license, if any, was subject to the risks incidental to the projected presence and work of the defendant's workmen, of which the uncontradicted evidence shews the plaintiff had notice, and therefore he cannot recover. *Castle* v. *Parker* (13); *Brooks* v. *Courtney* (14); *Southcote* v. *Stanley* (11), *Gautret* v. *Egerton* (6). Even if the defendant were gratuitous bailee of the plaintiff's goods, he would not be liable for their injury under the circumstances of this case. *Giblin* v. *McMullen* (15). And *a fortiori*, he is not liable when he assumed no trust in respect to the goods. The answer to the fourth question is not supported by affirmative evidence, and was properly set aside. The evidence is equally consistent with the absence as with the existence of negligence

(1) 17 Ch. D. 174.
(2) 32 Eng. Law. & Eq. 349.
(3) 8 M. & W. 782.
(4) 46 J. P. 360.
(5) 28 Can. S. C. R. 541.
(6) L. R. 2 C. P. 371.
(7) 1 H. & C. 633.
(8) 50 L. J. Q. B. 101.
(9) 11 Q. B. D. 474.
(10) 9 Q. B. D. 80.
(11) 1 H. & N. 247.
(12) 27 Can. S. C. R. 448.
(13) 18 L. T. 367.
(14) 20 L. T. 440.
(15) L. R. 2 P. C. 317.

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on the part of the defendant's servants. We rely on the reasons given by Ritchie J. and on *Cotton* v. *Wood* (1); *Lovegrove* v. *The London, Brighton etc. Railway Co.* (2), at page 692.

The answer to the fifth question was properly set aside; it is not supported by the evidence and the alleged act or neglect of the defendant's servant was not in regard to a matter within the scope of his authority. We rely on the reasons given by Ritchie J. and on the authorities he mentions. See also *McKenzie* v. *McLeod* (3); *Mitchell* v. *Crassweller* (4); *Storey* v. *Ashton* (5); *Lamb* v. *Palk* (6).

SEDGEWICK and GIROUARD JJ. concurred in the opinion of Mr. Justice Killam.

DAVIES J. (dissenting.)—I agree with the majority of the Court of Appeal for Nova Scotia and would, therefore, dismiss the appeal. The rights and liabilities of the parties as regards each other depend altogether upon the legal character of the occupancy of the premises by the plaintiff at the time his goods were injured. If occupying as of right as against the owner, the latter owed him a duty which involved taking care not to negligently destroy his goods. If there wrongfully it seems to me the duty was limited to the obligation not to do so recklessly, wantonly or wilfully. I agree with the judgment below that he was there as a trespasser or, at the most, as a bare licensee.

The defendant was a contractor employed under a contract with the owner, the Eastern Loan Company, in making an alteration in the upper story of the building in a portion of the lower part of which the

(1) 8 C. B. (N. S.) 568.
(2) 16 C. B. (N. S.) 669.
(3) 10 Bing. 385.
(4) 13 C. B. 237.
(5) L. R. 4 Q. B. 476.
(6) 9 C. & P. 629.

plaintiff's goods were at the time of the accident. The jury found that the accident was caused by one of the defendant's workmen negligently turning on the water-tap in the room where he was working and not turning it back, in consequence of which the water overflowed the basin and ran down through the floor upon the plaintiff's goods.

Now, the plaintiff was not there under any lease or agreement with or consent of the owner. As against him he had no right of possession or occupancy. He was, in point of fact, a trespasser in the sense that, after the end of February at any rate, he was unlawfully in possession as against the owner and as against the defendant, who was there as a contractor to carry out the alterations for the owner. He was not even a tenant at will but a tenant at sufferance, at the best. He entered, it is true, by a lawful lease, but held over by wrong. Co. Litt. 57*b*, cited 3 C. B. 229 note (*b*). See also Cole on Ejectment, p. 456. There was no contract between the plaintiff and the owner, the Eastern Loan Company, the defendant's employer. The company did not undertake with the plaintiff that their servants would not be guilty of negligence in carrying out the alterations. No duty was cast upon the defendant to take care of the plaintiff's goods, at any rate, none beyond that which a gratuitous bailee undertakes. For gross negligence there might be liability, but, for such negligence as was found in this case, there cannot be any liability unless arising from some duty which the defendant owed the plaintiff to protect his property.

I think the principle governing the case of *Jones* v. *Foley* (1) should apply to the facts here. The owner of the premises, there, was held not to be liable for unavoidable damages caused by his servants to the

(1) [1891] 1 Q. B. 730.

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goods of his overholding tenant in pulling down the roof of the building. The ground upon which this was held was that the defendant was perfectly justified in pulling down the house; that, although the plaintiff was in occupation of the house with his goods, he had no right whatever there as his tenancy had expired, and that, if he chose to remain improperly in the building with his goods, he did so at his own risk and could not prevent the defendant pulling down the house or exercising his rights as owner, even if such exercise of his rights necessarily and unavoidably injured the goods of the plaintiff. No doubt the defendant would, in that case, have been liable for the wilful, wanton or reckless conduct of his workmen, but it seems to me that, if not liable for such damage as was unavoidably caused to the plaintiff's goods in the removal of the roof, he cannot be held for that which was negligently caused, because there was no duty, on the part of the defendant, to protect the goods or property of the overholding tenant. The facts of this case seem to me very similar.

The defendant, as the contractor for the owner, was lawfully in possession of the premises and in actual occupancy of the upper story and also of the cellar. He had a perfectly legal right to carry out such alterations in the building as he pleased. He owed no duty to the plaintiff, who was wrongfully in occupation of part of the premises, to protect the latter's goods. By remaining improperly in occupation of certain rooms in the building and keeping his goods there he did so at his own risk. If in the exercise of his legal rights the defendant had entirely removed the upper story of the building and the rain had poured in and destroyed the plaintiff's goods, the defendant could not, under the principle on which *Jones* v. *Foley* (1) was decided,

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have been held liable for any damages caused thereby. And I take it, the principle on which he should be held not liable is that the plaintiff was there without right, that the defendant was merely exercising his legal rights in altering or removing part of the building, and that, while he must be liable for such gross negligence as is involved in reckless, wanton or wilful acts causing injury to the plaintiff's goods which were known to be in the premises, he cannot be liable for damages caused by the mere negligence of his servants in doing what he had a perfect right to do, because he owed no duty to the plaintiff under the circumstances, and the latter, by wilfully insisting upon remaining where he was, after his legal right to remain had ceased, must put up with the consequences of his own obstinacy. He could not, by his wrongful act of remaining in occupation of part of the premises, impose a duty upon the defendant.

I do not think there is any evidence to justify the finding of the jury that the plaintiff was in occupation of the premises with the tacit consent of the owner after the end of February. The evidence is all the other way. The defendant was, therefore, a trespasser, in the sense that he persisted in retaining the occupancy of the rooms after his right to do so had expired. He remained in such occupation with the full knowledge that the defendant's workmen were engaged in pulling the upper part of the premises to pieces, moving all the partitions, knocking down all the plaster, etc., and he must be taken to have elected to continue in his occupation subject to all the risks incident to such occupation while workmen were actually engaged, with his knowledge, in tearing down the walls and ceilings above him.

The learned equity judge, who dissented from the majority judgment in the court below, did so upon the

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ground that the plaintiff's possession was not that of a trespasser or even a bare licensee, but that he had "a *right* to possession as distinguished from mere possession." I am not able to reach that conclusion under the evidence and, of course, such a conclusion would, necessarily, make a marked difference in the rights and liabilities of the parties towards each other. But, even if the plaintiff was there by the "tacit consent" or mere acquiescence of the owner, I take it there would be no difference in the result.

In the case of *Ivay* v. *Hedges* (1), it was held that where a tenant has the mere privilege of using the roof of the tenement to dry linen on, which roof was flat with an iron rail round the edge, to the knowledge of the landlord out of repair, no duty arises on the landlord's part to protect such a place. The tenant, plaintiff, when going to the roof for the purpose of removing linen, slipped and caught at the rail which gave way so that he fell into the court yard. The landlord was held not liable as owing no duty to the tenant who, as regards the roof, was a mere licensee.

The same absence of legal duty is the ground for the decision in *Batchelor* v. *Fortescue* (2), and the learned judge, in this latter case, used expressions as to the absence of any such duty in the case of mere licensees which, if good law, would govern the case at bar. Smith J. says, at page 477:

> There was no duty cast upon the defendant to take due and reasonable care of him.

And Brett M. R. says, at page 479:

> There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence.

In commenting on this latter decision, Mr. Beven points out that the existence or non-existence of a

(1) 9 Q. B. D. 80. (2) 11 Q. B. D. 474.

contract cannot be a wholly adequate measure of the responsibility of one man with reference to the safety of another and though

no duty was cast upon the defendants to take care that the deceased should not go to a dangerous place,

yet, if in full sight of defendants' servants, he were there, they were in a different position with regard to the continuance of operations known to them to be dangerous than if he were not there. This criticism obviously has reference, as I understand it, to the point that what might be mere negligence not involving liability in one set of circumstances might, in different circumstances and relations, amount to gross and wilful negligence for which liability would attach.

In *Sullivan* v. *Waters* (1) the law is succinctly summed up by Pigot C. B. at page 475, as follows:

A mere license given by the owner to enter and use premises which the licensee has full opportunity of inspecting which contained no concealed cause of mischief and in which any existing source of danger is apparent, creates no obligation in the owner to guard the licensee against danger.

In the case of *Sweeny* v. *Old Colony and Newport Railroad Co.* (2), Chief Justice Bigelow thus states the law, at page 374:

The true distinction is this; a mere passive acquiescence by the owner or occupier in a certain use of his land by others involves no liability, but, if he directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use and, for a breach of this obligation, he is liable in damages to a person injured thereby.

This, he adds, is the pivot on which the cases turn.

Under these principles and authorities, even if the plaintiff was in occupation by the "tacit consent" or mere acquiescence of the owner, I would still be of opinion that, for the negligence proved, there was no liability.

(1) 14 Ir. C. L. R. 60.

(2) 10 Allen (Mass.) 368.

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NESBITT J. (dissenting). — I would dismiss this appeal upon two grounds; (1) that no duty was owed to the plaintiff except to avoid wilful injury; and (2) that the act of the servant was not within the scope of his employment.

KILLAM J.—I agree that the evidence did not warrant the finding of the jury, that, at the time of the doing of the injury complained of, the plaintiff was occupying the premises in question by the tacit consent of the loan society.

The plaintiff became a tenant of the premises under the mortgagor. Default having been made, the premises were sold under the mortgage and were purchased by the Eastern Canada Savings and Loan Society, Limited. By arrangement between the mortgagor and the plaintiff, the latter was to be allowed to continue in occupation until the 28th of February following the sale. There was evidence justifying the inference that the society consented to this continuation. Whatever equitable rights the plaintiff may have had, the society had, at law, after the 28th of February, the right to evict him. I take it that he must be treated, as regards his legal rights, as in the position of an overholding tenant whom the landlord has, so far, taken no active steps to evict.

The plaintiff moved his goods from the upper stories of the building and, with his knowledge and consent, the defendant, employed by the society, put in workmen to tear down some of the internal portions of these upper stories and to make alterations therein. The defendant and his workmen knew that the plaintiff was in occupation of the lower stories and had merchandise there. In my opinion they were bound, in carrying on their work, to exercise reasonable care not to do injury to the plaintiff's goods below, and it

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seems unimportant, so far as regards the liability of the defendant, whether the plaintiff had or had not a right to continue in occupation or to keep his goods upon the premises. In support of this view I think it necessary to refer only to the well known case of *Davies* v. *Mann* (1), the principle of which appears to me to directly apply. Cases with regard to the duty of the owner of lands or premises to make them safe for trespassers, known or unknown, expected or unexpected, or for mere licensees, do not appear to me to have any application, and the same may be said of the case of *Jones* v. *Foley* (2). The report of that case states explicitly that the act causing injury was done unavoidably. No question of negligence arose.

In my opinion, the act of the workmen which caused the injury should be considered to have been done in the course of their employment. They were employed to tear down the plaster. In doing so they obstructed the flow of water in the basin; they left it in that condition; one of them turned on the tap, either before or after the obstruction was caused, and in so leaving it obstructed, with the tap turned on, it appears to me that they were guilty of negligence for which the defendant was responsible. See *Ruddiman* v. *Smith* (3); *Abelson* v. *Brockman* (4); *Stevens* v. *Woodward* (5).

While the persons employed by the plaintiff to examine the goods and appraise the damage estimated it at a certain amount, the jury were not absolutely bound to accept their appraisement, even without other evidence. They did have the parties before them and were entitled to judge of the value of their estimate from the oral evidence. Although that evidence did not establish any other specific sum as represent-

(1) 10 M. & W. 546.
(2) [1891] 1 Q. B. 730.
(3) 60 L. T. 708.
(4) 54 J. P. 119.
(5) 6 Q. B. D. 318.

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ing the amount of damage done, yet the jury might act upon the view that they were not satisfied that damage to a greater amount than $1,000 was done. There seems to be no sufficient ground for allowing the case to go to a new trial upon the question of damages.

In my opinion the appeal should be allowed, the order for a new trial discharged and the original judgment affirmed.

Appeal allowed with costs.

Solicitor for the appellant: *Henry C. Borden.*

Solicitor for the respondent: *Alfred E. Silver.*

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Nov. 29, 30.

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*Jan. 31.

MARY A. E. A. McNEIL AND ALEXANDER McNEIL, EXECUTORS OF ALICIA CULLEN, DECEASED.. } APPELLANTS;

AND

JAMES ROBERT MARY CULLEN AND LEO CULLEN..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Execution—Evidence—Appeal.

In proceedings for probate of a will, the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers and if she wished the two persons present to witness it and she answered "yes"; each of the witnesses acknowledged his signature to the will but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed and his decision was affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment appealed from (36 N. S. Rep. 482) that two courts having pronounced against the validity of the will such decision would not be reversed by a second court of appeal.

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* PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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MCNEIL v. CULLEN

APPEAL from the decision of the Supreme Court of Nova Scotia (1) affirming the ruling of the Judge of Probate that the will in question in the case was not properly executed.

The facts of the case are stated as follows by Mr. Justice Townshend who delivered judgment for the Supreme Court of Nova Scotia.

"The two principal points in opposition to the will argued before this court, and also before the court below were: (1) That the will had not been properly and legally executed by the testatrix so as to comply with the statute: (2) That in view of the circumstances under which the will was prepared and executed it cannot be taken to express the true will of the deceased.

"The first and all important inquiry is as to the due execution of the will. It was not signed by the testatrix in the presence of the two subscribing witnesses, but as claimed by the executor was properly acknowledged by the testatrix in their presence. The only persons present at the time were the two witnesses, Stanford and Fluck, and Alexander McNeil as well as the testatrix, in Mr. McNeil's office. The two witnesses differ so essentially in their account of what took place on this occasion from Mr. McNeil that it is necessary to extract the testimony of each in order to form a correct conclusion whether an acknowledgment as required by the statute was made. According to Mr. McNeil's testimony Stanford came first to his office door, opened it and then drew away and did not enter immediately. Then he goes on to say:

"Just after Mr. Stanford opened the door Mrs. Cullen got up and went over to the seat, in front of my desk, sat down there, and wrote the signature 'Alicia Cullen'

(1) 36 N. S. Rep. 482, *sub nom. In re Estate of Alicia Cullen.*

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which is appended to this document. After writing the signature she went back to the seat she first occupied, about six feet from the desk. Almost immediately after Mr. Stanford followed by Dr. Fluck came in. I was standing at the desk facing Mrs. Cullen with my left hand on the will when I asked Mrs. Cullen, 'is this your will and signature, and do you wish these witnesses to sign it?' To which she answered 'yes.' On looking then at the witnesses I noticed that one seemed to be urging the other to go first. They then came forward and made the signatures to this document in the order in which they appear. I then delivered the document to Mrs. Cullen and she took it away with her."

"The above extract gives exactly his account of the acknowledgment by the testatrix. Now contrast the above with the evidence of the two witnesses. First, Humphrey Stanford, after stating that he entered the office with Dr. Fluck, proceeds: 'There was nothing said. Mr. McNeil produced the document. I signed it. * * * Dr. Fluck signed it in my presence. The lady was in the room. Mr. McNeil said something about the last will and testament. I do not remember anything else.'

"On cross-examination he says: 'Mr. McNeil just read over about a dozen words at the last of the will. I do not know whose will it was, but had an impression it was the lady's as she was sitting there. * * I don't know whether the lady could hear Mr. McNeil reading the last few words of the will or not; I did not hear Mr. McNeil say to the lady, 'is this your will and signature, and do you wish these witnesses to sign it,' nor did I hear the lady say 'yes.' Nothing of the kind was said to my knowledge. There was no conversation whatever. If anything of the kind had been said after I entered the room I could not

help hearing it. When Mr. McNeil was reading the few last words of the will I was about three feet away. * * * Mr. McNeil would be about ten feet from the lady.'

"Dr. Fluck says: 'To the best of my recollection I did not hear Mr. McNeil say to Mrs. Cullen, 'is this your will and signature and do you wish these witnesses to sign it.' I heard no such statement as that. If any such statement had been made while I was in the room I would have heard it. After I had said a few words to Mrs. Cullen Mr. McNeil pointed out to me where to sign. I hesitated and looked at Mr. Stanford, and then I signed. After I went back to my office I wondered if that was Mrs. Cullen's will. There was nothing said about it being the will while I was in the room. * * * I say positively that the only words uttered by Alexander McNeil while I was there were the words 'you sign here' or words to that effect. * * * If there had been any conversation between Mr. McNeil and Mrs. Cullen I would have remembered it."

On this evidence the learned judge held that the will was not properly executed and did not consider it necessary to discuss the other question.

This decision was affirmed by the the judgment now under appeal.

Ross K.C. for the appellants.

Newcombe K.C. and *Henry* for the respondents.

The judgment of the court was delivered by:

DAVIES J.—The real question for determination in this appeal is whether the signature of the testator, Alicia Cullen, to the will in dispute was acknowledged pursuant to the statute by her in the presence of the two witnesses who signed the will as such.

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On proceedings taken in the Surrogate Court of Nova Scotia to prove the will in solemn form, the surrogate judge pronounced against the will on the ground, mainly, that it had not been either signed or acknowledged by the testator in the presence of the witnesses. On appeal, the Supreme Court of Nova Scotia upheld this finding.

The question for our determination is whether the evidence is so clear and strong on the point of acknowledgement as to justify us in reversing the judgments of the courts below. I am inclined to the opinion that it is not and that the evidence of what took place at the time of the execution of the will did not involve an acknowledgment by the testatrix that the signature to the will was hers.

Mr. Ross argued that the Court of Appeal in Nova Scotia had drawn a wrong inference from the proved facts, but I take it to be clear from the decided cases on the statute, that, if the testator does not sign the will in the presence of the witnesses and its proof depends upon his or her acknowledgment of a signature previously written, not in their presence, there must be some clear evidence to show the testator's acknowledgment and approbation. From the decision of the Court of Appeal in the case of *Blake* v. *Blake* (1), it would appear that no acknowledgment is sufficient unless, at the time, the witnesses either saw or might have seen the testator's signature. In that case the signature was hidden by what Brett L. J. called,

the accident of putting a piece of blotting paper a quarter of an inch higher or lower,

but, while desirous of upholding the will so far as it possibly could,

the court had to consider an enactment of a statute in which there was no elasticity

and, consequently, found against the will.

(1) 7 P. D. 102.

The subsequent case of *Daintree* v. *Butcher* (1) was pressed upon us as conflicting with *Blake* v. *Blake* (2). The distinction between the two cases is vital. In both cases, the testator's signature was written to the will before the witnesses came into the room to witness. In the former the testator's signature was not and could not be seen by the witnesses. In the latter the signature of the testator was so placed that the witnesses could have seen it when they signed their names as witnesses. The Court of Appeal, in this latter case, held that the testator had asked one of the two attesting witnesses to sign it and that it must be taken from the evidence that, after the other attesting witness had come into the room, the first one

> had, in the presence of the testatrix, asked her, the second witness, to sign as witness.

This "in the presence of the testatrix" manifestly means from the report, in the "presence and hearing" of the testatrix, and, in fact, is so stated by Butt J. who first heard the case, at page 67 of the same report. In delivering the judgment of the court, Cotton L. J. says, at page 103:

> In my opinion, when the paper bearing the signature of the testatrix was put before the two persons who were asked by her or in her presence to sign as witnesses, that was an acknowledgment of the signature by her. The signature being so placed that they could see it, whether they actually did see it or not, she was, in fact, asking them to attest that signature as hers.

In the case now before us, I think it is proved satisfactorily that the testatrix, Alicia Cullen, had signed the will before the witnesses came into the room or office where she was with her solicitor, and that, at the time when they entered the room she had returned to her seat some short distance away from the desk on which the will lay. It is true that neither of the

(1) 13 P. D. 102. (2) 7 P. D. 102.

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witnesses could, at the hearing, positively affirm that Mrs. Cullen's signature was there at all, but I think that McNeil's evidence satisfactorily settles that point. Then, upon what facts or evidence can we hold that there was an acknowledgment of her signature? As Townshend J. in delivering the judgment of the court, says:

> Both of them (the witnesses) swear that, even if there, the testatrix did not, in their presence, acknowledge it to be her signature, nor did they hear her answer "yes" to any such question, nor is there any evidence of any act or conduct on her part which could be construed as the equivalent of an acknowledgment. In fact, both witnesses say she said nothing and appeared to be perfectly indifferent to what was going on.

It is true that McNeil states that almost immediately after the witnesses came in he, standing at the desk and facing Mrs. Cullen, asked her whether that was her will and signature and if she wished these witnesses to sign and that she replied "Yes." But, apart from the fact that they positively deny having heard anything of this, it is not sworn by McNeil himself that they did or could or must have heard it. If they never heard his question or her reply it is difficult, in the absence of other affirmative evidence, to see where there was an acknowledgment.

At any rate, on the facts, both courts have found against the will, and while, if the findings had been under all the surrounding circumstances the other way, I might have found it difficult, making proper allowances for lapse of time and memory, to reverse them, I cannot see, after most careful consideration, how I can, under the evidence and the findings as they are, do otherwise than express my concurrence in the judgment below and dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *H. C. Borden.*

Solicitor for the respondents: *W. A. Henry.*

THE DOMINION IRON AND STEEL COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

WILLIAM OLIVER (PLAINTIFF).....RESPONDENT.

1904
*Nov. 30,
*Dec. 1.
1905
*Jan. 31.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Employers' Liability Act—Defect in ways, works, &c.—Care in moving cars—Contributory negligence.

O., a workman in the employ of defendant company was directed by a superior to cut sheet iron and to use the rails of the company's railway track for the purpose. The superior offered to assist and the two sat on the track facing each other. O. had his back to two cars standing on the track to which, after they had been working for a time, an engine was attached which backed the cars towards them, and O. not hearing or seeing them in time was run over and had his leg cut off.

Held, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation and could not recover damages for such injury.

Held, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so.

Held per Sedgewick, Nesbitt and Killam JJ. that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, &c., of the company within the meaning of sec. 3 (*a*) of The Employers' Liability Act.

Held per Girouard and Davies JJ., that if it was such defect was not the cause of the injury to O.

APPEAL from the judgment of the Supreme Court of Nova Scotia, affirming the judgment of Mr. Justice Ritchie at the trial, without a jury, by which the plaintiff's action was maintained for $1,000 damages and costs.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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DOMINION IRON AND STEEL CO. v. OLIVER.

The circumstances of the case and the questions at issue on this appeal are stated in the judgments now reported.

Lovett for the appellants.

Henry for the respondent.

SEDGEWICK J. concurred in the opinion of Mr. Justice Killam.

GIROUARD J. concurred with Mr. Justice Davies.

DAVIES J.—The respondent, Oliver, the plaintiff in this case, was a workman in the employ of the defendant company at the time of the injuries received by him and for which the action is brought. The action is brought under the Employers' Liability Act of Nova Scotia. The plaintiff at the trial recovered a judgment for $1,000 damages. The learned judge seemed to base his judgment on sub-section *c.* of section 3 of the statute holding that the plaintiff was injured by the negligence of one McLean in directing a sheet of iron to be cut by plaintiff, in a dangerous place, and that

> McLean was in the employment of the defendant company and was a person to whose orders or directions the plaintiff, at the time of the injury, was bound to conform, and did conform, and the injury sustained by the plaintiff resulted from his having so conformed to McLean's directions.

The learned judge went on, however, to express his doubts whether the injury was really caused by the plaintiff having conformed to the directions of McLean within the meaning of the Act as the iron could have been cut on the rail without danger if the engine and cars had not been run over the track. The learned judge expresses his further opinion that there was negligence on the part of those in charge of the train in moving the cars upon the plaintiff in the way they

did, and his judgment may be said to be based, not only upon the ground already stated with doubts under sub-section *c*, of section 3, but also upon sub-section *e*, the negligence of those in charge of the train by which the plaintiff was run over.

On appeal to the Supreme Court of Nova Scotia that court drew the following conclusions from the evidence:

(1.) That McLean was at the time of the accident a person in the service of the company whose orders or directions the plaintiff was bound to conform to, and that the injury resulted from his having so conformed.

(2.) That the injury was due to the defect in the works or plant used in defendant company's business—that is to say—in the neglect or failure to provide proper plant and a reasonably safe place for cutting the sheet iron.

It is obvious of course that the first conclusion could not sustain the judgment because of the absence of the finding of the essential ingredient of negligence on McLean's part which caused the plaintiff's injuries. In the absence of that essential ingredient the judgment may be said to rest upon the second finding and it must be held to mean that the plaintiff's injuries were proximately and directly due to the "defects" referred to and to exclude negligence of the plaintiff himself as a contributory factor.

On appeal to this court the plaintiff relied upon all of the three grounds above referred to contending that the company was liable either because of the defects in their ways, works, plant, etc., or of the negligence of McLean to whose orders he was bound to and did conform, or of the train hands in moving the train.

The facts are stated by the trial judge as follows:

Plaintiff was employed on the coal washing plant as a jigger and according to instructions given him his duty was, when the jig he worked at was idle, to assist the repair men and work under their instructions. Fred. McLean, a mechanical engineer, was one of the repair men on the washing plant. His duty was to have any small repairs made that were necessary from time to time, and in doing so

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to control the work and to direct the men how it was to be done. On the 11th July, 1902, in the afternoon a jig on which the plaintiff was employed was not working, and it became necessary to reline with sheet iron one of the chutes connected with it.

The plaintiff was assisting McLean in doing this. McLean told plaintiff he was not doing right, and he marked out the shape he wanted on a piece of sheet iron and told him to cut it. The ordinary mode of cutting it was by hammer and chisel, and it was customary for the men working there to cut it on the rails of the railway track. Plaintiff took the sheet and attempted to cut it on a plank. McLean came along and said he was not cutting it right and told him to cut it on the track. Plaintiff put it on the track, and McLean said he would cut it, too, and they both sat on the track facing one another and cut the iron on the rail. There were two coal cars on the track not attached to any engine towards which plaintiff had his back a short distance away. While the plaintiff and McLean were so employed an engine with three cars backed up, coupled to the cars standing on the track and backed them on the plaintiff. Neither McLean nor the plaintiff saw or heard the cars moving until it was too late for the plaintiff to get out of the way. He was run over by the cars and one leg cut off.

So far as the plaintiff's injuries may be said to be due to the defects in the ways, works, premises, etc., of the defendant company, I am unable to concur in the reasoning of the court appealed from. The words of the section are:

> Where personal injury is caused to any workman (*a*) *by reason* of any defect in the condition or arrangement of the ways, works, machinery, plant, building or premises connected with, intended for or used in the business of the employer, the workman * * * shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, etc.

The effect of this statute is to take away from the employer the old defence of common employment. This sub-section (*a*) is merely an enactment or declaration of the principles of the common law.

The workman is placed in the same position with regard to his employer in certain enumerated circumstances as would be held by any person not in the employment but entering the defendant's

property by invitation and suffering injury. But it is only in cases where the injuries are caused to the workman *by reason of defects*, etc., that the statute applies. Can it be reasonably held in this case that the personal injuries suffered by the plaintiff were caused *by reason of the defects* in the works of the defendant company, assuming that such defects existed? Was there that immediate and intimate connection between the alleged "defects" and the injuries of the plaintiff that the latter could be said to have been caused by the former? Were the injuries the direct consequence of the defects in the sense that the latter may be said to be the *causa causans* of the injuries? In all the other four sub-sections of the section under review it is the negligence of a specified and designated person in common employment with the injured person by reason of which the personal injuries are caused which justifies the action and prevents the company from pleading the doctrine of common employment and so escaping from liability. In this sub-section (*a*) it is the "defects in the ways and works, etc," which has that effect. But to my mind it is clear that as under the other sub-sections to sustain the action the negligence must be shown to be the *causa causans* of the injury, so in a case under this sub-section (*a*) the "defect in the ways, works, plant, etc." relied on, must be shown to be the *causa causans* of the injury complained of. There must be such direct necessary and intimate connection between the "negligence" and the "defect" referred to in these sub-sections on the one hand, and the injuries received on the other as justifies the conclusion that the negligence or the defect as the case may be was the *causa causans* of the injury. The negligence or the defects specified in the section must be shown to have caused the injury not in any indirect or remote way but

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directly and proximately. The plaintiff, it is said, went on the railway track to cut the sheet iron because proper facilities were not otherwise provided for him to do so. But that did not of itself or directly or proximately cause his injuries. In fact there cannot be said to be any necessary immediate and intimate connection between the fact of the plaintiff resorting to the railway track to cut the sheet iron and his subsequent injuries. One was a sequence to the other, not a consequence, and there was not any *intimate or necessary* causal connection between them. The injuries were caused proximately by the moving train and not by any alleged defect in the plant or by the negligence of McLean and conforming to his order to cut the sheet iron on the track. If the moving train had not come along when it did neither the alleged defects in the plant nor obedience to the orders given would have caused the injuries plaintiff suffered. If plaintiff's injuries were caused directly and proximately by the moving train, as is of course the case, they can only be said under any legitimate assumption to have been indirectly and remotely caused by the alleged defect in the plant or the order to cut upon the track. The injuries were not caused as required by the statute "by reason of the defects in the plant, etc.", but by reason of the moving train either properly or negligently propelled and of the negligence and carelessness of the plaintiff in sitting down in the exposed and dangerous position he adopted and failing to take proper precautions against being run over. The railway track was a very dangerous place to do the work, and known by the plaintiff to be such. He knew trains were being moved along the track every few minutes and his injuries were caused by his own carelessness, if indeed it might not be called recklessness, in sitting down upon the railway track with his back

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to some cars standing on the track a very short distance from him and utterly neglecting to take such prudent and reasonable precautions for his safety as the circumstances I have mentioned obviously called for. Of course under the circumstances I have mentioned and the assumption I have argued the case upon, namely, the defects in the works justifying if not necessitating a resort to the track so as to cut the sheet iron, if the person in charge of the train which ran over the plaintiff had been guilty of negligence in the management of the train the action could be sustained under sub-section (*e*). But while the trial judge intimates an opinion that there was not sufficient care taken in moving the cars he does so upon the ground that the brakesman who was directing the operation of coupling the cars attached to the moving engine with those cars standing upon the track near to where the plaintiff was sitting should not have signalled to the engineer to go on after the coupling was completed until he had first gone to the rear end of the train from where he would have seen the plaintiff and McLean sitting on the track. I am unable to agree with the learned judge that the failure of the brakesman to do this was any evidence of negligence. He had no suspicion, of course, that any men were sitting on the track behind the end car. He had no reason whatever to expect they would be there. He acted on this occasion as he ordinarily did, getting off the cars attached to the engine and standing at the side opposite to the point where they coupled with those standing on the track, and as soon as the coupling was completed signalling in the usual way to the engine driver to back up. He could not possibly have seen the injured man unless he stooped down and looked under the cars or ran to the end of the last car to view the track before signaling to

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move. He was not bound, in my opinion, to do either one or the other, and his not doing either of them is no evidence of negligence. To lay down as a standard of duty which all men engaged in directing the coupling of cars and the moving of trains would be bound to comply with, that after coupling any cars on to a train the workman, before signaling the train to move, should assure himself that the track ahead was free of people either by going to the end of the last car or in some other way, would be to go far beyond what is reasonable. The bell, it was proved, was kept continuously ringing but for some reason the warning was unheeded by the unfortunate man who was injured and who, from the manner in which he was sitting on the track with his back to the approaching train, could not see it approaching.

The only remaining ground to be considered is the one on which the trial judge, but with doubts, based his judgment, viz., under sub-section (*c*) by reason of the negligence of McLean to whose orders the plaintiff was bound to conform and did conform, and whose injuries resulted from his having so conformed. The learned judge's doubts were as to the injuries having resulted from conformity to the orders. The judges of the appeal court were silent upon this ground and I think the doubts of the trial judge well founded.

The case of *Wild* v. *Waygood* (1), is an instructive one as to the proper construction of this sub-section of the Employer's Liability Act. As I read and understand the judgments delivered in that case by the distinguished judges of the Court of Appeal it is essential under this section to prove negligence of the person in the service of the employer to whose orders the workman injured was bound to conform. Such negligence must be the *causa causans* of the injury, and it

(1) [1892] 1 Q. B. 783.

must be shewn in addition that the injury arose not alone from such negligence but also from the injured person having conformed to the order. Lord Herschell says at page 790:

> The negligence must be proved, and if you prove the negligence, then it is sufficient if, in addition to proving that, you also prove that the injury resulted, not from the negligence alone, but from the negligence and the conforming to the order.

Lindley L.J. says, at page 793:

> The whole, I think, comes to this: that the injury must be the result of negligence of the person giving those orders and of the plaintiff conforming to those orders.

Kay L.J. says, at page 795:

> The injury must be caused by the negligence of that person (the one to whose orders the workman was bound to conform) and must result from the workman at the time of the injury conforming to the order.

And again:

> It relates to negligence which has an *intimate connection* with the conforming of the workman to an order given him at the time of the injury and to which he was conforming at the time of the injury.

I am of the opinion under the evidence that McLean was a person in the defendant's employ to whose order at the time and under the circumstances the plaintiff was bound to conform and did conform. But I am unable to discover the negligence of McLean, and the necessary and intimate connection between the injury plaintiff received and such negligence, if any there was, and plaintiff's conformity to the order he received. I have already discussed this point and have concluded that it was the negligence or recklessness of the injured party in cutting the sheet iron at the dangerous place and in the manner and way and under the circumstances he did without taking any of those reasonable and prudent precautions he should have taken which directly caused his injuries and not any negligence of McLean whose orders he had to obey or of the man or

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men in charge of the engine which run over him, or any defects in the ways, works, etc., of the defendant company.

It was of course strenuously contended by the appellant company that the finding of the Appeal Court as to the existence of defects in their plant because of the absence of proper places for the workmen to cut this sheet iron was contrary to the evidence. In the view I took, however, of the direct and proximate cause of the plaintiff's injuries and of the necessity, if there was a defect in the plant, of showing that it was the *causa causans* of the injury I thought it better to deal with the case as if the finding of fact on this point by the court was correct.

Under all the circumstances I am of opinion that the appeal must be allowed with costs.

NESBITT J.—I would allow the appeal with costs in all courts for the reasons stated by my brother Killam.

KILLAM J.—In my opinion no defect in the condition or arrangement of the ways, works, etc., of the company was proved. The steel plates could be cut upon any hard substance conveniently situated for the purpose. There was no necessity for keeping such substances scattered about so that they would always be near at hand wherever the cutting might be required to be done.

I am also of opinion that there was no negligence in the running of the railway cars or in the matter of proper precautions on the part of those moving them. The railway tracks were not provided for use in cutting plates. While some of the men may have seen fit to use them for such a purpose they did so at their own risk, and the train employees were not called upon to be on the look out for those who might happen

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to be on the tracks for that or any other purpose. They did not see the plaintiff or know of his presence on the track.

I agree, however, that McLean was a person in the company's employ to whose orders, at the time and under the circumstances, the plaintiff was bound to conform, and that, in using the railway tracks as he was, the plaintiff was conforming to McLean's orders. But I concur with my brother Davies in thinking that the plaintiff was bound to use reasonable precautions for his own safety in what he knew to be a dangerous situation and that his injuries substantially resulted from his failure to do so. In that view he cannot recover.

Appeal allowed with costs.

Solicitor for the appellants: *W. H. Covert.*

Solicitor for the respondent: *J. A. McDonald.*

THE NOVA SCOTIA STEEL COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES HUBERT BARTLETT (PLAINTIFF) ..... } RESPONDENT.

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*Dec. 2, 3.

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*Jan. 31.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Crown lands—Mining lease—Trespass—Conversion—Title to lands—Evidence—Description in grant—Plan of survey—Certified copy.

The provisions of section 20 of "The Evidence Act," R. S. N. S. (1900) ch. 160, do not permit the reception of a certified copy of a copy of a plan of survey deposited in the Crown Lands Office to make proof of the original annexed to the grant of lands from the Crown.

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*PRESENT:—Sedgewick Girouard, Davies, Nesbitt and Killam JJ.

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APPEAL from a judgment of the Supreme Court of Nova Scotia, setting aside the judgment entered at the trial on a verdict for the defendants and ordering a new trial.

The action was by the respondent claiming from the appellants the value of certain iron ore alleged to have been mined on the area covered by a lease to him from the Government of Nova Scotia, in 1889. The case was tried, for the second time, before Mr. Justice Meagher, with a jury, and questions were submitted to the jury, which they answered in favour of the defendants. Upon these findings judgment was entered for the defendants, but on motion on behalf of the plaintiff the Supreme Court of Nova Scotia ordered a new trial. The defendants now appeal.

The plaintiff claimed (1) the value of iron ore which the defendants purchased from the Pictou Charcoal Iron Co., paying them for the same, and (2) the value of other iron ore mined by the New Glasgow Iron, Coal and Railway Co. The defendants' contention with reference to the first part of the plaintiff's claim was that, although some of the ore was mined within the limits of the plaintiff's lease, this lease covered a part of the property included in a grant made to one Peter Grant and others, dated 3rd November, 1785, *in which the ores were not reserved to the Crown*, and that the ore in question was so mined by the Pictou Charcoal Iron Company, upon the Peter Grant property under agreement or lease from the present owners of that property. With regard to the second part of the plaintiff's claim, it was common ground that the plaintiff's lease covered land granted to one Finlay Cameron, one of the grantees in the said grant dated 3rd November, 1785, and the defendants' contention was that the ore in question was mined on this Finlay Cameron lot, and that it was so mined under agree-

ment or lease from the present owners of that lot. As regards both parts of the plaintiff's claim it was common ground that if the ore was mined within the limits of the lands granted to Peter Grant and Finlay Cameron in 1785, the plaintiff must fail. Both contentions of the defendants were denied by the plaintiff and the main issues at the trial were as to the exact location, on the ground, of the Peter Grant property and of the Finlay Cameron lot. Although the grant in question refers to a plan as being annexed to it, neither the original grant nor the counterpart at the Crown Lands Office have now any plan annexed.

In stating the reasons for the judgment appealed from, Mr. Justice Townshend, after making reference to certain hearsay evidence as improperly admitted, proceeds as follows:

"While in my opinion such evidence could not properly be received in this case, still more objectionable was the reception of certain plans, or copies of plans, found in the Crown Land Office, which, without doubt, must have carried great weight with the jury. The first of these plans is these marked 'W. W. F.' There was no plan attached to the grant under which Peter Grant and others got their title from the Crown. The grant says: 'and has such shape, form and marks, as appears by a plan thereof hereunto annexed.' * * * The last revision of the statutes (R. S. N. S. (1900) ch. 163, sec. 20), provides: '(1) A copy of any duplicate original of a grant from the Crown deposited in the Department of Crown Lands, certified by the Commissioner of Crown Lands, or a copy of any grant from the books of registry for any registration district in which the land granted is situated, certified under the hand of the registrar of deeds, shall be received in evidence in any court to the same extent as the original grant.' '(2). If any such duplicate origi-

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nal contains any reference to any plan, and there is on file in such department a plan corresponding to the description. or meeting the requirements of the said duplicate original, *such plan shall be deemed to be the plan referred to in such duplicate original notwithstanding the same is not annexed to such duplicate original.*' * * * It will be observed that the plan produced in evidence 'W. W. F.' was a certified copy of a plan shown to witness by Mr. Austin, in the Crown Land Office, and not the *plan on file* in the office. Objection was at once made that the statute did not make a certified copy evidence, and it is evident that it does not, and the objection was sound."

The questions at issue on the present appeal are stated in the judgment now reported.

Newcombe K.C. and *Henry* for the appellants.

W. B. A. Ritchie K.C. for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—I am of opinion that this appeal should be dismissed.

When this case was on appeal before us, after the first decision of the Supreme Court of Nova Scotia (1), we held, (26th Feb., 1903), affirming the judgment of that court that the area described in the mining lease under which the plaintiff claims was clearly defined and ascertained, and that all reference in the description therein to the southern line of Peter Grant's lot might be eliminated as *falsa demonstratio.*

Now, it was clearly proved at the second trial that most, if not all, of the workings, whether old or new, complained of were within that ascertained area, and it follows, therefore, in my view, that the plaintiff made out a *primâ facie* case, having put in his lease from the Crown, and having proved a trespass or con-

(1) 35 N. S. Rep. 376.

version by the defendants or those under whom they claim, upon any lands or goods within its boundaries. But the defendants claiming under the successors in title of Peter Grant, whose patent gave him a title to all minerals (the royal metals, of course, accepted), had a right to prove that, notwithstanding the lease from the Crown of the minerals below the surface, the Peter Grant lot overlapped that tract and that the ore taken out was taken out wholly within the limits of of the Peter Grant patent. This for the most part they established by sufficient evidence but they did not do it *in toto*.

The principal evidence that was given to shew the true location of the southern line of the Peter Grant lot was that of the surveyor Holmes, who, although at the first trial he had placed it as co-terminous with the boundary of the mining lease, at the second trial admitted that it was several chains south of that line. No witness gave any evidence to shew that the true line was further south than where Holmes, at the last trial placed it. The defendant company were, therefore, held to have been within their rights in respect to all ore mined north of the line so proved by Holmes, but there was evidence, and so far as I can make out, undisputed evidence, that the new workings, as they are called, from which ore was taken and which came into the hands of the defendant company, were south of the Holmes line.

Alexander McDonald, who was the director and secretary of the company, testifies that there were twelve hundred tons taken out of the new shaft, (otherwise spoken of as the new workings), in the year 1900. Now, if the new shaft was south of the only southern line of the Peter Grant lot, then the plaintiff must succeed, and a verdict for the defendants must be held

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to be contrary to the evidence, and the order for a new trial was consequently right.

I do not think it necessary to express any opinion as to the view which Mr. Justice Townshend took as to the improper receipt of alleged hearsay evidence, but I think he was right in his view as to the reception of the copy of the plan alleged to be a copy of the plan attached to the original grant.

If the plan itself had been produced and proved by a competent officer to be an original on file in the Crown Lands Office, it would, at common law as well as under the statute of 1900, have been evidence. Having probably been made by the officers of the Crown Lands Department about a century before the plaintiff's lease, it was certainly evidence against the Crown, not conclusive evidence, but evidence, as an admission by the Crown of the character of the country evidently surveyed by its officers and granted to settlers. And, if it is evidence against the Crown, it is likewise evidence against all persons claiming under the Crown subsequently to its coming into existence.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. A. Henry.*

Solicitor for the respondent: *H. C. Borden.*

H. EDWIN MOORE AND OTHERS, (PLAINTIFFS)..... } APPELLANTS;

AND

GEORGE F. ROPER (DEFENDANT).....RESPONDENT.

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*Dec. 3.
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*Jan. 31.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Debtor and creditor—Assignment of debt—Sheriff's sale—Equitable assignment—Statute of Limitations—Payment—Ratification—Principal and agent.

In Nova Scotia book debts cannot be sold under execution and the act of the judgment debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.

The purchaser received payment on account of a debt so sold which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations.

Held, that though the creditor might be unable to deny the validity of the payment he could not adopt it so as to obtain a right of action thereon and the payment having been made to a third party who was not his agent did not interrupt the prescription. *Keighley, Maxtead & Co.* v. *Durant* ([1901] A. C. 240) followed.

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

The facts of the case are stated by the trial judge in his judgment as follows:

"The plaintiff, H. E. Moore, was in partnership with one Robertson, and the firm sold part of the goods for which the action is brought and the other part Moore sold to the defendant after the dissolution when Moore took an assignment of Robertson's interest in the assets. On the 19th of January, 1897, H. E. Moore assigned for the benefit of creditors of W. A. Moore and one Moffat. On the same date W. H. Moore

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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recovered judgment against H. E. Moore for upward of $15,000 and an execution was forthwith issued and placed in the sheriff's hands. Apparently the assignment was afterwards treated as void for under the execution a levy upon and sale were made of the goods of H. E. Moore. The books of account and book debts due to H. E. Moore were levied upon under the execution and a sale of the same took place on the 22nd April, 1897. The execution was returned satisfied for the amount realized from the goods, book debts, etc. Before this sale, namely, on the 22nd February, 1897, W. H. Moore himself had assigned for the benefit of creditors to one Treen and Treen, at the sheriff's sale, as such trustee bid in these books and book debts, which included the claim against the defendant. He took possession of the books, notified debtors, and for several months, indeed until the 22nd June, 1898, he was collecting under the supervision of H. E. Moore these debts. On that date Treen re-conveyed back to W. H. Moore, who had compounded with his creditors. On the 24th October, 1898, a decree was made at the suit of a creditor of H. E. Moore setting aside as contrary to the Statute of Elizabeth, the assignment made by H. E. Moore. Apparently it contained some of the clauses condemned by the Supreme Court of Canada.

"Recently an action has been brought to recover the claim against the defendant and every person who has any possible interest has been joined as plaintiff. The Statute of Limitations is pleaded and the plaintiffs are obliged to rely upon an acknowledgment in writing and a payment made during the period when Treen, trustee of W. H. Moore, was believed to be the owner of the chose in action. The payment was made by a shipment of fish to be sold and the proceeds credited on account of the debt. H. E. Moore was concerned in conducting the business and he was cognizant of the

collection and its payment. The amount was credited in the original account in the book of H. E. Moore. The defendant in evidence says: 'After that I shipped the fish to Mr. William Ross for Mr. H. E. Moore in payment of the claim he had against me.' He had already received from Treen, as trustee, a statement of the account and a notification and his letter advising of the shipment of the fish was addressed to Treen."

The learned judge held that this transaction was capable of being, and was ratified by H. E. Moore and took the case out of the statute. He gave judgment for the plaintiffs for the sum claimed which judgment was reversed by the full court.

Newcombe K.C. for the appellants. The decision of the learned trial judge was right. The assignment having been for the benefit of creditors solely, and having been set aside as void as against creditors, is completely out of the way. Such assignments stand on a different footing from others which stand good *inter* parties. If the assignment be regarded as out of the way and the payment be regarded as having been made to Treen or to H. E. Moore, it was properly made; Treen and H. E. Moore were, it is submitted, in privity. Again, there has been ratification. The payment made has been adopted and is credited in the statement of claim herein. See Warren on Choses in Action, pp. 64, 78, 79 and 82.

If the assignment is out of the way and book debts cannot be seized and sold by the sheriff and if seized and sold such action cannot be ratified, then appellant H. E. Moore would be the creditor to whom the respondent in his evidence testified he made the payment through Ross, and the debt could be garnished by creditors. If the assignment be good and the book debts not leviable by the sheriff, even in this case H. E. Moore would be *cestui que trust*, and a payment

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made to him can be taken advantage of by the assignees to bar the Statute of Limitations. *Megginson* v. *Harper* (1). Darby & Bosanquet on Limitations of Actions (2 ed.) 114, 115, 116.

Both of the exceptions referred to in the case of *Stamford Spalding and Boston Banking Co.* v. *Smith* (2), occur here:—1. A payment to a person erroneously believed to fill a representative capacity which payment will enure to the benefit of the person entitled to receive payment. 2. A mistake made by both parties, which mistake will not prevent the payment having the effect it was intended to have.

In support of the exceptions referred to in *Stamford Spaulding and Boston Banking Co.* v. *Smith* (2) we refer to Wood on Limitations of Actions, p. 231; *Hart* v. *Stephens* (3); *Trulock* v. *Robey* (4); *McAuliffe* v. *Fitzsimons* (5); *Clark* v. *Hooper* (6); *Lyell* v. *Kennedy* (7); *Worthington* v. *Grimsditch* (8); Hewett on Statutes of Limitations, p. 32, s. 8.

Treen was, by implication of law, agent for the assignee of H. E. Moore, and a payment made to him either in error as to his capacity or otherwise enured to the assignee's benefit. Freeman on Executions, p. 262. A *fortiori* the debtor or his assignee could recover the amounts by suit unless ratification of payment was permissible and exercised.

W. B. A. Ritchie K.C. for the respondent. In order to take the case out of the Statute of Limitations, the payment must be made to the creditor or his agent. The respondent never understood that Treen was in any sense the agent of H. E. Moore; *Stamford Spalding and Boston Banking Co.* v. *Smith* (2). See also *Keighly, Maxted & Co.* v. *Durant* (9); *Fraser* v. *Sweet* (10).

(1) 2 C. & M. 322.
(2) [1892] 1 Q. B. 765.
(3) 6 Q. B. 937.
(4) 12 Sim. 402.
(5) 26 L. R. Ir. 29.
(6) 10 Bing. 480.
(7) 14 App. Cas. 437.
(8) 7 Q. B. 479.
(9) [1901] A. C. 240.
(10) 13 Man. Rep. 147.

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The sheriff in selling under an execution does not act as agent of the judgment creditor, much less of the judgment debtor; he acts for himself, executing the law. *Wilson* v. *Tumman* (1). H. E. Moore could not ratify the sale, having assigned all his book debts for the benefit of his creditors before the sale took place. There can be no ratification without full knowledge. It does not appear that H. E. Moore had notice or knowledge of the invalidity of the sheriff's sale and he no doubt supposed it valid. He cannot be said to have acquiesced in the sale, because, not knowing it was invalid, he took no steps to question it. Leake on Contracts, (4 ed.) page 311; *Lewis* v. *Read* (2); *La Banque Jacques Cartier* v. *La Banque D'Epargne, &c. de Montréal* (3); *Marsh* v. *Joseph* (4) at page 246. Mere failure to give notice of invalidity is not acquiescence or ratification. We also refer to *Boultbee* v. *Burke* (5); *Tanner* v. *Smart* (6); *Grenfell* v. *Girdlestone* (7) at p. 676; *Howcutt* v. *Bonser* (8).

The judgment of the court was delivered by:

KILLAM J.—We are all of opinion that the judgment in this case should be affirmed on the ground stated by Townshend J., to which I will add but a few words upon one or two points raised before us.

It has been suggested that there was an equitable assignment by H. E. Moore to Treen. It does not appear to me that there were either words or acts amounting to such an assignment. Moore did nothing more than stand by and allow the sheriff's vendee to collect the debts, probably supposing that the sheriff's sale was good. While he might possibly have been

(1) 6 M. & G. 236.
(2) 13 M. & W. 834.
(3) 13 App. Cas. 111.
(4) [1897] 1 Ch. 213.
(5) 9 O. R. 80.
(6) 6 B. & C. 603.
(7) 2 Y. & C. (Ex.) 662.
(8) 3 Ex. 491.

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estopped from denying the validity of a payment to Treen, he cannot adopt it so as to give himself a right of action under it.

Treen did not assume to act as the agent of Moore, and therefore, upon the principle laid down in *Keighley, Maxsted & Co.* v. *Durant* (1), Moore could not make the transaction his own by ratification.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. F. Phalen.*

Solicitor for the respondent: *Hugh Ross.*

(1) [1901] A. C. 240.

THE LISCOMBE FALLS GOLD MINING COMPANY AND ROBERT BROWNELL (PLAINTIFFS) ..... APPELLANTS;

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AND

JAMES R. BISHOP, AND A. J. O. MAGUIRE AND OTHERS DOING BUSINESS AS THE ALBION LUMBER COMPANY (DEFENDANTS).. RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mining lease—Prospector's license—Testing machinery—Annexation to freehold—Trade fixtures—Fi. fa. de bonis—Sale under execution.

The licensees of a mining area in Nova Scotia, erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various parts of the mill were placed in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold.

Held, that the mill was a chattel or, at any rate, a trade fixture removable by the licensees during the tenure of their lease or license and, consequently, it was subject to seizure and sale under an execution against goods.

Judgment appealed from (36 N. S. Rep. 395) affirmed, but for different reasons.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial dismissing the plaintiff's action with costs.

The case is stated in the judgment of the court as delivered by His Lordship Mr. Justice Davies.

Ross K.C. and *Lovett* for the appellants.

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 395.

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Henry for the respondent, Bishop.

Mellish K.C. for the respondents, the Albion Lumber Company.

The judgment of the court was delivered by:

DAVIES J.—The substantial question argued upon this appeal and on the determination of which the appeal must either be allowed or dismissed is whether a "five stamp gold mining mill" with boiler and all necessary machinery, erected by the appellant company on the waste lands of the Crown in Nova Scotia under a mining license given to it by the Commissioner of Mines, could be sold by the sheriff under an execution against the appellant company authorizing and directing a sale of its goods and chattels. The determination of this question depends upon the other questions whether the mill had been so annexed to the soil as to have been part of the land or whether it was a trade fixture capable of being removed by the appellant company as the tenant or licensee of the mining area during the term of its lease or license. Many questions were raised at the trial and before the Appeal Court in Nova Scotia but they were all with the exception of those above referred to either practically abandoned before this court or disposed of at the argument.

The learned trial judge held that, as a matter of fact, no parts of the mill were fixtures in the soil so as to have become and form part of the land, and in that finding I concur.

All the various parts of the mill were either resting by their own weight on the land or were only bolted down and all could be removed by unscrewing the bolts and lifting the parts out of their places. The only part to which it was contended this did not

strictly apply was the boiler, but the facts shew that the land was wilderness and that no injury could possibly be done to it by removing the boiler. The mill was only erected for testing purposes and the degree and object of the slight annexation which was apparent convinces me that it never was the intention of the parties to make it a fixture or part of the land.

The authorities all seem to show that it is not solely the fact of the chattels being annexed to the soil which determines whether or not they have become part of the soil but that the object and purpose and intention of their annexation must be looked to.

In *Hellawell* v. *Eastwood* (1), a question arose as to whether certain machinery used for manufacturing purposes was attached to the freehold so as to be exempt from distress. The court held they had not become part of the freehold and in delivering the judgment of the court Parke B. said,

> they were slightly attached so as to be capable of removal withou the least injury to the frame of the building or to themselves; and the object and purpose of their annexation was not to improve the inheritance but merely to render the machines steadier and more capable of convenient use as chattels.

See also *Huntley* v. *Russell* (2); and *Waterfall* v. *Penistone* (3), in which case the court acted upon the rule laid down in *Hellawell* v. *Eastwood* (1). It seems to me that every word of that rule is applicable to the erection of this temporary machinery for mining purposes on the waste lands of the Crown. It was erected for testing purposes; it was only slightly attached to the land, in fact the only part of it which could be said to be even so slightly attached or affixed was the boiler; and it was not even attempted to be

(1) 6 Ex. 295.
(2) 13 Q. B. 572.
(3) 6 E. & B. 876.

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argued that it was so attached with the object and purpose of improving the inheritance. All of the machinery was capable of being removed without any injury to the soil. The object and purpose and intention of its erection was the testing of the areas for minerals tentatively and temporarily. In *Holland* v. *Hodgson* (1), at p. 335, Blackburn J. in delivering the considered judgment of the court stated the rule deducible from the cases to be that

> an article which is affixed to the land, even slightly, is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

In the case at bar the circumstances convince me beyond reasonable doubt that it was intended this machinery should all along continue as a chattel and not be part of the Crown's wild land.

The case of *Wake* v. *Hall* (2), is one relating to mines and buildings and machinery erected for mining purposes and affixed to the soil, and to the right of the miner to pull down and remove them from the soil even though annexed. Though that decision depended largely upon custom and statute, the observations of the several law Lords on the broad general question raised in this appeal are most pertinent. Lord Blackburn, at pages 204-5 says:

> Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to show that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough, in *Elwes* v. *Maw* (3), says that those cases "may be considered mainly on

(1) L. R. 7. C. P. 328. (2) 8 App. Cas. 195.
(3) 2 Sm. L. C. (11 ed.) 189.

the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty." Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and as Lord Hardwicke said, in *Lawton* v. *Lawton* (1), "you shall not destroy the principal thing by taking away the accessory to it," and, therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being, as is stated in the 12th and 13th admissions, below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to the destruction of the land, or to show that the property in the materials must have been intended to be irrevocably annexed to the soil.

Lord Bramwell says at page 209:

But if no reason can be given why the maxim (*quicquid solo plantatur solo cedit*) should apply to this case, plenty of reason can be given why it should not. The defendants are lawfully in possession of the premises. They or their predecessors lawfully built these buildings, which are essential to the working of the mine, being accessorial to the engine and works; and it would be most unreasonable that they should have to leave them on the premises—as unreasonable as that they should leave the engine. On this ground alone I should advise your lordships to affirm the judgment.

Similar reasons and observations are to be found in the judgments delivered by Lord Watson and Lord Fitzgerald, and every word of them is applicable to the case before us.

There is this peculiarity in this case which, so far as my research has extended, cannot be found in any other case, that the Crown is not as a party to these pro-

(1) 3 Atk. 13.

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ceedings and has never contended that the engine and machinery had become annexed to its land and had ceased to be chattels of the appellant company. It is the latter company itself which puts forward the plea and bases an application upon it for a declaration that the sheriff's sale under the execution against it was as regards this machinery void, and the purchaser, who by the way had not removed the machinery, a trespasser. If the rule laid down by Lord Ellenborough in the leading case of *Elwes* v. *Maw* (1), at page 195 is followed that

> where the fixed instrument, engine or utensil (and the buildings covering the same falls within the same principle) was an accessory to a matter of a personal nature it should be itself considered as personalty

there would be, in my judgment, small room for doubt in this case. That rule is only another way of stating the proposition submitted by Baron Parke in *Hellawell* v. *Eastwell*, (2) that "it is the object, purpose and intention of the annexation which is to be considered," and if these are not to improve the inheritance but if the chattels are annexed as an accessory to a matter of a personal nature such as rendering the machinery steadier and more capable of more convenient use as chattels they will still, notwithstanding the slight annexation, continue their character as chattels. Now who can doubt but that such slight annexation as there was in this case capable of severance without detriment to the soil had for its object the *personal* one of testing the area licensed to the appellant company for minerals and as accessory to the mining the company carried on? Personally I should not consider it open to argument that the object was not the improvement and enrichment of the lands of the Crown. No such argument was addressed to us, the counsel being content to take it for granted, as the court of appeal had

(1) 3 East 28; 2 Sm. L. C. (11 ed.) 189. (2) 6 Ex. 295.

found, that the slight annexation had worked the transformation from chattels to land.

I do not think, however, it is necessary to rest my decision upon that ground because even assuming the mill and machinery to have become fixtures I am still clearly of opinion that they were within the category of trade fixtures which as between the appellant company and the Crown the former had a right to remove during the existence of the tenancy or holding

The appeal court of Nova Scotia held that the mill was real estate and that the sheriff under an execution directing the sale of personal property could not sell it nor give any title to the purchaser. But they at the same time held that this present equitable action could not be maintained because it was unnecessary and if the purchaser attempted to exercise his assumed rights as such an action at law could be maintained against him for damages, and, on a proper case being made out, an injunction granted restraining the purchaser from interfering with the mill On these grounds they dismissed the appeal.

To understand properly the respective rights and liabilities of the parties it becomes necessary to ascertain the facts, and the main and important question is: In what relation did the appellant stand towards the Crown? If in the relation of tenant or any analogous relation such as mining licensee there does not seem to be any reasonable room for doubt that the mill was a trade fixture which the appellant company had a right to remove, and if that be so it seems under the authorities reasonably clear that it might be seized and removed under a writ of *fieri facias* or other similar process. See the authorities as collected in Amos & Ferrard on Fixtures, pp. 393-4, and in 13 Am. & E. Enc. p. 676. Then what relation did the appellant company occupy towards the Crown? The clerk of

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the mines office of Nova Scotia in giving his evidence says:

> The mill is on areas 922 and 923, block 5, Millers Lake. * * * The plaintiffs have prospecting licenses for the areas referred to dated January 13th, 1902, for one year.

Under these licenses the appellants were not only entitled to enter upon these areas for the purpose of prospecting, but by section 159 of the Mines Act were entitled to a lease of such areas. Such lease if granted would be for forty years at an annual rental of fifty cents per area per annum—see sections 171 and 181 as amended. The appellants had put in an application to the Commissioner of Crown Lands for a lease of the surface which had been approved and they thereby became tenants at will. The appellants contended that this was a mistake and that the application was really for a grant and not a lease. But even if this was so their position as vendees in possession of the land before the passing of the grant would be that of tenants at will. Woodfall, Landlord & Tenant, 17 ed. p. 258; *Doe d. Stanway* v. *Rock* (1).

In his judgment in the case of *Wake* v. *Hall* (2) at p. 207, Lord Watson, in referring to the three classes of cases mentioned by Lord Ellenborough in his judgment in *Elwes* v. *Maw* (3) of which that of Landlord & Tenant was one, says:

> I assume that the doctrine would receive a similar application in cases analogous to these.

If the appellant company could be held to be not a tenant of any kind but a licensee simply and only, its position must in reason with respect to this machinery as between it and the Crown be the same as if it was a lessee. The erections were not made in bad faith and without a title in the lands of another in which case they would become part of such lands but were

(1) 4 M. & G. 30. (2) 8 App. Cas. 195.
(3) 1 East 28; 2 Sm. L. C. (11 Ed.) 189.

made with their own materials and money as licensees from the Crown on the latter's waste lands and as necessary to test and carry on the very operations the lands were given into their possession for. The stamp mill in dispute having been erected by the company under these circumstances on these lands for testing purposes was, in my opinion, a trade fixture removable by them during the tenure of their lease or license and perhaps within a reasonable time afterwards, and consequently while so removable subject to seizure and sale under the execution issued.

The authorities do not seem to leave this proposition in any doubt. Mather on Sheriff law, 1894, pp. 249-257, especially on page 252 where, after reviewing the authorities the writer says

but now it is clear that all fixtures of whatever nature over which the person proceeded against has a right may be taken

and seized by the sheriff under writ of *fi. fa.* or other similar process.

Once it is conceded that the relation in which the company appellant stood towards the Crown with reference to this stamp-mill was that of a tenant towards his landlord or any analogous position which justified him in erecting his mill for purposes of a personal nature, such as mining or testing for minerals, then his right to remove the fixtures as being trade fixtures seems clear, and falling within the principle of being "an accessory to a matter of a personal nature" must be considered as personalty and not as an interest in land. The stamp-mill in this case was an accessory to the carrying on of mining or testing for minerals on the land and was a matter of a personal nature, mining, within the definition given by Lord Ellenborough. The tenant has an interest as well as a power. *Poole's*

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Case (1); *Minshall* v. *Lloyd* (2); *Saint* v. *Pilley* (3).

In *Place* v. *Fagg* (4), Bayley J., speaking for the court, says:

> Fixtures which the tenant has a right to remove may be treated as chattels in a proceeding against the tenant.

The cases of *Hallen* v. *Runder* (5), and *Lee* v. *Gaskell* (6), shew that an agreement for the sale of such an interest as the tenant possesses in fixtures which he has the right to remove is not an agreement for the sale of an interest in land under the 4th section of the Statute of Frauds.

It is stated in *Barnard* v. *Leigh* (7), that the sheriff must separate and sell fixtures, over which he has a right of severance, apart from the leasehold if he cannot sell them together. And while that may be so, I cannot see why, under circumstances such as we have in this appeal, if the sheriff can sever the trade fixtures from the land and sell them, he cannot sell to a purchaser under his writ and confer upon him the same power of severance. On principle I cannot see why this should not be done and, in the absence of any express authority to the contrary, I am of the opinion that it can, and that a purchaser from a sheriff under such a writ, purchases as well the article which the tenant has the right to sever and remove as the right itself which the sheriff by virtue of his writ possesses.

The only other point pressed in argument was the alleged irregularity of the sale of the fixtures and other chattels *en bloc*. But whether or not by reason of such a sale an inadequate price was obtained, or whether or not as between the sheriff and the defendant (the now appellant) there was a wrong done the latter for which the former would be liable for damages, cannot arise in

(1) 1 Salk. 368.
(2) 2 M. & W. 450.
(3) L. R. 10 Ex. 137.
(4) 4 Man. & R. 277 at p. 281.
(5) 1 C. M. & R. 266.
(6) 1 Q. B. D. 700.
(7) 1 Stark. 43

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this appeal. The respondent, the execution creditor, in no way personally interfered in the execution of his duty by the sheriff and is not responsible even on the assumption (which I only adopt for the sake of argument) that a wrong was done by him to the execution debtor in the manner of the sale. The appellant company has waived any claim it might have against the sheriff and neither the execution creditor, who did not interfere, nor the purchaser at the sale are responsible for the sheriff's wrong doing, if any.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. A. Lovett.*

Solicitor for the respondent, Bishop: *W. A. Henry.*

Solicitor for the respondent, The Albion Lumber Co.: *W. H. Fulton.*

Solicitor for the respondent, Maguire: *H. C. Borden*

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*Oct. 27, 28, 31, Nov. 2, 3.
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*Feb. 27.

THE RURAL MUNICIPALITY OF NORTH CYPRESS (PLAINTIFF).... } APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

THE RURAL MUNICIPALITY OF ARGYLE (PLAINTIFF)..... } APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } RESPONDENTS.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE SPRINGDALE SCHOOL DISTRICT, NO. 23, OF THE NORTH-WEST TERRITORIES (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Assessment and taxation—Constitutional law—Exemptions from taxation—Land subsidies of the Canadian Pacific Railway—Extension of boundaries of Manitoba—Construction of statutes—B. N. A. Acts 1867 *and* 1871—33 *V., c.* 3 *(D.)*—43 *V., c.* 25 *(D.)*—44 *V., c.* 14 *(D.)*—44 *V., cc.* 1 *and* 6 *(3rd Sess.), (Man.)—Construction of Contract—Grant in præsenti.—Cause of action.—Jurisdiction.—Waiver.*

The land subsidy of the Canadian Pacific Railway Company authorized by the Act, 44 Vict. ch. 1 (D.), is not a grant *in præsenti* and, consequently, the period of twenty years of exemption from taxation

*PRESENT :—Sir Elzéar Taschereau C.J., and Sedgewick, Girouard, Davies and Nesbitt JJ.

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of such lands provided by the sixteenth section of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual issue of letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted and accepted by the Canadian Pacific Railway Company.

The exemption was from taxation "by the Dominion, or any province hereafter to be established or any municipal corporation therein".

Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a province "thereafter established" and such added territory continued to be subject to the said exemption from taxation.

The limitations in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act, 44 Vict. ch. 14, upon the terms and conditions assented to by the Manitoban Acts, 44 Vict., (3rd Sess.), chs. 1 and 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.

Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly or any municipal or school corporation therein is Dominion taxation within the meaning of the sixteenth clause of the Canadian Pacific Railway contract providing for exemption from taxation.

Per Taschereau C. J.—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case and such want of jurisdiction could not be waived.

APPEALS from the judgments rendered by the Court of King's Bench for Manitoba, in three cases consolidated for hearing by way of appeal, (1) affirming the udgments of the trial judge by which the actions of the plaintiffs, the Municipality of North Cypress and the Municipality of Argyle, were respectively dismissed, and reversing the judgment of the said trial judge by which the action of the said plaintiff, the Springdale School District, had also been dismissed

(1) 14 Man. Rep. 382.

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and ordering in the latter case that judgment should be entered therein in favour of the said plaintiff for $125 with costs of suit on the King's Bench scale, but allowing no costs of the appeals taken in any of said consolidated cases.

The actions were instituted for the purpose of determining the time of the commencement of the twenty years' exemption of the company's land grant from taxation under clause 16 of the contract for the construction of the Canadian Pacific Railway, entered into between the Government and the company on 21st October, 1880, and ratified by the Act 44 Vict., ch. 1, (D.) assented to on the 15th February, 1881, and the determination of the powers of taxation affecting the land subsidy in aid of the construction of the Canadian Pacific Railway. Three separate suits, in the Court of King's Bench for Manitoba, were brought for the recovery of taxes upon portions of the land grant of the railway company, in which the two municipal corporations in Manitoba and the school district above mentioned were plaintiffs, the Canadian Pacific Railway Company being defendants in all the cases. The jurisdiction of the court over the case from the North-West Territories was not objected to. The questions of law and fact in dispute were almost identical in each case, and formal judgments were entered for the defendants. The cases were then taken, by way of appeal, to the full court, where, by the consent of all parties, the three suits were consolidated.

The municipality of North Cypress is situated in Manitoba wholly within the main line belt provided for in section 11 of the contract for the construction of the Canadian Pacific Railway, and the municipality of Argyle is also situated in Manitoba entirely outside of this main line belt but within a reservation set apart by the Dominion Government by order in coun-

cil dated 3rd November, 1882, for the purposes of the contract. Both municipalities are in the territory which, at the time of the contract, formed a part of the North-West Territories and which was added to Manitoba in 1881, shortly after the contract, by the joint legislation of the Dominion and Manitoba (1) and became a part of Manitoba, by proclamation, on the first day of July, 1881. The Springdale School District is situated in the North-West Territories and is within the said main line belt.

The principal issues upon the present appeals were whether or not certain of the subsidy lands granted to the company, within twenty years of the institution of the actions, had become liable to assessment and taxation by the corporations within the limits of which they were respectively situated, by reason of the expiration of twenty years from the date of the contract for the construction of the railway, or by reason of the expiration of the period of twenty years from the time of the selection and setting apart of certain unpatented lands as part of such land subsidy earned by the company under the said contract and to which they were then entitled to a grant by letters patent from the Crown.

The railway company contended that all the lands were exempt from assessment and taxation for twenty years from the actual date of the issue of letters patent of grant from the Crown, under the sixteenth clause of the above mentioned contract, which is as follows:—

"16. The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be forever free from taxation by the Dominion or by any

(1) 44 Vict., ch. 14 (D.) and 44 Vict. (3rd Sess.), chs. 1 and 6 (Man.)

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province hereafter to be established or by any municipal corporation therein, and the lands of the company in the North-West Territories until they are either sold or occupied shall also be free from such taxation for twenty years after the grant thereof from the Crown."

In respect to the lands situated in Cypress and Argyle, those municipalities being part of the territory added to Manitoba after the ratification of the contract, the company also claimed exemption under the joint legislation in 1881, 44 Vict., 3rd sess., ch. 1, (Man.), which provided that such "increased limits shall be subject to all such provisions as Parliament has enacted or may hereafter enact respecting the Canadian Pacific Railway and the lands to be granted in aid thereof;" and the Act 44 Vict, ch. 14 (D.), assented to 21st March, 1881, extending the boundaries of Manitoba by the addition of territory which had, until then, been part of the North-West Territories, upon the terms and conditions mentioned in 44 Vict., ch. 1, 3rd sess., (Man.), and the Act 44 Vict., ch. 6, 3rd sess., (Man.), assented to on the 25th May, 1881, and brought into force by proclamation 1st July, 1881, enacting that the boundaries of the province should be extended as provided by the Dominion Act and subject to the terms and conditions therein contained, and that the said Act and all the enactments thereof should have the force and effect of law in Manitoba so increased as aforesaid.

The plaintiff municipalities contended that, even if the position taken by the railway company was sound, the exemption did not cover the taxation by Manitoba, a province established before the contract was made.

The material questions raised upon this appeal are stated in the judgments now reported.

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Howell K. C., and *Riddell K. C.*, for the appellants, the Rural Municipalities of North Cypress and Argyle and for the respondent, the Springdale School District.

C. Robinson K. C., *Ewart K. C.*, *Creelman K.C.* and *Phippen* for the Canadian Pacific Railway Company, respondents and appellants.

The CHIEF JUSTICE.—In the Springdale case the appeal should, in my opinion, be allowed without costs. The action should have been dismissed *in limine* by the original court *ex proprio motû* for want of jurisdiction. It is an action by which the Manitoba courts are asked to declare that a lot of land situate in the North-West Territories, outside of the territorial limits of the said courts, is and will be in the future subject to taxation for school purposes under the laws of the North-West Territories. That is the first and fundamental conclusion of the action. It might as well have been brought at Hong Kong. And the jurisdictional objection could not be waived. The action cannot be treated as a mere personal one for debt. The judgment for $125 (the amount claimed was $27) necessarily implies that the land in question is, and will be until sold, liable to taxation. That is why, probably, the costs on the King's Bench scale are granted. The controversy between the parties is not at all as to the amount claimed, but as to the liability or non-liability of this land to taxation.

In the other two cases I agree that the appeals should be dismissed. I would have done so at the hearing without calling on the respondents. The appellants' contentions are untenable. I do not see that I can usefully add anything to the cogent reasoning of the Chief Justice for Manitoba. I would say, no costs to either party as in the court below.

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SEDGEWICK J.—I agree in the reasoning of my brother Davies.

GIROUARD J.—I think the Canadian Pacific Railway Company has a right to judgment in its favour in the three cases. Without referring to all the statutes and orders in council which have been cited at bar and commented upon during five days, I propose to base my opinion upon clause 16 of the contract, sanctioned by the Parliament of Canada, and the statutes which provide for the extension of the boundaries of Manitoba and the constitution of the territories in force at the time of the passing of the contract.

Clause 16 of the contract declares:

> The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof and the capital stock of the company shall be forever free from taxation by the Dominion, or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown.

The courts below held that the taxes demanded by the plaintiffs, whether school or municipal, were "taxation" by a "municipal corporation" within the meaning of the above clause and since our decision in *The Canadian Pacific Railway Co.* v. *The City of Winnipeg* (1), I submit that the soundness of this conclusion is not open to any doubt.

A great deal of stress has been laid upon the expressions in clause 16 "by any municipal corporation therein." It is contended that they mean that the exemption from taxation applies only to corporations established in any new province organized in the territories. If this contention be well founded, it does seem

(1) 30 Can. S.C.R. 558.

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clear that the Manitoba municipalities at least cannot dispute the right of exemption; for a municipal corporation situated in the extended territory of Manitoba is exactly in the same position as a municipal corporation in a newly organized province in the territories. But is that the true meaning of the first part of clause 16? Did Parliament intend to give less power to a new province than to the provisional government? It cannot be so. It seems to me that the reference to any future province or "any municipal corporation therein" was hardly necessary, as the right of exemption was clearly secured by the words "shall be forever free from *taxation by the Dominion.*" This provision comprises first exemption from any tax imposed upon the property therein described directly by the Parliament of Canada, whether in the Territories or in the old provinces, for by the B. N. A. Act, s. 91, par. 3, the Parliament of Canada may resort to direct taxation upon lands or other property throughout the whole Dominion, although it has not done so yet. It means *a fortiori* that in the Territories owned and controlled by the Dominion, no tax of any kind whatever can be exacted from the Canadian Pacific Railway Co. by the Dominion Parliament or any local government organized or to be organized by that Parliament, whether provisional or provincial, or by any municipal corporation therein, for what the Dominion cannot do directly cannot be done indirectly by any delegated authority. The latter part of clause 16, however, removes in my mind any possible doubt in the matter,

> and the lands of the company in the North-West Territories * * shall also be free from such taxation, etc.

"Such taxation" must mean any kind of taxes imposed by the Dominion or its delegated authority upon the land grants in the North-West Territories.

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The courts below held that by clause 16 the Parliament of Canada did not intend to make a statutory grant *in præsenti*, but only a Crown grant by patent *in futuro*. The decision of this court in *The Rural Municipality of Cornwallis* v. *The Canadian Pacific Railway Co.* (1), and also the recent judgment of the Privy Council in the *Swamp Lands Case* (2) of Manitoba confirming the judgment of this court (3)—a much stronger case than the present one)—fully support this contention.

The Parliament of Canada, having first sanctioned the above contract, subsequently, on the petition of the Legislature of Manitoba, enlarged the Province of Manitoba by the addition of a large territory which until then had been part of the North-West Territories; but in face of the limitation expressly assented to by the Legislature of Manitoba, it cannot seriously be contended that this new territory, like the old one granted when it became a province, was subject to the same regulations and provisions and is free from past restrictions affecting the same. The enlargement is declared to be subject to the following condition by both the Parliament of Canada and the Legislature of Manitoba:

> The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway, and the lands to be granted in aid thereof.

This point has also been decided by this court in favour of the contention of the Canadian Pacific Railway Company in *The Rural Municipality of Cornwallis* v. *The Canadian Pacific Railway Co.* (1).

I therefore agree with all the judges in the courts below that the actions of the Municipality of North

(1) 19 Can. S. C. R. 702. (2) [1904] A. C. 799.
(3) 34 Can. S. C. R. 287.

Cypress and the Municipality of Argyle should be dismissed with costs.

I cannot see that a different conclusion can be arrived at in the other case of the Springdale School District No. 263 of the North-West Territories. I must confess that I fail to appreciate the force of the reasoning of Chief Justice Killam, concurred in by Richards J. I am rather inclined to agree with Mr. Justice Dubuc that the constitution previously granted to the Territories does not affect the case. It is true that before the Canadian Pacific Railway Act was passed, namely by 38 Vict. ch. 49, ss. 7 and 11, 40 Vict. ch. 7, s. 3, 43 Vict. ch. 25, s. 9, the council and the assembly of the Territories, respectively, were authorized to establish a system of local taxation for the support of schools. But each of the above statutes contains a proviso which, it seems to me, is a complete answer to the contention of the Springdale School District:

> Provided also that no ordinance to be so made shall be inconsistent with or alter or repeal any provision of any Act of the Parliament of Canada * * which may now, *or at any time hereafter, expressly* refer to the said Territories.

This reservation was a concession made to the Territories which must be respected, but not beyond its clear terms. I cannot conceive that until provincial autonomy be granted under the Imperial statutes to the Territories, or any part thereof, that the Parliament of Canada cannot amend, alter, or even repeal in whole or in part, any provision passed for its government; but by the above proviso the Parliament undertook to do so only by *express* enactments. Possibly the exemption from taxation in the Territories might be binding even if they had not been expressly mentioned, but it is not necessary to examine this point. The proviso was wisely inserted as a warning that the express orders of Parliament were to be the supreme law as

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long as the Territories remain part of the public domain of Canada, without provincial autonomy, which has not been granted to this day. They have not thus interpreted the proviso, although the exemption clause from taxes in favour of the Canadian Pacific Railway refers expressly to the Territories, and they, or their creatures, must abide the consequences and cannot even invoke surprise, good faith or unfairness.

For these reasons I am of opinion that the appeal of the municipalities of North Cypress and of Argyle should be dismissed with costs, and the appeal of the Canadian Pacific Railway Company against the Springdale School District should be allowed with costs.

DAVIES J.—Two of these appeals raised the question of the right of municipalities in the Province of Manitoba, as at present established, to tax the lands granted by the Dominion to the Canadian Pacific Railway Company under its contract in aid of the construction of its railway across the continent.

The question in these two appeals, of course, only applies to that part of the present territory of Manitoba taken in the year 1881 from the North-West Territories and added to the then existing Province of Manitoba by concurrent legislation of the Dominion and the province enacted by virtue of the Imperial Act, the "British North America Act, 1871."

The legislation taking this territory out of the North-West Territories and adding it on to the Province of Manitoba was passed by the Dominion and the province in the year 1881, a very short time after the passing of the Canadian Pacific Railway Act by the Dominion, 44 Vict. ch. 1, for the construction of the railway.

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The third section of the B. N. A. Act, 1871, provided that the Parliament of Canada might,

with the consent of the legislature of any province of the Dominion, increase, diminish, or otherwise alter the limits of such province upon *such terms and conditions* as may be agreed to by the said legislature.

The terms and conditions agreed to and incorporated in the legislation of the Dominion and the province extended to the new territory added to Manitoba all Dominion legislation which had been since the creation of Manitoba made applicable to it and then further provide that:

The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

Before the legislation passed, the Dominion Government had entered into the contract for the construction of the Canadian Pacific Railway, and by statute, 44 Vict. ch. 1, sec. 1, that contract had been "ratified and approved" and the Government

authorized to perform and carry out the conditions thereof according to their purport.

By sect. 2 a charter was authorized to be granted as therein prescribed and which on the conditions therein mentioned being complied with was to

have the force and effect as if it were an Act of the Parliament of Canada.

The contract so ratified and approved was made a schedule to the Act and in accordance with clause 21 it had annexed to it, as a schedule, the corporate powers, franchises and privileges of the company which were embodied in the charter subsequently granted by the Governor and which was to have "the force and effect of an Act of Parliament."

The 16th clause of the contract, as to the meaning of which there has been so much argument and on the

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construction of which so much depends, reads as follows:

The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company shall be forever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein, and the lands of the company in the North-West Territories until they are either sold or occupied shall also be free from such taxation for twenty years after the grant thereof from the Crown.

Mr. Riddell and Mr. Howell on behalf of the municipalities contended:—First, that the terms and conditions on which the increased territory had in 1881 been added to Manitoba, were not and could not be limitations upon its constitutional powers as a province of which the power of taxation of all lands within its bounds was one; that the Province of Manitoba was established when it was originally formed in 1870 and was not established within the meaning of the words used in the 16th clause of the contract when the additional territority was added to it. Secondly, that if there were such limitations the legislation of the Dominion Parliament ratifying and approving of the Canadian Pacific Railway contract and authorizing the issue of the charter was not an enactment "respecting the Canadian Pacific Railway and the lands to be granted in aid thereof" within the meaning of these words in the terms and conditions on which the increased territory was added to Manitoba and that if even it was such an enactment, under the proper construction of clause 16 of the contract, the period of exemption from taxation had expired as the meaning of the words "twenty years after the grant thereof from the Crown" meant either twenty years after the contract was passed virtually granting these lands or after the lands had been earned under the contract or after they had

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been earned and allotted and agreed to be accepted by the company "as lands fairly fit for settlement" as provided for by the contract. They enforced their argument by many illustrations shewing that the word "grant" was used in many sections of the contract in a general and popular sense as distinguished from the technical one of the issue of the letters patent.

A careful consideration, however, of all these arguments and of the contract itself, together with the circumstances under which it was granted and the objects sought to be attained as set out in the preamble of the Act, convince me that my first impression was correct and that the twenty years exemption from taxation of the 25,000,000 acres of land to be given in aid of the construction of the railway was to begin from and run after the issuing of the letters patent granting the lands, from time to time, after they had been earned, selected, surveyed, allotted and agreed to be accepted as complying with the general character of the lands the company was entitled to receive. I can discover no such words of present grant in the statute ratifying the contract as are to be found in the American statutes, decisions respecting the effect of the language in which were cited from the American reports as applicable to this contract and statute. I fail to see anything to justify us in putting an arbitrary construction upon the words in this section different from that which, it seems to me, in their ordinary and primary meaning, they bear. Certainly in the parts of this Dominion with which I am most familiar, the words "grant from the Crown" when used or spoken of in statutes or otherwise mean the letters patent from the Crown. In the absence therefore of any words of present grant I am compelled to reject the suggestion of the date or ratification of the contract as the period from which the exemption was to run. Nor

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am I able to see how any of the other alternative suggested periods can be accepted as fairly complying with the language of the statute. If it had been intended that any of these uncertain suggested periods were intended under the words "grant from the Crown" surely it was easy to say so. In my opinion, there was so much uncertainty with respect alike to the earning and selection of these lands to be granted, involving in the case of every surveyed alternate section a determination of the question as to whether the lands were fairly fit for settlement, questions, as I understand, not as yet finally determined as between the Government and the company that I do not think any one or all of these periods ever entered into the minds of the contracting parties or of Parliament as being the date from which the exemption was to run, or that any other date was thought of than that in my judgment expressed, namely, that of the grant or letters patent.

In all the cases before us now for consideration the letters patent had been issued before the controverted tax or assessment was levied.

No question therefore arises on these appeals whether or not the interest of the Canadian Pacific Railway Company could be assessed and taxed *before* the letters patent had issued but *after* the lands had been earned, surveyed and allotted by orders in council for the company, with its assent, as lands fairly fit for settlement, and whether or not by delay in taking out the letters patent the company could extend the period of exemption. Of course, if the clause operates as an exemption *before and up to the time of* the issue of letters patent and for twenty years after, there is an end to any question. But I do not desire to be understood as expressing any opinion upon these points which are not now before us. Under the 125th section of

the British North America Act, 1867, no lands while they "belonged to Canada" were liable to taxation and there would be no reason for making any special provision in the contract for that period. Whether they could legally be said to belong to Canada after they had been earned and assigned to the Canadian Pacific Railway Company by orders in council so as to remain exempted under that 125th section is a question I give no opinion upon. In the cases before us the lands have ceased to belong to Canada, and their exemption from taxation must depend solely upon the construction to be given to the 16th section of the contract. The reasoning of this court in the *Manitoba Swamp Lands Case* (1), the judgment in which was approved of by the Privy Council on similar reasoning (2), strengthens my conviction of the soundness of my construction of this 16th clause.

As regards the limitations placed upon the legislative powers of Manitoba with respect to the territory added to that province by the legislation of 1881, I have no doubt that the terms and conditions on which it was provided in the 3rd section of the B. N. A. Act of 1871, that the Parliament of Canada might with the consent of the legislature of any province agree for the increase or alteration of the limits of such province were not to be confined to small matters financial or otherwise as between the province and the Dominion but were broad enough to cover any existing legislation already applicable to the territory to be added to the province and were, as used in the legislation adding the territory to Manitoba, intended to embrace and did embrace the Dominion legislation relating to the Canadian Pacific Railway and the lands granted in aid of its construction. I fully agree with the Chief Justice of the court below that it was a constitutional limita-

(1) 34 Can. S. C. R. 287. (2) [1904] A. C. 799.

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tion upon the powers of the provincial legislature *quoad* this added territory The extent of such limitation is of course to be determined by its language.

Mr. Riddell argued with great force that even granting such a construction to be correct it could not be applied further or beyond the three specified classes of taxation mentioned in the 16th clause of the section, namely, by the Dominion, by a province thereafter to be established, or by any municipal corporation therein, and that the words "such taxation" refer to these three classes only. I am disposed to agree with him that the word "therein" has reference to a municipal corporation in a province thereafter to be established and that the words "such taxation" clearly refer to the three antecedent specified classes. If that is so, then the exemption can only be upheld by holding that so far as the added territory was concerned the Province of Manitoba was established with respect to it when and at the time it was added to the old province. I have no difficulty in accepting that as a reasonable construction and the more so as its rejection would operate to defeat the plain, clear and obvious intention of the Dominion Parliament and the Manitoba Legislature. Beyond doubt, as Mr. Robinson put it in his argument, the Province of Manitoba as it now exists was not established in 1870 nor before 1881. It was established, as it now exists and is bounded, in 1881. The Province of Manitoba was created in 1870 but its area then was comparatively small and circumscribed, a very large part of the present area of the province was added to it in 1881, and so the whole province as it now stands may fairly and reasonably be said to have been established in 1881. Whether or not apter language might have been chosen I am not prepared to say.

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The first part of the section makes the railway, its station grounds, buildings, yards, rolling stock and appurtenances used and required for the construction and working thereof, free from the three specific classes of taxation forever. The result of the adoption of Mr. Riddell's contention would be not only to subject the railway and its appurtenances within the added territory, which under the contract was to be free from taxation forever, to such taxation as Manitoba as enlarged and added to might forever after see fit to levy, but also to withdraw from the twenty years contractual taxation exemption such lands within the added territory as were granted in aid of the construction. It is said and truly said that we have nothing to do with results in construing a statute and that is of course, in a sense, correct. But in putting a construction upon such instruments of government as these Imperial, Dominion and provincial statutes, we are bound not to ignore plain obvious facts and conditions known to all men, and if two constructions are open one of which leads to a plain repudiation of a contractual exemption from taxation created by Government and the other does not, we are more than justified in accepting the latter

Manitoba, therefore, in my opinion, having asked for an addition of lands to its territories. a block of which lands were at the time subject to be exempt from all taxation by any authority having power to tax it for a specified period, and having agreed to accept the added territory subject to the then existing Dominion enactments regarding these lands, is bound by the terms of this 16th clause as being one of those enactments. Being so bound constitutionally, an interpretation must be given to the clause which, while consistent with its language, carries out the object and intent with which it was entered into. This being so, all subsequent legis-

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lation by the Legislature of Manitoba, even if broad enough in the language used to cover the exempted block, must be read and construed subject to the exemption and not as an attempt to repudiate or escape from a constitutional limitation the province had openly accepted.

There remains only the question respecting the power of the Springdale School District within the North-West Territories to tax the lands of the Canadian Pacific Railway Company within its bounds. That again depends upon the meaning to be given to the words "taxation by the Dominion" in the exempting clause. I fully agree with the conclusion that so far as those Canadian Pacific Railway lands in the territories are concerned the Dominion was, at the time the contract was entered into, the only existing taxing power and that all taxation attempted to be laid upon them by the north-west council, or assembly, or municipality, or school district, is Dominion taxation within the meaning of these words in the exempting clause. The vast territory west of Manitoba through which the railway was to run was practically at the time uninhabited by white men. The provisions made for its future government were temporary, tentative, and entirely subject to the control, guidance and supervision of the Dominion Parliament and authorities. The Act of 1881 was, at the time the Canadian Pacific Railway contract was entered into and when it was ratified and approved by Parliament, in force in the territories, and an important question arising out of its contruction is whether the powers it gave to the governing authorities it constituted or created were delegated or plenary powers. The Lieutenant Governor held his office during pleasure. His Council, composed of six persons, were from time to time to be apppointed by the Gover-

nor General in Council to aid him in the administration of the territories. The Lieutenant Governor in Council or by and with the advice of the Legislative Assembly had such powers to make ordinances for the government of the territories as the Governor in Council might from time to time confer upon him, not in excess of those, however, conferred on the legislatures of the provinces by the 92nd and 93rd sections of the B.N.A. Act, 1867. All such powers were subject to the express proviso that no ordinance should be inconsistent with or alter or repeal any Act of the Parliament of Canada which might then or any time thereafter expressly refer to the territories or which or any part of which might be made applicable thereto by the Governor in Council. Full powers were given to the Governor in Council by proclamation, from time to time, to apply any Act or parts of any Act of the Parliament of Canada to the territories.

The powers of legislation were therefore in respect to the territories vested in (1) The Parliament of Canada, (2) The Governor General in Council, and (3) The Lieutenant Governor in Council or by and with the advice and consent of the Legislative Assembly, the latter being limited in the exercise of their powers to the extent expressly given by the Governor General in Council from time to time. Section 10 gave express power to the Lieutenant Governor in Council under certain conditions to pass all necessary ordinances in respect to education and provision was made, as population increased, for the erection in the future of electoral districts and the election of members to the council until it reached 21.

The majority of the court below were of the opinion that the words "taxation by the Dominion" in the exemption clause of the contract "did not include taxation by the Government of the territories or any body

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to be established by it within its then powers." As to what were the powers of that territorial Government the learned judge who delivered the majority opinion admitted that he had grave doubt. He says:—

> The legislation affecting the legislative powers of the territories was in a very confused state when this contract was made, and it is difficult to judge just what powers the parties to the contract considered the territorial Government to possess,

and he concluded that it was not a

> delegate or branch of the Dominion Government or taxation by its authority within its then powers as taxation by the Dominion.

He seemed to think the principles laid down in the judgment of Lord Selborne with reference to India in *The Queen* v. *Burah* (1) applicable to the territories and governed him with respect to this case.

I am unable for myself to reach the conclusion that the principles with regard to legislation generally and specially with regard to India laid down in the *Burah Case* (1) have or can have any application to the special tentative and uncertain powers of legislation which were vested in the Lieutenant Governor in Council or the Lieutenant Governor by and with the advice of the Assembly for the North-West Territories in 1881.

There was no doubt at all that the legislation referred to in the *Burah Case* (1) was strictly within the express powers of the enacting body. Lord Selborne says, page 906:—

> The proper legislature has exercised its judgment as to place, laws, powers, and the result of that judgment has been to legisla'e conditionally as to all these things The conditions having been fulfilled, the legislation is now absolute.

How any such language could properly be used with respect to the legislation in question in the territories in this case I cannot understand. In the *Burah Case* (1) plenary powers of legislation existed. I agree with

(1) 3 App. Cas. 889.

Chief Justice Killam that it is very difficult indeed to determine just what powers of legislation and taxation the territorial Government of the municipalities or school districts to be formed within its jurisdiction had, but whatever the extent of such powers I am satisfied they were not plenary powers in the sense in which these words are used by the Judicial Committee of the Privy Council in the *Burah Case*. (1) Most of its powers were to be given in the discretion of the Governor General in Council, from time to time, and withdrawn when and as he thought fit. The latter could also concurrently legislate by applying any part or parts of Dominion legislation to the territories.

Reliance was placed in the judgment below and in the argument before us upon the education clause of the Territories Act of 1880, sec. 10. As the section was originally enacted in 1875 and re-enacted in the consolidating Act of 1880, its operation was expressly made contingent "upon a system of taxation" having been first adopted in the district. That limitation upon the operation of the section was, it is true, abolished in 1885 by Parliament (48 & 49 Vict., ch. 51), but when the latter statute was passed the North-West Territories Council had already, in 1883 and 1884, passed ordinances introducing "systems of taxation" for municipalities and school districts throughout the territories, and the words of limitation were no longer necessary. This statute of 1885 enacted that the amendment removing the limitation from section 10 of the Act of 1880 should take effect from the date of the passing of the latter Act, presumably in order to remove any doubts as to the validity of any school taxation which might have been imposed in the meantime.

The learned judge from whose judgment this appeal is taken considered the clause as it stood in the Act of

(1) 3 App. Cas. 889.

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1880 without the retroactive amendment sufficient to confer all necessary powers of taxation to support the action, and that if the effect of the repeal of the Acts of 1875 and 1877 was to leave no express provision for the adoption of a "system of taxation" he would imply from section 10 standing by itself the power to establish such a system for the purposes of the section. I have not myself been able to reach that conclusion but on the contrary think that, under the Act of 1880, in order to bring into effective force the provisions of the education clause 10, it would be necessary to have some general system of taxation introduced under authority to be granted by the Governor General in Council under the 9th section of the Act. This seems to have been the view adopted by the Lieutenant Governor in Council in introducing a system of taxation by municipalities and school districts to which I have referred.

The object and intent of Parliament in passing clause 10 in the Act of 1880 was not to provide for a system of taxation for the maintenance and support of schools, but to ensure to the Protestant or Roman Catholic minorities the right to have separate schools when, after population flowed in, school districts came to be established. And thus no system of taxation was expressly authorized in it nor was any language used from which it must necessarily be implied that a system of taxation for educational purposes was being authorized by the section. The substantive power conferred was to pass ordinances in respect of education. The provisos in which were inserted the incidental references to assessments and collections of rates were inserted in furtherance of the object the section had in view, namely, the protection of religious minorities. But whether I am right or not in this construction of the 9th and 10th sections of the Act

cannot affect my conclusion as to the validity of the tax because I desire to base that conclusion upon the broad proposition that the exemption from "taxation by the Dominion" provided for in the 16th clause of the Canadian Pacific Railway contract was under the circumstances broad enough to embrace and should be held to embrace taxation either by the Lieutenant Governor in Council or with the advice of the Assembly or by any municipalities or school districts created by the Dominion in the territories.

Look at the condition of matters as it was in the territories in 1881, when the contract was ratified and approved by Parliament. It is conceded that at that time there was no municipal corporation or school district in any part of them; that there was no Dominion statute imposing any taxation and no ordinance of the territories imposing any.

In his judgment in the *Balgonie Case* (1) Mr. Justice Wetmore says:

> I may just mention the fact that at the time of the passing of the Act of 1881 the North-West Council had not, so far as I can discover, passed any ordinance taxing real or personal property.

It was in these conditions and circumstances that the contract was passed with the exemption from taxation clause I am considering, and the question is: What meaning is to be attributed to its language?

I think there can be no reasonable doubt that the ratifying and confirming of the contract was legislation "expressly referring to the territories" within the meaning of the proviso to the 9th section of the Dominion statute of 1880, consolidating the laws constituting a government in the territories and defining and limiting its powers. That statute was in force in 1881 when the contract was ratified. I am of opinion that the powers of legislation of the North-West Terri-

(1) 5 Ter. L. R. 123 at p. 130.

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tories Council were delegated powers from the Dominion and that the exemption from Dominion taxation in the 16th clause of the contract embraced and included taxation by the territorial council or by any municipal district as well as by any school district afterwards established therein. The power to tax lands generally by any school district thereafter to be brought into existence might well exist consistently with the exemption of these specially exempted lands. Any other construction leaves us in this dilemma that, if the taxation by the territorial council or its municipalities or school districts is not covered by the words "Dominion taxation", then the railway bed and plant is equally liable with the lands granted in aid and the whole provision for exemption might be practically defeated. That clause being, in my opinion, part of the Dominion legislation, such a result could not be brought about by the exercise of any power acting as a delegate or agent of the Dominion. Taxation by the Dominion must embrace and include taxation by all or any authority created by it and acting under it, and such I conceive to be the relative position the North-West Territorial Government stood in with reference to the Dominion. If the exemption from taxation by the Dominion does not include taxation by the authorities it had called or was calling into existence to assist in the government of that vast territory, then we are face to face with the singular anomaly that while the Dominion could not without violating its contract ratified by Parliament directly tax the road-bed and its appurtenances, it could do so through the instrumentality of those agents, officials and governmental bodies it called into existence in the territories. And while, by the contract, the road-bed was to be forever free and the lands granted in aid free for a specified period, both were to be subject to the school taxes of the districts in which

they were situated, and I should judge by analogy to the municipal and territorial taxes also. If the school districts authorised to be created by the Act of 1880 are not, when levying taxation, acting as the authorized agents of the Dominion then I would imagine that neither would the municipalities and the territorial assembly be. Municipalities and school districts alike assess and collect taxes by virtue of the ordinance of the territories. The exemption therefore which was supposed to be certain and immediate so far as the road-bed and appurtenances were concerned, and certain both as to commencement and continuance as far as the lands in aid were concerned, would be simply a contingent exemption only springing into existence upon the establishment of provinces afterwards to be created. The period of infancy and dependence when the exemption was most required would be the period when taxation on the road-bed and the lands would be levied, and the exemption from taxation would begin to operate, if it ever did so, only when it was least needed. Such may be the proper construction of the legislation I have had under consideration, and if it was we should not hesitate so to declare however incongruous or unreasonable the results would be. But, for my part, I am satisfied, for the reasons I have given, it is not so and never was so intended.

To sum up my conclusions on the appeal from the judgment in the Springdale Case, I am of the opinion that the powers of legislation possessed by the territorial council were delegated and not plenary powers; that the special powers relating to education granted to school districts to be subsequently brought into existence, could only be exercised for the taxation of lands after a proper ordinance had been passed by the council, the main object of that section being the protection of religious minorities; that all ordinances

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which the council had power to pass were to be subject to and not inconsistent with Dominion legislation especially relating to the territories. That the ratification and approval by the Dominion Parliament of the Canadian Pacific Railway contract was such legislation expressly referring to the territories and having special relation thereto, and that the meaning of the 16th clause of the contract exempting the lands granted to the Canadian Pacific Railway Company in aid of the construction of its railway from Dominion taxation operated to prevent any taxation of such lands by the North-West Council or Assembly during the exemption period of twenty years following the issue of the letters patent for those lands, and that practically and substantially exemption from Dominion taxation included exemption from any school taxation which may be held to have been impliedly authorized by the 10th section of the North-West constitutional Act of 1880, to be imposed at a future time and in certain eventualities by school districts to be afterwards organized and when the necessary ordinances in that behalf had been passed by the North-West Council.

I think the appeal in the Springdale School District Case should be allowed and the two appeals in the cases of the municipalities of North Cypress and Argyle should be dismissed with costs in all cases.

NESBITT J.—I have had the advantage of reading the judgments of my brothers Girouard and Davies, and they have so clearly and fully stated the questions involved and their reasons for judgment, in which I fully concur, that I shall only add a few words of my own.

I propose dealing with these three cases together although they were not so argued. I have arrived at the same result in each; viz., that the defendant company is not liable to taxation.

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It appears to me that the question of liability may be solved without going at length into all the arguments which were advanced. In my opinion the political and business situation of the time should be considered in arriving at a conclusion as to what Parliament and the incorporators of the company agreed to. The preamble to the statute, 44 Vict., ch. 1 (D.), makes it clear that the Government was pledged to the construction of the railway, and that the vast unoccupied tract of lands could only be developed along national lines by such construction. It is common knowledge that the enterprise was viewed as a most hazardous and speculative one, and that the people of Canada must give largely to enable the incorporators of the proposed company to finance the undertaking and to bear the early burdens of operation when no adequate return could be expected. It is also common knowledge that Manitoba expected territory to be added to her then existing boundaries, and that the remaining lands would for a long time remain as a part of the territories, and, indeed, provincial autonomy has not yet been granted to any part notwithstanding the large settlement which has taken place and the flourishing condition of the territories.

I adopt the language of Lord Blackburn in *Caledonian Railway Co.* v. *North British Railway Co.* (1), at page 126:

> The matter turns upon the construction of an Act of Parliament which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed and the object as appearing from the instrument, and taking all those together we are to see what is the intention appearing from the language when used with reference to such facts and with such an object. The facts here and the object are all apparent without stepping out of the Act itself and those other Acts of which, being public Acts, we must take judicial notice;

(1) 6 App. Cas. 114.

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and also that of Sir Robert P. Collier in *Robertson* v. *Day* (1), at page 69:

> From these considerations it appears more probable that the legislature intended that which the plaintiffs maintain to be the true construction of the statute; at the same time this construction ought not to be adopted if the words of the Act are clear and unambiguous and exclude such a construction. * * * It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them,

as giving the true canon of construction to be followed in construing section 16 of the contract which, in my view, gives the exemption the railway company claims to be entitled to. That section is as follows:

> The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company shall be forever free from taxation by the Dominion, or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown.

When I read this with the description of lands to which the company expected to earn title, the conclusion is irresistible that Parliament intended to grant by way of bonus to the company to the fullest extent of its powers freedom from taxation, so far as lands to be granted were concerned, for twenty years from the patent, with the exception that if before patent obtained the lands were sold or occupied the exemption should cease. This would give the municipalities the benefit of taxation whenever the company sold or leased, as it was no doubt expected that the well known methods in vogue in the western United States would be followed; viz., either a leasing of large tracts for grazing purposes or selling to settlers in small parcels, the purchase money being

(1) 5 App. Cas. 63.

payable by instalments in many cases before the company would obtain patent, but after gaining selection. This construction makes a reasonable inducement to capitalists and leaves the company free from the burden of taxation in its early days when freedom from financial burden would be a great consideration. To hold that the lands admittedly exempted became taxable when those lands were added to Manitoba in face of the provision

> the said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof

would be to make the provision wholly nugatory, and I think Manitoba was granted and received this territory with this special exemption attached and has not attempted to repeal it, if, as was argued, it could repeal this provision, and, in my view, the later taxing statutes of Manitoba do not purport to repeal this provision.

In the case of the tax levied in the North-West Territories to give effect to the contention of the appellants would in reality be to hold that the contract did not exempt the land while in the North-West Territories but to make it subject to taxation and to be exempt only when the contingency of provincial autonomy occurred, if it ever did occur within twenty years from the issue of the patents. Such a construction is so opposed to good sense and good faith and so foreign to the object of the contract that apparently it never occurred to any one until after the opening of the argument of the case before the court in Manitoba. In my view the company's lands to be earned by building the railway were exempted for twenty years from the issue of the patent, from any Dominion taxation, or from provincial or municipal taxation, by any bodies subsequently obtaining provincial or municipal autho-

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rity in respect of such lands. If any difference is suggested in the case of school districts which the territorial authorities then had the power of creating, I think the Dominion still retained complete control over them, and taxation by such a body was taxation in conflict with the contract of the supreme authority (the Dominion) and by the very statute authorizing the ordinances creating the school district would be unauthorized as being inconsistent with existing Dominion legislation expressly referring to the territories.

I think the American cases of statutory grant of lands to be selected in future are quite distinguishable, the word "hereby" apparently controlling those decisions in holding the grant to be as of the date of the legislation, and I adhere to my previous opinion in the *Manitoba Swamp Lands Case* (1) in that respect. I would dismiss the Manitoba appeals and allow the North-West appeal, all with costs.

Appeals by the municipalities of North Cypress and Argyle dismissed with costs; appeal by the Canadian Pacific Railway Company allowed with costs.

Solicitors for the appellant municipalities and the respondent school district..... } *Howell, Mathers & Howell.*

Solicitors for the Canadian Pacific Railway Co., respondents and appellants..... } *Tupper, Phippen & Tupper.*

(1) 34 Can. S.C.R. 287; [1904] A. C. 799.

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*Feb. 27.

REFERENCE BY GOVERNOR GENERAL IN COUNCIL.

Constitutional law—Sunday observance—Reference to Supreme Court—R. S. C. c. 135, s. 37—54 & 55 V. c. 25. s. 4—Legislative jurisdiction.

The statute 54 & 55 Vict. ch. 25, s. 4, does not empower the Governor General in Council to refer to the Supreme Court for hearing and consideration supposed or hypothetical legislation which the legislature of a province might enact in the future. Sedgewick J. dissenting.

The said section provides that the Governor in Council may refer important questions of law or fact touching specified subjects "or touching any other matter with reference to which he sees fit to exercise this power."

Held, Sedgewick J. contra, that such "other matter" must be *ejusdem generis* with the subjects specified.

Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain or keeping open places of entertainment is within the jurisdiction of the Parliament of Canada. *Attorney General for Ontario* v. *Hamilton Street Railway Co.* ([1903] A. C. 524) followed.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court for hearing and consideration.

The questions submitted were as follows:

1. Has the legislature of a province authority to enact a statute in the terms of the annexed draft bill?

2. If the provisions of the draft bill are beyond the jurisdiction of a province in part only

(*a*) Which of the sections or which of the provisions thereof are *ultra vires*; and

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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(*b*) To what extent are they *ultra vires?*

3. (*a*) Upon the repeal of consolidated statute of Upper Canada, chapter 104, would it be competent to the legislature of Ontario to enact the said draft bill in its entirety or in part; and

(*b*) If in part only, what sections or provisions thereof and to what extent?

4. Has a province jurisdiction to legislate prohibiting or regulating labour so as to prevent any work, business or labour from being performed within the province upon the first day of the week, commonly called "Sunday," except work of necessity or mercy and except work or labour of the character and to the extent comprehended in section 2 of the said draft bill?

5. Has a province power to restrict the operations of companies of its own creation to six days in each week by provisions in the charters or Acts of incorporation of such companies or otherwise so as to render it unlawful for them, their servants or agents to do any work, business or labour within the province on the first day of the week?

6. Are the following classes of companies or corporations created by the Dominion or any of them, and if so which, and the servants and agents thereof, subject to the laws of the province within which they operate in so far as the prohibition or regulation of labour upon the first day of the week is concerned:

(*a*) Those whose works are declared to be for the general advantage of Canada but authorized to operate within one province only and whose operations are confined to such provinces;

(*b*) Those to which "The Companies Act, 1902" (Dominion) applies;

(*c*) Banks and banking companies;

(*d*) Companies for carrying on the business of insurance or the business of a loan company;

(*e*) Companies whose purposes or objects are the construction and operation of any of the works and undertakings mentioned in clauses (*a*), (*b*) and (*c*) of the 10th enumeration of section 92 of the British North America Act other than those falling under clause (*a*) hereof.

7. Had the Legislature of Ontario authority to enact:

(*a*) The second clause of subsection (2) of section 14 of Revised Statutes of Ontario, 1897, chapter 208;

(*b*) Section 136 of Revised Statutes of Ontario, 1897, chapter 209;

(*c*) Section 6 of 63 Victoria, chapter 49:

(*d*) Section 39 of Revised Statutes of Ontario, 1897, chapter 257, and sections 2 and 3 of 1 Edward VII. (Ontario), chapter 36;

(*e*) Section 79 of 4 Edward VII., chapter X

The draft bill annexed was as follows:—

"No.] "BILL." [1904."

"HIS Majesty, by and with the advice and consent of the Legislative Assembly of , enacts as follows:—

INTERPRETATION.

"1. In this Act unless the context otherwise requires

"(*a*) The expression 'day' means and includes the period of twenty-four hours from midnight to midnight;

"(*b*) The expression 'person' means and includes any body, corporate and politic, company, society or person;

"(*c*) The expression 'vessel,' includes any ship, vessel, boat, raft or other craft, or any contrivance made use of for the conveyance of passengers or freight by water;

"(*d*) The expression 'railway' includes steam railway, electric railway, street railway and tramway;

"(*e*) The expression 'performance' includes any game, match, sport, contest, exhibition or entertainment;

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"(*f*) The expression 'employer' includes every person to whose orders or directions any one is by his employment bound to conform.

APPLICATION.

"2. Nothing in this Act contained shall be deemed to apply to or affect or prevent the operation of or the performance of any work or labour the regulation or prohibition of which is within the exclusive authority of the Parliament of Canada upon or with respect to:

"(*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting this province with any other or others of the provinces or extending beyond the limits of this province;

"(*b*) Lines of steamships between this province and any British or Foreign country;

"(*c*) Such works as although wholly situated within this province are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces: or

"(*d*) Any work or service within the exclusive authority of the Parliament of Canada.

"3. Nothing in this Act contained shall be construed to repeal or in anywise affect the provisions of any Act respecting the Lord's Day in force in this province on the 1st day of July, 1867.

Weekly Day of Rest.

"4. The first day of each week commonly called Sunday shall be observed as a day of rest and abstention from labour, and it shall not be lawful for any person on any such day:

"(*a*) To do any work or perform any labour or transact any business or to sell or offer for sale or purchase any chattels or other personal property, or any real

estate, or to employ or be employed by any other person to do any work, business or labour;

"(*b*) To engage in any game or contest for gain or for any prize or reward or to be present thereat, or to provide, engage in or be present at any performance at which any fee is charged directly or indirectly either for admission to such performance or for any service or privilege thereat;

"(*c*) To run, conduct or convey by any mode of conveyance any excursion on which passengers are conveyed for hire and having for its principal or only object the carriage on that day of such persons for amusement or pleasure;

"(*d*) To open to the public any park or pleasure ground or other place maintained for gain or to which an admission fee is charged directly or indirectly or within which a fee is charged for any service or privlege;

"(*e*) To shoot at any target, mark or other object or to use any gun, rifle or other engine for that purpose.

"(2.) When any performance (at which an admission fee or any other fee is so charged) is provided in any building or place to which persons are conveyed for hire the charge for such conveyance shall be deemed an indirect payment of such admission fee within the meaning of this section.

"5. It shall not be lawful for any person to advertise in any manner whatsoever any performance or other thing prohibited by this Act.

"(2) It shall not be lawful for any person to advertise in this province in any manner whatsoever any performance or other thing which if given or done in this province would be a violation of this Act.

"Notwithstanding anything in this Act contained any person may on the first day of any week do any work of necessity or mercy.

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PENALTIES.

"7. Every constable or other peace officer who suspects that a violation of this Act is being committed in or upon any premises shall, within the limits for which he is such constable or peace officer, have the right at any time to enter into or upon and to search such premises for the purpose of ascertaining whether such offence is being committed.

"(2) Every one who obstructs such constable or peace officer acting under the authority of this section shall be guilty of a violation of this Act.

"8. Every one who violates any of the provisions of this Act shall for each offence be liable to a penalty of not less than one dollar and not exceeding forty dollars together with the costs of prosecution.

"9. Every one who as employer authorizes or directs anything to be done in violation of any of the provisions of this Act shall for each offence be liable to a penalty of not less than ten dollars and not exceeding one hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

"10. Every company or corporation which authorises, directs or permits its employees to carry on any part of the business of such company or corporation in violation of any of the provisions of this Act shall for the first offence incur a penalty of two hundred and fifty dollars and for each subsequent offence a penalty of five hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

"11. Every person who owns or controls wholly or partly any vessel or railway or any building or any park, pleasure ground or other place which is used for the doing of anything which violates any of the pro-

visions of this Act shall for each offence forfeit and pay the sum of not less than two hundred and fifty dollars and not exceeding five hundred dollars together with the costs of prosecution in addition to any other penalty prescribed by law for the same offence.

PROCEDURE.

"12. The penalties and costs incurred in respect of any offence under this Act shall be recoverable upon summary conviction before a justice of the peace or stipendiary magistrate."

The following counsel appear on behalf of the several parties interested:

Newcombe K.C., Deputy Minister of Justice, for the Dominion of Canada.

Patterson K.C. for the Province of Ontario.

Cannon K.C., Assistant Attorney General, for the Province of Quebec.

Macpherson for the Lord's Day Alliance.

Marsh K.C. for the Grand Trunk Railway Co., Michigan Central Railway Co. and Canadian Northern Railway Co.

Rose for the Wabash Railroad Company.

D'Arcy Tate for the Buffalo, Hamilton and Toronto Railway Company.

Blackstock K C. and *H. S. Osler K.C.* for the Canadian Copper Co.

Blackstock K.C. is heard on an objection to the jurisdiction of the court to consider the first six questions referred.

Section 4 of 54 & 55 Vict., ch. 25, amending section 37 of the "Act respecting the Supreme and Exchequer Courts," authorizes the submission to the Supreme Court of "important questions of law or fact touching

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provincial legislation or the appellate jurisdiction as to educational matters vested in the Governor in Council by The British North America Act, 1867, or by any other Act or law or touching the constitutionality of any legislation of the Parliament of Canada or touching any other matter with reference to which he sees fit to exercise this power."

We submit that the expression "provincial legislation" above referred to means some Act actually passed by a provincial legislature the constitutionality of which is challenged, and does not include speculative or academical questions as to the powers possessed by such legislature.

If this interpretation be correct the reference cannot be justified except it fall within the expression later on in the same section "touching any other matter with reference to which he sees fit to exercise this power." But any other matter must be construed as *ejusdem generis* with what goes before; in any event it only refers to some concrete, definite question which has actually arisen from particular circumstances and not to speculative matters which may possibly never arise. *Sandiman* v. *Breach* (1); *Reg.* v. *Cleworth* (2); *Palmer* v. *Snow* (3). The section was intended to cover the case of questions actually arising from the action of rival legislative authorities and not questions of this character, where the legislature may never assume to exercise the powers respecting which the court is called upon to make a deliverance.

In addition to these reasons adduced from a consideration of the statute itself, it is submitted that an intention of this kind cannot be imputed to the Parliament of Canada, because it would be an invasion of the rights, not only of provincial legislatures, but of

(1) 7. B. & C. 96. (2) 4 B. & S. 927.
(3) [1900] 1 Q. B. 725.

the individual citizen in the province. The first authority to interpret the British North America Act and to determine the jurisdiction of the federal and provincial authorities are the federal and provincial Legislatures, and these bodies are entitled to bring their actual legislation, passed after full deliberation and debate, before the ordinary tribunals of the country, unembarrassed by judicial opinions expressed in advance of the legislation itself. It is obviously not only a most inconvenient practice that is here resorted to, but it constitutes a very grave and serious invasion of the rights and powers of all those authorities among whom are partitioned the various legislative functions distributed by the British North America Act.

We also refer to the provisions of ch. 49 of R.S.O. (1897), which shows that the legislature of Ontario only concurred in the jurisdiction conferred upon the Supreme Court by the Supreme and Exchequer Courts Act to the extent of the submission thereto of actual "controversies" between the Dominion and the Province. When questions touching Sunday legislation were submitted under a somewhat similar statute to the Court of Appeal for Ontario, and subsequently by way of appeal to the Judicial Committee of the Privy Council [*Attorney General for Ontario* v. *Hamilton Street Railway Co.* (1)] their Lordships answered the question propounded as to the validity of an Act passed by the Legislature of Ontario and declared the same *ultra vires* that body, but as to the other questions submitted, which are of the same character as those propounded here, they declined to pass upon them, the Lord Chancellor using this language, at page 529 of the report:—

"With regard to the remaining questions, which it has been suggested should be reserved for further

(1) [1903] A. C. 524.

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argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise they must arise in concrete cases, involving private rights, and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it."

Language of a similar character was used in reference thereto by Osler and Moss, JJ. A., when the case was before the Court of Appeal.

Newcombe K.C. contra referred to *Severn* v. *The Queen* (1).

The court reserved judgment on the objection to the jurisdiction and proceeded with the hearing on the merits.

Newcombe K.C. was heard, and was followed by *Patterson K.C.* and *Macpherson.* They contended that the legislation would be valid as dealing with civil rights and matters of a local and private nature in the province; also that, even if the subject matter was within the legislative jurisdiction of Parliament, the legislature could deal with it so long as Parliament abstained.

(1) 2 Can. S. C. R. 70.

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The other counsel were not called upon.

The judgment of the court was as follows :—

After the fullest consideration of the 37th section of the Supreme and Exchequer Courts Act, under which this reference is made to us, and of the strong observations made by the Judicial Committee in the reference made by the Government of Ontario to the Court of Appeal of that province in the matter of the Hamilton Street Railway Company, reported on appeal to the Judicial Committee, (1), at page 528, as to the principle, convenience and expediency of courts of justice answering hypothetical questions submitted to them as distinct from those arising in concrete cases, we are of the opinion that the questions submitted to us as to whether certain supposed or hypothetical legislation which the legislature of one of the provinces might in the future enact would be within the powers of such legislature, are not within the purview of the section. Questions as to the constitutionality of existing legislation are clearly within the meaning of that 37th section, and the general words "touching any other matter" must be considered as within the rule *ejusdem generis*, and may well refer to orders in council by the Governor General or Lieutenant Governors, as the case may be, passed pursuant to the Dominion or provincial legislation the constitutionality of which may be in question, or to departmental regulations authorized by statute. These orders in council cover a very large legislative area, and include regulations on the subjects of navigation, pilotage, fisheries, crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views, from which Mr. Justice Sedgewick dissents.

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As, however, the practice of this court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominion or the Provinces and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the courts on similar references and proceed to answer the questions as follows;

In answer to question (1), we are unable to distinguish the draft bill submitted for our opinion from the Act pronounced by the Judicial Committee in the case before referred to as *ultra vires* of the Provincial Legislature and think, for the reasons given in that case by the Lord Chancellor, that this draft bill as a whole is also *ultra vires* of the Provincial Legislature. This answer covers also questions (2) and (3). With regard to the other questions (4) to (7) inclusive, it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognised in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference before referred to and is within the jurisdiction of the Dominion Parliament.

It is (Mr. Justice Sedgewick dissenting from this view) undesirable and inexpedient if not altogether impossible properly to answer categorically the questions enumerated in question 7. The rule suggested by the Privy Council is, we think, peculiarly applicable to those questions and it is quite clear that useful or satis-

factory answers could only be given to them when the questions arise in concrete cases under the statutes.

(Signed) ROBT. SEDGEWICK J.
" D. GIROUARD J.
" L. H. DAVIES J.
" WALLACE NESBITT J.

SEDGEWICK J.—In differing from my learned brothers, as indicated in the foregoing, it is necessary for me, under the statute, to give my reasons.

First, upon the question of jurisdiction. The original section 37 of the Supreme and Exchequer Courts Act giving power to the Governor in Council to refer any matter to this court for its consideration and opinion is couched in as wide and general terms as human language could enable Parliament to do. Under this section, as it then stood, the Governor in Council had power to propound any question to this court, whether that question related to a matter of law or fact or even policy. Now when, in 1891, Parliament was pleased to repeal the original section 37 and substitute in its place the present one, its object was, and I think its sole object was, to give express parliamentary authority to the Governor in Council in respect to the several matters therein mentioned, but in no way whatever to limit or modify the powers already possessed by the Executive.

Secondly, I do not think this is a case in which the doctrine of *ejusdem generis* applies, but, even if that principle does apply, then this is a case falling within it. In my view, to submit a question asking this court to determine whether a proposed Act (giving us the draft of it) is within the competency of a provincial legislature is a similar or like question to, or *ejusdem generis* with, a question asking us to pass upon the constitutionality of a provincial Act. If we decide

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that neither the Act itself nor the proposed Act is within such competency, then they fall within the same category, and therefore the doctrine referred to applies.

I feel it to be my duty to answer, not only the questions already answered by my brother judges and myself, but also the rest of them, and my answer is in the negative, basing my opinion upon the Privy Council case above referred to and the fact that all the matters dealt with in the particular statutes mentioned fall within the ambit of the criminal law of Canada.

IDINGTON J.—The questions are raised here of the right of the Governor General in Council to ask and the jurisdiction of this court to answer questions of a speculative character touching the constitutionality of proposed or possible future legislation by the Parliament of Canada or the legislature of any of the provinces of Canada and having no relation to actual existing legislation enacted by any of these bodies.

It is urged that the 37th section of "The Supreme and Exchequer Courts Act" gives this right to ask and this power to answer, and it is said that, even if this be not so, it has been the practice heretofore to answer such questions, and that such practice should be now followed. I cannot find that such a practice has been so followed or followed for so long a time as to constitute it an established usage that has grown thereby to be law that must govern the conduct of this court.

It must be admitted that the deliberate adoption by the court of such a practice, when that adoption could not be attributed to any authority but this section 37 or that for which it is substituted, should be looked upon as an interpretation of these sections or one of them which now should bind all the judges of this court.

In considering the question from this point of view it is worth while to review the cases. The New Brunswick penitentiary case of April, 1880, is shewn by the original records to have been a question as to the validity of Acts of the Parliament of Canada passed for the creation and regulation of penitentiaries. The Province and Dominion, I infer by consent, submitted a case, using this power of reference, however, to bring the matter before this court. The cases from Perth and Kent counties in 1884 upon the Canada Temperance Act, 1878, involved questions as to conditions precedent to the Governor in Council acting in bringing into operation the powers conferred by that Act. The "Thrasher case" arose out of contentions as to the status of the Supreme Court of British Columbia and the power of the legislature of that province to legislate in regard to procedure in that court and in regard to the residences of the judges thereof. It had been suggested that the court, having had an existence and power over its own procedure prior to the Province of British Columbia coming into confederation in 1871, was not a provincial court within the meaning of the 14th subsection of section 92 of the British North America Act and was not subject to legislation that the Legislature of the Province of British Columbia, as a member of confederation subject to the British North America Act, had enacted.

This reference was in 1883. See *Thrasher Case* (1).

His Excellency the Governor General was petitioned in 1889 to submit by way of reference to this court under sec. 52 of "The Supreme and Exchequer Courts Acts" the much agitated questions in respect of "The Jesuits' Estates Act." The late Sir John Thomson, then Minister of Justice, in reporting upon this position amongst other things said to His Excellency as follows:

(1) 1 B. C. Rep. pt. I. 153, at p. 243.

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This provision which confers that power on your Excellency was undoubtedly intended to enable the Governor General to obtain an opinion from the Supreme Court of Canada in relation to some order which his Government might be called upon to make or in relation to some action which his officers might be called on to adopt (1).

I think all the cases that can be said to have been referred solely by virtue of sec. 52 to this court down to the time when this opinion was expressed came well within the description here given of the class of cases that should or might be so referred.

There were other cases that, meantime, had been referred, which, if a wider meaning or province than Sir John Thompson assigned to sec. 52 and especially that now urged on us as what it bore, were to be given it, one would have expected to have seen them referred by virtue of the power and authority of sec. 52 unaided by special enactment giving jurisdiction.

A most significant instance is the special legislation contained in 47 Vict. ch. 32, sec. 28, specially providing for this court determining, on the Governor in Council referring to it the question, as to the competence of Parliament to pass "The Liquor License Act, 1883 and amendments thereto" in whole or in part. Why was the then existing power under sec. 52 to refer to this court thus questioned if it extended beyond the class of cases defined by Sir John Thompson? Was this special statutory reference of the constitutional limitations then in question and the trial of the conflict of authority between the Parliament of Canada and the Provinces being thus provided for, not a Parliamentary exposition of the meaning of sect. 52?

"The Railway Committee" was by the Railway Act, 1888, sec. 19, empowered to state a case for the opinion of this court upon any question which the Committee might think to be a question of law. And

(1) See 12 Legal News, 283, at p. 286.

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by sec. 20 of the same Act, the court was directed to hear and determine such questions of law. And,—Was not this also, but in a more indirect way, to a limited extent, the case with the enactment of secs. 19 and 20 in the Railway Act, 1888, empowering the Committee to state a case for the opinion of the court upon such question of law as the Committee might desire such an opinion? It was under this and not as stated under sec. 52 that the Manitoba Crossings case was referred in 1888.

It is to be borne in mind that this sec. 52 was in its essential feature copied from sect. 4 of the statute (3 & 4 William IV. ch. 41) constituting the Judicial Committee of the Privy Council.

It is to be observed that the Privy Council was a consultative body and the committee then after all but a part of such body and so remained, to such an extent that, in 1871, so high an authority as Lord Cairns declared that even then the Judicial Committee had no judicial power and was not a judicial body but merely —as a portion of the Council —a consultative assembly. See Finlayson's History etc., of the Judicial Committee of the Privy Council, p. iii.

Without going further into the question this view of the origin of sec. 52 is suggestive.

And all this review of the origin of sec. 52 and the uses to which it has been put and the light in which it has been held enable me to conclude that under it there was no reference of a question such as asked here for agitating or framing future legislation and that so far as any assistance is to be got from that source in the interpretation of the present sec. 37 substituted for it there is nothing to lead me to place upon it the wide meaning now contended for but rather the contrary.

This origin of the clause is also to be considered in viewing the matter as I do hereinafter from the point

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of view of the meaning to be put upon sec. 101 of the British North America Act.

Sec. 37 (substituted for sec. 52) so far as now in question is as follows:

Important questions of law or fact *touching provincial legislation*, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the "British North America Act, 1867", or by any other act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching *any other matter with reference to which he sees fit to exercise this power*, may be referred. by the Governor in Council, to the Supreme Court for hearing or consideration; and the court shall thereon hear and consider the same.

Under this, enacted in 1891, The Manitoba Schools Act to which it is specially applicable was referred and all the questions asked seem clearly incidental to the question raised by that Act.

In re Provincial Jurisdiction to pass Prohibitory Liquor Laws, (1) (in 1895) was a case submitted by reference under sec. 37. Then the question of the jurisdiction of the Provincial Legislature to pass the actual legislation of the Ontario Legislature by 53 Vict., "An Act to improve the Liquor License Acts" and 54 Vict. ch. 46, "An Act respecting local option in the matter of liquor selling", raised many questions touching that legislation.

The questions submitted, save as to manufacture and importation of liquor, were, I think, arising directly from or upon this legislation, and the questions in relation to manufacture and importation were, if more remotely connected therewith, yet germane to the others. It is upon this case alone that counsel supporting the reference now in hand sought to rest the right and power now challenged. It is to be noted no such challenge or question was then made as to this right or power.

(1) 24 Can. S.C.R. 170.

In *Re Fisheries*, (1) (in 1895) the questions were all such as were directly suggested by the actual legislation of the Dominion Parliament, or of the Legislature of the Province of Ontario, or in respect of the proprietary rights in dispute between the Dominion and the provinces or some of them.

In *Re Criminal Code, Bigamy Sections*, (2) (1897), the questions referred are all directly in relation to an Act or law of the Dominion Parliament.

In *Re Representation in the House of Commons*, (3) (April 1903), the questions referred were not in relation to any Act or law of the Dominion Parliament or any other of the specific subjects named in section 37, but in fact upon the interpretation to be given to certain of the provisions of the British North America Act.

It appears, however, upon the face of the reference that it was made at the request of the provinces interested, and that they had asked that a reference be made to the Supreme Court of Canada for *a determination of the question in difference.*

In the matter of *The Representation of Prince Edward Island in the House of Commons*, (4) (June, 1903), the questions referred to were of same nature and upon the proper interpretation to be given to certain provisions of the British North America Act and an Imperial order in council admitting Prince Edward Island into the Union. It also was at the request of the province "that a reference be made to the Supreme Court of Canada *for a determination of the question in difference*" just as in the last named case.

Does this phase of the order make any difference? The reference in each of these later cases purports to be made "pursuant to the authority of the Supreme

(1) 26 Can. S.C.R. 444.
(2) 27 Can. S C. R. 461.
(3) 33 Can. S. C. R. 475.
(4) 33 Can. S. C. R. 594.

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and Exchequer Courts Act as amended by the Act 54 & 55 Vict. ch. 25" and with the *approval or upon the suggestions respectively of the province or provinces concerned.*

The Dominion and Provincial representatives appeared before the court and urged their respective claims.

This court was by the 1st section of the Act constituting it declared to be "constituted and established a court of common law and equity in and for the Dominion of Canada."

Its powers, given directly by the Act, are almost entirely of an appellate character, and it has been repeatedly said not to have inherent original jurisdiction, and with none conferred by statute but the right to issue a writ of habeas corpus.

I am not prepared, however, to say that having been constituted and established such a court, as just stated, for the Dominion of Canada that it is incompetent to hear such submission and determine the differences between parties, as the Dominion and the provinces submitting a case, consenting to be bound, as in these representation cases seems to have been the nature of the proceeding.

I would prefer to attribute its action in these cases to this consent and that source of power and authority rather than that to be drawn from the words in section 37 quoted above, i. e, "*or touching any other matter with reference to which he sees fit to exercise this power.*"

I agree with the majority of the court that these general words must be read as within the rule of law generally known as the *ejusdem generis* rule which was enunciated by Lord Campbell, as follows:

> I accede to the principle laid down in all the cases which have been cited, that, where there are general words following particular and

specific words, the general words must be confined to things of the same kind as those specified.

See Hardcastle, page 200 *et seq.*

It will be observed that there are specified in this section 37:

(1) Important questions of law or fact touching provincial legislation;

(2) In the appellate jurisdiction as to educational matters vested in the Governor in Council by the British North America Act;

(3) Or by any other Act or law;

(4) Or touching the constitutionality of any legislation of the Parliament of Canada.

It can hardly be said that the speculative questions involving something that may never become even the subject of a bill in the legislature is "provincial legislation." I take it that provincial legislation means that which has been passed. For the purposes of argument it might be assumed as possibly meaning a bill passing through the legislature, and yet it could not be stretched to apply here.

Indeed it was not seriously argued that it could be supported by these words but might be rested on the general words of "any other matter."

The words in the original section which this sec. 37 amends were "may refer to the Supreme Court for hearing or consideration *any matter* which he thinks fit to refer," etc.

Why were such comprehensive and unlimited words as these stricken out, and those now under consideration substituted if we are yet to read the general words in the substitution as unrestricted by the *ejusdem generis* rule or indeed anything else?

We ought, I submit, to credit Parliament with some intention or purpose and probably with some knowledge of the rules of construction. When we consider the

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words of sec. 101 of the British North America Act, which enabled the Parliament of Canada to 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,*

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and we find that there were used in doing so, words very apt for expressing the duties of a consultative body, but that might not be found so apt for the defining of the powers of a Court of Appeal, or other additional courts, as judicial bodies, commonly known and understood as such, we may find reason for the radical change of power that this amendment was intended to make. What might be innocuous in the constituting of and defining of the duties of a judicial committee of the Privy Council in England, where the historic traditions and constitutional usages having the force of law, would restrain such wide expressions of power within recognised limits might, set in the place they were here, become a source of danger, a temptation in times of stress and storm to great abuse. The experience of sixteen years may have taught this and resulted in this amendment. I will rather infer this, and the purpose to restrict, than adopt the theory that it meant nothing.

Having regard to all the applications of the executive to this court, under or purporting to be under this statute at large, or specifically under the section thereof now in question, and to the fact that in most of the cases there was in fact but a mutual submission of points in dispute to the court, and in such cases possibly but little regard had to the form, save as a means of executing this mutual purpose; and to the important fact that not in a single case had the right or power been challenged by any of the parties, and hence never argued, till this reference; I do not consider that the decisions given under such circum-

stances are to be treated as at any time an interpretation by the court of the general words used and now in question in such way and to such extent and with such meaning as we are asked in face of objection by those having a right to object, to accept here and act upon.

None of the cases have gone so far, in assuming jurisdiction to exist, as would be required, here, to answer speculative questions.

We are asked, here, to say that the court has interpreted its jurisdiction in a way that I do not find it has, and then to extend it further.

The jurisdiction to pass upon proposed or only possible future legislation, such as the governing power of the people might never assent to, is one of so grave a character fraught with such far reaching consequences, and such a departure from the recognised principle of severing and keeping as distinct as possible the respective powers and duties of the legislative, executive and judicial functions of Government that I would desire to see the power we are asked here to exercise distinctly and clearly conferred by Parliament, if it is to be conferred at all, rather than by an assumption of its existence on such slender basis as is alleged here to have expressed its existence.

All constitutional authority has placed stress upon the benefits flowing from the keeping distinct and independent the several duties of the legislative, executive and judicial functions of Government.

To bring into action the judicial authority in respect of future possible legislation before the matter has passed through the beneficent ordeal of public discussion, parliamentary investigation, and solemn determination in the high court of Parliament or Legislative Assembly is, I respectfully submit, an innovation.

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Iam not concerned here to lay down nor do I try to lay down any course of duty to be pursued by Parliament in that regard, but it seems to me that to adopt such an innovation it ought to be made clear beyond doubt as the will and intention of Parliament before I presume to attribute to it the innovating purpose that assuming jurisdiction here would clearly involve.

I desire to abstain from and to be understood as abstaining from any expression of opinion as to the power of Parliament in Canada to exercise any such innovating power and establish in this or any other court such a jurisdiction as we are asked here to exercise in that regard.

There is much that is instructive in regard to this and matters of a like nature in the constitutional history of the United States from the time when under Chief Justice Jay the Supreme Court of that country declined upon request of the President to interpret a treaty with France, down to the present time. See Story on Con. U. S. p. 388 and 24 Am. Law Review, p. 372 *et seq.*

Hence in that country (where every phase of resorting to judicial authority, for defining by adjudication constitutional limits), the duties of the judge when called upon to do so, have been the subject of much serious consideration.

Cooley on Constitutional Limitations, (5 ed.), at page 192, says, in speaking of that duty:

> It must be evident to any one the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where be can conscientiously and with due regard to duty and official oath decline the responsibility.

I, not being able to find that jurisdiction to answer, accept this high authority on the fruits of experience I have referred to, as some light upon the way to

discharge the duty to be done, under such circumstances as my finding leaves me. Not having jurisdiction I should not go further.

I, with great deference for the opinion of the majority of the court who come to the like conclusion I do, in regard to the want of jurisdiction, yet can find their way by reason of practice to express an opinion on the question submitted, feel I am constrained by the decided view I take as to the matter, to dissent from such a course, and, with the highest respect for the authority asking an answer to the questions submitted, must ask to be, for the reasons I have given, excused from answering question No. 1. My reasons given above are specially directed to question 1 and such as are of like character looking to future legislation and 1 to 6 are chiefly so.

Question No. 1 being answered in the negative I understood counsel for the Attorney General of Canada not to desire further prosecution of the inquiry as to these matters, 1 to 6, inclusive, and treat them as a group to be dealt with in like manner as the first.

I have read with interest the protest made, in *Re Manitoba Educational Statutes* (1), at page 677, by the present Chief Justice of the court in regard to the jurisdiction in question, but his point of view taken there is so entirely different from that I have taken, that I have for that reason, and that only, refrained from adverting to it in giving my reasons.

As to question 7 and the sub-sections of it, many matters which are no doubt within the range of "important questions of law or fact touching provincial legislation" are referred to and therefore within the jurisdiction given by these words in sec. 37. Upon questions properly framed (as to some of these matters) so as to discriminate between that which may be with-

(1) 22 Can. S. C. R. 577.

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in the jurisdiction of the Parliament of Canada and that within the jurisdiction of the provincial legislatures answers might be given that might serve some useful purpose.

A categorical answer to the question 7 (*a*) or 7 (*b*) cannot be given without probably misleading, and to answer with such limitations as would be necessary to avoid this it might be found after the best possible consideration had been given to the matter that further limitations than given in such answer would be necessary to cover the entire ground. The same holds true in a less degree as to each of the other sub-questions of question 7.

This is probably only another way of expressing the necessity for a concrete case before passing upon the question.

I desire to refrain from expressing (especially as the matter with only an *ex parte* argument now stands) any opinion as to the jurisdiction of the Parliament of Canada over any of the subject matters touched upon in question 7.

In assenting as I do under the circumstances of this reference to the disposition made by the majority of the court of question 7 for reasons stated by them, I do so without intending to assent to anything in such reasons, or their opinions, that might by implication or otherwise be held as declaring that any or all of the matters in question fall within the exclusive or other jurisdiction of the Parliament of Canada.

ALFRED SLAUGHENWHITE.....APPELLANT; 1905

AND *March 2.
*March 3.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Criminal Code, 1892, *ss.* 241, 242—*Wounding with intent—Verdict—Conviction—Crown case reserved.*

On an indictment for wounding with intent a verdict of "guilty without malicious intent" is an acquittal. Judgment appealed from (9 Can. Crim. Cas. 53) reversed, Davies and Idington JJ. dissenting.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1), affirming, on an equal division of opinion, the conviction of the appellant on the verdict of the jury rendered at the trial.

The prisoner, appellant, was indicted "for that he, on the 18th day of May, 1904, at St. Margaret's Bay Road, in the County of Halifax, with intent to disable one William Hill, did unlawfully wound the said William Hill, by shooting at him, the said William Hill, with a loaded gun." On a reserved case stated by Mr. Justice Townshend, the judge at the trial, to the Supreme Court of Nova Scotia, the learned judge referred to the evidence and then proceeded as follows:

"I told the jury that under the evidence they could convict the prisoner of the charge laid in the indictment if they were satisfied he intended to disable Hill at the time he fired the gun, and that he fired with that object, and that they were at liberty to infer such intent from the facts in evidence. If they thought he

*Present:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

(1) 9 Can. Crim. Cas. 53.

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had no such intent at the time, still they could convict him of the lesser offence, under section 242, of unlawfully wounding Hill with the gun because of his unlawful act in pointing a loaded gun, and firing it at Hill, and it was for them to say whether the accused knew or ought to have known that it was loaded, and whether he did point it at Hill; that it was not necessary to constitute this offence to prove actual malice. It was enough that it was unlawful.

"The jury, after deliberation, returned a verdict of 'Guilty without malicious intent,' and that verdict I accepted, and it was recorded as found.

"The prisoner's counsel, Mr. Power, then requested me to reserve for the opinion of the Supreme Court of Nova Scotia, sitting as a Court of Appeal for Crown Cases Reserved, certain questions of law which I do now state and reserve. These questions are: (*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered? (*b*) Were my instructions in law correct?

"I sentenced the prisoner to two years in Dorchester Penitentiary, but did not respite the execution of the sentence."

The reserved case was heard before the full court composed of all the judges of that court, including the trial judge, the result being an equal division in opinion, Weatherbe C. J. and Graham and Russell JJ. holding that the conviction should be quashed, while Townshend, Meagher and Fraser JJ. considered it valid. The questions argued upon the present appeal are stated in the judgments now reported.

John J. Power for the appellant.

Longley K. C., Attorney-General for Nova Scotia, for the respondent.

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The judgment of the majority of the court was delivered by :—

GIROUARD J.—At the July Assizes, 1904, at Halifax, the appellant was indicted for that he, on the 18th May, 1904, at St. Margaret's Bay Road, in the County of Halifax, with the intent to disable one William Hill, did unlawfully wound the said William Hill by shooting at him with a loaded gun. The jury after deliberation returned a verdict of "guilty without malicious intent" and that verdict the trial judge accepted and, upon being recorded as found, he sentenced the prisoner to two years in the Dorchester Penitentiary and did not respite the execution of the sentence. At the same time at the request of prisoner's counsel, Mr. Power, the learned judge reserved two questions.

(*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered ? (*b*) Were my instructions in law correct ?

The reserve case came before the court *in banco* with the result that the court was evenly divided, Weatherbe C. J., and Graham and Russell JJ. for quashing the conviction ; Townshend J., who presided at the trial, Meagher and Fraser JJ. for affirming the conviction.

It is contended on the part of the appellant that the addition made by the jury to their verdict "guilty", of the words "without malicious intent", amounted to an acquittal. The majority of the court is of that opinion.

It is conceded by the judges affirming the conviction that the verdict is not a conviction of the offence mentioned in section 241 of the Criminal Code under which the prisoner was indicted. It is contended that it is valid under section 242 which provides that every one is guilty of an indictable offence and liable to three years imprisonment who

unlawfully wounds or inflicts any grievous bodily harm on any other person either with or without an instrument.

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Probably the jury could have returned a verdict under this section or a verdict of common assault, but they have not done so. Their finding that the offence committed by the prisoner, whatever it might be, was without "malicious intent", removed the essential requirement of a crime, whether malice is to be inferred from an unlawful act or is "express." We have the less hesitation in arriving at this conclusion because the Attorney General for the Province of Nova Scotia, (Hon. Mr. Longley), declared before us that he could not sustain the verdict as worded.

Without going further into the examination of the reasons of the learned judges pro and con, we order that the said conviction be quashed and the prisoner discharged from the said penitentiary.

DAVIES J. (dissenting):—This was an appeal upon a Crown case reserved by Mr. Justice Townshend. On the hearing the six judges were equally divided for and against sustaining the conviction. The two questions reserved were (*a*) Whether on the verdict rendered an acquittal should have been entered? and (*b*) Were the judge's instructions to to the jury correct?

I am of the opinion that a verdict of acquittal should not have been entered on the jury's finding and also that the judge's instructions were correct.

I would have been content to express my simple concurrence in the judgment prepared by my brother Idington were it not for the reference therein to the question of "common assault" which does not appear from the record to have been referred to at the trial or on the hearing of the case reserved and was not raised or touched upon by the prisoner's counsel before us. I do not wish to be understood as expressing any opinion upon the point discussed by my brother Idington. In all other respects I concur in his opinion.

The prisoner was indicted under the 241st section of the Code for wounding one Hill *with intent*. The trial judge told the jury, I think properly, that they could, under the provisions of the Code, convict the prisoner of the lesser offence simply of "wounding" under the 242nd section, if they were not satisfied he was guilty of the offence of *wounding with intent* specially charged against him under section 241 and that to find him guilty of the lesser offence it was not necessary for the Crown to prove or for them to find actual malice.

The jury returned a verdict of "guilty without malicious intent". I think that verdict means just what it says. The jury found the intent which is an essential element in the offence defined by section 241 to be wanting. The prisoner, therefore, was entitled to be acquitted of that offence. The finding of the absence of *malicious* intent negatived the existence of "actual malice" on the part of the prisoner about which the judge had instructed them. But it meant neither more nor less than that. I construe the verdict to mean—"We find the prisoner guilty of the lesser offence of wounding under the 242nd section as he had no malice and no intent"—or, as they put it, malicious intent. To complete the offence under the 242nd section "intent" or malicious intent was not an essential ingredient. It was such an essential element to complete the offence defined in the 241st section. The jury found that ingredient wanting but that the defendant was guilty. It seems to me, therefore, plain beyond reasonable doubt that he must be acquitted under the 241st section and convicted under the 242nd section of the offence without the intent pursuant to the power contained in the 713th section of the Code.

That is what the trial judge did and I think he was right. I agree with him that the case of *The Queen* v.

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Latimer, (2) decided unanimously by six judges all experienced in criminal law, is ample authority, if such was needed, for his decision.

It was said by one of the learned judges in the court below that we are not entitled to indulge in speculations as to the meaning of the jury's verdict. I agree, but think speculation as to this verdict quite unnecessary. On the other hand I do not think I am justified in giving effect to arguments which present themselves to my mind merely as subtle refinements upon words and which would nullify what appears to me a plain and clear verdict.

IDINGTON J. (dissenting):—The appellant was tried upon an indictment preferred under section 241 of the Code and found by the verdict of the jury who tried him, "guilty without malicious intent".

The learned trial judge upon this verdict sentenced the prisoner but reserved certain questions which as finally settled were:—

(*a*) Whether or not upon the finding of the jury a verdict of acquittal should have been entered? (*b*) Were my instructions in law correct?

I do not think that the verdict was one of acquittal.

I am, with due respect, unable to understand how such a contention can have any solid foundation in law, when regard is had to the provisions of section 713, where it is said:—

Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included, which is proved, although the whole offence charged is not proved; etc., etc.

This was intended to avoid the necessity of repeating in a needless multiplication of counts, as ancient

(1) 17 Q. B. D. 359.

learning rendered necessary, substantially the same or a minor cognate offence but having otherwise a slight variation in degree of criminality.

The indictment charged that the prisoner

with intent to disable one William Hill, did unlawfully wound the said William Hill by shooting at him.

The indictment, if the intent had been stricken out, would have been a perfectly good indictment charging accused with "unlawful wounding" and such charge was, in the language of section 713, included in the charge as described and would have been included in the commission of the offence charged and as described, and when and if the proof of intent fell short of establishing the charge as laid but proved the charge without the intent it became the duty of the jury to acquit the accused of the offence as charged and find him guilty of the unlawful wounding.

This, I take it, is clearly the evolution of law that the Code in this regard is intended to express and declare to be the law in substitution of what had gone before.

It is not an uncommon thing for juries to return such verdicts, with simply stating without intent, and I think it can make not the slightest difference that they used an adjective that aptly described the sort of intent that was here charged, and may mean and I think was intended by the jurors to mean, more than the mild form of malice that the law imputes to every man who infringes even in the most trifling manner the criminal law.

The intent to disable another carries with it actual deliberation that may be well designated malicious in the wilful sense of the word, and to discriminate that from the legal malice implied in unlawful wounding is all that the jury no doubt meant.

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To impute to them something else is, I submit, with due respect, a clear departure from the canons of construction that require words to be read and interpreted in the light of the surrounding facts and circumstances and by their plain and ordinary meaning.

To interpret such a verdict as an acquittal seems to me to treat the jurors' verdict differently from what we would the expressions of other ordinary people, trying to express their meaning.

As to the proper interpretation to be put upon these words we are not, by the case, left free to determine otherwise than as to whether or not an acquittal. If not an acquittal our duty as to that ends.

I am not quite free from doubt as to whether it might not be said that as the statute allows a verdict of assault to be rendered upon such a count the jury might not, *if properly directed*, have found prisoner guilty of assault. This, however, is not what I would draw from reading the charge as laid and the verdict without looking beyond. And if we turn to the judge's charge, as I think we can here to any part of the case submitted, and see no allusion to the third alternative of an assault, it seems less chance exists for having any doubt as to the meaning of the jury.

This is not a case where, as in *Reg.* v. *Gray*, (1) the jury expressly negatived fraud which was of the essence of the crime there charged and, therefore, clearly in law shewed that the prisoner was not guilty ; or *Reg.* v. *Healey*, (2) where a verdict of guilty of murder had added thereto, that there was no evidence to shew malice aforethought and premeditation, which was found too ambiguous to allow judgment to pass upon it. The foundation of the conviction was taken away.

This finding without intent or malicious intent does not meet the case and mean acquittal, where a man may

(1) 17 Cox 299. (2) 3 N. S. Rep. 331.

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be found guilty without intent of any kind, nay, as in *the Queen* v. *Latimer*, (1) against the actual intentions of the accused.

As to the instructions given the jury by the learned judge, I do not think that so far as he went they contained error of law; but I think he ought to have gone further and explained to the jury the three alternatives open to them upon such an indictment as was preferred here.

I think, though no statutory requirement may exist in regard to this, in respect of more than one or two specified cases, that proper practice requires a verdict of acquittal, where that is intended, in respect of the higher offence as laid, and a conviction found in respect of the lower, just as if there had been two counts in the indictment dealing respectively with each charge.

In regard to that, however, *Latham* v. *The Queen* (2) shews that even where there were separate counts the omission of a finding on the first count did not prevent the judgment going on an appropriate finding of guilty on, or applicable to, a subsequent count.

That shows that what was omitted to be done here would not vitiate the proceedings so as to render the conviction liable to be quashed.

I may point out that much of the interesting argument addressed to this court is in light of sections 743 and 745 no longer valid, and that cases such as this are governed by these much wider provisions than prevailed so late as *Reg.* v. *Gibson*, (3) which, however, as indicated in the opinion of the court there a right beyond what was contended for here, in regard to what could be looked at, to interpret the proceedings calle n question.

Appeal allowed.

Solicitor for the appellant: *John J. Power.*

Solicitor for the respondent: *The Attorney General for Nova Scotia.*

(1) 17 Q. B. D. 359.

(2) 5 B & S. 635.

(3) 16 O. R. 704.

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*Feb. 27, 28.
*March 6.

THE SHIP "CALVIN AUSTIN" (DEFENDANT). ..... } APPELLANT;

AND

WILLIAM L. LOVITT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA NEW BRUNSWICK ADMIRALTY DIVISION.

Maritime law — Collision — Inland waters — Narrow channel — Boston harbour.

Rule 25 of the United States "Inland rules to prevent collision of vessels" provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

Held, affirming the judgment appealed against (9 Ex. C. R. 160) that the inner harbour of Boston, Mass., is not a narrow channel within the meaning of said rule.

APPEAL from a decision of the local judge for the New Brunswick Admiralty District of the Exchequer Court of Canada (1) in favour of the plaintiff.

The following statement of the facts is taken from the judgment of Mr. Justice McLeod, local judge for the New Brunswick Admiralty Division.

"This is an action brought by William J. Lovitt, owner of the British barque "Reform," against the steamer "Calvin Austin" for damages caused by a collision which occurred in what is known as the Boston inner harbour.

"The "Calvin Austin" is an American steamer of about twenty-eight hundred tons register.

"The barque "Reform" is a steel vessel, British register, of about 545 tons, and was just terminating a voyage

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ

(1) 9 Ex. C. R. 160.

from Rosario *via* Buenos Ayres to Boston with a cargo of wool and hide clippings when the collision occurred.

"The steamer "Calvin Austin" is a passenger steamer running between the ports of Boston and St. John, and at the time of the collision she was just leaving Boston for St. John. The collision happened in the Boston inner harbour on the 30th of July, 1903, at about 15 minutes past 12 o'clock in the day. The dock which the "Calvin Austin" used in Boston is known as the "Commercial" dock, and is on the south side of the harbour. On the 30th of July she left her dock a few minutes after 12 o'clock noon. 12 o'clock is her time for sailing, but she was a few minutes late leaving that day. The pilot, Captain Mitchell, says she came out of her dock, and when she left the dock (that is, when she was clear of the dock) it was 10 minutes past 12 o'clock. Shortly before she left the dock but just as she was preparing to leave a five-masted schooner, the "Van Allens Boughton," in tow of the tug 'J. S. Chandler," passed down the harbour. The length of hawser between the tug and the schooner was about 75 fathoms. Shortly afterwards and immediately before she in fact left her dock a fishing schooner in tow of the tug "William J. Williams" came out of her dock just below the "Commercial" dock, on the same side of the harbour, a dock known as the "T dock," and proceeded down the harbour. The length of hawser between the tug and fishing schooner was about 40 or 50 fathoms. There were vessels anchored on both sides of the harbour, that is, on both the north and south sides of the harbour or channel. The day was fine and clear, but there was a strong south-west or west-south-west wind blowing. The "Van Allens Boughton," in tow of the tug "Chandler,' was going down about the centre of the harbour or channel, or possibly a little to the southern or starboard side going out.

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The fishing schooner, in tow of the tug "Williams", was following the "Van Allens Boughton" down, a little on her starboard side. When the "Calvin Austin" came out of her dock she came clear out free from the dock, some of the witnesses say a length and a half or two lengths—one witness gives a shorter distance—but, at all events, when she got clear of the dock her helm was put hard a-port. She took a south-east course, which would take her down the harbour, and when she came on her course she was rather on the port side of the "Van Allens Boughton."

"The "Calvin Austin," when she took her course of south-east, was going faster than the "Van Allens Boughton" or the fishing schooner. She was probably three lengths behind the "Van Allens Boughton," and so far as I can gather from the evidence was just commencing to pass the fishing schooner but was some two or three hundred feet from her port side. Among the vessels anchored on the north side of the harbour was a barque, the "Davis P. Davis," that appeared to be anchored a little outside the line of vessels so that her bow projected somewhat farther out in the harbour than the other vessels. When the "Calvin Austin" was straightened on her course she gave a signal of two whistles. Captain Pike, of the "Calvin Austin," says they were given to the tug "Williams", having the fishing schooner in tow. At the time those whistles were given the "Calvin Austin" had commenced to pass the fishing schooner—one of the witnesses says she had in fact passed the schooner.

"From all the evidence she was at all events passing the schooner when the whistles were given and was some two hundred feet on her port side and about two lengths or two lengths and a half behind the "Van Allens Boughton." The whistles were answered by the "Williams" towing the fishing schooner, by the

"Chandler" towing the "Van Allens Boughton," and the "Pallas" towing the "Reform." Capt. Pike says he heard the answer of the "Williams", but did not hear the other two. A few minutes after this signal was given, and Capt. Pike says after he had passed the tug of the fishing schooner and without any further signal being given, the helm of the "Calvin Austin" was passed hard a-port and she crossed the stem of the "Van Allens Boughton," and attempted to pass her on her starboard side and as she came on the starboard quarter of the "Van Allens Boughton" she met the "Reform" in tow of the tug "Pallas", coming up on that side and ran into her about a-midship, striking her about a foot abaft of the fore rigging breaking a number of her plates and doing a good deal of damage.

"The pilot of the "Calvin Austin" says she left the wharf at ten minutes past twelve, that is when she swung clear of the wharf it was ten minutes past twelve and the collision occurred at fifteen minutes past twelve, five minutes later.

"The "Reform" was coming into Boston that day, and some distance outside of the Boston light she took the tug Pallas, and shortly after the pilot came on board and took charge. The tug first took her in tow on a hawser about one hundred feet long and they proceeded thus to the Boston light, passing through what is called the Narrows at the entrance of the harbour, past Castle Island, until they came about to what is called "Burnham's Channel" buoy. There they stopped and took in the hawser and the tug dropped down alongside the barque and made fast on her port side. The wharf she was going to is what is known as the "Cunard wharf" on the north side of the harbour, or nearly opposite the "Commercial" wharf, and the captain of the tug says he went on the port side as it would be handier to put her into her wharf on that side. She

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would lie with her starboard to the wharf. As they were taking in the hawser the tug "Chandler", with the "Van Allens Boughton" in tow, was coming down the harbour or channel, and she gave two whistles to the Pallas, indicating that she wished to pass starboard to starboard. This was answered by the "Pallas" consenting. She then was made fast alongside the barque and they proceeded up the harbour on the south or port side at about two or two and a half knots an hour. Just after the tug was made fast alongside of the "Reform" the first two whistles of the "Calvin Austin" were heard and were answered by the "Pallas" consenting to meet starboard to starboard, those aboard the "Pallas" saying they supposed the signal was intended for them. The "Reform" in tow of the Pallas proceeded up the south side of the harbour or channel and when she was passing the "Van Allens Boughton" the "Calvin Austin" came across the stern of the "Van Allens Boughton" and the collision occurred. The "Calvin Austin" as she came on the starboard quarter of the "Van Allens Boughton" and saw the "Reform," again gave two whistles, put her helm hard to port and her engines full speed astern .The "Pallas" answered with two whistles. The helm of the "Reform" was put hard to port and the engines of the "Pallas" full speed astern, but the vessels came together and the damage occurred as stated."

The learned judge held that the "Calvin Austin" was solely to blame for the collision and gave judgment accordingly, assessing the damages at $9,059.61.

The questions at issue on the present appeal are stated in the judgment of the court delivered by Mr. Justice Davies.

Stockton K.C. for the appellant.

H. H. McLean K.C. and *Edward S. Dodge* (of the Bar of the State of Massachusetts), for the respondent.

The judgment of the court was delivered by

DAVIES J.—This was an action brought in the Admiralty Court of the City of Saint John, N. B., by the respondent, the owner of the barkentine "Reform" against the SS. "Calvin Austin" for damages caused by the collision of the two ships in the inner harbour of Boston, Mass.

By agreement of the parties the damages were fixed, in case the "Calvin Austin" was found solely liable, at $9,059.61, for which amount the local judge in admiralty gave judgment.

The main contest on the appeal was as to the application and construction of articles 25 and 27 of the regulations for preventing collisions prescribed and enacted by the Congress of the United States relating to the navigation of all harbours, rivers and inland waters of the United States, certain ones specially named excepted of which Boston is not one. These two articles or regulations are as follows :—

NARROW CHANNELS.

Art. 25. In narrow channels every *steam-vessel* shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.

GENERAL PRUDENTIAL RULE.

Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and *collision*, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

The appellant, the "Calvin Austin," contended that the inner harbour of Boston was a "narrow channel" within the meaning of the words in rule 25, and that the barkentine "Reform" and her tug boat the Pallas were guilty of a direct breach of that rule in coming into and sailing along "that side of the fair-way or mid-channel of that inner harbour lying on the port side of such vessel" and that no "circumstances"

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were proved under the articles making such a course of navigation and breach of the rule excusable.

The respondent submitted that the inner harbour of Boston, after passing inwardly the buoy, indifferently called the "Gas Buoy" or "Buoy No. 9", was not a "narrow channel" within the meaning of article 25, and, secondly, if it was, the circumstances proved fully justified the "Reform" and her tug in keeping to the southern side of that harbour.

The local judge in admiralty, Mr. Justice McLeod, held both contentions of the respondent well founded. We are of the opinion that he was right on both points.

As regards the main question, whether the inner harbour of Boston, at the point where the collision occured, was a "narrow channel" within the meaning of the words of article 25, we have carefully read the evidence relative to the harbour, its configuration, its buoys, its depth, its dredging, its docks, and its entrance channel, and examined most carefully the charts shewing all these important facts, and we are of the opinion that neither the language nor the reason of the rule are properly applicable to this inner harbour. As it appears from the chart, the line of the inner harbour forms a kind of semi-circle and is almost entirely lined with docks and wharves.

The depth of water from the docks on the north side to those on the south side, and from those on the west to the place of the collision, nearly out to the Gas Buoy, is practically uniform. There is no fair-way or mid-channel in this inner harbour to which the words of the rule could apply or by which ships sailing in it could be guided. When vessels reach this inner harbour they either anchor under the direction of the harbour master or proceed straight to their dock or wharf wherever that is in North, South or West

Boston. The waters in front of these docks are used as anchorage grounds for vessels under the direction of the harbour master. Several small rivers run into this inner harbour but they do not affect the question now in consideration. From the Gas Buoy seawards the evidence and the charts shew there is what might be called a " narrow channel " in whole or in part. Its depth and width are more or less defined and it is marked by buoys the greater part of the way. It is not necessary for us, however, to decide whether this channel from the sea to the Gas Buoy, or any part of it, is or is not a " narrow channel." What we have to determine is whether the inner harbour inside of these buoys, at the place where the collision occurred, is such a channel, and we hold it is not.

The object of the rule is to prevent collisions by keeping steamers on the proper side of narrow channels though which they steam. It is a reasonable and necessary rule for such waters but we cannot see reason or object in its application to such a place as this inner harbour. Surrounded except at its entrance from the sea by docks and wharves, having practically a uniform depth of water, and not having either a natural fair-way or mid-channel or an artificially buoyed one to indicate to vessels the side of the fair-way which would lie on their starboard side, we cannot see how article 25 could reasonably be applicable to it.

This conclusion would practically decide the case because, if the " Reform " was being towed where she was at the time of the collision properly and not in violation of the rule, it was not really arguable that she had been guilty of faults or neglect which would bring her within the rule of contributory negligence.

In deference, however, to the able argument of Dr. Stockton that the " Calvin Austin " was not shewn to have been guilty of any positive fault either in the

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steam signals she gave before the collision took place or otherwise in her navigation, we have given special attention to the evidence upon these points. We fully agree with the trial judge that the steamer was distinctly to blame for the misleading steam signals or whistles she gave and that these signals directly led up to the collision. They were heard and answered by the tug of the "Reform" amongst other vessels and properly acted upon by them and the subsequent wrongful navigation of the "Calvin Austin" at variance with those signals given by herself, was the proximate cause of the collision for which she must be held answerable.

We are unable to find, considering the circumstances of the time, place and weather conjoined with the signals from the "Calvin Austin" that the "Reform" was guilty of any negligence for which she should be held liable in whole or in part.

Concurring as we substantially do with the reasoning and the conclusions of the learned trial judge on the main questions we do not think it necessary to support our judgment with reference to the evidence as these references are all given in the trial judge's judgment.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Kerr.*

Solicitor for the respondent: *H. F. Puddington.*

JAMES A. JAMIESON (DEFENDANT).....APPELLANT; 1905

AND

MARY ELIZABETH HARRIS (PLAINTIFF)..... RESPONDENT.

*Mar. 1, 2.
*Mar. 9.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Master and servant—Findings of jury—New trial.

In constructing the bins for an elevator a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured by dogs placed underneath. When secured workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of the bin were holding up the staging until it could be secured, a plank on top of the adjoining pile fell off. In falling it hit the men on top of the bin and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator twenty-five questions were submitted to the jury and on their answers a verdict was entered for the plaintiff.

Held, Idington J. dissenting, that while the falling of the plank caused the accident there was no finding that the same was due to the negligence of the defendant nor any that the death of deceased was due to negligence for which, under the evidence, defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial.

APPEAL from a decision of the Supreme Court of New Brunswick maintaining the verdict at the trial in favour of the plaintiff by an equal division of the judges.

The material facts which led to the death of the plaintiff's husband are sufficiently stated in the above head-note and in the judgments given on this appeal.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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At the trial twenty-five questions were submitted to the jury which, with their answers thereto, were as follows:

"1. From which load on the tramway did the plank, which struck the deceased, fall,—the load which Humphreys was handling, or the one next to it?

"A. The one next to it, directly over the bin where the men were raising stage.

"2. To what cause do you attribute the falling of the plank?

"A. To Humphreys throwing off plank.

"3. Was the system of appliances used by the defendant for the raising of the staging and holding it securely after being raised a safe and proper system for the purpose, having regard to the work to be accomplished and circumstances?

"A. Yes, after it was secured in place, but not otherwise.

"4. If not a safe and proper system for the purpose, wherein was it defective as to safety?

"A. The possibility of dogs dropping off.

"5. Was it equally as safe and proper as the system shown to be generally used for the like work or purpose in similar erections?

"A. When properly applied.

"6. If not equally as safe and proper as the system shown to be generally used, wherein does its inferiority in respect of safety consist?

"7. Was the defendant guilty of negligence in respect of the system of appliances provided for the raising and holding of the staging after being raised, and if yes, what negligence, and did that negligence cause or contribute to the death of the deceased Harris?

"A. Yes, 5. No, 2.

"8. Should the defendant have provided a supply of extra dogs on the top of the bins, to be available in

case of any dropping down, as a reasonable precaution for the safety of the stage raisers, and did the omission to provide such supply cause or contribute to the death of the deceased, and if so, how?

"A. Yes, and he should have informed the men of their whereabouts. Yes, 6. No, 1.

"9. Should the defendant have seen that the counterweights were at all times kept on the dogs, as a necessary part of the appliance for safely raising and securing the stage, and did the omission to do so cause or contribute to the death of the deceased?

"A. Yes, 6. No, 1.

"10. Was the tramway and its connections, as an appliance for distributing the lumber, in all parts essential for the protection and safety precaution for the stage raisers, the same as generally used for like work in building similar erections; or, if not, was there any material difference, affecting the safety of the appliance, and if there was, wherein did such difference consist and how did it affect the safety of the appliance?

"A. Yes.

"11. Assuming the appliances to be all that reasonable precaution for the stage raisers' safety would require, did the method or system of using those appliances protect the stage raisers at the time of the stage raising, that is to say, take all reasonable precaution for their safety?

"A. No.

"12. Would reasonable precaution for the safety of the stage raisers require that in the distribution of the lumber there should be no handing down or throwing of plank from off the tramway opposite or in close proximity to bins where and when stage raising was going on, or not, having regard to the work to be

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accomplished and other existing conditions and circumstances?

"A. Yes.

"13. Would reasonable precaution for the stage raisers' safety while stage raising, permit of the handing down or throwing of lumber from off the tramway opposite or in close proximity to bins where stage raising was going on, the handing down or throwing being to the other side of the tramway from that on which the stage raising was going on, if due care was exercised in the handing down or throwing off, having regard to the work to be accomplished and the existing conditions and circumstances?

"A. No.

"14. Did the defendant employ a sufficient number of men for the proper performance of the work in its various departments or branches? If not, in what respect was he negligent therein, and did such negligence cause or contribute to the death of the deceased Harris; and if so, how?

"A. No—by not having enough men on tramway.

"15. Did the defendant use all reasonable precautions for the protection of the stage raisers? If not, in what respect did he fail to do so?

"A. No. By allowing plank to be thrown off at or near stage raising.

"16. Did the defendant take reasonable care to provide proper appliances, and so to carry on his operations as not to subject those employed by him to unnecessary risk?

"A. No, 6. Yes, 1.

"17. If you answer "no" to the last question, then was the want of reasonable care in not providing proper appliances, or in carrying on his operations, or both? Was it through such want of reasonable care that the

accident occurred to the deceased by which he lost his life?

"A. It was. Yes, 6. No, 1.

"18. Were the several men employed by the defendant in their respective positions, so far as was reasonably necessary, experienced or instructed for the duties they had to perform? If not, in what respect was the defendant negligent therein, and did such negligence cause or contribute to the death of the deceased Harris, and if so, how?

"A. Yes, the men were experienced, but not sufficiently instructed.

"19. Did the defendant personally control and direct the method of using the appliances, to the extent of authorizing the throwing lumber off the tramway opposite or in close proximity to the stage raisers when at work stage raising, and to the other side of the tramway?

"A. Yes.

"20. Did the defendant direct the particular manner of taking the loads off the slings, placing them on the rollers, conveying them to the place of removal from tram, and mode of handing down or throwing off, as it was done; or did he leave the manner of so doing to the men who had the work to do?

"A. Yes.

"21. Was the manner of taking the loads off the slings, placing them on the rollers, conveying them to the place of removal from tram, and mode of handing down or throwing off, safe and proper? If not, in what respect was the manner of so doing unsafe or improper; and did it contribute and if yes, in what way did it contribute, to the death of the deceased Harris?

"A. No—not having men in the distribution.

"22. Were all parts of the work as carried on by the several workmen in their respective positions so carried

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on with the approval and by the direction or authority of the defendant, both as to what they did and the manner of doing their work? If not, in what work and what respect was the approval, direction or authority of the defendant absent?

"A. Yes.

"23. Was due care exercised in receiving the loads from the sling, placing the same on the tramway from which the plank fell on the deceased, transmitting the same to the place of unloading, and in unloading same off the train? If not, in what respect was due care not taken and who omitted to take due care therein; and was such want of due care in any way the cause of the plank falling from the tram?

"A. Can't answer.

"24. Did the defendant so hurry and overwork the men, or any of them, who had the work to do mentioned in the last question, or any part of it, that they could not, or had not time to, perform their work otherwise than as they did?

"A. Yes.

'25. Did the deceased know of the existence of the risk, that is, the danger of accident happening to him in the work he entered upon, as the whole work was carried on, did he appreciate the danger, or have the means of appreciating it, and take upon himself the risk?

"A. No.

"26. What damages do you find by way of fair compensation to the wife of the deceased for the pecuniary loss resulting to her from the death of her husband?

"A. Twelve hundred and fifty dollars. ($1,250.00).

On these findings a verdict was entered for the plaintiff for the damages assessed by the jury. An application to the Supreme Court of New Brunswick

for a new trial was unsuccessful the court being equally divided and the verdict consequently stood.

Pugsley K. C. and *A. G. Blair, jr.*, for the appellant.

Mullin K. C. for the respondent.

The judgment of the majority of the court was delivered by :

NESBITT J.—The majority of the court are of the opinion that a new trial should be granted in this case.

We fully recognize the principle that if the verdict could fairly be supported upon any evidence upon which reasonable men might come to a conclusion in its favour that it should not be set aside because the appellate court did not agree with the conclusions reached. We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported. It must, however, be borne in mind that where it is felt there has been a confusion of the issues at the trial and it is doubtful whether the attention of the jury was given to the real point in issue and the questions answered or unanswered because the jury say "can't answer" leave the real question in controversy in doubt and ambiguity, the cause of justice is best promoted by a new trial. Unless the answers given by the jury to the questions as a whole or to one or more of the questions fairly indicate a finding that the death of the workmen was proximately caused by some specific or definite act of negligence for which the defendant is answerable he cannot be held liable. Any number of findings of want of reasonable care in providing or using proper appliances for the work the defendant was engaged in constructing, could not

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justify the court in entering a verdict against the defendant unless there was a direct finding, or it must be irresistibly inferred from the findings made, that this negligence or want of care was the direct and proximate cause of the accident. That is the difficulty we find here.

There appears to be no reasonable doubt that it was the falling of the plank which caused the accident. But there is no finding that this falling of the plank was caused by the respondent's negligence, and, although we have subjected the multitudinous and somewhat conflictory findings of the jury to the most searching analysis, we have been unable to conclude as a result that there has been a substantial finding on what seems to us to be the crucial point of the case; in fact we find it impossible in the conflict of actual findings and the confessed inability of the jury to answer question 23, to say that there has been any finding as to the proximate cause of the accident on which a verdict could be entered.

We desire to offer as few observations as possible lest either of the parties might be prejudiced on a new trial. It is necessary, however, to indicate what we think is the real issue between the parties.

The learned trial judge submitted some twenty-five questions many of them of great length and several of them containing distinct inquiries each necessitating an answer. In addition to this a great many of the questions are directed towards allegations of negligence which, in our opinion, have no bearing upon the issue. On the evidence before us it may well be argued that the proximate cause of the accident was the falling of a plank upon the deceased while he was engaged in the act of raising the stage, and that questions as to whether the system of stage raising adopted by the defendant took a somewhat shorter or longer time than the systems

adopted elsewhere, are not pertinent. The peril involved in a plank striking one of those engaged in the operation of raising the stage must exist according to the evidence for a short space of time, no matter what system of stage raising is adopted, and an injustice might be done if, in applying the doctrine of negligence to a case of this sort, the maxim *causa proxima et non remota spectatur* were lost sight of. The negligence, if any, must have consisted, under the circumstances, in the throwing off of planks in the immediate neighbourhood of the men engaged in the act of stage-raising; and the throwing off or falling off of the plank at that particular period of time, if found to be negligence and the direct and immediate cause of the damage, would determine the defendant's liability. No evidence, establishing that if some other method of stage-raising had been adopted, the men at the particular moment when the plank fell might have had the stage-raising completed and thus the fatal accident been avoided, is pertinent. Had the stage-raising a little lower down in the same bin, at an earlier moment, taken even longer, then the men at the particular moment when this plank fell would have been at their ordinary work instead of being engaged in stage-raising.

This is not dissimilar from the class of cases where it is urged that if a train had been going faster it would have been past the spot where the accident occurred and that, therefore, speed is not negligence.

We think that all the questions relating to counterweights and dogs and staging were unnecessary.

The jury have found, in answer to questions 7 and 9, that the defendant's failure to see that counterweights were at all times kept on the dogs caused or contributed to the death of the deceased. They have also found that not having enough men on the tramway

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likewise caused or contributed to the death of the deceased. They have also found that by allowing planks to be thrown off at or near stage-raising the defendant failed to use reasonable precautions for the protection of stage-raisers, but not that it was the cause of the accident. They have said that they are unable to answer whether there was anything negligent either in placing planks upon the tramway or in transmitting them to the place of unloading *or in unloading them.* This, apparently, conflicts with the answer to question 15. They have not expressly found that the negligence of throwing off planks *caused* the death, but have simply found that reasonable precaution would have required that such a system be not adopted. We are, therefore, unable to say that the jury have found any negligence causing the death for which, in our opinion, the defendant, on the evidence, can be said to be liable.

We think that, assuming the tramway to be proper and assuming that the planks are properly placed upon it, and assuming that due care is exercised in unloading the planks, if the plaintiff is able to satisfy the jury by evidence that the defendant reasonably ought to have foreseen that accidents might occur from the throwing off of planks near to the men engaged in stage-raising (even upon the opposite side of the tramway) the defendant would be answerable for such negligence.

It is quite evident that the personal supervision of the work was done by him and he was aware of the method of carrying on the work. See *Sword* v. *Cameron* (1) affirmed in *Smith* v. *Baker* (2). Upon this essential part of the case the learned trial judge charged the jury as follows :

(1) 1 Ct. of Sess. Cas. (2 Ser.) 493. (2) [1891] A. C. 325.

You will bear the fact of the two accidents in your minds throughout the case, if you please, when you are considering what would reasonably be required of the defendant; because he would not have more than a knowledge of the possibility, or probability, as the case may be, of either one of these accidents happening, and *still less would he be likely to have it in his mind that two accidents would be apt to occur at the same moment.* He would in regard to the tramway and the unloading of the lumber from the tramway, I think, and I think any reasonable man would be apt to have in his mind, and the jury would expect him to have in his mind, the possibility of lumber falling from the tramway; but he would not be likely to have in his mind, *nor do I think he ought reasonably to be held likely to have in his mind that the floor upon which that deal would fall would be other than a stage covered bin.* I think it would be expecting a man to foresee possibilities to a greater extent than a jury would be likely to expect him to foresee if they held him to anticipate the occurrence of those two accidents together in the falling of the deal upon the man *when he was in the act of raising staging and when the bin was exposed so that he could go to the bottom.* And I think there have been some references given to his duty in regard to there not having been plank put down if there was a dangerous condition of the bin below, from the fact that it seems *the instructions always forbade the throwing off of lumber from the tramway on to bins where stage-raising was in fact going on.*

We cannot find the evidence went this length but point to it as shewing that the attention of the jury was not closely drawn to what we conceive to be the vital point in issue.

We are unable to say what the evidence may be upon a new trial, but we think that the jury should be made clearly to understand that no matter how perfect the system be, if the defendant, as a reasonable man, should have apprehended that the method adopted in carrying out the system might lead to an accident under particular circumstances, he is liable if the accident occurs under those circumstances. We do not think that the jury's mind should be distracted and embarrassed by questions relating to the different methods of the system of stage-raising; it is common to both systems that at some particular moment the men should be engaged in stage-raising, and the point to be determined is whether or not the defendant was negli-

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gent in allowing planks to be thrown off in the way this plank was thrown off at such a time and place, no matter how carefully the operation is carried on. If there is no evidence whatever from which a jury might infer that such a contingency ought reasonably to have been apprehended by the defendant, then the trial judge would probably think that there was no evidence to go before the jury under the doctrines enunciated by this court in *Wood* v. *The Canadian Pacific Railway Co.* (1), following the authorities therein referred to.

We would suggest that, upon a new trial, the jury be simply asked:—Was the defendant guilty of negligence causing the death of deceased, and if so, in what did such negligence consist?

We regret the necessity of a new trial and that the appeal must be allowed and with costs, as we feel that any other order as to costs would be a departure from principle and laying down a dangerous precedent.

IDINGTON J. (dissenting).—The appellant in erecting an elevator which had reached at the time when the accident now in question happened about sixty-five feet in height, used for the purpose of the distribution of the planks needed in the construction of the elevator, a system of rollers two feet long set transversely across a tramway that extended four inches beyond the ends of the rollers.

This tramway extended alongside the range of bins that were being made of various sizes from four by eight to twelve by fourteen feet, or some such sizes. These bins were built open from the bottom clear to the top. The planks used to form the sides of these bins were being nailed together by a large number of men. The men engaged in nailing together the planks forming these bins stood upon a stage set in each bin.

(1) 30 Can. S. C. R. 110.

This stage was from time to time as building progressed moved up by four men standing on the wall of the bin, each pulling a rope attached to the stage at or near the corner of it and, as it was drawn up, there was an appliance called a dog that fell, or was intended to fall, into a notch in the wall of the bin and support the stage when it had reached the point where the men needed it set to proceed with the work.

The plaintiff's husband, whilst engaged in the moving of this stage in the manner I refer to, was struck by a plank falling from the tramway which would be some few feet above where he stood, and by force of the blow knocked into the bin and thrown to the bottom along with another workman who was trying to fix one of the dogs needed for the support of this stage. The plaintiff's husband, as the result of this fall of sixty-five feet, was killed.

It seems he had been kept standing in this strained position for a longer time than he need otherwise have been had the dog been at hand to be put into its place. It had dropped off as it was apt to do and time was lost recovering it. As it happened to have been recovered and got back to the place where the man placing it was engaged in doing so, I do not just now attach the importance to the question of its falling out that seems to have been done at the trial by all parties.

Suffice it to say that it became the duty of the deceased in the course of his serving the defendant to help to hold this movable staging and to stand, whilst doing so, in the perilous place he did, on top of a narrow wall sixty-five feet high.

He was entitled in law at the hands of the defendant in the discharge of so risky a duty to the reasonable safeguards that a prudent careful man under the circumstances must have seen necessary for the purpose of protecting one of his servants so placed.

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It seems that the tramway might be seven feet above the workmen at one time and again only three or four feet above them, that height depending entirely upon the progress of the work of construction. Upon this tramway a man would place the needed planks when elevated, and so place them that there might be three tiers alongside each other, consisting of seven two-inch planks in depth.

Thus piled they could be moved along upon and by means of the rollers to the point needed. There would be three of these piles in succession, and propelling one after the other would bring their ends into contact and, if much force directly applied or acquired from momentum of motion, might crowd them upon each other so as to overlap or interlap each other.

When this happened as there was only one man working at throwing off the load he might, though working with care, disturb these planks on the load beyond where he was working.

The act of moving these piles would also sometimes disintegrate the load and tend to throw it or part of it off on the men below.

Any disturbance of these planks was liable to produce a fall of some of them.

That fall might take place just at the unfortunate moment when the men engaged in raising the stage had their hands full and stood in the place of greatest danger in prosecuting their work.

The evidence shows that within two weeks prior to the accident in question planks falling from these piles on the tramway had knocked down two different men engaged beside and below the material thus piled from which such falling took place, and at least on three other occasions there were observed similar occurrences of falling planks.

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All this was apparently not due to carelessness but would seem to have been a necessary incident of operating the narrow, unguarded appliances in use for distributing this timber, and was something one would say who had never seen similar appliances in operation as most likely to happen. Operated a few feet from the ground, it was not likely to produce serious results. Indeed, when the staging was in its place and the men had that to stand upon and a chance to protect themselves, fatal accidents might seem improbable. But when known to happen or to be likely to happen, the question arises if in running the chance of its doing so, at such a critical moment as that now in question, can be aught but negligence on the defendant's part.

It has been established by the evidence of the defendant and his witnesses that this system and these appliances were in charge of most careful men, warned to take every care for the safety of themselves and others, and yet there happened in the operation of this system and these appliances so guarded, within a fortnight or so preceding the accident in question, five different accidents of the same nature as this in so far as lumber falling off from this tram is concerned upon men at work or in the immediate vicinity of the men at work but so placed as to escape the like misfortune of deceased at the time of this the sixth falling of lumber from the tram piles.

If that could happen then and there under such circumstances, I think beyond any question that there was such a condition of things then existing in the defendant's works where deceased was employed as might, and in the language used in this court in *Wood* v. *The Canadian Pacific Railway Co.* (1)

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could, reasonably have been foreseen to be likely to endanger the safety of the defendant's servants working under or beside such tramway whilst in use where such servants were working.

Then there is evidence in express terms that there might have been more precaution taken and that there was no proper care taken; that lumber had been known to fall from cars when in use in defendant's service, on the tramway, and that the almost self-evident safeguards of outriggers involving a trifling expense might have been applied but was not, and that there could have been greater safety by use of two men instead of one, and that the defendant not only insisted upon one man doing the work of two or where two might have been employed but also pressed the one so much as to induce hasty action, adding thus to the perils of the men by increasing risk of lumber falling off and that if there was undue haste on Humphrey's part it was the act of the defendant who directed it.

I am not concerned beyond the determination of the question whether or not there existed such evidence of this danger and of the neglect to provide against it as to render it the duty of the trial judge to submit the evidence to the jury, the proper tribunal to pass upon it. If I cannot find that, by reason of this evidence falling short of that, the action should have been dismissed, I am in law bound by the verdict of the jury.

This is elementary law—it needs no argument to uphold it.

There was no objection made at the trial to the learned judge's charge or any of his questions that he submitted or to the number thereof. None can be made now.

The only remaining question is what is the meaning of the verdict? Is there enough in it to entitle the plaintiff to have judgment?

They find that the plank which struck the deceased fell from the load next to one Humphreys was handling and directly over the bin where the men were raising the stage and attributable to Humphreys's throwing off the plank, and answer questions Nos. 11, 12, 13, 14, 15, 16, 17, 18 and 19, as follows:—

11. Assuming the appliances to be all that reasonable precaution for the stage-raisers safety would require, did the method or system of using those appliances protect the stage-raisers at the time of the stage-raising, that is to say, take all reasonable precaution for their safety?

A. No.

12. Would reasonable precaution for the safety of the stage-raisers require that in the distribution of the lumber there should be no handing down or throwing of plank from off the tramway opposite or in close proximity to bins where and when stage-raising was going on, or not, having regard to the work to be accomplished and other existing conditions and circumstances?

A. Yes.

13. Would reasonable precaution for the stage-raisers' safety while stage-raising, permit of the handing down or throwing of lumber from off the tramway opposite or in close proximity to bins where stage-raising was going on, the handing down or throwing being to the other side of the tramway from that on which the stage-raising was going on, if due care was exercised in the handing down or throwing off, having regard to the work to be accomplished and the existing conditions and circumstances?

A. No.

14. Did the defendant employ a sufficient number of men for the proper performance of the work in its various departments or branches? If not, in what respect was he negligent therein, and did such negligence cause or contribute to the death of deceased Harris; and, if so, how?

A. No, by not having enough men on tramway.

15. Did the defendant use all reasonable precautions for the protection of the stage-raisers? if not, in what respect did he fail to do so?

A. No. By allowing plank to be thrown off at or near stage-raising.

16. Did the defendant take reasonable care to provide proper appliances and so to carry on his operations as not to subject those employed by him to unnecessary risk?

A. No, 6. Yes, 1.

17. *If you answer "No" to the last question, then was there want of reasonable care in not providing proper appliances, or in carrytng on his operations, or both? Was it through such want of reasonable care that the accident occurred o the deceased by which he lost his life?*

A. It was. Yes, 6. No, 1.

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18. Were the several men employed by the defendant in their respective positions, so far as was reasonably necessary, experienced or instructed for the duties they had to perform? If not, in what respect was the defendant negligent therein, and did such negligence cause or contribute to the death of the deceased Harris, and, if so, how?

A. Yes. The men were experienced, but not sufficiently instructed.

19. Did the defendant personally control and direct the method of using the appliances, to the extent of authorizing the throwing lumber off the tramway opposite or in close proximity to the stage-raisers when at work stage-raising, and to the other side of the tramway?

A. Yes.

I am unable to see any difficulty in understanding what the jury intended by these answers when I bear in mind, as I must, the subject matter in relation to which they were asked, the evidence given and the learned judge's charge thereon to which no objection was taken and that counsel for defendant made no objection to any of these questions. There was and is no manner of doubt that deceased met his death by reason of the falling from the tramway of a plank, that knocked him and his comrade, whilst engaged in stage-raising, down into a pit sixty-five feet deep.

The questions Nos. 16 and 17 and answers thereto would alone be sufficiently comprehensive and accurate, under the circumstances, to convey to the mind of the court that the deceased met his death by reason of the defendant not taking reasonable care to provide proper appliances and carry on therewith his operations in which his late servant was engaged; and the answer to the 19th question attributes this to the defendant personally or as done under his personal control and direction.

An over-refinement in framing so many questions may seem at first sight perplexing. In the answers that the jury have given I think they shew clearly that they successfully overcame everything that was thus so apparently perplexing, and made their meaning clear in spite thereof. I do not think that we should,

by over-refining, fritter away their plain meaning. It is much more clearly shewn, I submit, than in some other verdicts such as *Moore* v. *The Connecticut Mutual Life Insurance Co.* (1); *Balfour* v. *The Toronto Railway Co.* (2); *Seaton* v. *Burnand* (3); and *O'Connor* v. *The Hamilton Bridge Co.* (4), where verdicts had to be extracted from some apparently inconsistent or inconclusive answers and yet were upheld in most of these instances by this court.

Counsel for the defendant, in opening his defence, said, referring to the contentions by counsel for plaintiff: "He says that the defendant is guilty of negligence in that he did not supply or provide a suitable or safe tramway—in other words a perfect system of tramway. He says that the defendant is guilty of negligence in that he did not provide a safe and secure system of staging; and the third allegation is that he is guilty of negligence in that the method of operating the said system was defective. I may say to you that if the plaintiff could establish—could substantiate these allegations, then I apprehend that we could not very well ask you to do other than bring in a verdict for the plaintiff."

The jury have, upon the evidence which was upon each of these issues sufficient to entitle them to do so, found each of the allegations in question well founded, and yet we are asked to grant a new trial.

The issue as to the safe and secure system of staging I have not dealt with separately though questions were submitted in regard to it and were answered favourably to the plaintiff.

The security and safety of that system is covered sufficiently for the purposes of the trial in question by those answers I have quoted.

(1) 6 Can. S. C. R. 634.
(2) 32 Can. S. C. R. 239; 2 Can. Rway Cas. 325 at p. 327.
(3) 16 Times L. R. 232.
(4) 21 Ont. App. R. 596.

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Much more than need have been, I think, was gone into at the trial on this head but possibly the doing so was unavoidable, and certainly the defendant cannot say after (so to speak), joining issue thereon in the address I have quoted from, that he was embarrassed by it.

I think the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Blair & Blair.*

Solicitor for the respondent: *Daniel Mullin.*

ROBERT THOMAS HOPPER (PLAINTIFF)..... APPELLANT;

AND

DANIEL HOCTOR AND FRANK W. MAY (DEFENDANTS)..... RESPONDENTS.

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*March 6, 7.
*March 20.

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

Partnership—Syndicate for promotion of joint stock company—Trust agreement—Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.

A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom plaintiff was one, furnishing capital, and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants and patent rights were assigned to them, in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows, 37½ per cent to the defendants who held the property, 32½ per cent to the owners of the patent rights, the other three members to receive each 10 per cent of the total stock. A time limit was fixed within which the company was to be formed and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void and all parties were to be in the same position as if the agreement had never been made. The tenth clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed but, within the time limited, the plaintiff, and the other two members, holding together 30 per

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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cent interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages.

Held, that the tenth clause of the agreement controlled the administration of the affairs of the syndicate and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners and the plaintiff could not enforce specific performance.

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

The following statement of the case made by Mr. Justice Hall, in his dissenting judgment, in the court below, was referred to by Mr. Justice Blanchet, in delivering the judgment now appealed from, as a sufficient statement of the facts in controversy. Mr. Justice Hall said:—

"The appellant's action was brought upon an agreement *sous seing privé* of date April 30th, 1900, to which the plaintiff and the defend ants and also Francis C. Crean, Gerald J. Crean, James Dobson and Charles Webb were parties. The appellant, Hopper, acquired, and now represents the interests of Dobson and Webb. By this agreement a syndicate was formed for acquiring and developing certain lots in the Township of Duval, on the east side of the River Natashquan, in the Province of Quebec, containing deposits of iron sand. The Messrs. Crean were proprietors of letters patent for a magnetic separator by which the iron was to be separated from the sand.

"The preamble of this agreement of April 30th, 1900, sets forth that the respondents Hoctor and May have

acquired the lots in question, that the appellant Hopper, and Dobson and Webb, have provided certain large sums of money, which have been expended in exploring for minerals upon the said properties, and in the examination of other properties in the Gulf of St. Lawrence and Straits of Belle Isle, and in the construction of the electrical separator, etc., and that Gerald J. Crean, the owner of the patent for the separator, has transferred it to the respondent Hoctor, in trust for the syndicate formed by the agreement. Clause one of the agreement then continues as follows:

'1. The parties of the first part hereby agree to transfer and convey in fee, to the syndicate composed of the parties hereto, or to the corporation to be formed or other nominee of such syndicate, the lots of land hereinabove described, free and clear of all encumbrance, without any consideration other than the share and interest of said parties in the said syndicate allotted to them as hereinafter set forth, together with all rights in the above mentioned patents transferred by the said Gerald J. Crean to Daniel Hoctor, in trust for the said syndicate, and ratified by Francis C. Crean, tutor of the said Gerald J. Crean.'

"The second and third clauses of the agreement apportion the interests of the several parties in the following terms —

'2. Having taken fully into consideration all the sums of money expended by the parties hereto up to April 9, 1900, the parties agree now to readjust the interests in the said syndicate as of that date, neither party having any claim upon the other for past expenses for any reason whatever up to that date.

'3. The share and interest of the said parties in the present syndicate, and in its assets and rights, or in any corporation to be formed to take over its assets and rights, shall be as follows:

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'Daniel Hoctor, eighteen and three-quarters per cent.

'Frank W. May, eighteen and three-quarters per cent.

'Francis C. Crean and Gerald J. Crean, thirty-two and a half per cent.

'Robert Thomas Hopper, ten per cent.

'James Dobson, ten per cent.

'Charles J. Webb, ten per cent.'

"Crean agrees to transfer to the syndicate, its successors or assigns, all further patents which he may obtain in Canada for inventions of a similar nature, and it is agreed that the members of the syndicate shall contribute whatever money is needed in the enterprise in proportion to their several interests.

"The seventh and eighth clauses, which are important, are in these words.—

'7. It is agreed that on or before September 1, 1901, a corporation or joint stock company shall be formed by the syndicate for the development and exploration of the above mentioned properties, or any others that may be acquired under this agreement and the shares in the said corporation or joint stock company shall be allotted to the members in the syndicate in the proportion of their several interests as herein expressed.

'8. If the joint stock company shall not be formed before the first day of September, one thousand nine hundred and one, or, if after September 1, 1900, a majority in value notify the other members of the syndicate that they require the formation of such company, and for the space of two months after the receipt of such notice the minority members refuse to unite in forming such company, then the whole of the lands above mentioned shall revert to and become the property of the said Daniel Hoctor and Frank W. May; and any transfers made by the said Gerald J. Crean of

his own patent or of any improvements thereof shall be void and of no effect, and all the parties shall be in the same position as if this contract had never been made, without any right to recover any moneys expended in connection with the syndicate after April 9th, 1900, except that any properties acquired by purchase by moneys contributed by members of the syndicate shall be sold and the net proceeds divided among those who contributed in the proportions of their contributions.'

"The tenth clause, which was relied upon at the argument by the respondents, declares that 'all matters affecting anything more than mere detail of administration shall first be approved by all of the syndicate, and in case of difference of opinion three-fourths in value shall control.'

"The parties did not agree upon the formation of a joint stock company. On the 11th May, 1901, by the ministry of Dunton, notary, the appellant, Hopper, specially called upon the respondents to unite in the formation of a joint stock company in accordance with the terms of the agreement, and notifying them that in default of their declaring their willingness to unite in forming such joint stock company the appellant would with others proceed to obtain letters patent of incorporation under the name of 'The Natashquan Iron Company.' The respondents would not unite with the appellant, who associated with himself certain others, and on the 13th August obtained incorporation under the name of 'The Natashquan Iron Company, and on the 28th August, by Derome, notary, appellant and the Natashquan Iron Company notified the respondents of the incorporation of the company and of their willingness to transfer shares in the company in pursuance of the agreement of April 30th, declaring the willingness of the appellant and the Natashquan Iron

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Company to enter into any agreement which would give effect to the syndicate contract of April 30th, 1900, calling upon the respondents, in the event of their refusing to accept shares in the said company, to forthwith transfer and convey the lands and mining lots and patent invention to the syndicate, in which the appellant, Hopper, owned thirty per cent, he having acquired the interests of Dobson and Webb. The respondents replied to the notarial notification of appellant that they were willing to unite in any company which could insure practical results and success, but made no suggestions as to what such a company should be.

"The appellant brought suit, asking that the respondents be ordered to transfer to the Natashquan Iron Company the lots in question, together with the patent for the separator, and alternatively that the judgment should go to transfer the property and patent to the syndicate in accordance with the terms of the agreement, and failing either of these remedies, that the respondents be condemned to pay the sum of $20,000 damages.

"The consideration set forth in the deed by which the respondents acquired the property, appears to be $5,570, though the respondent, May, swears that further sums were paid. The appellant and those whose interests he represents, contributed in cash $4,983 for which they acquired an interest of thirty per cent in the syndicate."

Hoctor and May contested this demand upon three grounds:—(1) that Hopper was not legally seized of the rights of Dobson and Webb, as he had not given proper notice of his purchase of their interests to the respondents; (2) that the Creans had not been called in the case, and that the conclusions of the action could not be granted so long as they were not made

parties to it; and (3) that the Creans and themselves had always been willing to form a company, but had been unable to agree with Hopper as to the amount of its capital; that they had made repeated attempts to dispose of their rights, but had been unsuccessful, without any fault of theirs and sometimes through the opposition of Hopper; that the latter could not form a company without their consent, as they represented 70 per cent of its assets, and that they could not be forced to transfer their properties and rights in the patent to the company organized by him in contravention to the express terms of their agreement which says that the company shall be formed by the syndicate, and that, therefore, his demand in damages was unfounded in fact and in law.

The Superior Court dismissed the appellant's action upon two grounds; (1) because Francis C. Crean and Gerald J. Crean were not made defendants; and (2) because the time limit for the formation of a joint stock company had expired, and the intentions of the other members of the syndicate as to the formation of such a company were frustrated by the plaintiff, and the property had reverted to the respondents.

The majority of the judges in the court below did not adjudicate formally upon the two first objections, but came to the conclusion that the action must fail upon the third plea.

R. C. Smith K.C. for the appellant. It was not necessary to make the Creans parties to this action. They had not any possession or control in any manner of either the lands or the letters patent in question, nor is any condemnation sought against them. In any case, the pleadings did not raise this question in a definite manner. The plaintiff was thus taken by surprise at the hearing and, if necessary, ought then to have been offered an opportunity of joining them in

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the suit, and it was no ground for dismissing the action. Art. 177 C. P. Q.; *Currie* v. *Currie* (1), per Bossé J.; *Chalmers* v. *North-West Shoe Co.* (2); *Jacob* v. *Klein* (3); *Montchamp* v. *Montchamp* (4); *Stewart* v. *Molsons Bank* (5); *McNally* v. *Préfontaine* (6).

The respondents were bound to transfer to the syndicate without any demand whatsoever. They were *en demeure* by the very terms of the first clause. If, however, any demand were necessary, any member of the syndicate could make such demand. This demand was regularly made as evidenced *inter alia* by two notarial protests. The respondents answered by declaring that they "never refused to join in forming a reasonable company which can assure practical results and success," and "that they held the properties mentioned in the deed of agreement of the 29th April, 1900, subject to the terms of said agreement and for the purposes thereof." It is erroneous to say that the appellant had virtually a mere option which expired on a certain date, in default of his having exercised it; that he had under the agreement merely a conditional right which never became effective because the formation of the joint stock company was never fulfilled. Clause 2 of the agreement specifically declares that the re-adjustment of the interests of the parties in the said syndicate is based upon a full consideration of all the sums of money expended by the parties up to 9th April, 1900. Clause 3 then declares what the share and interest of the said parties in the present syndicate and in its assets and rights or in any corporation to be formed to take over its assets and rights shall be. Whatever moneys were expended on either side were fully taken into consideration and the parties received a share in the syndicate "and in its assets" in propor-

(1) Q. R. 3 Q. B. 552.
(2) 4 R. L. (N.S.) 397; 1 Q. P. R. 250.
(3) 3 Q. P. R. 519.
(4) M. L. R. 3 S. C. 98.
(5) M. L. R. 6 S. C. 324.
(6) Q. R. 11 K. B. 370.

tion to what they had actually expended. There was the disbursement of a substantial consideration, and the acquisition of a substantial share or interest in certain assets. The appellant did not acquire an inchoate or an eventual right, but an actual interest in an actual property. The respondents propose to confiscate this interest and despoil the appellant of all his rights in the property and assets of the syndicate upon the ground that a joint stock company was not formed before the 1st of September, 1901, an obligation which rested equally upon each member of the syndicate. The respondents were the obstructionists and held back to let the time expire and oust the appellant of his interest in the property.

The Natashquan Iron Company was formed within the time provided for by the agreement, and if the property and patent be transferred to the company upon respondents being transferred 70 per cent of the stock, they can have nothing to complain of. The directors of the company were duly authorized to allot such stock to the respondents to comply with the terms of the agreement, by resolution of the 27th August, 1901. The other 30 per cent will properly belong to Hopper and his associates as representing his 30 per cent in the syndicate. The respondents will have 70 per cent of the capital, therefore, it is immaterial whether the capital is one thousand dollars or one million dollars.

Francis McLennan K.C. and *DeLorimier K.C.* for the respondents. As to the transfer of the properties to the syndicate, the respondents contend that they were, with the consent of the majority, holding the properties as the nominees of the syndicate for the purposes of the syndicate, and the appellant cannot alone, and against all the other members of the syndicate, take objection to this. It is clear that Hopper

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cannot obtain the transfer of the properties to the company organized by himself, because the company contemplated was to be formed by all the parties to the contract of 30th May, 1900, and no outsiders could be brought into this company against their will. The majority would not confide the management and the disposal of interests valued by them at $1,000,000.00 to a board not selected by themselves. The respondents had 70 per cent of the total assets to be transferred to the company contemplated by them, and although the directors of the company formed by Hopper were authorized to offer and did offer to buy the property for cash, provided they would take in payment an equivalent amount of the stock of the company, it appears from the record that 50 per cent of the stock of the company formed by Hopper was already transferred to these outsiders, and the offer was consequently irregular and insufficient, as it does not appear that the stock already disposed of had been re-transferred to the company. The respondents could not be expected to part with their interests without receiving a full and valuable consideration for the same, as stipulated in the agreement.

The subsidiary demand that a transfer be ordered to be made to the syndicate must also be rejected. The object of the agreements was to give the syndicate a temporary control only of the properties and rights described until the company was formed, the formation of this company being the principal object in contemplation, as the only means by which the mines could be worked or disposed of with advantage. For that reason, if the company was not formed within the stipulated time, the whole scheme was to be abandoned and the parties restored to their original position, and Hopper and his two associates would lose not only their advances but also all their interests

as well. Under these circumstances a transfer to the original members of the syndicate for one day, as the time expired the day after, would have been absolutely useless, because this syndicate could not have transferred to a company which never existed and had not the remotest chance of existing in the future.

The real difficulty and sole obstacle to the formation of the company projected was a difference of opinion between Hopper, who insisted that its capital should be $100,000, and Hoctor and May and the two Creans, who wished it to be fixed at not less than $400,000, upon the ground that the amount needed to acquire the necessary plant to work the mines, in case they could not dispose of them, would exceed $300,000. There could be no business ground for Hopper to object to the demand of the majority on this point, for he controlled only 30 per cent of the assets and had agreed that, in case of difference of opinion, three-fourths in value would control The time having expired before a company was formed in accordance with the terms of the agreement, the promise of sale made by Hoctor and May lapsed and does not bind them. See arts. 1851, 1852 C. C.; Fuzier Herman, art. 1859, *n.* 9.

The action is bad because it is taken by the wrong person and against the wrong persons. It sets up a right belonging to a syndicate of seven persons, and alleges that the appellant represents three out of the seven, but there is no proof that he acquired the rights of Dobson and Webb. Art. 1571 C.C.; *Prowse* v. *Nicholson.* (1) He is claiming a right belonging to the syndicate, and it does not appear in any way that he represents the syndicate, but, on the contrary, it appears that all the other members were opposed to his action. Appellant cannot sue in his own name for the benefit

(1) M. L. R. 5 Q. B. 151.

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and on behalf of the syndicate. The obligation to form a company was an obligation of the syndicate, but all the members of the syndicate are not made parties and, therefore, it must fail. Troplong, Société, nn. 525-529; *McFarran* v. *The Montreal Park & Island Railway Co* (1). As to the damages prayed for there is no proof of breach of contract by default.

The judgment of the court was delivered by :

IDINGTON J.—The questions raised here must be determined by the interpretation of the written contract of 9th April, 1900.

Two of the parties owned lands supposed to contain minerals that might be made productive, especially by the use of appliances and methods for which two other of the contracting parties held patents. Two others joined in the contract after having expended some means in the way of investigation and experiment, and the plaintiff, who introduced these last-named as capitalists likely to aid in the development of the property, also became a party to the contract.

Having assembled, so to speak, their several interests and properties together for the common object of such gain as they might hope for by their joining their forces, they set out in this contract, which seems to have been of a purely tentative character, a method by which they might hope in following the lines laid down, to produce something of a more permanent character.

They assigned to the respective parties, by paragraph two of the contract, the proportion of share and interest each should have in the syndicate and its assets and rights or in any corporation formed to take over its assets and rights.

(1) 30 Can. S. C. R. 410.

They declared this by paragraph two to be a readjustment of their rights so that neither party could have any claim upon the other for past expenses for any reason whatever up to the date of this agreement.

By paragraphs one and four provision was made for the assignment to the syndicate, comprised of the parties to this agreement, of the properties and patents then held by the respective parties I have above referred to as respectively owning same.

Paragraphs five and six look to the acquisition of other properties and the furnishing of means for doing so.

Paragraph nine looked to a possible sale of the property and the recouping of the parties who had advanced moneys for acquisition past or prospective and for preliminary examinations before a division should be made of the proceeds of such sale.

It may be said of all these paragraphs but No. 6 that they were each and all self-operative and could not be governed by the will of a majority or of any one of the syndicate. Therefore none of them need be considered in regard to the effect to be given to No. 10, the last paragraph of the whole agreement.

Now, the judgment prayed for is to have the properties and patents directed to be conveyed to the syndicate, and, if there were nothing more in the contract, this prayer must, as a matter of course in a properly constituted suit, have been granted, or, if not, should now be granted by allowing this appeal, unless we are to accept in its entirety the argument of counsel that the agreement to convey was, as a matter of law, a conveyance, and nothing further needed.

In the agreement there appear the following paragraphs 7 and 8, which, with paragraph 10 following hereunder, give rise to the contention of the parties and

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any difficulties that exist in the interpretation of the agreement.

7. It is agreed that on or before September 1, 1901, a corporation or joint stock company shall be formed by the syndicate for the development and exploration of the above-mentioned properties, or any others that may be acquired under this agreement, and the shares in the said corporation or joint stock company *shall be allotted to the members in the syndicate in the proportion of their several interests as herein expressed.*

8. If the joint stock company shall not be formed before the first day of September, one thousand nine hundred and one, or if, after September 1, 1900, a majority in value notify the other members of the syndicate that they require the formation of such company, and for a space of two months after the receipt of such notice the minority members refuse to unite in forming such company, then the whole of the lands above-mentioned shall revert to and become the property of the said Daniel Hoctor and Frank W. May, and any transfers made by the said Gerald J. Crean of his own patent or of any improvements thereof shall be void and of no effect, and all the parties shall be in the same position as if this contract had never been made, without any right to recover any moneys expended in connection with the syndicate after April 9th, 1900, except that any properties acquired by purchase by moneys contributed by members of the syndicate shall be sold and the net proceeds divided among those who contributed in the proportion of their contributions.

10. All matters affecting anything more than mere detail of administration shall first be approved by all of the syndicate, and in case of difference of opinion three-fourths in value shall control.

It is quite clear from this paragraph 8 that it was intended that if these parties should fail to form a joint stock company by 1st September, 1901, the properties conveyed should revert to the parties who originally owned them, and all parties concerned should stand thenceforth as if nothing had ever been done or contracted for.

I do not understand this to be denied save by saying that there was an implied obligation arising upon and from paragraph 7 that rendered it the legal duty of each member of the syndicate to do what in him lay to form the corporation or joint stock company pro-

vided for, and that the defendants and others concerned did not discharge this duty, and therefore by reason of this breach of contract the provisions for the returning or reconveying of the properties never came into operation.

I do not intend to be understood as affirming anything beyond what is needed for the purpose of disposing of this appeal.

I think that the powers given by paragraph 10 of the agreement were intended to apply to and control the operation of the seventh paragraph.

There is nothing else but paragraphs 6 and 7 that it can apply to.

Each of these three paragraphs, plainly, to my mind, needed, to make them effective, just some such determining power as paragraph 10 creates.

Paragraphs 6 and 9 are not in question here.

The difficulties in question all arise thus, I think, upon the consideration of, and are to be solved by the construction of paragraph 10 in relation to paragraph 7. Paragraph 10 is not repugnant to paragraph 7. But, on the contrary, the latter needs paragraph 10 or something of its nature to make anything of paragraph 7 at all. But for that it would, on honest differences arising between the parties as to the terms and conditions on which a company should be formed, prove to be impracticable and useless.

Paragraph 7 does not provide for anything that any court if applied to would declare specific performance of. It is of the most indefinite character and, apart from the notion of specific performance, many difficulties suggest themselves as to any remedy for a breach of its obligations whatever they may be.

Can any one man sue any other for damages for such a breach?

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Can one man sue all the rest for such a breach? Or must he sue the syndicate which includes himself?

Can we indirectly, by directing, now that the time for forming a corporation has elapsed, a conveyance of these properties, supply a remedy for this supposed breach? Any such legal speculations I venture to think are beyond what here could be required of us to execute. I think that to avoid such, or any such results, the parties relegated the decision of all such matters and things as could arise in the way of policy to be adopted or rejected, to the decision of the syndicate itself and that three-fourth's thereof in value, at least, should first agree before any policy could be adopted in relation to such things as incorporation and its terms.

Of such matters I think the amount of the capital stock of the proposed corporation or "joint stock company" was one that had to be determined by three-fourth's in value of the syndicate.

The parties never were able to agree upon this initial step. I think that for the court to interfere under the facts here, and directly or indirectly coerce the three-fourths in the way plaintiff seeks would be a direct interference with the rights they reserved to themselves by the plain meaning of the agreement.

The power the plaintiff and his partners constituted for their government and the decision of such questions as in truth and fact are involved here, though that may not in words appear in the pleadings, has decided against plaintiff. He must abide by it.

Unless and until he can reverse that decision I do not think we can go through the idle form of directing a conveyance of properties that should be reconveyed in the events that have happened.

Whether or not in a proper case, if one of the members of the syndicate, moved by improper motives,

could have been restrained from deciding as they did, I am not concerned with here.

I think the defendants and those with them acted within their rights.

I do not attach the importance to the quotation from the evidence of defendant Hoctor that appellant's counsel did, and I do not think it, read with the context, shews an intention willingly to frustrate the formation of a company under the agreement.

I doubt if it was not merely the hasty expression of the irritated witness, rather than the business man giving the result of the true history of the attitude that defendants had assumed or the position they had taken, as shewn by the other evidence regarding negotiations that had taken place.

The rest of the evidence taken as a whole does not permit me to find any such result or determination by the defendants as plaintiff contends is shewn.

It is to be borne in mind that the plaintiff after introducing capitalists whose resources were the one originating cause of any agreement between the parties abandoned the enterprise and left the defendants without any present hope for the working out of the purposes of the parties.

I am not going to scrutinize too closely the action of parties, thus placed by the plaintiff, and I think that the hope of getting capital being lost the defendants were quite within their rights in staying their hands in the forming of any corporation till they saw some way out, other than a way of merely giving plaintiff a lien on defendant's property for some claims he had bought from his associates.

Such a result seemed likely to be all that would flow from the submission of defendants to the dictation of the plaintiff.

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I do not think it necessary in this view to consider the many other interesting questions that have arisen. But one very obvious difficulty is that the terms of the contract by reason of Dobson & Webb assigning to plaintiff could not be carried out as designed since they were to have become corporators and each get a 10 per cent interest or share of the stock. The plaintiff's substitution for them was not contemplated by the contract.

Construing the agreement as I do the facts fall short of entitling plaintiff to any relief and the appeal should be dismissed with costs

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Markey & Montgomery.*

Solicitors for the respondents: *Angers, DeLorimier & Godin.*

THE TRUST AND LOAN COMPANY OF CANADA (DEFENDANTS AND INCIDENTAL PLAINTIFFS) } APPELLANTS;

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*March 7, 9.

*March 20.

AND

THE HONOURABLE JONATHAN SAXTON CAMPBELL WÜRTELE AND ERNEST FREDERICK WÜRTELE (PLAINTIFFS AND INCIDENTAL DEFENDANTS)..... } RESPONDENTS.

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

Mandate—Principal and surety—Negligence—Laches—Release of surety—Mortgage—Pledge—Construction of contract—Principal and agent—Arts. 1570, 1959, 1966, 1973 *C. C.*

Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan. One of the clauses of the deed provided "for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy" that the debtor and sureties "by way of pledge *à titre d'antichrèse*, transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the actual agent of the seigniory should remain agent until the loan should be repaid with interest and insurance premiums disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premiums out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from

*PRESENT:—Sedgewick Girouard, Davies, Nesbitt and Idington JJ.

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such revenues to pay a renewal premium which fell due shortly before the death of the debtor, and of which payment had been omitted to be made through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of this failure to pay the premium the benefit of the policy was lost.

Held, affirming the judgment appealed from (Q. R. 13 K. B. 329), Idington J. dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned; that the creditor had failed to use proper diligence in respect to the payment of the premium and that the sureties were, therefore, entitled to be discharged *pro tanto* and the property pledged released accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Superior Court, Pagnuelo J. in the District of Montreal, and maintaining the action of the plaintiffs and dismissing the incidental demand of the defendants with costs.

In March, 1894, the late Jonathan Wilfred L. Würtele, deceased, borrowed $7,500 from the company, appellants, and subsequently, in February, 1899, he borrowed from the company a further sum of $2,500, in each case giving a deed of obligation and hypothec. The terms and conditions of the deeds were identical and both affected the Seigniory of Bourg-Marie de l'Est, and the constituted rents thereof, for the purpose of securing the repayment of the loans, the Honourable J. S. C. Würtele, as institute in the substitution charged upon the said seigniory and Ernest F. Würtele, as the substitute (in case of the death of the borrower, the first substitute), becoming parties to both deeds for the purpose of charging the seigniory with said hypothecs, and also thereby obliging themselves as sureties for the repayment of the loans jointly and severally with the borrower. As further security, in each case, policies of assurance on the life of the borrower for the amounts of the loans, respectively, were assigned, transferred and delivered to the company, at the times of the

(1) Q. R. 13 K. B. 329.

execution of the deeds. In each of the deeds of obligation there were clauses as follows:

"And for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy, the said Honourable Jonathan S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele have, by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender, accepting hereof by the said Richard John Evans, the said constituted rents of the said seigniory of Bourg-Marie de l'Est, established by the said schedule No. 10 of the seigniorial cadastre of the old district of Three Rivers, and entered in the said schedule under the cadastral numbers from one to four hundred and sixty-six, both inclusive.

"It is covenanted and agreed by and between the said parties that the present agent of the said seigniory, Charles John Campbell Würtele, of the City of Sorel, Esquire, advocate, shall retain the agency of said seigniory until such time that the said lender shall have been repaid the amount of the present loan, in capital, interest and accessories and insurance premiums, but with the option, on the part of the said lender, to dismiss him should he fail to make out of the revenues of said seigniory any of the instalments of interest as they become due, or, at the expiry of the term of payment, if the capital is not repaid, or any of the insurance premiums as may be paid by the said lender.

"It is also understood that the said lender shall not in any way be responsible to the said borrower and to the said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele for the acts and deeds of the said agent, the said borrower and sureties hereby exonerating the said lender from all such responsibility

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as regards the acts and deeds of said agent, and assuming themselves personally the said responsibility.

"It is understood that the collection of the said constituted rents shall never be, at any time, at the expense of the lender, but that, on the contrary, all expenses attending that collection should be exclusively borne by the said borrower and sureties and kept out of said constituted rents and retained as first charge thereon.

"And for security of the payment of said insurance premiums, liquidated damages, expenses above mentioned, interest on overdue interest, and of that which may happen to be due to the lender over and above the two years' interest and the current year, and of the repayment of any such taxes as may be imposed on the present loan by virtue of any law in force in this province and of the repayment of all expenses incurred by the lender for the said publication of the above transfer by way of pledge, as required by law, the borrower and said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele have hypothecated the above described immoveable property in favour of the lender (in the first deed) to the further extent of one thousand and fifty dollars" (and, in the second deed) "to the further extent of three hundred dollars."

The company paid all the half yearly premiums on the first policy, with moneys supplied by the borrower during the first three years and, afterwards, with funds for which they reimbursed themselves out of the rents pledged to them, but they neglected to pay the premium on the policy transferred to them at the time of the second loan, in February, 1899, which became due in the month of January following, (1900), and the borrower, Jonathan Wilfred L. Würtele, died on the 24th of February, 1900, at which time the

second policy had been allowed to lapse, it was alleged, through the neglect of the company.

The action was brought by the sureties for a decree against the company ordering them to execute a discharge of the second mortgage, (tender being made of the difference between the amount due thereon and the $2,500, amount of the lapsed policy) and to retransfer to the plaintiffs the constituted rents of the seigniory transferred to the company to secure the second loan. The company contested the action, refused to discharge the sureties and hypothec and made an incidental demand against the plaintiffs for the amount of the second mortgage which they claimed to be still due and unsatisfied. The judgment of the Superior Court dismissed the action of the plaintiffs with costs, allowed the incidental demand by the defendants, and condemned the plaintiffs to pay the amount thereof with costs to the company. On appeal to the Court of King's Bench, this judgment was set aside and the plaintiffs action maintained with costs while the defendants' incidental demand was dismissed with costs. The company now appeals.

The questions raised upon the argument of this appeal are referred to and discussed in the judgments now reported.

Kavanagh K.C. for the appellants.

Angers K.C. and *DeLorimier K.C.* for the respondents.

SEDGEWICK J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by my brother Nesbitt.

GIROUARD J.—I might be satisfied by a reference to the complete and well considered opinion by Chief Justice Lacoste to indicate the reasons which induce

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me to dismiss the appeal, but on account of the importance of the questions which it presents, I feel myself bound to state them shortly in the few following observations, although they may not add to the force of his reasoning.

I have arrived at the conclusion that the obligation of the appellant to pay the insurance premium results both from the contract and from the law.

In the first place, as to the contract, it must not be lost sight of that the hypothecated seigniory, Bourg-Marie de l'Est, having a permanent revenue, not subject to fluctuation, was amply sufficient to guarantee the loan, in capital, interest, assurance premiums and other accessories, even leaving a surplus reverting to Judge Würtele, a fact admitted by the appellant; that there was no reason why it should have the additional guarantee of a life assurance policy from the borrower or any one else; that the borrower, the eldest son of Judge Würtele, Jonathan W., known by the name of "Jack", was not the owner of it and that he had a simple expectancy of ownership, namely, in case he survived his father. This event failing, his younger brother, Ernest, was to become owner on the decease of the father under the substitution created by the will of their ancestor Josias Würtele. Ernest, and the father, the latter having alone the right to the revenues during his life as institute or *grevé*, had therefore, an interest to protect himself against the possibility of Jack, the borrower, pre-deceasing him. The father was willing to deprive himself of a portion of his revenues to oblige his eldest son, but like his son Ernest, he did not wish to expose himself to repay the capital sum loaned. It was, accordingly, agreed between all the parties to the deed of obligation, evidently for the advantage of the sureties, that Jack should secure a policy of assurance on his life for the

amount of the capital of the loan. A policy was taken by Jack Würtele for $2,500, and delivery of it with a transfer indorsed on the back was made to the appellant which caused the assignment to be accepted by the assurance company. The deed of obligation which was executed on the 7th of February 1899, does not state by whom the premium should be paid in January each year. In any event it could not in the first place be due by any one but the principal debtor, and it would only be in default of such payment by him that the sureties could be called upon to do so. Naturally, the first premium was paid by Jack, but the second (which was the last) was not, and the appellant did nothing to keep the policy in force, although it had the best guarantees in the world that the needful advance, $110.25, would be repaid; it had the hypothec for the insurance premiums and even an additional hypothec for $300. But what is remarkable, about the same date, on the 8th January, 1900, it paid, long before the last day of grace, fixed at the 31st of January, the semi-annual assurance premium upon another policy for $7,500 in connection with another obligation executed in 1894 between the same parties and with the same terms and conditions. Several times previously this premium was likewise advanced by the appellant for which it was reimbursed without delay. But with regard to the policy for $2,500, the appellant, by an unpardonable negligence, did nothing to keep it in force; it did not even notify Judge Würtele, who resided in the same city, of what they had done on the 8th January and of its intention with regard to the other policy for $2,500; if it had done so he had all the month of January to pay the premium. The consequence was that the policy lapsed and Jack Würtéle died a few days afterwards, on 20th February 1900, and several years before his father. Bv their

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action the sureties ask to be discharged. The appellant contends that the loss should fall upon them.

The conduct of the appellant in this matter is simply inexplicable. It contends for the first time, in its factum, —its plea, and the judges of the courts below being silent thereon—that the larger policy had a commercial value and that that was the reason that the premium was paid, as if it was needed for the reimbursement of the loan. It is an afterthought conceived evidently for the purpose of covering, if possible, the carelessness and responsibility of an employee of the appellant, not examined, who was charged with renewal of policies of assurance. If this pretended excuse was well founded, the appellant would not only be in fault but also in bad faith, because it had deliberately allowed the insurance policy to lapse.

It is well to note that the appellent had no more funds in hand to provide for one of these policies than for the other. It had done nothing to obtain from the agent, Charles Würtele, the judge's brother, who was, at any time, he tells us in his testimony, in a position to remit the necessary amount. This is what he says, speaking of the two loans :

Q. Did you pay the premium of insurance every time you were called upon ?

A. I did. Every time I was notified I paid it.

Q. By whom were you ever notified ?

A. Never except by the Trust and Loan Company.

Q. Never except by the Trust and Loan Company ?

A. No.

Q. Were you ever notified by the Trust and Loan Company to pay the premium on the second policy for two thousand five hundred dollars ?

A. No, I never was.

Q. Did you know where that policy was ?

A. I never knew anything about it till I came up to Montreal this time.

Q. Now, will you look at this policy, Plaintiff's Exhibit p-7. (The policy for $2,500). The insured there is....

A. Jonathan W. Würtele.

Q. The borrower ?

A. Which I understand to be the borrower.

Q. You knew him ?

A. I knew him, yes.

Q. Were you in a position to pay the premium on that policy had you been requested to do so by the Trust and Loan Company ?

A. Yes, that is at any time after the eleventh of November.

Mr. Kavanagh K.C. :

Q. In what year ?

A. Any year.

Mr. Angers K. C., continuing :

Q. That was payable in January ?

A. Yes, I was in a position then to pay it had I been requested.

I infer from the clauses of the deed of obligation, from the construction that the appellant's conduct has given to it, and the circumstances, the obligation on its part to pay the premiums upon their falling due, solely for the protection of the sureties, so much so that the appellant has not considered it necessary to protect the policy.

The appellant contends that Judge Würtele received a part of the revenues so as to render them insufficient to meet the premiums. The precise testimony of the agent is quite to the contrary. The evidence moreover shews that Judge Würtele had, besides the Seigniory of Bourg-Marie de l'Est, the Seigniory of St. David and some mills in the immediate vicinity, yielding him altogether more than $3,000 net per year, all administered by the same agent, his brother Charles, who, by the deed of obligation, was also the agent of the appellant. The receipts of all these properties formed only one fund of which the agent rendered account in one and the same statement ; and, in receiving the money which the agent remitted to him, Judge Würtele could reasonably have supposed that he was receiving only that which belonged to him. Examined as a witness for the appellant, he says :

My brother was appointed agent to receive the rents of the Seigniory of Bourg Marie, to be applied in default of my son's paying, to be applied on demand and on request by the Trust and Loan Company, to the pay-

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ment of interest and premiums of insurance, and when that was paid, when all the demands of the company were satisfied-he paid over the balance to me. It was included in my general balance.

If Judge Würtele received more than his share, which is not shewn, it was the fault of the appellant which did nothing to make its rights known to the agent; it did not send him a copy or a memo. of the deed of obligation; it did not even inform him of the existence of the second loan.

But, assuming that the agreement and the appellant's conduct do not establish the duty on the part of the appellant to pay the premium, the law imposes it by two precise articles, arts. 1959 and 1973 C. C.

Article 1959, different from the Roman Law (Pothier, obl. n. 557; Baudry-Lacantinerie, caut. n. 1175), more precise then the old French jurisprudence, similar to article 2037 of the Code Napoléon, and it seems in accord also with the English law, decrees as follows:

> The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor.

The respondents knew of the practical effect of this article of the Civil Code; they knew they could rely upon the assurance policy for reimbursement of the capital of the loan in case of the death of the borrower before his father. The appellant, by its act, has made it impossible for it to transfer all its rights, namely those accruing from the assurance policy and, in consequence of its negligence, the sureties find themselves released by the terms of art. 1959.

It cannot be contended that the forfeiture decreed by this article takes place only when "the act" of the creditor is positive, *in commitendo;* it may result likewise if it consists simply *in omittendo* and is in good faith. The doctrine and jurisprudence as well in

France as in Quebec and Louisiana, which also reproduced the article of the Code Napoléon, are in accord and leave not the least doubt on this point, which, moreover, has been conceded by Mr. Kavanagh, the appellant's counsel. Nevertheless he added, and he maintains in his factum, that the article does not apply to sureties jointly and severally liable; but in this respect his contention is overruled by the commentators and the *arrêts*, the article of the code making no distinction between simple suretyship and several suretyship; they are collected in Beauchamp's Code Civil Annoté, art. 1959; Merrick's Rev. Civil Code of La., art. 3061; Gilbert sur Sirey, art. 2037 C. N.; 4 Aubry & Rau, p. 694; 9 Marcadé p. 368; Fuzier-Herman, *vo.* Cautionnement, nos 750-761; 12 Huc, nos. 250-253; 21 Baudry-Lacantinerie Cautionnement, nos. 1174-1180

Judge Würtele was not content with the protection afforded him by art. 1959 C. C. Famillar with this class of financial operations and undoubtedly, on the admission even of Mr. Kavanagh, the highest legal authority in such matters, he stipulated in the deed that the policy of assurance should be delivered and held " by way of pledge." This pledge actually existed, for the stipulations and the facts fulfil all the necessary conditions to make the pledge perfect. The policy of assurance, which is movable property, *un bien meuble*, was placed in the hands of the creditor with the consent of assurer and assured and sureties, as a security for the debt, and that is what constitutes pledge. Arts. 374, 1966 C. C. Then comes article 1973:

> The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title of obligations.
>
> On the other hand, the debtor is obliged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing.

It appears to me clearly that, in the terms of this article, the appellant was obliged to pay the premiums,

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whether provided for, guaranteed or not, saving recourse for reimbursement. This article has the principal debtor in view, but it enures to the benefit of the surety invoking it. Art. 1958 C. C.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

DAVIES J.—I concur for the reasons stated by my brother Nesbitt.

NESBITT J.—The mortgage in question contained a provision as follows:

> And for further securing the repayment of the said loan, interest and accessories, the said borrower hath transferred and assigned, and doth transfer and assign by way of pledge unto the said lender the policy of insurance. * * * * And for further securing the repayment of the said loan, interest and accessories *and premiums of insurance* on the said life policy, the said Honourable J. S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele, have by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender * * * the said constituted rents, etc.

The mortgage further provided that the agent of the seigniory, C. J. C. Würtele, should remain agent until the lender should be paid the loan, interest and insurance premiums, with the right of dismissal of the said agent by the lender if he failed to make out of the revenues of the said seigniory the interest or insurance premiums. It further provided that the lender was not to be responsible to the borrower and sureties for the acts and deeds of the agent, the borrower and sureties assuming responsibility therefor.

The Court of King's Bench, for the Province of Quebec, held that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium and undertaken to employ the assigned revenues in payment of the interest and premiums, and that for such purpose it became the mandatary of

the sureties and was responsible as any other mandatary for the due fulfilment of its mandate. It was also held that the evidence disclosed that there were funds derived from the rents of the seigniory which were sufficient to pay the premiums due in January. It was further held that it was through forgetfulness or some fault on the part of the loan company that it did not obtain from the agent the amount required to pay the premium.

Assuming these findings of fact to be correct, I think the judgment appealed from ought to be affirmed. I also think, in the clauses in the mortgage I have extracted, the premiums were contemplated to be paid by the loan company and repayment made to them out of the funds assigned. I think that Ernest Würtele had a right to expect that the creditor would use due diligence to see that no one did obtain any moneys until after the rents so assigned had been properly applied to the payment of the insurance premiums to keep alive the policy assigned to the company by the borrower. This policy was the only security which Ernest Würtele, on payment of the debt, could receive. The rents which were mortgaged belonged not to the borrower but to Mr. Justice Würtele. I think that by art. 1570 of the Code the assignment as between the parties to the deed was complete. That article provides as follows:

> The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title if authentic, or the delivery of it if under private signature.

Signification is only required as against the *censitaires*. *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (1).

Art. 1966 C. C. provides as follows:

(1) [1903] A. C. 59.

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Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him with the owner's consent, in security for his debt.

The thing may be given either by the debtor or by a third person in his behalf.

Art. 1973 C. C. provides:

The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title of obligations.

On the other hand, the debtor is pledged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing.

Art. 1959 C. C provides:

The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor.

This latter is a copy of article 2037 of the Code Napoleon.

Laurent, vol. 28, No. 310, says:

Que faut il entendre, dans l'article 2037, par fait du créancier? Est-ce seulement un fait positif, tel que la renonciation à l'hypothèque, ou est-ce aussi la simple négligence par suite de laquelle le créancier perd ses droits? Si l'on s'attache au principe tel que l'ont expliqué les orateurs du gouvernement et du Tribunat, il faut dire que toute faute du créancier qui a pour conséquence de faire périr, en tout ou en partie, les garanties qui assurent le payement de la dette entraîne la décharge de la caution. On suppose que celle-ci s'engage sous la condition d'être subrogée aux droits du créancier, et que celui-ci s'oblige à conserver ces garanties. Dès que le créancier ne remplit pas cette obligation, il est responsable; or, il ne la remplit pas par cela seul que les garanties périssent par une faute qui lui est imputable; et les fautes se commettent par négligence, aussi bien que par un fait positif.

This corresponds with the English law upon the subject. In *Watts* v. *Shutleworth* (1) Pollock C.B. says:

The rule upon the subject seems to be that if the person guaranteed does an act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Equity Jurisprudence, sec. 325. The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl* v. *Deacon* (2) where he cited with approbation the opinion of Lord Eldon in *Craythorne* v. *Swinburne* (3), that the rights of a surety depend rather on principles of equity

(1) 5 H. & N. 235-247.
(2) 24 Beav. 186-191.
(3) 14 Ves. 164-169.

than upon the actual contract; that there may be a *quasi* contract; but that the right of the surety arises out of the equitable relation of the parties.

This rule was adopted by this court in *Merchants Bank of Canada* v. *McKay* (1).

In deColyar on Guarantees (3 ed) page 446, the rule is stated as follows:

> We have already seen that a surety is entitled to the benefit of all the securities which the creditor has against the principal. It follows, therefore, that, if the surety be deprived of this benefit by the act of the creditor, he will be discharged to the full extent of the security to which he was entitled; and, consequently, a creditor is bound to use diligence and care with regard to securities held by him. Thus, for instance, a creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. The right of the surety is to have the same security in exactly the same plight and condition in which it stood in the creditor's hands. This doctrine does not, however, apply to such securities as life insurances. It is not the duty of the creditor on the bankruptcy of the debtor to keep up a policy on the life of the latter. On the contrary, it is his duty to sell and realize such a security.

In Rowlatt's Law of Principal and Surety (1899 ed.) the rule is stated more narrowly and the cases referred to by deColyar as justifying his statement of the law are analyzed and additional cases cited, particularly the case of *Queen* v. *Fay* (2). I shall refer to this case later. Brandt on Suretyship (2 ed.), secs. 444 and 448, inclusively, collects the English and American authorities, and with special reference to *Wulff* v. *Jay* (3), lays down the doctrine that omission is equivalent to commission. I do not think that the cases go this length. So far as I can see the French authorities agree with what I conceive to be the result of the English authorities, namely, that unless there is some duty to do that which is omitted, such duty arising from express or implied obligation, then mere passiveness by the creditor will not release the surety. See,

(1) 15 Can. S. C. R. 672. (2) 4 L. R. Ir. 606.
(3) L. R. 7 Q. B. 756.

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in addition to the cases referred to in deColyar, already quoted, Story's Equity (2 ed. London, 1892); *Carter* v. *White* (1) at page 670; and the review of all the English authorities to date by Chief Baron Palles in *The Queen* v. *Fay* (2), before noted.

I think that in every case where the surety has been held to have been discharged, the decision was founded upon some act or omission of the creditor which was held to be a breach of obligation due by him to the surety. Chief Baron Palles seemed (in the *Fay Case* (2)) to think that if the act which was omitted could have been performed either by the surety or by the creditor the creditor could not be held liable, and if that was so I think it would be difficult to hold the loan company liable in this case. But in appeal Lord Chancellor Ball rests his judgment upon the ground that neither the nature of the security nor the knowledge possessed by the officers of the Crown that there were any lands against which registration of the bond could be effective, would render a duty to register incumbent upon the officers of the Crown.

As I have said the searching analysis which has been made of all the authorities in *The Queen v. Fay* (2) renders it unnecessary to go through the various cases again, and I am content to rest my judgment upon the short ground that the sureties made a provision for the express purpose of paying these premiums and had the right to rely upon the loan company making that provision effective by notification to C. J. C. Würtele of the amounts required for interest and premiums, and he was to collect the moneys from the rents sufficient to pay this premium and remit same to the loan company; and that the sureties had a right to assume that if the loan company desired the surety to pay the

(1) 25 Ch. D., 666. (2) 4 L. R. Ir. 606.

premiums it would notify its desire to the surety and its non-reliance upon the provision for payment created by the mortgage and assignment of the rents.

I cannot distinguish this case in principle from this illustration. Suppose the sureties had handed over to the loan company bonds or certificates of stock the coupons or dividends of which were ample to pay interest and premiums and the loan company had failed to pay the premiums and allowed the policy to lapse, would it be argued the sureties could not claim a discharge *pro tanto?*

I think the appeal should be dismissed with costs.

Since writing the above, I have had the advantage of reading the opinion of my brother Girouard and, so far as that opinion is based upon the construction of the documents hypothecating the seigniory and pledging the rents thereof, I fully agree with it.

With regard to the construction to be placed upon art. 1973 of the Quebec Code, I do not find it necessary, for the purposes of this case, to express any views, as I have reached my conclusion upon the proper construction of the written documents between the parties.

IDINGTON J. (dissenting).—On the 17th March, 1894, the late Jonathan W. L. Würtele son of the respondent, the late Honourable Jonathan Saxton Campbell Würtéle, borrowed $7,500 from the appellants and secured same by deed of transfer in which the respondents joined as sureties, and by transfer of a policy of a life insurance on the life of the borrower.

This transaction is, as far as the matter now in question is concerned, of no moment save as furnishing some light upon the relations of the parties thereto and that it remained a prior charge upon the properties now in question when the later mortgage or hypothecation we have to consider was created.

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The instruments are, save as to the amounts secured by each, in all material terms almost identical.

Inferences might, as was pressed upon us in the argument, be drawn from the acts of the parties in relation to the first document and transactions it related to showing how they understood such a document.

I am inclined to think that the course of dealing in respect of the first policy of insurance on which for the three first years the company did not pay premiums tended to forbid the respondents from relying upon any obligation or supposed obligation of the appellants to look after, for the sake of respondents, the maintenance of the second policy of insurance.

In saying that much I desire to make clear that I discard such inference in arriving at the conclusion I do in regard to the claims set up and treat the matter as if such inference had not been possible, for I doubt if its consideration is a legitimate factor in dealing with what is now in dispute.

The first mortgage and its priority over the one we have to consider and the means by which it was secured, including the agency of Charles Würtele, must all be kept in mind however.

The same borrower, on the 7th of February, 1899, borrowed from the appellants $2,500, and by a deed of obligation and transfer of that date in which the plaintiffs as sureties joined secured the repayment of said sum on the 1st day of May, 1904, with interest at six per centum per annum yearly at the office of the lender on the 1st day of November in each and every year.

The borrower also had transferred by assignment of same date a policy of insurance for $2,500 on his life dated 24th of January, 1899, which was handed over to the appellants when assigned, and this assignment

was intimated to the Sun Life Assurance Company of Canada who were the insurers.

The premium was $110.25 which for the *first year had not been paid* when the assignment of policy was made and deed of obligation and transfer had been *executed on 7th February*, 1899.

The receipt for this first premium shows that it was on the 14*th February*, 1899, that it was paid. It was not paid by the appellants.

On the 2nd December, 1899, the sum of $600 was paid by the hand of Charles J. C. Würtele, agent of the Seigniory of Bourg Marie de l'Est, out of the rents of which he was the collector, to the appellants to cover a year's interest on both loans.

Nothing more was ever paid appellants since the second loan but the sum of $111.95 to pay a half yearly premium on the first assigned policy, and there does not seem to have been any further communications had between the appellants and the respondents and the borrower in relation to the second loan or any of the securities therefor, or, in short, in any way whatsoever relating to such matters, till after the death of the borrower, the late J. W. Würtele, on the 24th of February, 1900.

It is said that if the second premium of insurance for and in respect of the policy for $2500 had been paid on the 1st of January, 1900, or any day up to the 31st January, 1900, that such would by reason of his death have become payable to the appellants and would have been paid, and the respondents, who were only sureties, would have been relieved from the burthen.

It is further alleged that the non-payment of this premium is attributable to the neglect of the defendants and that as a result the respondents are released and are entitled to have their property discharged of and from what is now apparently a charge thereon.

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In order that the true position may be clearly apprehended I may state that the deed of obligation and transfer I adverted to above bound the late Honourable J. S. C. Würtele as well as the borrower *personally* to repay the loan but only in the event of his becoming entitled under the will of his grandfather to the hypothecated property. Did it bind Ernest Frederick Würtele in any way?

They all however, the late Honourable J. S. C. Würtele as institute and said two sons as substitutes under said act, will and testament, hypothecated the real estate and immovable property therein described as part of seigniory commonly known as Bourg Marie de l'Est, now represented by the capital of the constituted rents, to secure the repayment of the loan of $2500 and interest.

And by these instruments the borrower for further securing such repayment transferred by way of pledge unto the lender the policy of insurance dated 24th January, 1900, for $2500.

And then the provisions therein are as follows:

And for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy, the said Honourable Jonathan S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele have by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender, accepting hereof by the said Laurence Edye, the said constituted rents of the said seigniory of Bourg Marie de l'Est, established by the said schedule No. 10 of the seignorial cadastre of the old district of Three Rivers and entered in the said schedule under the cadastral numbers from one to four hundred and sixty-six both inclusive.

It is covenanted and agreed by and between the said parties, that the present agent of the said seigniory, Charles John Campbell Würtele, of the City of Sorel, Esquire, Advocate, shall retain the agency of the said seigniory until such a time that the said lender shall have been repaid the amount of the present loan, in capital, interest and accessories, and insurance premiums; but with the option on the part of the said lender to dismiss him, should he fail to make out of the revenues of said seigniory any of the instalments of interest as they become due, or at the expiry of the

term of payment if the capital is not repaid or any of the insurance premiums as may be paid by the said lender.

It is also understood that the said lender shall not in any way be responsible to the said borrower and to the said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele for the acts and deeds of the said agent, the said borrower and sureties hereby exonerating the said lender from all such responsibility as regards the acts and deeds of said agent, and assuming themselves personally the said responsibility.

It is understood that the collection of the said constituted rents shall never be, at any time, at the expense of the lender, but that on the contrary all expenses attending that collection shall be exclusively borne by the said borrower and sureties and kept out of said constituted rents and retained as a first charge thereon.

It is also understood and stipulated that all expense incurred by the lender for the publication of the above transfer by pledge, as required by law, shall be paid by said borrower and sureties to the said lender.

(Stipulations are here made for certain expenses and damages.)

The borrower shall pay interest at the rate of six per cent on overdue interest.

And for the security of the payment of said insurance premiums, liquidated damages, expenses above mentioned, interest on overdue interest, and of the repayment of any such taxes as may be imposed on the present loan by virtue of any law in force in this province, and of the repayment of all expenses incurred by the lender for the said publication of the above transfer by way of pledge as required by law, the borrower and said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele hypothecated the above described immovable property in favour of the lender to the further extent of three hundred dollars.

Upon these provisions and the relations between appellants as creditors, and respondents as sureties, for the debt in question the respondents rely in claiming that an obligation rested upon the appellants to do all that was necessary to keep alive the security furnished by the $2,500 policy of insurance.

It is to be observed that there is not here or elsewhere in the document now to be interpreted an express covenant by the appellants to discharge any such duty as the alleged obligation implies, or to give notice to Charles Würtele, the agent

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It is to be further observed that one would naturally expect so serious an obligation as the payment of $110.25 a year, if intended by the parties, to have been expressly provided for.

If intended at all it must operate for five years at least.

Where was the money to come from?

Two sources are pointed out—One the annual revenue from the Seigniory which the agent in his evidence speaks of as follows:

> Question.—Will you please state if the amount you collect annually could cover, and did cover the interest on the first loan, and the premium on the first insurance, the interest on the second loan, and the premium on the second policy?
>
> Answer.—Yes, I collect sufficient yearly to cover the amount.
>
> Question.—Was there a surplus?
>
> Answer.—Well, *when everything was collected there would* be a surplus of thirty some odd dollars.

It is clear that this makes no provision for the expenses of collection or the supervision of the collection.

Then the other source is that provided for by the hypothecation above set forth of the imovable property in favour of the lender to the further extent of three hundred dollars to cover this and *all the other matters therein specified.*

This rather scant sort of security does not encourage one to believe that the appellants thought they were undertaking to look after the premiums upon this policy which the evidence shews was, and would be for two years longer, even if premiums paid, worth less as a realizable commercial asset, if insured should live so long.

It is to be observed that in none of these provisions is there any allowance made *for interest upon the sums that might thus be advanced by the appellants* for the payments of premiums of insurance.

The rents which formed the revenue of the Seigniory fell due on the 11th day of November in each year, and generally were all collected by the agent Charles J. C. Würtele on or before the 2nd of December and accounted for and paid over to the respondent, the late Honourable J. S. C. Würtele, by the 2nd of December.

Those for 1899 proved no exception and the agent had no answer to the demand for the balance due to the institute if he asked for it.

How then can it be said that the appellants had funds placed in their hands to meet the premium of insurance falling due in respect of this $2,500 in the month of January ?

The instrument giving any right to the use of such rents only gave it in relation to such premium as the appellants *had paid* to repay them.

The appellants could only, if any obligation rested upon them to see the premiums paid, advance it in January, and wait till following November to be repaid, and thus lose the interest on the money in the meantime.

This is not an idle suggestion. It represents the actual condition appellants were left in by the respondent's surety, the Honourable J. S. C. Würtele, in January, 1900, for *he admits he was paid the balance in the agent's hands after the interest on both loans and the premium on the first life insurance had been provided for.*

He, in other words, by this suit sought to hold the appellants liable for not having used the money they never received (but, so far as existing any place, he got) to pay the premiums due in January, 1900.

This divested of all its wrappings that obscure the issue is the gist of the complaint here made.

Want of notice to his agent is raised as entitling the late the Honourable J. S. C. Würtele to make this complaint.

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Before consideration can be given to such want of notice it ought to be shewn by proof beyond doubt, which is not the case here, that such want of notice was the cause of the money not being in the hands of the agent Würtele to pay the premium in question. The right to claim either notice or relief by reason of omission to give such notice can only rest upon a legal equity. The agent here to be notified being the agent of him who complains, seems to suggest that it does not lie in his mouth to raise such question or questions.

The logical result of holding the appellants bound to notify Charles J. C. Würtele under penalty of forfeiting the security of sureties would be that if the late the Honourable J. S. C. Würtele had for want of this notice and by reason of its absence collected the rents and used them for the whole term of the mortgage he would be discharged in law as the rents were lost and not available to discharge the debt.

It is urged that the agent Charles J. C. Würtele became by the words of this document the agent of the appellants.

He speaks of himself throughout his evidence as his brother's agent, beginning thus:

Question.—Previous to the first loan for seven thousand five hundred dollars, and previous to the second loan for two thousand five hundred dollars made to Mr. Jonathan W. L. Würtele, the borrower, you were the agent of the Seigniory of Bourg Marie de l'Est?

Answer.—I was the agent since eighteen hundred and seventy-two.

Question.—After these loans, were you retained as agent to collect the rents?

Answer.—I have collected them all the time, ever since eighteen hundred and seventy-two.

Question.—Did the Trust and Loan Company make known to you the loan made to Mr. Würtele, and the transfer of the rents to the Trust and Loan Company?

Answer.—Well I cannot say that the Trust and Loan Company made it known to me, *but my brother, the plaintiff in this case, informed me of it.*

* * * * *

And again:

Question.—You are still the agent of Judge Würtele, are you not?
Answer.—Yes, I am.
Question.—And you have been his agent for how long did you say?
Answer.—Since eighteen hundred and seventy-two.
Question.—And during all the interval?
Answer.—During all the interval, yes.

And again at page 92 of case:

My brother told me not to make any distinction between those and the lots that were transferred, so the whole thing coming together always came to more than the amount of the schedule rents.

And at page 93:

Question.—What were the expenses of collection in each year?
Answer.—Well, I cannot say for each seigniory, because I collect—
Question.—(Interrupting)—I am talking about one seigniory.
Answer.—I cannot say. I am paid a block sum for collecting on all the seigniories that my brother owns—my brother owns another seigniory there, far larger than this one transferred. I am still his agent for that, and I am paid for both together, a block sum, so I cannot specify which is for which.

And at page 93:

Question.—Now, you stated that you continued to remain the agent of the plaintiff in this case?
Answer.—Yes, for this and other seigniories I was telling you of, River David.
Question.—Those several seigniories?
Answer.—He has those two.
Question.—Besides the one mortgaged to the Trust and Loan Company?
Answer.—Yes, one besides that. I continued as his agent the same as before.
Question.—You are agent for the mills, farms, and the collection of rents?
Answer.—Yes.
Question.—Seigniorial rents?
Answer.—Yes.

He was paid a block sum of two hundred dollars annually by his brother for collecting all, including rents here in question.

Such being the nature of the agency how can it be said that there was or was intended to be created any privity between the appellants and this agent of the

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institute respondent? He was not a party to this contract.

The appellants are forbidden by the express terms of the contract to meddle with the existing relations of the agent to the seigniory unless *default be made in the required payments or repayments.*

The parties all agree Charles Würtele is to continue in such agency subject to an option of dismissal by appellants if he failed to collect and pay.

But surely this did not deprive either the institute or the borrower of the right to pay by either of their own hands and from such other sources as they or either of them had the money that would fall due.

It would seem to me unwarranted officiousness for the appellants to have assumed that such default would have to be anticipated by serving a formal notice upon the agent before any moneys fell due, and especially so as the first premium had been paid by the borrower after this security had been given, and the borrower and his sureties expressly undertook that the appellants were not to be responsible to either of them but that the borrower and sureties were to be liable for the acts and deeds of the said "agent" and to answer personally such responsibility.

The hypothecation of this insurance policy was peculiarly for the protection of the sureties. The lenders were secured otherwise and as to them its maintenance was a burthen. Was it not the duty of the institute to instruct his own agent if he desired to keep such a security on foot? By what right should he for whose benefit it might be needed transfer his burthen on to the appellants?

All these considerations I submit tend to repel the implication of any legal obligation binding appellants to pay the premiums or to give notice to the agent Charles J. C. Würtele to pay it and see that he did so.

If the proper interpretation of this contract supplies no express contract to pay, and the implications arising from it and the relation of the parties as seen in light thereof and the surrounding facts seem to repel any implication of such a character, is there anything in the law governing the relations of creditor and surety that raises such a duty as is claimed here? Or, does the weight of authority not go the other way?

Strange v. *Fooks* (1): Where security was lost by reason of the creditor's failure to *perfect* the assignment of same by service of notice upon the trustees of the settlement;

Wa'son v. *Allcock* (2): Where a creditor omitted to file a warrant of attorney that the agreement and circumstances called upon him to do, and the security was lost as a result;

Capel v. *Butler* (3): Where creditor had failed to register an assignment of a ship;

Wulff v. *Jay* (4): Where creditor failed to register bill of sale and having so failed did not cover that initial default by taking possession of the goods as he might have done;

And *Beliveau* v. *Morelle* (5), of same nature and others like unto these all rest upon the failure to perfect the *security that all parties were agreed upon should be* made so and were acts necessary to the perfecting of the security and *peculiarly within the power of the creditor to have done.*

The duty there springs up manifestly in accord with reason and justice.

If the appellants had failed to intimate to the insurance company the assignment here and loss had happened by reason of the borrower transferring to others the parallel would be complete.

(1) 4 Giff. 408.
(2) 4 DeG. M. & G. 242.
(3) 2 Sim. & Stu. 457.
(4) L. R. 7 Q. B 756.
(5) 16 L. C. R. 460.

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Or if the appellants were not relieved from publication, and by reason thereof the rents had been collected from the *censitaires* by a subsequent assignee and the substitute surety applied to be relieved, the parallel would be complete.

But in the case I put, though the substitute surety might claim relief how could the institute surety, who in such supposed case would be the party getting the money and producing the loss, complain?

How much less can he here where the step to be taken was not to perfect the instrument or security but to collect and pay or to repay the premium.

The notice of the agent of the institute to provide funds could have been given by the institute or other party concerned.

Once the security is perfected, as it was here, or as we may fairly for the present purpose assume it was as no injurious result came from want of publication, there rested no further duty, for which authority can be found, upon the appellants to pay the premiums needed for preservation of the policy or to remind the institute surety or his agent of the need to do so.

What was said by Lord Eldon in *Eyre* v. *Everett* (1), where forbearance to sue was claimed as relieving the surety, that

> the surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is *the passive conduct* of *the creditor in not suing*,

may well be applied here.

It has since been applied in or to many modifications of circumstances in regard to *passive conduct* of a creditor in relation to preservation of securities and in all these instances I have found if nothing more existed the result has been in favour of the creditor and against the surety.

See, amongst others, the following:—*Macdonald* v. *Bell* (2), at pages 332 and 333, where the money was much

(1) 2 Russ. 381.

(2) 3 Moo. P.C. 315.

more certainly available upon mere notice of the demand than here and for want of which the security was lost, yet the highest court of appeal held that not having been lost by a positive act but by an omission the sureties were not relieved; *Carter* v. *White* (1), at page 670, where the surety was not discharged merely by the negligence of the creditor to fill in the drawer's name and give notice of the bill as the surety might do it; *Coates* v. *Coates* (2), where the Master of the Rolls expressly held that a creditor was not bound to pay insurance premiums in absence of express contract to do so, and that sureties were not, for want of it, discharged; *Mayor of Kingston-upon-Hull* v. *Harding* (3), where plaintiff who had a right to superintend and a right to retain part of the money drawn upon a building contract did neither and yet sureties were not discharged. See also *Queen* v. *Fay* (4) at pages 615 and 627: *Black* v. *Ottoman Bank* (5) where similar law is laid down. See Colebrooke on Collateral Securities, pages 424,425 and 428, and cases cited there; de Colyar, pages 334, 335 and 336, and case scited there; *Killoran* v. *Sweet* (6), *Rees* v. *Berrington* (7) page 599 *et seq.*

I think the appeal should be allowed with costs against the estate of the late Honourable J. S. C. Würtele.

As to the other plaintiff it was alleged by counsel for appellants and seemed not to be denied that there was some mistake in the entry of judgment, and that apart from the liability of the late Honourable J. S. C. Würtele's estate as surety the claim of the other surety to be relieved and the claim of the appellants against both sureties is not ripe for consideration. The conclusions in the pleadings and the reservation in the cross action

(1) 25 Ch. D. 666.
(2) 33 Beav. 249.
(3) [1892] 2 Q. B. 494.
(4) L. R. Ir. 4 C. L., 606.
(5) 15 Moo. P. C. 472.
(6) 72 Hun. (N.Y.) 194.
(7) 2 White & Tudor, L. C. (7 ed.) 568

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or counterclaim of appellants would seem to bear this out to the extent at all events of making it inexpedient to deal here with the liability of the respondent Ernest F. Würtele. One surety being relieved sometimes has the effect of relieving another, but that can not operate in this case where the surety was himself a party to the fault that may have relieved the other. I do not desire to be held as expressing opinion in regard to the other.

Appeal dismissed with costs.

Solicitors for the appellants; *Branchaud & Kavanagh.*

Solicitors for the respondents; *Angers, DeLorimier & Godin.*

THE QUEBEC AND LEVIS FERRY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS JESS, ÈS QUALITÉ, (PLAINTIFF)..... } RESPONDENT.

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*Mar. 9, 10.
*Mar. 20.

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

Negligence—Ferry boat wharf—Dangerous way—Precautions for preventing accidents—Evidence—Findings of jury—Non-suit.

A passenger, arriving on the pontoon wharf, as a ferry boat was swinging out and was a few feet away from the wharf with the gangways withdrawn, attempted to jump aboard over the stern bulwarks and was drowned. In an action by her representatives to recover damages from the ferry company on account of negligence in failing to provide proper means to prevent accidents at their wharf, the jury found that the drowning was caused by the fault of the company "in not having proper gates at the gangway openings leading from the pontoon to the boat," and that deceased was herself negligent "by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon," but that she "was not then aware that the boat had left the wharf."

Held, reversing the judgment appealed from (Girouard J. dissenting, on a different appreciation of the facts), that, as there was no proof of any negligence on the part of the company which proximately and effectively contributed to the accident, but, on the contrary, it appeared that the sole, direct, proximate and effective cause of the accident was the wilful and rash act of the deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn and the boat had got under way, the company could not be held responsible in damages. *Tooke* v. *Bergeron* (27 Can. S. C. R. 567) and *The George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 585) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review at Quebec, which ordered judgment to be entered for the plaintiff on the

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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verdict of the jury at the trial on a case reserved for the consideration of that court by the trial judge.

The action was brought by the tutor of a minor child of the deceased, Annie Jess, widow of Edouard Loiseau, who was drowned under the circumstances mentioned in the head-note, to recover damages on behalf of said minor, on the ground that the accident resulted from the gross negligence of the company in failing to place proper guards on their pontoon wharf to secure the safety of the public making use of their ferry boats and leaving the wharf insufficiently lighted and in neglecting to have men there to assist and warn the passengers.

The questions submitted to the jury and their answers, so far as they are material to the issues on the present appeal, are as follows .—

"Second question—Was the drowning of the said Annie Jess caused by fault, neglect or want of care on the part of the defendants? If so, what was such fault, neglect or want of care?

"Answer—Yes, by not having proper gates at the gangway openings, leading from the pontoon to the boats.

"Third question—Was the said Annie Jess guilty of any fault or negligence leading to her death? If so, what; and specially did she attempt to board the defendant's ferryboat after it had left its wharf, and, if so, was she then aware it had left it?

"Answer—Yes, by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon.

"The said Annie Jess was not then aware that the boat had left wharf.

"Fourth question—Had the defendants taken proper precautions for the due protection of the public against

such accidents; if not, what precautions had the defendants omitted to take?

"Answer—No; in not having proper gates at the gangway opening leading from the pontoon to the boats. The jury would recommend that the company provide proper gates at the gangway leading to the boats from the pontoon for the general safety of the public.

"Fifth question—If the jury find the defendants liable, what sum do they find the said minor child, Mabell Jess, entitled to, as being the damage caused her by the death of her mother?

"The jury finds the company defendants liable in the sum of one thousand dollars."

The trial judge, Andrews J., reserved the case under article 491 C. P. Q. for the consideration of the Court of Review, stating the following reasons:

"1. By the answer of the jury to the second question to them submitted they find the defendants in fault in 'not having proper gates at the gangway openings leading from the pontoon to the boats,' and by their answer to the fourth question the jury repeat that imputation of fault. But I entertain doubts: (*a*) Whether this is a matter covered by the plaintiff's declaration. (*b*) Whether there was any legal obligation on the defendants to have such gates. (*c*) Whether the absence of such gates can be considered a fault causing the death of Annie Jess.

"2. I entertain doubts (*a*) Whether the fact found by the jury in their answer to the third question (viz: that the said Annie Jess attempted 'to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon' does not deprive the plaintiff of all recourse. (*b*) Whether there was any evidence to justify the jury in finding

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'that the said Annie Jess was not then aware that the boat had left the wharf.' "

In the Court of Review the plaintiff moved for judgment on the verdict, and the defendants moved for judgment dismissing the action or in the alternative for a new trial. By the judgment of the Court of Review (Andrews J., dissenting) the defendants' motion for a non-suit or a new trial was dismissed with costs and judgment ordered to be entered for the amount of the verdict in favour of the plaintiff with costs. On appeal to the Court of King's Bench the judgment of the Court of Review was affirmed, Bossé J. dissenting, and the defendants now assert the present appeal to the Supreme Court of Canada.

The material questions at issue upon this appeal are referred to in the judgment of the majority of the court, as delivered by His Lordship Mr. Justice Davies.

Stuart K.C. for the appellants.

Alex. Taschereau K.C. for the respondent.

The judgment of the majority of the court was delivered by:

DAVIES J.—The court is of the opinion, Girouard J. dissenting as to facts, that this appeal must be allowed and the action dismissed.

We are also of the opinion after careful consideration of the evidence that the defendant's motion for a non-suit at the close of the plaintiff's case should have been granted. There was no evidence on which the finding of the jury could be sustained which held that the death of the unfortunate woman, Mrs. Loiseau, called in the pleadings Dame Annie Jess, was directly caused or effectively contributed to by any negligence of the defendant company or its servants.

The facts are few and simple. The defendant is a ferry company whose steamers ply between

Quebec and Levis. The late Mrs. Loiseau was a passenger on these steamers and, on the evening of the accident, was returning to Quebec from Levis accompanied by her sister Alice Jess and one Joseph Rankin. These three persons passed through the gates at the head or entrance of the ferry gangway, paid their fares and hearing the boat's whistle ran down the gangway and on to the floating pontoon, alongside of which the boats lie, hoping to be in time to get aboard. When they reached the end of the pontoon they saw that the steamer's bow had swung out and off from the pontoon, that the gangway by which passengers entered the boat had been withdrawn from its position and raised up on the steamer, as part of her bulwarks, thus effectually debarring passengers from entering, and that the steamer was under way. The stern of the ferry boat was only a couple of feet or a little more from the wharf and the sister, Alice Jess, jumped with the object of getting aboard over and across the bulwarks of the steamer. Her feet seemed to have landed on the guard which runs outside of the bulwarks level with the deck. She was caught by one of the passengers aboard the boat in his arms and dragged on board. She says she cannot say whether, but for his timely assistance, she also would not have fallen into the water or whether she landed on the top of the rail or on the guard which ran around the boat. Mrs. Loiseau followed right after her sister but was not so fortunate. She seems to have struck against an upright stanchion, but at any rate she fell backward into the water and, notwithstanding every effort to rescue her, was drowned.

Rankin did not jump but remained on the pontoon. The bulwark's rail was eighteen inches or two feet higher than the pontoon. The boat was at least two feet away from the pontoon and under way when Mrs.

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Davies J.

Loiseau jumped. The gangway drawn up and forming part of the bulwarks effectually prevented any access to the boat except over the rails of the bulwarks. The attempt of these two woman to jump aboard at this time and under these circumstances cannot, we think, be characterised better than by calling it reckless imprudence. Nothing but superior skill and strength on the part of the women or the assistance of third persons could, under the circumstances, have avoided an accident. Some men aboard, who saw them, gave evidence that they shouted warnings to the women not to jump but the warnings do not appear to have been heard. The unfortunate woman's wilful imprudence was the direct cause of her death.

The jury found, in answer to questions put to them, —first that the drowning of Mrs. Loiseau (Annie Jess), was caused by the fault of the defendants in not having proper gates at the gangway openings leading from the pontoon to the boats; and, secondly, that she was herself guilty of fault or negligence leading to her death

by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon. The said Annie Jess was not then aware that the boat had left the wharf.

It was proved in evidence that, for some time previously to the accident, the company had been accustomed to put a chain across the opening leading from the pontoon to the steamer about four or five feet back from the outside edge of the pontoon, and that upon this occasion the chain was not put across through some negligence on the part of the company's servants.

The plaintiff contended vigorously and the court below found that this was negligence contributory to the accident, and that, therefore, according to the law

of Quebec, the company was liable for part of the damages.

The company denied any obligation on their part to put up this chain or any negligence in their servants having omitted to put it up on the night in question.

Whether it was an obligation on their part to put up the chain or negligence in omitting to do so at the time in question we are not called upon to decide. We certainly do not intend by our judgment to say that there was not such an obligation or that in a case where any passenger was injured or lost his life by reason of the absence of such a precaution the company would not be liable.

What we do hold is that to make such negligence (assuming it to be such) available to the plaintiff in this action as a contributory cause of the accident, it must be shewn to be a proximate and effective cause.

There is no evidence in this case on which such a finding could be made. The sole, direct, proximate and effective cause of Mrs. Loiseau's death was her wilful and rash act in attempting to jump aboard the ferry boat over the bulwarks after the passenger gangway had been withdrawn and raised up so as effectually to prevent passengers going on board and after the steamboat had got under way.

Suppose Annie Jess or Mrs. Loiseau, in attempting to jump on board the ferry boat over and across the bulwark rail, had slipped on the rail and fallen to the deck breaking her arm or leg. Could it be successfully contended that the company was liable in such a case? And yet the same method of reasoning as that adopted by the plaintiff in this case would, if accepted, create such liability.

The absence of the chain did not induce, or cause the deceased to jump or attempt to jump on board.

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That act was found by the jury to be an imprudent one. It was no doubt that, but it was more, it was a wilfully reckless act, and the one which solely and proximately caused her death.

It was argued that if the chain had been there it probably would have stopped her altogether or at any rate delayed her and caused her to pause and think before attempting to make the jump. But there was no causal connection between the absence of the chain and the fatal act of jumping. So in a slightly remoter degree might it be argued that if the deceased had been stopped at the top of the gangway and not allowed to go down upon the pontoon after the steamer had whistled, her death would have been prevented. It is sufficient to say that such remote negligence as the absence of the chain, the only negligence on the part of the company insisted on at bar, not being the direct and effective cause of the accident, is not such negligence as to make the company liable.

The law governing the case is the same in the Province of Quebec as in the rest of Canada.

In the case of *Tooke* v. *Bergeron* (1), in which Mr. Justice Girouard delivered the judgment of the court, it was held that:

Where an employee sustains injuries, the employer, although he may be in default, cannot be held responsible in damages unless it is shewn that the accident by which the injuries were caused was directly due to his neglect.

And the present Chief Justice, then Taschereau J., said in *The George Matthews Co.* v. *Bouchard.* (2), at pages 584-585;—

It seems to be taken for granted that because there was an accident and because there was an act of negligence it follows that the plaintiff has proved his case. Now that is not the law; * * * The evidence might be consistent with his theory but it is equally consistent, to say the least, with the theory that the accident was due to his own carelessness, and it is a rule that where the evidence is as consistent with one state of facts as with another it proves neither.

(1) 27 Can. S. C. R. 567. (2) 28 Can. S. C. R. 580.

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We adopt this as a correct statement of the law. For these reasons we think the appeal should be allowed with costs.

GIROUARD J. (dissenting)—I believe that the principal cause of the accident was the want of a chain or guard, and for that reason I do not feel inclined to disturb the verdict of the jury.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellants; *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondent; *Fitzpatrick, Parent, Taschereau, Roy & Cannon.*

EDMOND LETOURNEAU AND JOSEPH BERNIER (DEFENDANTS) ..... APPELLANTS:

AND

CHARLES EUGENE CARBONNEAU AND BELINDA ANN CARBONNEAU (PLAINTIFFS)..... RESPONDENTS.

1905

Oct. 25.

*Oct. 26,

Practice—Amending judgment after entry.

The minutes of judgment as settled by the registrar directed that the appellants' costs should be paid out of certain moneys in court, and in this form the judgment was duly entered and certified to the clerk of the court below. Subsequently it was made to appear that there were no moneys in court available to pay these costs, and upon the application of the appellants the court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1905

LETOURNEAU v. CARBONNEAU.

MOTION to vary the minutes of the judgment of the Supreme Court of Canada (1) as settled by the Registrar.

The appeal was from the judgment of the Territorial Court of the Yukon Territory *in banco*, affirming the judgment of Craig J at the trial by which the plaintiffs' action was maintained and the counterclaim of the defendants dismissed with costs.

The appeal was allowed by the Supreme Court of Canada (1) Sedgewick and Killam JJ. dissenting.

Mr. Justice Nesbitt gave the reasons of the majority of the court, which as to costs provided as follows:

"All costs of the previous trial and of the proceedings in the court below and in this court of the appellants, defendants, to be payable forthwith out of the moneys in court, with power to either party to apply with reference to such moneys and full power of amendment to dispose of all questions which may arise out of the counterclaim." (2)

The minutes of judgment were settled by the registrar on the 21st July, 1904, as follows:

"And this court proceeding to render the judgment which the said the Honourable Mr. Justice Craig should have rendered did further—ORDER AND ADJUDGE that the whole question of taking of accounts between the parties and the claim for damages under the counterclaim should be and the same were referred back to be tried and disposed of by the courts below and that all costs of the previous trial and of the proceedings in the courts below and in this court of the appellants (defendants) be paid forthwith out of the moneys in court, with power to either party to apply to the courts below with reference to such moneys and full power to the said courts below to make such amend-

(1) 35 Can. S. C. R. 110. (2) 35 Can. S. C. R. at p. 113.

ments as may be necessary to dispose of all questions which may arise out of the counterclaim."

The judgment as settled was duly entered and forwarded by the Registrar of the Supreme Court to the Clerk of the Territorial Court of the Yukon Territory on the 25th day of July, 1904. On the 18th October following, the solicitors for the appellants gave notice that the Supreme Court of Canada would be moved on behalf of the appellants for an order amending the minutes of judgment by adding thereto after the words "this court doth order and adjudge that the said appeal should be and the same was allowed and that the said judgments of the Territorial Court of the Yukon Territory *en banco* and of the Honourable Mr. Justice Craig should be and the same were reversed and set aside," the words "with costs in all said courts to be paid by the said respondents to the said appellants forthwith after taxation thereof," and in support of the application filed an affidavit of the appellants' solicitor, Mr. Noel, in which he deposed that between the date of the pronouncing of the judgment of the Territorial Court on the 15th December, 1903, and the date of the delivery of judgment by the Supreme Court of Canada on the 8th day of June, 1904, the respondents withdrew from court all the moneys paid into court, and that at the date of the delivery of the judgment of the Supreme Court there were no moneys in court to the credit of the cause out of which the costs of the appellants could be paid.

The application was heard by the full court on the 25th day of October, 1904.

J. A. Ritchie for the motion.

Glyn Osler contra.

On the 26th October the court granted the motion and directed the judgment to be amended as moved for, the reasons for judgment being delivered by:

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Girouard J.

GIROUARD J.—We think that the motion to amend the minutes of our judgment should be granted. At the time the case was argued we were told by both parties that a sum of $10,000 was in court pending the appeal. It is alleged that the moneys have been withdrawn by the respondents, and it is contended that in consequence there is some doubt as to the meaning of our judgment. We believe there is none, but to remove the possibility of a doubt, we would amend the judgment by adding the following words: "with costs in all said courts to be paid by the said respondents to said appellants forthwith after taxation thereof."

The motion is therefore allowed. No costs.

Motion allowed without costs.

MEMO.—The judgment which had been forwarded to the Clerk of the Territorial Court, upon requisition of the Registrar, was returned to the Supreme Court of Canada and amended to conform to the present order of the court.

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CONTRACT—*Continued.*

are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.—Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly or any municipal or school corporation in the North-West Territories is Dominion taxation within the meaning of the sixteenth clause of the Canadian Pacific Railway contract providing for exemption from taxation. NORTH CYPRESS *v.* CAN. PAC. RY. CO.; ARGYLE *v.* CAN. PAC. RY. CO.; CAN. PAC. RY. CO. *v.* SPRINGDALE. **550**

10——*Partnership—Syndicate for promotion of joint stock company — Trust agreement — Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.*] A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom plaintiff was one, furnishing capital, and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants and patent rights were assigned to them, in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows, 37½ per cent to the defendants who held the property, 32½ per cent to the owners of the patent rights, the other three members to receive each 10 per cent of the total stock. A time limit was fixed within which the company was to be formed and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void and all parties were to be in the same position as if the agreement had never been made. The tenth clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed but, within the time limited, the plaintiff, and the other two members, holding together 30 per cent interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages.—*Held*, that the tenth clause of the agreement controlled the administration of the affairs of the syndicate and that as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners and the plaintiff could not enforce specific performance. HOPPER *v.* HOCTOR—**645**

11——*Mandate—Principal and surety—Negligence—Laches—Release of surety—Mortgage—Pledge—Construction of contract—Principal and agent—Arts.* 1570, 1959, 1966, 1973 *C. C.*] Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan. One of the clauses of the deed provided "for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy" that the debtor and sureties "by way of pledge *à titre d'antichrèse*, transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the actual agent of the seigniory should remain agent until the loan should be repaid with interest and insurance premiums disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premiums out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from such revenues to pay a renewal premium which fell due shortly before the death of the debtor, and of which payment had been omitted to be made through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of this failure to pay the premium the benefit of the policy was lost. *Held*, affirming the judgment appealed from (Q. R. 13 K. B. 329), Idington J. dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned; that the creditor